

## ADULTERY, INFIDELITY, AND CONSENSUAL NON-MONOGRAMY

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*Thirty-eight states have laws in place that relate to adultery. Though criminal laws against adultery are not frequently enforced, the network of criminal laws, tort laws, and domestic relations laws related to adultery disincentivize extra-marital sex, an effect heightened by the stigma and other social attitudes associated with adultery. This Essay argues that the socio-legal state of affairs concerning adultery is bad for marriages (and similar relationships), bad for public health, and is simply bad public policy. This is in part because the law treats infidelity—having sex with someone other than your primary partner without his or her consent or knowledge—and consensual non-monogamy in the same manner. In fact, infidelity and consensual non-monogamy are significantly different ethically, psychologically, and practically, a claim buttressed by social scientific research. In contrast to proposals to abolish laws that disincentivize adultery whole cloth, this Essay argues for a more nuanced set of reforms that would end the negative treatment of*

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*consensual non-monogamy while leaving unchanged laws relating to infidelity.*

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#### I. INTRODUCTION

Americans dislike adultery. According to Gallup, which conducts an annual survey of the “values and beliefs” of Americans, in 2019, 89 percent of Americans believed that it was “morally wrong” for a married man or woman to have an affair.<sup>1</sup> This was in contrast to 28 percent of Americans who thought that sex between an unmarried man and an unmarried woman was morally wrong, 35 percent who thought that “gay and lesbian relations” were morally wrong, and 58 percent who thought that “sex between teenagers” was morally wrong.<sup>2</sup> According to this survey, a greater percentage of Americans had a negative view of adultery than they did of abortion, cloning, polygamy, pornography, suicide, and the death penalty.<sup>3</sup>

This strong negative moral attitude towards adultery is reflected in the law. Adultery—when a married person has sex with someone to whom he or she is not married—remains a crime in almost 40

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1. Megan Brenan, *Birth Control Still Tops List of Morally Acceptable Issues*, GALLUP (May 29, 2019), <https://news.gallup.com/poll/257858/birth-control-tops-list-morally-acceptable-issues.aspx>. Only 9 percent of Americans find extra-marital affairs “morally acceptable,” the lowest percentage for the twenty-one moral issues included in the survey. *Id.*

2. *Id.*

3. *Id.*

percent of the states,<sup>4</sup> although it is rarely enforced.<sup>5</sup> Further, adultery remains a ground for divorce in almost two-thirds of the states.<sup>6</sup> In some of these states, there are other family laws that punish adultery. For example, in New Jersey, spouses who have committed adultery lose certain inheritance rights to which they would otherwise be entitled as spouses.<sup>7</sup> Further, several states still allow for “heart balm” actions, tort suits designed to “soothe” a “broken” heart by allowing recovery of damages for the loss of spousal affection from a spouse’s paramour.<sup>8</sup> Just like one can sue an alleged tortfeasor for physical injuries caused by his or her wrongful behavior (for example, careless driving or selling defective products), heart balm suits allow people who cause “romantic” injuries to be sued for wrongful behavior.<sup>9</sup> Sometimes, romantically-injured spouses win a substantial financial award, such as a North Carolina woman who, in 2014, was awarded nine million dollars from her husband’s mistress.<sup>10</sup> Altogether, adultery remains a behavior with the potential for significant legal and social consequences in more than three-quarters of the states.<sup>11</sup>

The legal status of adultery in a supra-majority of the states has “indirect” legal effects. Even if people are rarely charged—and even more rarely convicted—of the crime of adultery, in light of the continued criminal status of adultery, some people think it is permissible to fire a person from a job for committing adultery, to deny housing to a person for committing adultery, or to give a person

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4. Nineteen states. *See infra* note 52. Adultery is also a crime under U.S. military law. For discussion, see DEBORAH L. RHODE, ADULTERY: INFIDELITY AND THE LAW 89, 91, 93 (2016) (discussing military law and enforcement of adultery laws). Some states define adultery so as to only criminalize a married person having sexual intercourse with someone other than his or her spouse, while others define it to include an unmarried person who has sex with a married person. *Compare* GA. CODE ANN. § 16-6-19 (1968) (“A married person commits the offense of adultery when he voluntarily has sexual intercourse with a person other than his spouse . . .”), *with* MICH. COMP. LAWS § 750.29 (1971) (“Adultery is the sexual intercourse of [two] persons, either of whom is married to a third person.”).

5. *See* RHODE, *supra* note 4, at 60–61.

6. Thirty-two states. *See infra* note 60.

7. N.J. STAT. ANN. § 3A:37–2 (West 2019).

8. Seven or eight states. *See infra* notes 66–67.

9. *See* H. Hunter Bruton, *The Questionable Constitutionality of Curtailing Cuckolding: Alienation-of-Affection and Criminal-Conversation Torts*, 65 DUKE L.J. 755, 756 (2016); Lance McMillian, *Adultery as Tort*, 90 N.C. L. REV. 1987, 1987 (2012).

10. *Shackelford v. Lundquist*, No. COA13-960, 2014 WL 1791267, at \*2 (N.C. Ct. App. May 6, 2014), *appeal denied*, 762 S.E.2d 460 (N.C. 2014).

11. Thirty-eight states. Thirty-two of these are states that have adultery as a ground for divorce (*see infra* note 60); five of these are states where adultery is a crime but where adultery is not a ground for divorce (Arizona, Florida, Michigan, Minnesota, and Wisconsin); and one state that allows for a heart balm cause of action but where adultery is neither a ground for divorce or a crime (Maine).

who has committed adultery a smaller percentage of the marital property upon divorce than he or she would get otherwise.<sup>12</sup> Relatedly, the legal status of adultery provides support and justification for the negative attitudes many Americans have towards adultery and, on the other hand, the negative attitudes of many Americans buttress the law's continued stance on adultery.

In sum, the United States remains quite hostile towards adultery. In this Essay, I argue we should approach adultery differently both in the law and more generally. Some legal scholars have argued that adultery should be decriminalized, that civil suits based on adultery should be abolished, that adultery should be eliminated as a ground for divorce, and that other laws that in some way punish adultery should be repealed or held unconstitutional.<sup>13</sup> Recently, for example, Professor Deborah Rhode, in her book *ADULTERY: INFIDELITY AND THE LAW*, makes a sustained argument that “adultery should not be a basis for criminal or civil liability, employment decisions, or custody and alimony awards.”<sup>14</sup> While I have great sympathies with these “abolitionist” conclusions, in this Essay, I take a different tack. I show that, all too often, in law and in other contexts, adultery and infidelity are treated the same way. This elision of adultery and infidelity is a significant practical and conceptual mistake. In particular, the law treats *consensual non-monogamy*—engaging in extra-marital sex with the consent of one's spouse—like infidelity but, in fact, consensual non-monogamy does not warrant the moral and legal treatment it currently receives. I argue that consensual non-monogamy is importantly different from infidelity. While infidelity—insofar as it is an instance of dishonesty—should be discouraged (although I doubt it should be a crime), consensual non-monogamy should be *encouraged* or at least not discouraged. More dramatically, I argue that consensual non-monogamy is “morally” equivalent to monogamy, or at least, it should be viewed as equivalent to monogamy through the lens of public policy. I argue that, especially in a pluralist society like ours, the law should not favor monogamy over consensual non-monogamy as it

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12. See *infra* notes 61–63.

13. See, e.g., Linda S. Anderson, *Marriage, Monogamy, and Affairs: Reassessing Intimate Relationships in Light of Growing Acceptance of Consensual Non-Monogamy*, 22 WASH. & LEE J. C.R. & SOC. JUST. 3, 7 (2016); Bruton, *supra* note 9, at 755 (arguing for the unconstitutionality of adultery laws and suggesting an alternative legal framework); Andrew D. Cohen, *How the Establishment Clause Can Influence Substantive Due Process: Adultery Bans After Lawrence*, 79 FORDHAM L. REV. 605, 605 (2010) (analyzing adultery laws under substantive due process precedent and arguing that the primary purpose of the laws violates the Establishment Clause and renders them unconstitutional); Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 364 (2004); Gabrielle Viator, Note, *The Validity of Criminal Adultery Prohibitions After Lawrence v. Texas*, 39 SUFFOLK U. L. REV. 837, 860 (2006).

14. See RHODE, *supra* note 4, at 7.

currently does. Significant legal reform to the law of adultery is thereby needed. Specifically, while I am sympathetic to calls for the complete abolition of laws punishing adultery, in this Essay I sketch an alternative reform to family law, criminal law, tort law, and other areas of law that relate to non-monogamy. Rather than the complete abolition of laws related to adultery, my proposed reform prioritizes ending the law's negative treatment of consensual non-monogamy.

This Essay begins with an exploration of the conceptual landscape around adultery. Next, this Essay considers the legal treatment of adultery. Then, after discussing some empirical claims about and related to adultery, this Essay defends the provocative normative claim that one type of adultery, consensual non-monogamy, is not bad at all and that the legal and moral approach taken towards it by three-quarters of the states is wrongheaded. This Essay concludes by outlining a proposal for reforming these problematic laws that is distinct from the abolition of all adultery laws.

## II. THE CONCEPTUAL GEOGRAPHY OF ADULTERY

Adultery and infidelity are morally tinged words, so I start my exploration of the concepts related to adultery using more neutral terms. A person who is married or is in a primary relationship similar to a marriage (such as a civil union or domestic partnership)<sup>15</sup> and has sex with a person other than his or her spouse or partner is having *extra-dyadic sex*.<sup>16</sup> If neither of the people in a couple engages in

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15. For a (now outdated) discussion of civil unions and domestic partnerships, see Edward Stein, *The Topography of Legal Recognition of Same-Sex Relationships*, 50 FAM. CT. REV. 181, 181–99 (2012). Twelve U.S. jurisdictions still have domestic partnership and civil union laws on the books: four still allow couples to obtain civil unions (Colorado, Hawaii, Illinois, New Jersey); five still allow couples to obtain domestic partnerships (California, Maine, Nevada, Oregon, Washington, D.C.); two no longer allow couples to obtain civil unions but still have the status of civil union so couples who had obtained civil unions may retain that status (Vermont, Rhode Island); and one no longer allows couples to obtain domestic partnerships but still has the status so couples who had obtained domestic partnerships may retain that status (Wisconsin). For further discussion, see Edward Stein, *How U.S. Family Law Might Deal with Spousal Relationships of Three (or More) People*, 51 ARIZ. ST. L.J. (forthcoming Winter 2020).

16. My discussion throughout assumes, without any articulated theoretical justification, that a marriage is a “dyadic” relationship, that is, a relationship between two people. There are, however, people who are involved in “group marriages,” marriage-like relationships in which three or more individuals are all romantically involved with each other. Such a relationship involving three people is called a “triad” (or a “throuple”); involving four people is called a “quad”; and involving more than four people, a “moresome.” RONALD C. DEN OTTER, IN DEFENSE OF PLURAL MARRIAGE 8–9 (2015). Triads, quads, and moresomes can, like dyadic relationships, be “open” or “closed,” that is, people in group relationships might decide to engage in sexual activity only within the group (a “closed” relationship) or might agree that it is permissible for people in the group

extra-dyadic sex, they are *monogamous*,<sup>17</sup> otherwise they are non-monogamous. If one has extra-dyadic sex and one's spouse or partner has agreed that having extra-dyadic sex is permissible, then this is *consensual* non-monogamy.<sup>18</sup> If one has extra-dyadic sex and one's spouse or partner has not agreed that this is permissible, then this is *non-consensual* non-monogamy or, more simply, *infidelity*.<sup>19</sup> When a person in a relationship engages in extra-dyadic sex, he or she is committing adultery (which may or may not be a crime, depending on the jurisdiction in which the behavior occurred and the legal status of the relationship).<sup>20</sup> Adultery includes both infidelity (having sex with a person other than one's spouse when one's spouse has *not* consented to it) and consensual non-monogamy (having sex with a person other than one's spouse when one's spouse has in some manner consented to it). In other words, some instances of adultery are not instances of infidelity, namely, when a couple has agreed not to be monogamous.

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relationship to engage in sexual activity with others not in the relationship (an "open" relationship). See, e.g., *id.* at 215. Note that a *group* relationship/marriage is distinct from a plural relationship/marriage; a *plural* marriage is when an individual is involved in separate and distinct relationships with two or more individuals. See, e.g., Diane Klein, *Plural Marriage and Community Property Law*, 41 GOLDEN GATE U. L. REV. 33, 45–49 (2010); Edward Stein, Symposium, *Plural Marriage, Group Marriage, and Immutability in Obergefell v. Hodges and Beyond*, 84 UMKC L. REV. 871, 880 (2016). While there are interesting legal, ethical, and social scientific issues to explore regarding such non-dyadic relationships and monogamy/non-monogamy, I henceforth, for the sake of simplicity, set aside plural and group marriages and relationships.

17. There is a bit of a simplification here because it is not the case that a person is monogamous if she has sex with a different person every week so long as she (i) thinks that she is in a serious relationship with each sexual partner and (ii) she has sex with people one at a time. This would be like the person who claims he is fasting between meals and snacks. "Serial monogamy," the idea that someone can be involved in several different relationships over a course of his or her life and still count as monogamous, implies such relationships are not overlapping and that each lasts a significant period of time. *But see* Terri D. Conley et al., *A Critical Examination of Popular Assumptions About the Benefits and Outcomes of Monogamous Relationships*, 17 PERSONALITY & SOC. PSYCHOL. REV. 124, 126 (2013) (describing—and implicitly critiquing—the view that almost any personal relationship is monogamous, even one in a series of relationships in quick succession).

18. I do not, herein, offer a robust account of consent, in part because, "consent has never been a simple or self-evident concept in the law." WILLIAM ESKRIDGE ET AL., *SEXUALITY, GENDER, AND THE LAW* 267 (4th ed. 2018). *But see infra* text accompanying notes 172–77 for a discussion of an objection to my proposal for reforming the law of adultery that relates to the concept of consent. For a nuanced discussion of consent in contract law that is potentially applicable to the approach advocated herein, see Orit Gan, *The Many Faces of Contractual Consent*, 65 DRAKE L. REV. 615, 626–651 (2017).

19. Amy C. Moors et al., *Unique and Shared Relationship Benefits of Consensually Non-Monogamous and Monogamous Relationships: A Review and Insights for Moving Forward*, 22 EUR. PSYCHOLOGIST 55, 56 (2017).

20. See *infra* Part III for a survey of the law of adultery in the U.S.

One of the central claims of this Essay is that not all instances of adultery are appropriate targets for moral and legal disapproval.

Adultery is about behavior, but underlying this sexual behavior is sexual desire.<sup>21</sup> Human sexual desire can be categorized in a variety of ways. Most typically, we classify people in terms of the sex or gender of their sexual object choice, namely, whether they are gay, lesbian, heterosexual, or bisexual.<sup>22</sup> But sexual orientation is just one aspect of the broader notion of sexual desire, sexual taste, or sexual interest. People have a wide range of sexual tastes. Some people are particularly or primarily attracted to people of certain age ranges, body types, races, hair colors, personality types and/or professions in addition to being attracted to people of a certain sex, gender, gender identity and/or certain sexual orientation.<sup>23</sup> People are not only sexually interested in certain sorts of people, some also have quite specific interests in certain sorts of sexual acts, sex in certain venues, and certain frequency of having sex.

Of particular interest for this Essay, some people may be sexually attracted only to one person at a time, may be completely satisfied having sex with just this person, and may be happy in a companionate and sexual relationship with just that person. Such a person has *monogamous* desires. Most people, however, even if they are in a dyadic relationship, remain sexually attracted to other people besides the person with whom they are romantically involved and are *tempted*—for this reason or others—to have sex with other people. In fact, for a significant percent of people, it is very difficult to resist this temptation and remain sexually active with just one person for an extended period of time.<sup>24</sup> Some people in relationships may, over time, become less interested in sex with their spouse or partner while remaining interested in sex with other people. Others may remain as attracted to their spouse or partner as they always were while still desiring sexual variety, especially as time goes on. And others may

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21. For a discussion of the distinction between sexual desires and behaviors (a distinction that is not as straightforward as it might seem), see EDWARD STEIN, *THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION* 41–49 (1999). See also ERIC ANDERSON, *THE MONOGAMY GAP: MEN, LOVE, AND THE REALITY OF CHEATING* 77–83 (2012) (distinguishing behavior, desire, and identity with respect to monogamy).

22. See STEIN, *supra* note 21, at 39.

23. See *id.* at 49–67; EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 22–27 (1990); Fredrick Suppe, *Curing Homosexuality*, in *PHILOSOPHY AND SEX* 391, 394–97 (Robert Baker & Frederick Elliston eds., rev. ed. 1984); Robin A. Dembroff, *What Is Sexual Orientation?*, *PHILOSOPHERS' IMPRINT*, Jan. 2016, at 1, 1–2.

24. See, e.g., ANDERSON, *supra* note 21, at 37–70; DAVID P. BARASH & JUDITH EVE LIPTON, *THE MYTH OF MONOGAMY: FIDELITY AND INFIDELITY IN ANIMALS AND PEOPLE* 1–2 (2001); CHRISTOPHER RYAN & CACILDA JETHÁ, *SEX AT DAWN: HOW WE MATE, WHY WE STRAY, AND WHAT IT MEANS FOR MODERN RELATIONSHIPS* 293–95 (2010); JAY ZISKIN & MAE ZISKIN, *THE EXTRA-MARITAL SEX CONTRACT* 66 (1973). See *infra* Subpart IV.A for a discussion of how common extra-dyadic sex is.

seek sex outside of their relationship when their spouse or partner becomes uninterested in sex or suffers from a health problem that leaves them unable to have sex.<sup>25</sup>

Of course, one's sexual behavior often does not accord with one's sexual desire. A person with non-monogamous desires may be monogamous in terms of behavior, for example, to avoid social and legal sanctions, because his or her partner demands monogamy, or due to the lack of opportunity to find willing and appealing extra-dyadic partners. Similarly, a person who desires to be monogamous may, for various reasons, have extra-dyadic sex on occasion or may be celibate.

Whether focusing on behavior or desire, non-monogamy takes many forms. A person who is *not* in a dyadic relationship and who does not wish to be in one but who desires to have sex with more than one partner outside of a marriage or a primary partnership is non-monogamous in terms of behavior and desire. So long as such a person is having sex with others who are not themselves in dyadic relationships, such a person is non-monogamous but not engaging in adultery. Given that this is an Essay on adultery, this type of non-monogamy is not my focus. People in dyadic relationships deal with their sexual desires for people other than their spouse or partner in different ways. Some people repress their desires for extra-dyadic sex. These people, because they repress their non-monogamous desires, do not engage in adultery. They are also not my primary focus (although many such people may be relieved of the legal and some of the societal pressures that give rise to this repression if my approach to non-monogamy were implemented). Those in dyadic relationships who have extra-dyadic desires and who act on, rather than repress, these desires are my focus. In other words, my focus is on non-monogamy in the context of dyadic relationships.<sup>26</sup>

Some people in relationships who have extra-dyadic sex do so secretly, that is, without admitting to their spouse or partner that they have had or are having extra-dyadic sex. This is *non-consensual non-monogamy* or *infidelity*. In contrast, when a couple agrees it is permissible for one or both of them to have sex with other people, at least under some circumstances, I call this *consensual non-monogamy*.<sup>27</sup>

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25. See, e.g., ANDERSON, *supra* note 21, at 104–10; DAN SAVAGE, AMERICAN SAVAGE: INSIGHTS, SLIGHTS, AND FIGHTS ON SEX, FAITH, LOVE, AND POLITICS 23–28 (2013).

26. Some people count “virtual sex” with someone other than one's spouse—or even having sexual desires for a person other than one's spouse—as adultery. See, e.g., Kathryn Pfeiffer, Comment, *Virtual Adultery: No Physical Harm, No Foul?*, 46 U. RICH. L. REV. 667, 667–69 (2012); Sandi S. Varnado, *Avatars, Scarlet “A”s, and Adultery in the Technological Age*, 55 ARIZ. L. REV. 371, 409–12 (2013). For purposes of this Essay, I do not count virtual sex as adultery.

27. As an example of research that uses this terminology, see Conley et al., *supra* note 17, at 125–26.



Consensual non-monogamy takes many forms.<sup>28</sup> In the 2011 movie *Hall Pass*, two wives give their respective husbands permission to have sex with other women for a week; the “hall passes” are presumably not renewable, and the husbands are not required to tell their wives about any of the sexual escapades they might engage in during the week.<sup>29</sup> In contrast, some couples (including, it seems, a significant percentage of men in relationships with other men and couples involving bisexual or transgendered people)<sup>30</sup> have arrangements that allow extra-dyadic sex for more than just a week. Some couples opt for a so-called “don’t ask, don’t tell” policy that allows extra-dyadic sex but with the understanding (tacit or explicit) that they are either not required or not supposed to tell each other about their sexual activities outside the relationship.<sup>31</sup> Others have an agreement that they can only have extra-dyadic sex when one of them is out of town (some call this a “what happens in Vegas stays in Vegas” agreement).<sup>32</sup> Some couples will only have extra-dyadic sexual relationships together, that is, by having a *ménage à trois* or other type of group sex activities.<sup>33</sup> Some couples are “swingers,” namely, they engage in extra-dyadic sex in special social settings (“swinging” parties, conventions, or cruises) in which both partners are present and when the extra-dyadic sex is with people who are friends or acquaintances, but not romantic partners.<sup>34</sup> Other couples have relationships that are even more “open,” namely they have

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28. For a useful overview of some forms of consensual non-monogamy and related concepts, see ELISABETH SHEFF, *THE POLYAMORISTS NEXT DOOR: INSIDE MULTIPLE-PARTNER RELATIONSHIPS AND FAMILIES 1–22* (2014).

29. HALL PASS (New Line Cinema 2011).

30. See, e.g., ANDERSON, *supra* note 21, at 99–103; BLAKE SPEARS & LANZ LOWEN, *BEYOND MONOGAMY: LESSONS FROM LONG-TERM GAY MALE COUPLES IN NON-MONOGRAMOUS RELATIONSHIPS 1* (2010), [http://thecouplesstudy.com/wp-content/uploads/BeyondMonogamy\\_1\\_01.pdf](http://thecouplesstudy.com/wp-content/uploads/BeyondMonogamy_1_01.pdf) (explaining that “non-monogamous relationships are very common in the gay community”); Paula C. Rust, *Monogamy and Polyamory: Relationship Issues for Bisexuals*, in *PSYCHOLOGICAL PERSPECTIVES ON LESBIAN, GAY, AND BISEXUAL EXPERIENCES*, 475–96 (Linda D. Garnets & Douglas C. Kimmel eds., 2d ed. 2003) (discussing consensual non-monogamy among bisexuals); Kinton Rossman et al., *A Qualitative Examination of Consideration and Practice of Consensual Nonmonogamy Among Sexual and Gender Minority Couples*, 6 *PSYCHOL. SEXUAL ORIENTATION & GENDER DIVERSITY* 11, 15–20 (2019) (same for transgender people).

31. SHEFF, *supra* note 28, at 8; SPEARS & LOWEN, *supra* note 30, at 11–14. The name of this type of consensual non-monogamy is a play on the informal name of the U.S. military’s former policy towards lesbians, gays, and bisexuals that was codified (from 1993 to 2010) at 10 U.S.C. § 654 (2006) (repealed 2010).

32. SHEFF, *supra* note 28, at 8, 91.

33. See, e.g., SPEARS & LOWEN, *supra* note 30, at 9–10.

34. See, e.g., SHEFF, *supra* note 28, at 74–75; Richard J. Jenks, *Swinging: A Review of the Literature*, 27 *ARCHIVES SEXUAL BEHAV.* 507, 507 (1998); Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 *CAP. U. L. REV.* 439, 515 (2003); Dan Savage, *Swingers: A Love Story*, *CHI. READER* (Oct. 17, 2002), <https://www.chicagoreader.com/chicago/swingers-a-love-story/Content?oid=910051>.

fewer—or no—restrictions about when, where, and with whom they can have extra-dyadic sex.<sup>35</sup>

There are two particular flavors of non-monogamy that are usefully distinguished for purposes of this discussion: *polyamorous* non-monogamy and *monogamish* non-monogamy. Both of these types of non-monogamy can apply to behavior or desire. Sometimes they can be used in ways that imply consensual non-monogamy and sometimes that can be used in ways that do not. According to one definition, *polyamorous* people desire serious sexual and romantic involvement with more than one person at a time.<sup>36</sup> But according to another—perhaps more widely used—definition, the non-monogamy involved in polyamory is *necessarily* consensual. Professor Hadar Aviram, for example, defines polyamory as desiring “more than one sexual loving relationship at the same time with the full knowledge and consent of all the partners involved.”<sup>37</sup> Similarly, Professor Elizabeth Emens, defined polyamory as a lifestyle that prioritizes and privileges “self-knowledge, radical honesty, consent, self-possession, and [variety when it comes to] love and sex.”<sup>38</sup> While I agree that consent is essential to many self-identified polyamorous people, given the focus of this Essay, I find it useful to use the first sense of the term polyamory to distinguish one of several types of non-monogamy, independent of whether the non-monogamy is consensual or non-consensual.

Popular advice columnist Dan Savage coined the felicitous term *monogamish* for people who are “*mostly* monogamous,” open to non-monogamy on occasion but, generally, are not “actively looking” for extra-dyadic sex.<sup>39</sup> Sometimes Savage uses this term in a way that seems to imply that a monogamish relationship is a consensual one, but other times it is less clear.<sup>40</sup> As with polyamory, I will use monogamish for a type of non-monogamy, independent of whether the non-monogamy is consensual or not. With this more nuanced

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35. See SHEFF, *supra* note 28, at 21.

36. This definition of polyamory follows Ann E. Tweedy, *Polyamory as a Sexual Orientation*, 79 U. CIN. L. REV. 1461, 1462 (2011) (defining polyamory as “a preference for having multiple romantic relationships simultaneously”).

37. Hadar Aviram, *Make Love, Not Law: Perceptions of the Marriage Equality Struggle Among Polyamorous Activists*, 7 J. BISEXUALITY 261, 264 (2008); see also SHEFF, *supra* note 28, at 1 (“Polyamory is consensual, openly conducted, multiple-partner relationships . . . [involving] negotiated access to additional partners outside of the traditional committed couple.”).

38. See Emens, *supra* note 13, at 283.

39. Dan Savage, *Savage Love: Monogamish*, STRANGER (July 20, 2011), <http://www.thestranger.com/seattle/SavageLove?oid=9125045> (coining the word *monogamish*). For discussion of this concept and Savage’s use of it, see Mark Oppenheimer, *Married, With Infidelities*, N.Y. TIMES MAG. (June 30, 2011), [http://www.nytimes.com/2011/07/03/magazine/infidelity-will-keep-us-together.html?\\_r=0](http://www.nytimes.com/2011/07/03/magazine/infidelity-will-keep-us-together.html?_r=0).

40. Oppenheimer, *supra* note 39.

terminology in hand, I turn now to how the law deals with adultery and related concepts.

### III. THE LAW OF ADULTERY

For a good part of this nation's history, adultery laws played a significant role in the regulation of sexuality and in the law of domestic relations.<sup>41</sup> Adultery was once a serious crime that drew significant legal penalties, including capital punishment.<sup>42</sup> Criminal prohibitions on fornication (sex between two unmarried people) and adultery made marriage the exclusive context in which two people could legally engage in sexual relations.<sup>43</sup> If you wanted to have sex without becoming an outlaw or an outcast, you married the person with whom you wanted to have sex. As Professor Melissa Murray nicely put it, “[C]riminal laws prohibiting adultery . . . reflected marriage’s place as the lawful site for sexual expression; however, these laws also were intended to protect and stabilize the marital family from the destructive influences of extramarital sex.”<sup>44</sup> Given the potential harshness of penalties for being convicted of adultery or fornication, there were strong incentives to wait until marriage to have sex and, once married, to limit one’s sexual activities to one’s spouse.

Not only did criminal adultery laws play a role in channeling people into marriage and “protecting” marriages from extra-marital sex, the laws around adultery in the context of family law played a central role in getting people out of—and keeping people in—marriages.<sup>45</sup> In the age of fault-based divorce, adultery was central to divorce law. Until the 1960s, throughout the United States, in order to get out of a marriage, a person had to prove to a judge both that his or her spouse had committed a statutorily-specified “ground” for divorce, one of an enumerated “wrongs” that caused the breakdown of the marriage, and that, unlike his or her spouse, that

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41. See, e.g., JoAnne Sweeny, *Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws*, 46 LOY. U. CHI. L. J. 127, 132 (2014).

42. JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 28 (3d ed. 2012).

43. *Id.*

44. Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1270 (2009).

45. In addition, historically, part of the implicit justification for adultery laws was deeply connected to gender. Adultery laws harnessed the power of criminal law and divorce law to protect wives from the philandering of their husbands at a time when men had much greater economic power and disproportional legal status. Similarly, adultery laws gave husbands extra assurance that their wives’ offspring were actually their offspring. See Sweeny, *supra* note 41, at 138–39 (explaining that one reason women were historically subject to stricter adultery laws was concerns about paternity).

he or she was “innocent” with respect to the marital breakup.<sup>46</sup> Until the “no-fault” revolution in family law,<sup>47</sup> adultery was an important ground for divorce, and in some states, even until surprisingly recently, one could *only* obtain a divorce by proving that one’s spouse had engaged in adultery.<sup>48</sup>

Tort law played a supporting role to criminal law and family law in the context of the law of adultery. As previously mentioned, heart balm suits allowed a married person to sue his or her spouse’s sexual partner for interfering with his or her marriage by stealing a spouse’s affection.<sup>49</sup> Heart balm suits supplemented the potential criminal penalties of adultery, the risk of divorce, and the financial implications associated with adultery in the context of divorce. In particular, heart balm suits allowed an aggrieved spouse to target his or her “competition,” namely the other person with whom one’s spouse was having sex.<sup>50</sup>

I use the phrase “the law of adultery” for the cluster of laws that are (or were) supposed to disincentivize adultery. For much of this country’s history, the law of adultery was robust. Times have certainly changed regarding the law of adultery: its scope and power are significantly diminished.<sup>51</sup> That said, adultery retains a presence as a part of criminal law, family law, and tort law in a surprising number of states. Although prosecutions are rare (but not unheard of), adultery remains a crime in nineteen states today and a felony in five of them.<sup>52</sup> Although Colorado, New Hampshire, Massachusetts

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46. See, e.g., JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 161 (2011) (“As of the 1930s, every state that recognized divorce . . . listed adultery as one of the available grounds.”).

47. See, e.g., J. HERBIE DIFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA* 74–75 (1997).

48. In New York, for example, adultery was the sole ground for divorce until 1966. See N.Y. DOM. REL. LAW § 170 (McKinney 2010) (denoting how cruelty, abandonment, and extended confinement in prison officially became additional grounds for divorce in September of 1967).

49. See McMillian, *supra* note 9, at 1989.

50. See, e.g., *id.*; Bruton, *supra* note 9, at 792–94.

51. See Sweeny, *supra* note 41, at 136.

52. Alabama (ALA. CODE § 13A–13–2 (2011)); Arizona (ARIZ. REV. STAT. ANN. § 13–1408 (2018)); Florida (FLA. STAT. § 798.01 (2019)); Georgia (GA. CODE ANN. § 16–6–19 (2018)); Idaho (IDAHO CODE § 18–6601 (2019)); Illinois (720 ILL. COMP. STAT. 5/11–35 (2012)); Kansas (KAN. STAT. ANN. § 21–5511 (2017)); Maryland (MD. CODE ANN., CRIM. LAW § 10–501 (LexisNexis 2012)); Michigan (MICH. COMP. LAWS §§ 750.29–.30 (2020)); Minnesota (MINN. STAT. § 609.36 (West 2019)); Mississippi (MISS. CODE ANN. § 97–29–1 (2017)); New York (N.Y. PENAL LAW § 255.17 (McKinney 2017)); North Carolina (N.C. GEN. STAT. § 14–184 (2017)); North Dakota (N.D. CENT. CODE § 12.1–20–09 (2019)); Oklahoma (OKLA. STAT. tit. 21, §§ 871–872 (2015)); Rhode Island (11 R.I. GEN. LAWS § 11–6–2 (2002)); South Carolina (S.C. CODE ANN. §§ 16–15–60 to 16–15–70 (2015)); Virginia (VA. CODE ANN. § 18.2–365 (2014)); and Wisconsin (WIS. STAT. § 944.16 (2019)). Adultery is a felony in Idaho, Michigan, Minnesota, Oklahoma, and Wisconsin.

and Utah have repealed their adultery laws in the past several years,<sup>53</sup> other recent attempts to repeal adultery laws have failed.<sup>54</sup>

Further, while every jurisdiction now allows for a path to divorce without requiring proof of fault, adultery continues to be a ground for divorce in the majority of jurisdictions.<sup>55</sup> As no-fault divorce swept through the United States starting with California in 1970,<sup>56</sup> states took two different approaches to reforming their divorce law. The more radical approach, pioneered by California, is “pure” no-fault divorce, in which fault has no place in whether a divorce will be granted.<sup>57</sup> Other jurisdictions, instead of eliminating fault grounds like California did, simply added a no-fault pathway to the existing fault grounds.<sup>58</sup> Such jurisdictions adopted what I call the “hybrid” fault/no-fault approach to divorce. New Mexico, for example, when it adopted no-fault divorce, simply added “incompatibility” to its pre-existing list of statutory grounds for divorce.<sup>59</sup> Thirty-two states adopted the hybrid approach. Adultery remains a ground for divorce in these states today.<sup>60</sup>

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53. H.B. 13–1166, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013); H.B. 1125, 2014 Gen. Court (N.H. 2014); S.B. 2260, 190th Gen. Court, 2018 Reg. Sess. (Mass. 2018); H.B. 40, 2019 Gen. Sess. (Utah 2019).

54. See, e.g., Bill Sizemore, *Adultery Will Remain a Criminal Offense in Virginia, State Senate Committee Decides*, VIRGINIAN-PILOT (Jan. 18, 2016), [https://pilotonline.com/news/government/politics/virginia/article\\_909e3fa2-41c8-57ab-bb3c-fd332c2be594.html](https://pilotonline.com/news/government/politics/virginia/article_909e3fa2-41c8-57ab-bb3c-fd332c2be594.html). There is presently a bill in Virginia to repeal its adultery law. H.B. 1701, 2019 Sess. (Va. 2019).

55. See, e.g., Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Looking at Interjurisdictional Recognition*, 43 FAM. L. Q. 923, 976 (2010) (table indicating how various states approach no-fault divorce).

56. See, e.g., GROSSMAN & FRIEDMAN, *supra* note 46, at 176–77.

57. See, e.g., CAL. FAM. CODE §§ 2310–2311, 2335 (West 2017) (“Dissolution of the marriage . . . of the parties may be based on either of the following grounds, which shall be pleaded generally: (a) Irreconcilable differences, which have caused the irremediable breakdown of the marriage. (b) Permanent legal incapacity to make decisions. . . . Irreconcilable differences are those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved . . . . Except as otherwise provided by statute, in a pleading or proceeding for dissolution of marriage . . . of the parties, including depositions and discovery proceedings, evidence of specific acts of misconduct is improper and inadmissible.”); see also *infra* note 80 (discussing *Diosdado* case).

58. See *infra* note 60.

59. N.M. STAT. ANN. § 40–4–1 (2019) (“On the petition of either party to a marriage, a district court may decree a dissolution of marriage on any of the following grounds: A. incompatibility; B. cruel and inhuman treatment; C. adultery; or D. abandonment.”).

60. Alabama, Alaska, Arkansas, Connecticut, Delaware, Georgia, Idaho, Illinois, Kansas (Although Kansas does not explicitly list adultery as a ground, one ground is “failure to perform a material marital duty or obligation.” KAN. STAT. ANN. § 23–2701(2) (2016). Case law has held adultery is included under this language, see *Matter of Marriage of Sommers*, 792 P.2d 1005 (Kan. 1990).), Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma,

In addition, in some jurisdictions, the fact that one spouse has committed adultery may have financial implications upon divorce or death of a spouse and may undermine the adulterous spouse's argument for custody of his or her child. South Carolina, for example, prevents spouses who have committed adultery from being awarded alimony.<sup>61</sup> New Jersey prevents adulterous spouses from receiving certain inheritance rights that they would otherwise be qualified to receive.<sup>62</sup> And, in Illinois, adultery is a ground for finding a person seeking to adopt a child to be unfit.<sup>63</sup>

Further, although most states have abolished heart balm suits either through legislative action<sup>64</sup> or judicial decision,<sup>65</sup> five or six states allow a married person whose spouse has committed adultery to sue the person who had sex with his or her spouse for alienation of affection,<sup>66</sup> and four states allow for a somewhat similar cause of

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Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, and West Virginia. Arizona, which has adultery as a fault ground only in virtue of having covenant marriage law, is not included on this list. A covenant marriage, which is an option in Arizona and two other states (instituted in these states years after these states had embraced no-fault divorce), is a marriage that can only be dissolved if one spouse establishes that the other spouse committed fault. *See* ARIZ. REV. STAT. ANN. §§ 25–901 to –906 (2019); ARK. CODE ANN. §§ 9–11–803 to –811 (2019); LA. STAT. ANN. §§ 9:275, 9:307 (2008).

61. S.C. CODE ANN. § 20–3–130 (2019) (“No alimony may be awarded a spouse who commits adultery before the earliest of these two events: (1) the formal signing of a written property or marital settlement agreement or (2) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties.”). North Carolina, for example, also has a similar law. N.C. GEN. STAT. § 50–16.3A (2019).

62. N.J. STAT. ANN. § 3A:37–2 (West 2019) (“If a married person voluntarily leaves his or her spouse and goes away and continues with his or her paramour, such person shall be forever barred from having jointure, dower or curtesy, as the case may be, unless the deserted spouse voluntarily becomes reconciled to and lives with the deserting spouse, in which case jointure, dower or curtesy shall be restored.”).

63. 750 ILL. COMP. STAT. § 50/1(D)(j) (2012) (listing “[o]pen and notorious adultery or fornication” as a ground for a person’s being “unfit” for adoption).

64. *See, e.g.*, 740 ILL. COMP. STAT. § 5/7.1 (2015) (repealing alienation of affections actions starting January 1, 2016).

65. *See, e.g.*, *State ex rel. Golden v. Kaufman*, 760 S.E.2d 883, 895 (W. Va. 2014) (abolishing cause of action for criminal conversation).

66. *Hunt v. Chang*, 594 P.2d 118 (Haw. 1979) (allowing an action for alienation of affection); *Fitch v. Valentine*, 959 So. 2d 1012, 1020 (Miss. 2007) (“[I]n the interest of protecting the marriage relationship and providing a remedy for intentional conduct which causes a loss of consortium, this Court declines the invitation to abolish the common law tort of alienation of affections . . . .”); *Malecek v. Williams*, 804 S.E.2d 592, 594 (N.C. App. 2017) *appeal denied* 807 S.E.2d 574 (N.C. 2017) (“Claims for alienation of affection . . . are designed to prevent and remedy personal injury, and to protect the promise of monogamy that accompanies most marriage commitments . . . and are not facially unconstitutional . . . .”); *State Farm Fire & Cas. Co. v. Harbert*, 741 N.W.2d 228, 230–31 (S.D. 2007); *Heiner v. Simpson*, 23 P.3d 1041, 1042–43 (Utah 2001). The New Mexico Court of Appeals has expressed “disfavor” with the tort of alienation

action called “criminal conversation.”<sup>67</sup> Recently, both a state appellate court and a federal district court in North Carolina reaffirmed the constitutionality of criminal conversation and alienation of affections causes of action in that state.<sup>68</sup>

In sum, despite the changes in the law of adultery, adultery continues to have direct legal consequences through family law, criminal law, and tort law. All in all, the law of adultery survives in some way in thirty-eight states.<sup>69</sup>

Adultery also may have *indirect* legal consequences. When a state criminalizes a behavior but rarely enforces it, the legal consequences typically flow not from actual prosecutions for engaging in the behavior, but from legally permissible sanctions that piggyback on the criminality of the behavior. For example, numerous courts have held—even after *Lawrence v. Texas*<sup>70</sup>—that a public employee who commits adultery may be fired even if he or she has not been prosecuted for (or convicted of) adultery (or for any related actions).<sup>71</sup> Similarly, courts have also held that a landlord may refuse to rent a home to a couple that engages in adultery (insofar as adultery remains a crime), even if they have not been prosecuted for (or convicted of) these crimes.<sup>72</sup> Although such indirect legal consequences are less likely to occur today than they were say, thirty years ago, the existence of legal prohibitions continues to give rise to legal consequences beyond actual prosecutions.

Indirect legal consequences arise in the divorce context as well. A judge might award an adulterous spouse a smaller portion of the

of affections, *see, e.g.*, *Padwa v. Hadley*, 981 P.2d 1234, 1240 (N.M. App. 1999), a view that the New Mexico Supreme Court has suggested it supports, *see Lovelace Med. Ctr. v. Mendez*, 805 P.2d 603, 610 (N.M. 1991), but that court does not yet seem to have abolished the cause of action. *See Bruton, supra* note 9, at 756; *McMillian, supra* note 9, at 1991.

67. *Hawaii v. Kuhia*, 10 Haw. 440, 441 (Haw. 1896); *Drennan v. Chalfant*, 282 P.2d 442, 445 (Kan. 1955); *Collett v. Bither*, 262 A.2d 353, 357 (Me. 1970); *Brown v. Ellis*, 678 S.E.2d 222, 224 (N.C. 2009).

68. *Ammarell v. France*, No. 3:16-CV-00708-RJC-DSC, 2018 WL 2843441, at \*1 (W.D.N.C. June 11, 2018); *Malecek*, 804 S.E.2d at 599.;

69. *See supra* note 11.

70. 539 U.S. 558 (2003) (striking down, on due process grounds, Texas’ sodomy law, which criminalized same-sex sexual acts but not similar sexual acts between people of different sexes).

71. *See, e.g.*, *Coker v. Whittington*, 858 F.3d 304, 305–07 (5th Cir. 2017); *Starling v. Bd. Cty. Comm’rs.*, 602 F.3d 1257, 1262–63 (11th Cir. 2010); *Seegmiller v. Laverkin City* 528 F.3d 762, 772 (10th Cir. 2008); *Beecham v. Henderson Cty.*, 422 F.3d 372, 378 (6th Cir. 2005); *Marcum v. McWhorter*, 308 F.3d 635, 636 (6th Cir. 2002); *Stevens v. Holder*, 966 F. Supp. 2d 622, 625 (E.D. Va. 2013); *Caruso v. City of Cocoa*, 260 F. Supp. 2d 1191, 1207–08 (M.D. Fla. 2003).

72. *See, e.g.*, *State v. French*, 460 N.W.2d 2, 11 (Minn. 1990) (holding it is permissible for a landlord not to rent to woman who planned to live with her fiancé). For discussion of these types of cases, *see, e.g.*, Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. REV. 2083, 2119 (2017).

marital assets than he or she would otherwise receive even if the judge does not explicitly cite adultery as a factor in deciding what distribution is equitable. Another indirect legal effect concerns the validity of marital agreements upon divorce: it is not clear if a couple can voluntarily waive adultery as a ground for divorce through a prenuptial or postnuptial agreement. This is evident, for example, in a Louisiana divorce proceeding.<sup>73</sup> After eight years of marriage, Constance Boudreaux filed for divorce. Her husband, Deno, wanted to try to save the marriage and got his wife to withdraw her divorce action as part of a postnuptial agreement in which he promised that, if he divorced her for any reason, he would pay her alimony of \$1,500 per month.<sup>74</sup> Four years later, Deno filed for divorce and asked the trial court to nullify the postnuptial agreement, which it did.<sup>75</sup> On appeal, the Louisiana appellate court upheld the voiding of the postnuptial agreement because an “agreement to pay alimony, regardless of fault—even adultery[—]is . . . against public policy . . . [because] [s]uch a contract would undermine the sanctity of marriage and would encourage the parties to approve adulterous conduct for a price.”<sup>76</sup> A premarital or postmarital agreement cannot, the court held, repeal or amend the nature of marital obligations.<sup>77</sup> Under Louisiana law, “married persons owe each other fidelity, support, and assistance.”<sup>78</sup> For this reason, the court held that a prenuptial or postnuptial agreement that facilitates adultery, even indirectly by attempting to limit, restrict, or discourage divorce on the grounds of adultery, is unenforceable.<sup>79</sup>

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73. *Boudreaux v. Boudreaux*, 745 So. 2d 61, 63 (La. Ct. App. 1999).

74. *Id.* at 62.

75. *Id.* at 63.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* As a result, in Louisiana and states that take a similar approach, written agreements to have a consensual non-monogamous relationship—like the “open union” contract proposed by Anderson, *supra* note 13, at 43–46, or the “extra-marital sex contract” proposed by ZISKIN & ZISKIN, *supra* note 24, at 251 (see *infra* note 172 for the text of the Ziskins’ sample contract)—would not be enforceable in Louisiana, as well as in many other states. Other courts have refused to enforce contracts between married couples regarding adultery, but for different reasons than in *Boudreaux*. In *Diosdado v. Diosdado*, 97 Cal. App. 4th 470 (Cal. 2002), after she discovered her husband was having an affair, a woman threatened divorce. Her husband promised to break off the current affair, to not have another affair, and agreed to put his money where his mouth was (so to speak). *Diosdado*, 97 Cal. App. 4th at 471–73. The couple signed a written agreement wherein each promised to remain faithful to the other. *Id.* The agreement also provided for \$50,000 liquidated damages, to be paid upon dissolution of the marriage, should either spouse breach the agreement. *Id.* Contrary to his promise, the husband did not end his extra-marital relationship. *Id.* at 473. When the couple divorced, the wife asked the trial court to enforce the liquidated damages clause. *Id.* The trial court refused and the appellate court affirmed, saying that the clause in question “was contrary to the public policy underlying California’s no-fault divorce laws [which limit] [r]ecovery in no-fault



This result is especially surprising given the generally permissive attitude virtually every state has regarding prenuptial and postnuptial agreements: today, such agreements are widely enforced regarding the distribution of property, spousal support, and virtually any other economic matter (although they are not typically enforced about household or lifestyle matters, such as agreements to perform household chores or to have sex with a certain frequency).<sup>80</sup> Despite the general pro-enforcement attitude towards prenuptial and postnuptial agreements, some states refuse to enforce agreements that have the effect of waiving adultery as a ground for divorce (or the even the hint of it) because adultery is an enumerated ground for divorce; thus, they view waiving adultery as a violation of public policy.<sup>81</sup> Other states refuse to enforce agreements penalizing adultery because fault-based divorce is against that public policy of those states.<sup>82</sup>

In sum, the law of adultery has direct legal effects (in the criminal context and relating to custody and distribution of property in case of divorce or death of a spouse) and indirect legal effects (relating to, for example, effects on employment, housing, adoption, limiting the types of marital agreements couples can enter, and subtly influencing the distribution of marital assets upon divorce). Further, because the law has expressive power, the existence of legal prohibitions and the associated legal consequences have *extra-legal effects* as well. States, through their laws, say what is good and bad. Even when a law is rarely used or never enforced, as long as people know (or believe) that the law takes a negative attitude towards a behavior, it thereby shapes and reinforces social attitudes, pushes the behavior underground, and keeps it secret. The state is, in effect, saying adultery is bad and adultery undermines marriage by making adultery illegal, making adultery an explicit ground for divorce, and refusing to enforce prenuptial agreements that endorse adultery. This helps keep extramarital sex “in the closet,” contributes to the shame many people feel when they or their spouse engage in adultery,

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dissolution proceedings . . . to half the community property and appropriate support . . . [but does not allow] hefty premiums for emotional angst.” *Id.* at 473–74. See also *In re Marriage of Cooper*, 769 N.W.2d 582, 587 (Iowa 2009); *Parker v. Green*, No. 73176, 2018 WL 3211974, at\* 2 (Nev. June 25, 2018) (unpublished disposition) (refusing to enforce a contract written in anticipation of a domestic partnership penalizing a party for a dissolution due to infidelity or dishonesty).

80. See Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 158 (1998) (explaining that “divorce-focused premarital agreements regarding the division of property and spousal support are now enforceable in almost every state”); M. Neil Browne & Katherine S. Fister, *The Intriguing Potential of Postnuptial Contract Modifications*, 23 HASTINGS WOMEN’S L.J. 187, 195–96 (2012) (discussing how courts are hesitant to enforce agreements that involve “day-to-day marital behavior”).

81. See *Boudreaux*, 745 So.2d at 63.

82. See, e.g., *Parker*, 2018 WL 3211974, at \*2.

and creates a stigma around marriages that are in any way non-monogamous.<sup>83</sup>

Further, the negative attitude of Americans towards adultery and the legal status of adultery are mutually reinforcing. In contrast, as the legal climate for LGBT people has improved over the past fifteen to twenty years, Americans' opinions about the morality of same-sex sexual behavior have improved. Looking at the aforementioned annual Gallup survey, from 2001 to 2019, moral attitudes towards same-sex sexual activity shifted significantly, from 40 percent of Americans surveyed finding such activity morally acceptable in 2001 to 63 percent finding it morally acceptable in 2019.<sup>84</sup> During the same time period, laws criminalizing same-sex sodomy and laws limiting marriage to different-sex couples were both found unconstitutional.<sup>85</sup> There must have been significant synergies between the dramatic changes in the legal landscape for LGBT people and the significant shift in public attitudes towards LGBT people. Synergies must also be at play in the general stability of the legal landscape and the moral landscape surrounding adultery, although the nature of the synergy seems different.

#### IV. SOCIAL SCIENTIFIC RESEARCH ON ADULTERY AND CONSENSUAL NON-MONOGRAMY

This Part turns to a variety of empirical questions that will inform the assessment of the current state of the law of adultery discussed in Part V. This Part first looks at social scientific research regarding the frequency of adultery and consensual non-monogamy. It then considers how monogamy, infidelity, and consensual non-monogamy compare in terms of their impact on the health, well-being, and other aspects of the lives of the people who engage in such behaviors.

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83. See, e.g., ANDERSON, *supra* note 21, at 78; DAN MARKEL ET AL., PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 71–72 (2009) (“Although one might be tempted to dismiss the significance of adultery laws today, we are loathe to do so in light of the continued enforcement of such laws in some jurisdictions . . . . Additionally, even though someone might not get prosecuted for the crime of adultery . . . that the criminal laws remain on the books has real consequences in civil contexts . . . such as child custody, adoption, and employment.”)

84. See Brenan, *supra* note 1; Jeff Jones & Lydia Saad, *Gallup Poll Social Series: Values and Beliefs*, GALLUP NEWS SERV. (May 29, 2019), [https://news.gallup.com/file/poll/257882/190529MoralIssues.pdf?g\\_source=link\\_news9&g\\_campaign=item\\_257858&g\\_medium=copy](https://news.gallup.com/file/poll/257882/190529MoralIssues.pdf?g_source=link_news9&g_campaign=item_257858&g_medium=copy). For context, the most recent Gallup polls place Americans' view of same-sex sexual activity in between the percentage of Americans who find sex between an unmarried man and unmarried woman morally acceptable (71 percent) and the percentage of Americans who find sex between teenagers morally acceptable (37 percent). *Id.*

85. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

A. *Frequency of Adultery*

There are two types of problems associated with social scientific studies concerning the frequency of adultery. First, the studies that have been conducted vary dramatically regarding the terminology they use in questioning subjects, the population surveyed, and method used to find participants.<sup>86</sup> Compare, for example, the 2006 study by Elizabeth Allen and Donald Baucom that found that *only* 69 percent of participants had engaged in extra-dyadic sex,<sup>87</sup> with the 2007 study by Mark Whisman and colleagues that found *just over* 2 percent of participants had engaged in extra-dyadic sex.<sup>88</sup> The dramatically different rates of extra-dyadic sex can be explained, in part, by various factors. First, the two studies surveyed different populations (Allen and Baucom used a convenience sample<sup>89</sup> to survey college students who were dating someone with an average age of nineteen, while Whisman used a national probability sample<sup>90</sup> to survey married adults with an average age of thirty-seven). Second, the two studies used different definitions of extra-dyadic sex (Allen and Baucom asked participants if they had engaged in “romantic or sexual behavior” with someone other than the person they were dating,<sup>91</sup> while Whisman asked if they had engaged in sexual intercourse with someone other than their spouse)<sup>92</sup>. And, third, the two studies covered different time periods (Allen and Baucom asked participants about their behavior in the past two years, while Whisman focused on the past year). In light of these differences, the divergence in the reported rates of extra-dyadic sex is not especially surprising.

The second reason why accurate data about the frequency of adultery is difficult to obtain is more intractable: given the norms against it and the fact that many individuals want to keep adultery secret from their spouse, individuals are not likely to tell the truth about their extra-dyadic sexual activities. The negative views about adultery that continue to exist help keep people from being open

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86. Shanhong Luo et al., *Assessing Extradynamic Behavior: A Review, a New Measure, and Two New Models*, 49 PERSONALITY & INDIVIDUAL DIFFERENCES 155, 156 (2010); see also ANDERSON, *supra* note 21, at 157–62 (discussing research on the frequency of “cheating” in relationships).

87. Elizabeth S. Allen & Donald H. Baucom, *Dating, Marital, and Hypothetical Extradynamic Involvements: How Do They Compare?*, 43 J. SEX RES. 307, 309 (2006).

88. Mark A. Whisman et al., *Predicting Sexual Infidelity in a Population-Based Sample of Married Individuals*, 21 J. FAM. PSYCHOL. 320, 321 (2007).

89. Convenience sampling is a method of obtaining data by selecting subjects who are easy to reach.

90. National probability sampling is a method of obtaining data that utilizes a form of random selection in order to obtain subjects who are representative of the population being studied.

91. Allen & Baucom, *supra* note 87, at 309.

92. Whisman et al., *supra* note 88, at 321.

about adultery;<sup>93</sup> the continued vitality of the law of adultery has a similar effect. More generally, people are hesitant to talk openly about sex and sexuality.

Table 1 lists six studies of adultery that have certain features in common. They all focus on marriages between people of different sexes; they all look at whether respondents have engaged in extra-dyadic sex during the course of their marriage to the person they are presently married to (rather than, for example, whether they have engaged in extra-dyadic sex in the past year); they all ask about actual physical sexual intercourse (rather than, for example, online sex or “sexual involvement”)<sup>94</sup>; they all have large sample sizes from the United States (more than one thousand subjects); and they all use national probability samples. Although there is some variation among these studies, they all indicate that more than 10 percent of married individuals report having engaged in extra-dyadic sex during the course of their marriage.<sup>95</sup>

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93. See, e.g., ANDERSON, *supra* note 21, at 78; David L. Weis, *Adult Heterosexuality*, in 3 INTERNATIONAL ENCYCLOPEDIA OF SEXOLOGY 1498, 1500–08 (Robert T. Francoeur ed., 1997).

94. Shirley P. Glass & Thomas L. Wright, *Sex Differences in Type of Extramarital Involvement and Marital Dissatisfaction*, 12 SEX ROLES 1101, 1107, 1109 (1985) used the term sexual involvement (which included kissing, “petting” and intercourse) and found that 50 percent of people surveyed had engaged in extramarital sexual involvement.

95. Other types of studies get higher rates. For example, the classic Kinsey surveys, which used convenience samples rather than probability samples, found that 33 percent of husbands and 25 percent of wives engaged in adultery. ALFRED KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 416 (1953); ALFRED KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 585 (1948). In a study of 918 men and women, almost a quarter of the men and almost 20 percent of the women in a “monogamous” heterosexual relationship indicated that they had “cheated” during their current relationship in the sense that they had engaged in sexual interactions with someone other than their partner that could jeopardize or hurt their (primary) relationship. Kristen P. Mark et al., *Infidelity in Heterosexual Couples: Demographic, Interpersonal, and Personality-Related Predictors of Extradynamic Sex*, 40 ARCHIVES SEXUAL BEHAV. 971, 974–75 (2011).

TABLE 1. EXTRA-DYADIC SEX AMONG MARRIED MAN-WOMAN COUPLES

Study	Rate of Extra-Dyadic Sex Among Married Man-Woman Couples	
	Husbands	Wives
Clements (1994) <sup>96</sup>	19%	15%
Laumann (1994) <sup>97</sup>	25%	15%
Wiederman (1997) <sup>98</sup>	23%	12%
Treas & Giesen (2000) <sup>*99</sup>	11%	11%
Atkins et al. (2001) <sup>*100</sup>	13%	13%
Atkins & Kessel (2008) <sup>101</sup>	23%	15%

\* These studies do not provide separate rates of extra-dyadic sex for husbands and wives. Blended rates for spouses are provided.

A few observations about these social scientific studies are relevant. In the studies that break out the rate of extra-dyadic sex for husbands as compared to wives, a greater percent of husbands report having extra-dyadic sex than wives (some researchers have argued that this gender gap is narrowing)<sup>102</sup>. Given that a marriage involves two people, it surely is the case that at least 15 percent of marriages involve one or more spouse who has engaged in extra-dyadic sex. The percentages of marriages in which one or more spouse has engaged in extra-dyadic sex will be even higher if sexual behavior beyond sexual intercourse is included. And, in light of the underreporting that is almost certainly occurring, the actual percentage of extra-dyadic sex is no doubt even higher.<sup>103</sup>

Not only does adultery occur in many relationships, adultery frequently has a dramatic impact on those relationships, especially when there is infidelity. Decades of studies indicate that infidelity is

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96. M. Clements, *Sex in America Today: A New National Survey Reveals How Our Attitudes Are Changing*, PARADE MAG., Aug. 7, 1994, at 4–6.

97. EDWARD LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICE IN THE UNITED STATES 216 (1994).

98. Michael W. Wiederman, *Extramarital Sex: Prevalence and Correlates in a National Survey*, 34 J. SEX RES. 167, 170 (1997).

99. Judith Treas & Deirdre Giesen, *Sexual Infidelity Among Married and Cohabiting Americans*, 62 J. MARRIAGE & FAM. 48, 52 (2000).

100. David C. Atkins et al., *Understanding Infidelity: Correlates in a National Random Sample*, 15 J. FAM. PSYCHOL. 735, 738 (2001).

101. David C. Atkins & Deborah E. Kessel, *Religiousness and Infidelity: Attendance, but not Faith and Prayer, Predict Marital Fidelity*, 70 J. MARRIAGE & FAM. 407, 409 (2008).

102. See, e.g., Frank D. Fincham & Ross W. May, *Infidelity in Romantic Relationships*, 13 CURRENT OPINION PSYCHOL. 70, 71 (2017).

103. See, e.g., ANDERSON, *supra* note 21, at 159.

the most frequently mentioned self-reported cause of relationship dissolution and divorce.<sup>104</sup>

*B. Frequency of Consensual Non-monogamous Relationships*

Data on how many people are in consensual non-monogamous relationships is even harder to obtain than data on the frequency of adultery. The reasons parallel, to some extent, the problems with determining how common adultery is. First, there is a significant stigma associated with non-monogamy, even when it is consensual.<sup>105</sup> As a result, even in a seemingly anonymous survey, people might not want to reveal that they are not monogamous. Second, there are terminological problems. For example, are people whose only extra-dyadic sex involves engaging in group sex with their partners non-monogamous? Is a person who has a “don’t ask, don’t tell” agreement with his or her partner in a consensual non-monogamous relationship even though the partner cannot consent to any of his or her partner’s specific extra-dyadic activity because he or she does not know about it? Are swingers, monogamish people, and polyamorous people appropriately grouped together as people who are consensually non-monogamous? Do couples who have decided to be open to non-monogamy but who do not act on it count as non-monogamous? One of the men in the movie *Hall Pass*, whose wife gave him permission to have extra-dyadic sex for a week, did not in fact have extra-dyadic sex. Is this an example of consensual non-monogamy or not?

Two recent publications focused on the prevalence of consensual non-monogamy. First, Margaret Hauptert and colleagues surveyed

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104. See, e.g., Paul R. Amato & Denise Previti, *People’s Reasons for Divorcing: Gender, Social Class, the Life Course, and Adjustment*, 24 J. FAM. ISSUES 602, 614–15 (2003); Laura Betzig, *Causes of Conjugal Dissolution: A Cross-Cultural Study*, 30 CURRENT ANTHROPOLOGY 654, 659 (1989); Denise Previti & Paul R. Amato, *Is Infidelity a Cause or a Consequence of Poor Marital Quality*, 21 J. SOC. & PERS. RELATIONSHIPS 217, 218 (2004); Shelby B. Scott et al., *Reasons for Divorce and Recollection of Premarital Intervention: Implications for Improving Relationship Education*, 2 COUPLE FAM. PSYCHOL. 131, 135 (2013); Mark A. Whisman et al., *Therapists’ Perspectives of Couple Problems and Treatment Issues in Couple Therapy*, 62 J. FAM. PSYCH. 361, 365 (1997). These studies provide further indication of the frequency of adultery. Even outside of marriage, there is social pressure, especially on women, to end a relationship with a partner who has extra-dyadic sex. See, e.g., ANDERSON, *supra* note 21, at 188.

105. See, e.g., ANDERSON, *supra* note 21, at 159–60; Terri D. Conley et al., *The Fewer the Merrier?: Assessing Stigma Surrounding Consensually Non-Monogamous Romantic Relationships*, 13 ANALYSES SOC. ISSUES & PUB. POL’Y 1, 21–22 (2013); Derrell W. Cox et al., *What Do Polys Want? An Overview of the 2012 Loving More Survey*, LOVING MORE MAG. (June 21, 2013), <https://www.lovingmorenonprofit.org/polyamory-articles/2012-lovingmore-polyamory-survey/> (finding that more than 25 percent of people in polyamorous relationships experienced discrimination in the past decade based on their plural relationships).

single adults in the United States in a pair of studies.<sup>106</sup> Respondents<sup>107</sup> were asked whether they had engaged in consensual non-monogamy during their lifetime.<sup>108</sup> Twenty-one percent of those surveyed said they had.<sup>109</sup> Second, Jennifer Rubin and colleagues used data from two large online studies of people eighteen years and older who were in relationships that asked participants about their involvement in consensual non-monogamy.<sup>110</sup> Averaging across these two studies, just over 5 percent of participants indicated they were currently part of a consensual non-monogamous relationship.<sup>111</sup> The remaining 94.7 percent of participants were engaged in monogamous relationships. Both the Hauptert and the Rubin studies indicate that men and sexual minorities (lesbians, gay men, and bisexuals) were more likely to report previous and current engagement in consensual non-monogamy, compared to women and heterosexual individuals, respectively.<sup>112</sup>

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106. M. L. Hauptert et al., *Prevalence of Experiences with Consensual Nonmonogamous Relationships: Findings from Two National Samples of Single Americans*, 43 J. SEX & MARITAL THERAPY 424, 430 (2017).

107. In one of these studies, individuals had to be at least twenty-one years of age and legally single at the time of the survey; for the other, individuals had to be at least eighteen years of age and either single and not seeing anyone, or single and casually dating. *Id.* at 430.

108. Participants were asked if they had ever had an open sexual relationship. The question defined an “open sexual relationship” as “an agreed-upon, sexually non-exclusive relationship.” *Id.* at 431.

109. *Id.* at 435–436. Participants in this study were recruited exclusively from those who have registered to participate in U.S. based opt-in research panels. . . . Panelists [were] initially drawn from a diverse pool of established participants who have been continuously recruited over several years from a wide variety of venues, including paper and electronic mailings, referrals, corporate partnerships, and Internet recruitment. Participants [were] recruited from these opt-in research panels, with recruitment targeting based on demographic distributions (i.e., age, gender, ethnicity, region, and income) reflected in the most recent Current Population Survey conducted by the United States Bureau of the Census, and adjusted in real-time using inbound click balancing . . . [with] augmented oversampling of . . . homosexual men and women. All data were collected over the Internet.

*Id.* at 430.

110. Jennifer D. Rubin et al., *On the Margins: Considering Diversity Among Consensually Non-Monogamous Relationships*, 22 J. FÜR PSYCHOLOGIE 1, 7–8 (2014). Both studies used convenience sampling techniques through postings on Craigslist and Facebook; the content of the studies used was not specific to consensual non-monogamy.

111. The survey defined a consensual non-monogamous relationship as “dating one or more people and your romantic partners agree/know about it; for example, open relationship, polyamorous relationship, swinging relationship.” *Id.* at 8.

112. Hauptert, *supra* note 106, at 433, 435; Rubin, *supra* note 110, at 10–11, 13–14.

C. *Health, Well Being, and Parenting*

The majority of people in the United States have a negative assessment of consensual non-monogamy as compared to monogamy.<sup>113</sup> Several studies have indicated that most people believe that, compared to consensual non-monogamous relationships, monogamous relationships are more emotionally and physically healthy, less risky when it comes to sexually-transmitted diseases, more trusting, more committed, more sexually satisfying, less likely to involve jealousy, and better for children of the relationship.<sup>114</sup> This common assessment is contradicted by the findings of most social scientific studies of such relationships. In fact, the research suggests that, in terms of sexual health, psychological health, and overall relationship quality, people in consensual non-monogamous relationships fare roughly the same as—if not better than—people in other sorts of relationships.<sup>115</sup> In fact, a recent review concludes as follows:

The majority of research suggests that the psychological well-being and the quality of the relationships of [people in consensual non-monogamous relationships] is not significantly different from that of [people in monogamous relationships]. This is evident in terms of psychological well-being, overall relationship adjustment, jealousy, sexual satisfaction, and relationship stability.<sup>116</sup>

The most robust findings concern safe-sex practices and the risk of sexually transmitted infections. Several studies have shown that

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113. See Katarzyna Grunt-Mejer & Christine Campbell, *Around Consensual Nonmonogamies: Assessing Attitudes Toward Nonexclusive Relationships*, 53 J. SEX RES. 45, 46–47 (2016).

114. See Christopher T. Burris, *Torn Between Two Lovers? Lay Perceptions of Polyamorous Individuals*, 5 PSYCHOL. & SEXUALITY 258, 265 (2014); Conley et al., *supra* note 17, at 127; Kevin T. Hutzler et al., *Three's a Crowd: Public Awareness and (Mis)perceptions of Polyamory*, 7 PSYCHOL. & SEXUALITY 1, 3 (2015); Jes L. Matsick et al., *Love and Sex: Polyamorous Relationships Are Perceived More Favourably than Swinging and Open Relationships*, 5 PSYCHOL. & SEXUALITY 339, 341 (2014); Grunt-Mejer & Campbell, *supra* note 113, at 50–51; Moors et al., *supra* note 19, at 62; Todd G. Morrison et al., *A Comparison of Polyamorous and Monoamorous Persons: Are There Differences in Indices of Relationship Well-Being and Sociosexuality*, 4 PSYCHOL. & SEXUALITY 75, 83–86 (2013); D. Joye Swan & Suzanne C. Thompson, *Monogamy, the Protective Fallacy: Sexual Versus Emotional Exclusivity and the Implication for Sexual Health Risk*, 53 J. SEX RES. 64, 64 (2016). See generally ANDERSON, *supra* note 21, at 9–21 (sketching a scholarly critique of monogamy).

115. ANDERSON, *supra* note 21, *passim*, makes a sustained argument, drawing on sociology, psychology, and biology, that our society's embrace of monogamy as an ideal is deeply problematic for many people's "social, emotional, and moral health." *Id.* at 9.

116. Alicia N. Rubel & Anthony F. Bogaert, *Consensual Nonmonogamy: Psychological Well-Being and Relationship Quality Correlates*, 52 J. SEX RES. 961, 979 (2015).



individuals in consensual non-monogamous relationships are much less likely to engage in risky sexual behaviors than those who engage in extra-dyadic sexual behaviors without their partners' knowledge or consent.<sup>117</sup> Terri Conley and her collaborators found that

[s]exually unfaithful individuals . . . us[e] condoms for anal and vaginal intercourse less than . . . individuals [in consensual non-monogamous relationships], . . . were less likely to inform their primary partner of . . . sexual encounter[s] [with others, and] . . . more likely . . . to be under the influence of alcohol or other drugs during [such] sexual encounter[s].<sup>118</sup>

Another study conducted by Conley and her collaborators established that people in consensual non-monogamous relationships were more likely to use condoms and to do so properly than people in relationships who were engaged in extra-dyadic sex without the knowledge or consent of their spouse/partner.<sup>119</sup> Relatedly, various studies indicate that people who think they are in monogamous relationships are just as likely, if not more likely, to contract a sexually transmitted infection compared to people in consensual non-monogamous relationships.<sup>120</sup> Even though those in consensual non-monogamous relationships report far more sexual partners than those in other sorts of relationships, people in consensual non-monogamous relationships had rates of sexually transmitted infections similar to people in monogamous relationships and non-consensual non-monogamous relationships (that is, relationships where there is infidelity). This suggests that the risks of sexually transmitted infections from a single instance of extra-dyadic sex is greater for those who believe they are in monogamous relationships as compared to those who know they are not in such relationships,<sup>121</sup> which fits well with the aforementioned results of Conley's studies. No doubt,

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117. Moors et al., *supra* note 19, at 62; Swan & Thompson, *supra* note 114, at 65, 70.

118. Terri D. Conley et al., *Unfaithful Individuals Are Less Likely to Practice Safer Sex Than Openly Nonmonogamous Individuals*, 9 J. SEXUAL MED. 1559, 1563 (2012).

119. Conley et al., *supra* note 17, at 128.

120. See ANDERSON, *supra* note 21, at 119–22; see, e.g., G. Hughes et al., *Comparison of Risk Factors for Four Sexually Transmitted Infections: Results from a Study of Attenders at Three Genitourinary Medicine Clinics in England*, 76 SEXUALLY TRANSMITTED INFECTIONS 262, 266 (2000) (finding no correlation between getting a sexual transmissible viral infection and having multiple sexual partners); Justin Lehmiller, *A Comparison of Sexual Health History and Practices Among Monogamous and Consensually Nonmonogamous Sexual Partners*, 12 J. SEXUAL MED. 2022, 2026 (2015); Frances Shiely et al., *Increased Sexually Transmitted Infection Incidence in a Low Risk Population: Identifying the Risk Factors*, 20 EUR. J. PUB. HEALTH 207, 209 (2010) (finding women in Ireland with just one sexual partner were more likely to contract sexually transmitted infections than those with more than one partner).

121. Lehmiller, *supra* note 120, at 2025–27.

part of the explanation of why consensually non-monogamous people are less likely to engage in unsafe sex practices than others is that long-term monogamous couples quite frequently are planning the eventual cessation of condom usage to prevent sexually-transmitted infections, in part because cessation of condom usage is seen as demonstrating a commitment to the relationship and a sign of heightened intimacy.<sup>122</sup> This is not the case for those in consensual non-monogamous relationships; for them, safe-sex practices and other methods of risk reduction are more often part of being non-monogamous.<sup>123</sup>

Additionally, social scientific studies over the past few decades have established that people in consensual non-monogamous relationships report high levels of relationship satisfaction and happiness, levels at least on par with those reported by people in monogamous relationship.<sup>124</sup> Other studies suggest that people in

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122. See, e.g., A. Michelle Corbett et al., *A Little Thing Called Love: Condom Use in High-risk Primary Heterosexual Relationships*, 41 PERSP. SEXUAL & REPROD. HEALTH 218, 222 (2009); Jill Hammer et al., *When Two Heads Aren't Better than One: AIDS Risk Behavior in College-Age Couples*, 26 J. APPLIED SOC. PSYCHOL. 375, 388, 391–92 (1996); Jennifer Manlove et al., *Relationship Characteristics and Contraceptive Use Among Young Adults*, 43 PERSP. SEXUAL & REPROD. HEALTH 119, 120, 125 (2011).

123. The character of risk-reduction and safer-sex practices has changed within certain subgroups of gay and bisexual men where use of pre-exposure prophylaxis drugs (“PrEP”) like Truvada have become common for preventing HIV infection. See, e.g., Luke A. Boso, *Dignity, Inequality, and Stereotypes*, 92 WASH. L. REV. 1119, 1154 (2017) (explaining that the federal government recommends Truvada as PrEP for non-monogamous gay men); Robert M. Grant et al. *Preexposure Chemoprophylaxis for HIV Prevention in Men Who Have Sex with Men*, 363 NEW ENG. J. MED. 2587, 2588 (2010); Martin Holt et al., *Community-Level Changes in Condom Use and Uptake of HIV Pre-Exposure Prophylaxis by Gay and Bisexual Men in Melbourne and Sydney, Australia: Results of Repeated Behavioural Surveillance in 2013-17*, 5 LANCET HIV e448, e448, e454 (2018).

124. See, e.g., Curtis Garner et al., *Satisfaction in Consensual Nonmonogamy*, 27 FAM. J. 115, 117–119 (2019); Rubel & Bogaert, *supra* note 116, at 979; see also Curtis Bergstrand & Jennifer Blevins Williams, *Today's Alternative Marriage Styles: The Case of Swingers*, 3 ELECTRONIC J. HUM. SEXUALITY (2000), <http://www.ejhs.org/volume3/swing/body.htm>; David Blasband & Letitia Anne Peplau, *Sexual Exclusivity Versus Openness in Gay Male Couples*, 14 ARCHIVES SEXUAL BEHAV. 395, 409, 411 (1985); Bram Buunk, *Sexually Open Marriages*, 3 ALTERNATIVE LIFESTYLES 312–13, 319–20 (1980); D. Dixon, *Perceived Sexual Satisfaction and Marital Happiness of Bisexual and Heterosexual Swinging Husbands*, 11 J. HOMOSEXUALITY 209, 219 (1985); Brian G. Gilmartin, *Sexual Deviance and Social Networks: A Study of Social, Family, and Marital Interaction Patterns Among Co-Marital Sex Participants*, in BEYOND MONOGAMY: RECENT STUDIES OF SEXUAL ALTERNATIVES IN MARRIAGE 291, 319–20 (James. R. Smith & Lynn. G. Smith, eds., 1974); Warwick Hosking, *Agreements about Extra-Dyadic Sex in Gay Men's Relationships: Exploring Differences in Relationship Quality by Agreement Type and Rule-Breaking Behavior*, 60 J. HOMOSEXUALITY 711, 725–26 (2013); James W. Ramey, *Intimate Groups and Networks: Frequent Consequences of Sexually Open Marriage*, 24 FAM. COORDINATOR 515, 519 (1975); Arline M. Rubin, *Sexually Open Versus Sexually Exclusive Marriage: A Comparison of*

consensual non-monogamous relationships experience less jealousy than those in relationships that are supposed to be monogamous.<sup>125</sup> For some people, having negotiated and agreed upon non-monogamy with one's spouse or partner reduces the anxiety and jealousy that may stem from the possibility that one's spouse is secretly sexually or romantically involved with someone else.<sup>126</sup> Other studies have suggested that consensual non-monogamy encourages honesty and greater communication among spouses and partners.<sup>127</sup> As Conley and her collaborators observed, a "growing body of qualitative research . . . shows that those in [consensual non-monogamous] relationships report high degrees of honesty, closeness, happiness, and communication and low degrees of jealousy."<sup>128</sup> Similar studies suggest that there are other non-sexual benefits to consensual non-monogamy, such as greater intimacy and individual growth and development.<sup>129</sup>

Finally, one of the arguments most frequently made by opponents of non-monogamy is that children are harmed when their parents are not monogamous.<sup>130</sup> This argument assumes that the effect of

*Dyadic Adjustment*, 5 ALTERNATIVE LIFESTYLES 101–02, 107 (1982); Arline M. Rubin & James R. Adams, *Outcomes of Sexually Open Marriages*, 22 J. SEX RES. 311, 317–18 (1986).

125. Meg Barker, *This Is My Partner, and This Is My . . . Partner's Partner: Constructing a Polyamorous Identity in a Monogamous World*, 18 J. CONSTRUCTIVIST PSYCH. 75, 81–82, 86 (2005); Kristoff Bonello & Malcolm C. Cross, *Gay Monogamy: I Love You but I Can't Have Sex with Only You*, 57 J. HOMOSEXUALITY 117, 119–20 (2010); Christian Klesse, *Polyamory and Its "Others": Contesting the Terms of Non-Monogamy*, 9 SEXUALITIES 565, 569–70, 574 (2006); Richard de Visser & Dee McDonald, *Swings and Roundabouts: Management of Jealousy in Heterosexual 'Swinging' Couples*, 46 BRIT. J. SOC. PSYCH. 459–61 (2007); see also ANDERSON, *supra* note 21, at 128–34 (suggesting that monogamous relationships lead to more jealousy than consensual non-monogamous relationships).

126. See, e.g., TRISTAN TAORMINO, OPENING UP: A GUIDE TO CREATING AND SUSTAINING OPEN RELATIONSHIPS 148–50 (2008); JILLIAN DERI, LOVE'S REFRACTION: JEALOUSY AND COMPERSION IN QUEER WOMEN'S POLYAMOROUS RELATIONSHIPS 5 (2015); Conley et al, *supra* note 17, at 133. See ANDERSON, *supra* note 21, at 128–34, for an illuminating discussion of "why monogamous relationships likely engender more jealousy than open sexual relationships." *Id.* at 128.

127. Conley et al., *supra* note 105, at 4.

128. *Id.*

129. See, e.g., Moors et al., *supra* note 19, at 60–62. ANDERSON, *supra* note 21, at 199, suggests that consensual non-monogamous relationships, compared to other types of relationships, have a decreased risk of intra-relationship violence, especially violence against women.

130. See, e.g., BHIKHU PAREKH, RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY 290–91 (2d. ed. 2006) ("polygamous marriage . . . is . . . unlikely to create an environment conducive to the balanced growth of children"); ZISKIN & ZISKIN, *supra* note 24, at 196 (discussing oft-mentioned concern that the welfare of children will be affected by parents who engage in extra-marital sex); William C. Duncan, *The More the Merrier?*, AM. SPECTATOR (Sept. 2, 2010, 12:00 AM), <http://spectator.org/the-more-the-merrier>;

parents' non-monogamy will be the same whether it is consensual or non-consensual. In fact, because infidelity is the most frequently cited cause of divorce<sup>131</sup> and because parental relationship dissolution sometimes has a negative impact on children,<sup>132</sup> infidelity (that is, *non-consensual* non-monogamy) is probably worse for children than consensual non-monogamy.

In any event, while little research has been done on the impact of consensual non-monogamy on children, it appears that having parents who are in consensual non-monogamous relationships does not negatively impact children, or at least is no more harmful to children than divorce or serial monogamy.<sup>133</sup> Perhaps the best relevant study on the effect of consensual polyamory on children found that children aged five to eight had little awareness of their parent(s)' relationships.<sup>134</sup> Rather, such young children primarily related to adults in their household through their one-on-one relationship with each adult and that adult's "utility" to them.<sup>135</sup> This study further found that children aged nine to twelve and teenagers were more aware of their parent(s)' relationships than the five- to

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Stanley Kurtz, *Rick Santorum Was Right: Meet the Future of Marriage in America*, NAT'L REV. (Mar. 23, 2005, 12:46 PM), <https://www.nationalreview.com/2005/03/rick-santorum-was-right-stanley-kurtz/>. For an insightful discussion of arguments against plural marriage that focus on children, see OTTER, *supra* note 16, at 147–58.

131. *See supra* note 104.

132. The work of Judith Wallerstein provides an example of research on the negative impact of divorce on children. *See, e.g.*, JUDITH S. WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY (2000); Judith S. Wallerstein & Julia M. Lewis, *The Long-Term Impact of Divorce on Children: A First Report from a 25-Year Study*, 36 FAM. & CONCILIATION CTS. REV. 368 (2005); JUDITH S. WALLERSTEIN & JULIA M. LEWIS, THE UNEXPECTED LEGACY OF DIVORCE: REPORT OF A 25-YEAR STUDY, 21 PSYCHOANALYTIC PSYCHOL. 353, 353 (2004). Wallerstein's conclusion has been criticized for its selection bias, lack of control subjects, and for inferring that divorce, rather than other factors that are commonly associated with divorce (such as having a parent or parents with mental health problems or having parents who have a great deal of conflict), is the cause of significant emotional difficulties in children whose parents divorce. *See, e.g.*, E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED 5, 9 (2002); Paul R. Amato, *Reconciling Divergent Perspectives: Judith Wallerstein, Quantitative Family Research, and Children of Divorce*, 52 FAM. REL. 332, 332–333 (2003); Sol R. Rappaport, *Deconstructing the Impact of Divorce on Children*, 47 FAM. L.Q. 353, 353–58 (2013).

133. *See* SHEFF, *supra* note 28, at 135–63; Hadar Aviram & Gwendolyn M. Leachman, *The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle*, 38 HARV. J.L. & GENDER 269, 316–19 (2015); *see also* LARRY L. CONSTANTINE & JOAN M. CONSTANTINE, GROUP MARRIAGE: A STUDY OF CONTEMPORARY MULTILATERAL MARRIAGE 148–61 (1973) (summarizing methodology and results of a study of children raised in "group marriages"); MARIA PALOTTA-CHIAROLLI, BORDER SEXUALITIES, BORDER FAMILIES IN SCHOOLS 161–220 (2010).

134. *See* Marc Goldfeder & Elisabeth Sheff, *Children of Polyamorous Families: A First Empirical Look*, 5 J.L. & SOC. DEVIANCE 150, 200–02 (2013).

135. *Id.*

eight-year-olds<sup>136</sup> and that the older children perceived several benefits of their parent(s)' multiple relationships including: having a larger number of parental figures available to them; having more open and honest parents; having access to more family resources and parental attention; and having greater diversity in terms of role models and people who could provide them emotional and other types of support.<sup>137</sup> They also noted that their parents' were often able to stay friendly with their partners if they separated, which allowed the children to have a continuing relationship with their parents' former partners.<sup>138</sup> These children also perceived some disadvantages to having parent(s) involved in multiple relationships at the same time including: the risk of losing relationships with people they cared about; social stigma; household crowding; excessive supervision; and family complexity.<sup>139</sup> Overall, the study found that children of consensually polyamorous parents have a supportive "village" to help raise them and that their lives are more stable than children of divorced parents who move between multiple households.<sup>140</sup> More generally, children with parents who are in consensual non-monogamous relationships face challenges, but so do children of all different family structures and backgrounds; aside from the distinctive social disapprobation associated with non-monogamy, the challenges facing such children are not greater than the challenges facing most children.

Despite this, some parents who are consensually non-monogamous fear that their lifestyle may be used against them in custody disputes, legal proceedings, and in other contexts related to their children and, for this reason (among others), they are more likely to try to resolve custody disputes in private.<sup>141</sup> At least one court has based its decision to take custody of a child away from her mother based on the mother's polyamorous lifestyle.<sup>142</sup> That said, while it used to be the case that many courts viewed a person who was involved in more than one sexual or romantic relationship at the same time as either unfit to be a parent or less fit than a parent not

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136. *Id.* at 202–07.

137. *Id.* at 207–17.

138. *Id.* at 218–19.

139. *Id.* at 220–36.

140. *Id.* at 238. The village reference to is an African proverb made famous by HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE: AND OTHER LESSONS CHILDREN TEACH US* (1996).

141. *See* Aviram, *supra* note 37, at 269 (2008); *see also* Nathan Patrick Rambukkana, *Uncomfortable Bridges: The Bisexual Politics of Outing Polyamory*, 4 J. BISEXUALITY 141, 148 (2004) (noting the concern that being openly polyamorous might lead to loss of custody of children).

142. *See* Emens, *supra* note 13, at 309–13 (describing a Tennessee case where a child was removed from her mother and placed in the custody of the Department of Children's Services on the grounds that the mother's polyamorous relationship with two men was "detrimental to the child.").

so involved,<sup>143</sup> in the last twenty years or so, this approach has been mostly abandoned for a more fact-specific analysis focused on the best interests of the child.<sup>144</sup> Further, several states, either through statute or case law, now allow that a child can have more than two parents.<sup>145</sup> While the statutes were not developed with consensual non-monogamous, polyamorous, or polygamous people in mind (and only one of the reported cases appears to involve a consensual non-monogamous relationship)<sup>146</sup>, legal recognition that a child could have more than two parents does, at a minimum, show greater openness to a variety of non-traditional family forms based on a consensus that there is no single right way for people to parent.<sup>147</sup>

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143. See, e.g., *In re State in Interest in Black*, 283 P.2d 887, 892 (Utah 1955) (deeming polygamous parents unfit solely on grounds of being polygamous).

144. See, e.g., *Sanderson v. Tryon*, 739 P.2d 623, 625 (Utah 1987) (holding polygamous parents should not be deemed unfit in virtue of being polygamous); see also *In re W.A.T.*, 808 P.2d 1083, 1085 (Utah 1991) (polygamous parents not excluded from consideration as adoptive parents in virtue of being polygamous).

145. There are five U.S. jurisdictions with statutes that explicitly recognize three or more parents: California (CAL. FAM. CODE § 7612(c) (West 2017)), Louisiana (LA. CIV. CODE ANN. ART. 185 & 195 (2005)), Maine (ME. STAT. tit. 19-A § 1853 (2) (2016)), Vermont (VT. STAT. ANN. tit. 15, § 206 (2017)), and Washington (WASH. REV. CODE § 26.26A.460 (2018)). At least two other U.S. jurisdictions have statutes that allow for the possibility of a child having more than two parents when a child's parent(s) gives permission to another adult to become a *de facto* parent of their child, namely Delaware (DEL. CODE ANN. tit 13, § 8-201(c)(1) (2016)) and Washington, D.C. (D.C. CODE § 16-831.01(1)(A)(iii) (2016)). Courts in at least five more states have, in published opinions, held that children can have more than two legal parents: Minnesota (*LaChapelle v. Mitten*, 607 N.W.2d 151, 157 (Minn. Ct. App. 2000)), New Jersey (*D.G. v. K.S.*, 133 A.3d 703, 706 (N.J. Super. Ct. 2015)), New York (*Dawn M. v. Michael M.*, 47 N.Y.S.3d 898, 903, (N.Y. Sup. Ct. 2017)), North Dakota (*McAllister v. McAllister*, 779 N.W.2d 652, 654-55 (N.D. 2010)), and Pennsylvania (*Jacob v. Schultz-Jacob*, 923 A.2d 473, 475 (Pa. Super. Ct. 2007)). Other states may allow three parents to be listed on a child's birth certificate, see Colleen M. Quinn, *Mom, Mommy & Daddy and Daddy, Dad & Mommy: Assisted Reproductive Technologies & the Evolving Legal Recognition of Tri-Parenting*, 31 J. AM. ACAD. MATRIM. LAW. 175, 198 (2018) (mentioning Florida and Nevada), and there are unreported decisions in various U.S. jurisdictions that seem to have allowed that a child can have more than two parents, *id.* at 199-200 (mentioning Alaska, New Jersey, Oregon, Virginia & Washington, D.C.). For further discussion of the possibility of a child having more than two parents, see, e.g., *id.*; Susan F. Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 11-16 (2009); Naomi Cahn & June Carbone, *Custody and Visitation in Families with Three (or More) Parents*, 56 FAM. CT. REV. 399 (2018); June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHL.-KENT L. REV. 9, 12 (2017); Melanie Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 309-14 (2007).

146. See *Dawn M.*, 47 N.Y.S.3d at 900.

147. Several legal scholars have argued for more openness in our view of what makes a parent. See, e.g., Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2361 (2017) (emphasizing the importance of social factors in who is a parent). NeJaime is not, however, completely enthusiastic about the recognition of more than two parents. *Id.* at 2361-62.

This survey of social scientific research dramatically undermines the commonly held beliefs that people in non-monogamous relationships are less happy, less healthy, and less effective parents than people in monogamous relationships. This becomes especially clear when non-monogamy is studied in a way that distinguishes between consensual non-monogamy and *non-consensual* non-monogamy (infidelity).

#### V. LAW AND POLICY IMPLICATIONS

This Essay began with the insight that the concept of adultery (understood as having extra-dyadic sex in the context of a marriage, a civil union, or the like) includes both non-consensual non-monogamy (infidelity) and consensual non-monogamy (Part II). It then showed how the law of adultery and the associated stigma and social disapprobation create incentives for people to be monogamous (Part III), but that despite these incentives, non-monogamy is quite common (Subpart IV.A). It then presented social scientific evidence that a significant number of people are consensually non-monogamous at some point in their lives and that consensual non-monogamous relationships compare well to monogamous relationships across a variety of metrics (Subparts IV.B and IV.C). These insights are in tension with the fact that the law of adultery and attitudes about non-monogamy (even when it is consensual) push non-monogamous people (both those who are non-monogamous in terms of their behavior and those who are non-monogamous in terms of their desires) into the closet. By pushing non-monogamy into the closet, the law of adultery disincentivizes *consensual* non-monogamy and, thereby, perversely encourages infidelity. All this suggests, at a minimum, that the legal disincentives relating to extra-dyadic sex are ripe for reconsideration. More specifically, it suggests that we should stop disincentivizing consensual non-monogamy.

To illustrate the point that the law of adultery, by pushing non-monogamy into the closet, encourages infidelity, consider for example, a man who is married to a woman and who is sexually attracted to other women and would like to act on this desire. At one level, he would like to discuss his desires with his wife. Knowing, however, that adultery is stigmatized, he is afraid she would want to avoid the impact of the law of adultery, especially the associated social stigma, even if she does not really care if he has sex with another person on occasion or even if she might want to have sex with someone else herself. In short, the law of adultery and the associated stigma might well prevent him from having an open conversation with his wife and getting the consent needed for consensual non-monogamy, especially if he does not want to divorce. Despite not getting his wife's consent, such a man might still eventually have extra-dyadic sex. His sexual drives and interests, which are fairly

common,<sup>148</sup> push him towards extra-dyadic sex; combined with the law of adultery, these desires push him toward infidelity. For reasons discussed above in Subpart III.C, this alternative is bad for public health, bad for public policy, and bad for his marriage. *Consensual* non-monogamy is better than *non-consensual* non-monogamy. Insofar as the law of adultery treats these distinct types of non-monogamy the same, the law of adultery is deeply problematic and in need of revision.

There are two approaches, one more dramatic than the other, to revising the law of adultery that respond to the problems that emerge from the current legal and social situation surrounding adultery. Both approaches would short-circuit the way the law of adultery disincentivizes consensual non-monogamy. The less dramatic approach would transform the law of adultery in a way that continues to disincentivize infidelity while not disincentivizing consensual non-monogamy. The more dramatic approach (the *abolitionist* approach) would get rid of the law of adultery entirely. The abolitionist approach would:

- decriminalize adultery;
- abolish alienation of affection and criminal conversation causes of action;
- eliminate adultery as a ground for divorce;
- end enforcement of prenuptial agreements that penalize adultery;<sup>149</sup> and
- repeal other domestic relations laws that punish adultery.

I call the *less* dramatic approach to reinforcing the law of adultery the *revisionist* approach. This approach would:

- decriminalize extra-dyadic sex for consensually non-monogamous couples, but leave untouched criminal prohibitions against infidelity;<sup>150</sup>
- leave in place the few remaining heart balm causes of action in cases of infidelity, but a person in a consensual

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148. See, e.g., ANDERSON, *supra* note 21, at 78; BARASH & LIPTON, *supra* note 24, at 1–2; RYAN & JETHÁ, *supra* note 24, at 1–7.

149. This is in accord with the approach that the California appellate court took in *Diosdado v. Diosdado*, 188 Cal. Rptr. 2d 494, 494 (Cal. Ct. App. 2002).

150. Emens, *supra* note 13, at 365–75, proposes and discusses various alternative adultery laws that would take this form, including, for example, “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 extra sex” (*id.* at 368) and “any extramarital sex by a married person will be treated as consensual and therefore noncriminal unless . . . the married person and his or her spouse committed to exclusivity, enforceable though the criminal law, as part of their marital agreement.” *Id.* at 374.



non-monogamous relationship would not be able to bring a heart balm suit;<sup>151</sup>

- retain adultery as a ground for divorce when there is infidelity, but eliminate adultery as a ground for divorce for consensually non-monogamous couples;
- permit enforcement clauses in prenuptial agreements that penalize adultery only in cases of infidelity; and
- leave in place other domestic relations laws that punish adultery only insofar as they punish infidelity, not consensual non-monogamy.

The revisionist approach is not much different from the law in South Carolina after its Supreme Court decided *Eason v. Eason*.<sup>152</sup> After thirty years of marriage, Charlean Eason filed a complaint seeking a legal separation from her husband, Fredrick, and requested alimony.<sup>153</sup> After mediation, the parties signed a separation agreement that said neither would file for divorce on grounds of adultery.<sup>154</sup> This mattered, in part, because, under an aforementioned South Carolina law,<sup>155</sup> alimony cannot be awarded to a spouse who commits adultery prior to the signing of a marital settlement agreement or the entry of a permanent settlement agreement (the Easons, when they signed the separation agreement, did not satisfy this condition)<sup>156</sup>. Subsequently, Charlean filed for divorce on the ground of continuous separation for a period of one year and again requested alimony.<sup>157</sup> Fredrick then counter-claimed for divorce on the ground of adultery and sought the denial of his wife's request for alimony in light of her having committed adultery.<sup>158</sup> Fredrick initially prevailed: the family court denied Charlean alimony because she had committed adultery.<sup>159</sup> The family court reasoned that the separation agreement contravened public policy and was, therefore, unenforceable, leaving in place the statutory prohibition against granting alimony to an adulterous spouse.<sup>160</sup> Ultimately, however, Charlean won: the South Carolina Supreme Court reversed the family court, finding the separation agreement to be a valid waiver of the "right to use adultery as a bar to alimony"<sup>161</sup> and not a violation of public policy. In South Carolina, in light of *Eason* and § 20-3-130 of the South Carolina Code (which disqualifies

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151. It is hard to see how one could plausibly make a heart balm claim against another for having sex with his or her spouse or partner when the claimant and his or her spouse were in a consensual non-monogamous relationship.

152. 682 S.E.2d 804 (S.C. 2009).

153. *Id.* at 805.

154. *Id.*

155. S.C. CODE ANN. § 20-3-130 (2019); *see supra* note 63.

156. *Eason*, 682 S.E.2d at 807.

157. *Id.* at 805.

158. *Id.*

159. *Id.* at 806.

160. *Id.*

161. *Id.* at 807.

a person who commits adultery from receiving alimony), the status quo is like the framework proposed by the revisionist approach to the law of adultery: while adultery is typically a bar to receiving alimony in South Carolina, if both parties consent, that bar can be waived. Similarly, under the revisionist approach to the law of adultery, *so long as a couple has embraced non-monogamy*, their extra-dyadic sex is not a crime, not a ground for divorce, and not a justification for a heart balm suit.<sup>162</sup>

The revisionist approach to the law of adultery is supported by a version of what might be called sexual pluralism. In his dissent to the Supreme Court's 1986 decision in *Bowers v. Hardwick*,<sup>163</sup> which upheld Georgia's sodomy law, Justice Harry Blackmun embraced pluralism with respect to same-sex sexuality. He said:

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests . . . that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.<sup>164</sup>

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162. The revisionist approach to the law of adultery, as I have articulated it, requires couples to opt-out of the law of adultery. Under this approach to the law of adultery, the default rule would be that the law of adultery applies to married couples (and other legal relationships), but they can opt out of this regime if they agree to do so. I am thus proposing something more like the first of the two proposals from Emens, *supra* note 13 (quoted, *supra* note 129). Emens discusses some reasons for preferring a revision to adultery laws in which couples have to *opt in* to the law of adultery rather than to *opt out* of it. *Id.* at 372–74. I am sympathetic to the *opt in* version of revisionist proposal, but I here propose the *opt out* version because I think that it has a better chance of being broadly acceptable.

163. 478 U.S. 186 (1986).

164. *Id.* at 205 (Blackmun, J., dissenting). Blackmun was talking about same-sex sexual activity in the context of a constitutional challenge to Georgia's sodomy law that criminalized oral and anal sex (regardless of whether the parties engaged in it were married or their sex or gender). Blackmun specifically distinguished adultery from same-sex sodomy (which is what the majority focused on in upholding Georgia's sodomy law):

[A] court could find simple, analytically sound distinctions between certain private, consensual sexual conduct, on the one hand, and adultery . . . ([one of the] specific "sexual crimes" to which the majority points), on the other. For example, marriage, in addition to its spiritual aspects, is a civil contract that entitles the contracting parties to a variety of governmentally provided benefits. A State might define the contractual commitment necessary to become eligible for these benefits to include a commitment of fidelity and then punish individuals for breaching that contract.

*Id.* at 209 n.4. Blackmun's views on adultery aside, the sexual pluralism he advanced in his now-vindicated dissent—see *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)—seems an appropriate theoretical position to undergird the revisionist approach to the law of adultery.

The same sort of pluralist argument that Blackmun made about same-sex and different-sex sexual activity can be made about consensual non-monogamy and monogamy. In light of the social scientific evidence about the relative impact of monogamy, consensual non-monogamy, and infidelity on health and well-being, among other considerations, monogamy and consensual non-monogamy stand on equal footing in terms of public policy and morality. Both are among the “right” ways of structuring an intimate relationship.

In contrast, infidelity does not stand on equal footing with monogamy and consensual non-monogamy in terms of public policy and morality. Lying to one’s spouse or partner about something he or she cares about is morally and ethically problematic. Many people in dyadic relationships care about sexual fidelity; for them, it is a problem if their spouse lies about sexual fidelity.<sup>165</sup> Lying (or deception) is part of what distinguishes infidelity from monogamy and consensual non-monogamy from the point of view of morality and

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165. See, e.g., Richard Wasserstrom, *Is Adultery Immoral?*, in PHILOSOPHY AND SEX, *supra* note 23, at 93. In contrast, SAVAGE, *supra* note 25, at 23, has suggested that at least in certain limited situations, it might be permissible to deceive one’s spouse or partner about extra-dyadic sex. He wrote:

[A] man’s wife informed him, ten years and two children into their marriage, that she not only wasn’t interested in having sex with him anymore, she was never really that interested in having sex with him, or anyone else . . . “When we met she seemed very into sex,” the unlucky guy wrote. “. . . She tells me that I am not doing anything wrong, just that her libido is gone. She says she never really enjoyed sex, and . . . doesn’t miss it . . . Any conversation about my getting my needs met elsewhere ends in tears. She gets upset when she catches me looking at porn or masturbating because it makes her ‘feel guilty,’ like she’s ‘doing something wrong.’ It’s been five years since I’ve had sex, and my choices right now boil down to leaving my wife (and my kids, which I don’t want to do) . . . or cheating on my wife and . . . being the bad guy.”

The advice I am supposed to give in cases like this . . . is of the Work Harder on Your Marriage . . . variety . . . . But let’s say that this man is doing everything right to no avail. Let’s say that his wife truly has no libido and never did . . . [The sex advice] industry’s go-to advice . . . [is] to tell him to do the “right” thing and get a divorce. Never mind the love, . . . the kids, . . . the expense, . . . the trauma. If he wants to have sex again—[or] to masturbate in peace again!—he has to leave his wife and abandon his children. What’s the one thing I am not allowed to suggest? The one thing that might actually save this marriage [and] make it possible for this man to stay married and stay sane: *Get it elsewhere*. If I were to give that advice, . . . I would also urge him to be discreet (don’t humiliate your wife) and to be dishonest (don’t make your wife cry by asking permission). But when I tell people who are trapped in sexless—but-otherwise—rewarding marriages to get it elsewhere—and urge them to show consideration by being discreet and compassion by being dishonest—an angry mob gathers under my window to chant “Cheating is never okay!”

public policy. Even so, the state has no legitimate interest in imposing sexual fidelity on couples who opt for consensual non-monogamy, on couples who sometimes have *a ménage à trois* or other sorts of group sex activities (activities that constitute adultery), or on couples when one person in the couple is not able to engage in sexual activities due to injury or illness. As there is no state interest at stake here, the state should not prefer monogamy to consensual non-monogamy.

The abolitionist approach builds on the revisionist approach but goes further: not only should the state not prefer monogamy to consensual non-monogamy, the state should not be in the business of discouraging infidelity. On this view, there is no bona fide state interest to ensure that married (or partnered) people have sex only with each other. Insofar as the state has an interest in the maintenance of “good” marriages and relationships, the state should encourage (or at least stop discouraging) open communication about sexual exclusivity by neither criminalizing nor disincentivizing adultery, even when there is infidelity. While lying to one’s spouse is generally not a good thing to do, the state does not specifically police lying to one’s spouse<sup>166</sup> and it has many reasons for not doing so. Consider, for example, financial deception. Imagine two people who are married and who have agreed to share income with each other and make joint decisions about major expenditures. If one spouse has been hiding some income from the other spouse, using it to make investments she keeps secret from her spouse, so long as no laws have been broken, the state has no role to play. Of course, if the deceived spouse discovers the financial deception, he or she can seek a divorce and, in that context, as part of the distribution of the marital assets, the deceived spouse will be entitled to get an equitable share of the hidden funds. Even so, the deceived spouse is not entitled to any distinctive ground for divorce or a special tort cause of action.<sup>167</sup> The same type of point could be made against how the law of adultery treats infidelity, namely that deception by a spouse about extra-dyadic sex is not generally the state’s business, and the state has no role to play when such deception occurs unless the extra-dyadic sex somehow dissipates marital property.<sup>168</sup>

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166. One context in which states do focus on whether one has lied to one’s spouse is with respect to whether to grant an annulment based on fraud. That said, annulments based on fraud are uncommon and, at least historically, were granted only under “extreme” situations. *See, e.g.*, GROSSMAN & FRIEDMAN, *supra* note 46, at 183–87.

167. If the financial deception involved the dissipation of marital property for nonmarital purposes, then the deceived spouse would, however, typically be made whole through the equitable distribution of marital property as part of the divorce. *See, e.g.*, JUDITH AREEN ET AL., *FAMILY LAW: CASES AND MATERIALS* 1164–65 (7th ed. 2019).

168. *See, e.g.*, *Dykman v. Dykman*, 253 S.W.3d 23 (Ark. App. 2007) (upholding award of alimony to wife because husband had diverted marital funds to women

Although I acknowledge that there are strong arguments for the abolitionist approach to the law of adultery, there are pragmatic arguments in favor of the revisionist approach. Abolishing the law of adultery is unlikely to be accomplished by courts, legislators, or other politicians. Because there are so few adultery prosecutions, courts are unlikely to have the chance to strike down remaining criminal adultery laws.<sup>169</sup> Further, significant pressure is unlikely to be applied to legislators or other elected officials to repeal these laws; without such pressure, politicians are unlikely to support reform in this area because of concern that doing so would be seen as supporting adultery, something they might reasonably believe carries risk of harm to their political careers.<sup>170</sup> In contrast, it is much easier to put a positive spin on the revisionist approach to the law of adultery; the revisionist approach can be characterized as giving people a choice—that is, a choice to opt out of the existing legal regime—while otherwise leaving the current law of adultery in place as a default rule. Additionally, the revisionist approach may provide a more feasible—albeit indirect—pathway to abolishing the law of adultery than the abolitionist approach: adopting the revisionist approach and allowing for couples to opt out of the law of adultery might eventually change the minds of some who are skeptical of abolishing the law of adultery by showing them that “hell does not freeze over” when adultery is permissible.

The revisionist approach has the further virtue of creating an incentive to be honest with one’s partner about the desire for extra-dyadic sex: under the revisionist approach, there are legal benefits to consensual non-monogamy as opposed to infidelity. Under the revisionist approach, if you engage in extra-dyadic sex without the consent of your partner, you may be subject to financial “punishments” for your behavior, but if you have gotten your partner’s consent, you will not be subject to such punishment. Given that consensual non-monogamy is better than infidelity with respect to public health and public policy (Subpart IV.C), this is a virtue of the revisionist approach.<sup>171</sup> (In contrast, under the abolitionist

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with whom he was having—or hoping to have—extra-dyadic sex, but *not* because he had engaged in adultery or because he gave his wife a box containing a snake and a note saying “Die Bitch”).

169. See Sweeny, *supra* note 41, at 170–71.

170. See, e.g., Anderson, *supra* note 13, at 32–34 (discussing why legislators and other politicians might be unlikely to advocate for reform of the law of adultery and related laws because of how it implicates morality). Note, however, that a few states have recently repealed their adultery laws. See *supra* note 53 and accompanying text. There has not been a similar move to remove adultery as a fault ground for divorce in jurisdictions that take the hybrid fault/no-fault approach to divorce. See *supra* text accompanying notes 58–60.

171. See also ANDERSON, *supra* note 21, at 199–200 (making a similar argument outside the legal context).

approach, there is no such incentive, because abolition eliminates all current legal disincentives associated with infidelity.)

There is at least one significant objection to the revisionist approach: the revisionist approach seems based on a robust distinction between *consensual* non-monogamy and *non-consensual* non-monogamy, but that distinction may not be robust, either in theory or in practice. At the practical level, there is an issue about how one proves consent to non-monogamy. Imagine a jurisdiction where adultery is a ground for divorce but where the revisionist approach to adultery has been adopted. Suppose, that Pat and Lee are married and live in that jurisdiction and that Pat files there for divorce on the grounds of adultery. In response, Lee acknowledges having engaged in extra-marital sexual activity but claims that they have a consensual non-monogamous relationship. Pat's defense to adultery as a ground for divorce might have strong support if the couple had signed a prenuptial or postnuptial agreement that allowed for extra-dyadic sex or, more specifically, if they signed an extra-marital (or extra-dyadic) sex contract.<sup>172</sup> But few if any couples sign such agreements, in part due to the law of adultery and the stigma associated with extra-dyadic sex, in part due to the reticence of judges to enforce "lifestyle" provisions of pre and postnuptial agreements,<sup>173</sup>

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172. See ZISKIN & ZISKIN, *supra* note 24, at 251. The authors provide this model of such an extra-marital sex contract:

WHEREAS [the parties] desire to expand and enrich their married lives and . . . feel that sexual activity with others . . . will contribute to such expansion and enrichment THEREFORE, it is mutually agreed that [the parties] shall each be free to engage in sexual activities with others subject to the following terms, conditions, and restrictions.

1. Said activities shall take place only at such times as mutually agreed upon by the parties.
2. Such activities shall not take place with such individuals as are specifically excluded upon the request of either party.
3. Such activities shall not be conducted in such a manner as to interfere substantially with meeting the usual marital and familial responsibilities of either party.
4. This agreement and all activities authorized under it shall be terminated immediately upon the request of either party.
5. In the event of the termination of this agreement or failure of the activities encompassed within it to achieve the stated goals and expectations of the parties, each party agrees to hold the other blameless so long as each has fulfilled the terms and obligations herein stated.

It is understood that this contract deals with an interpersonal relationship and is subject to such modifications as are mutually agreed upon by the parties.

*Id.*; see also Anderson, *supra* note 13, at 43–46 (providing model language for an "open union" contract).

173. See Browne & Fister, *supra* note 80, at 195–96; Jonathan Fields, *Forbidden Provisions in Prenuptial Agreements: Legal and Practical Considerations for the Matrimonial Lawyer*, 21 J. AM. ACAD. MATRIM. L. 413, 428 (2008).

and in part due to the inertia that leads people not to draft wills or prenuptial agreements generally. Absent such a written agreement, there is a concern about how a judge should deal with this type of defense to divorce on the ground of adultery. Of course, judges and juries often have to decide which party to believe in a dispute where written proof of an important fact is lacking.<sup>174</sup> Further, relevant evidence to establish the existence of an agreement about extra-dyadic sex may be available absent a written extra-marital sex contract or a prenuptial or postnuptial agreement with provisions like those contained in an extra-marital sex contract.

This concern about proof of consent connects to a deeper concern about the role of consent in the revisionist approach to the law of adultery: beyond the *epistemological* problem regarding consent lurks a deeper *metaphysical* problem. Consider a traditional different-sex marriage in which the husband is the more moneyed and more “powerful” spouse. If the husband wants to have extra-marital sex and suggests to his wife that they “open up” their marriage in this way, his wife might feel that she has no choice but to say “yes” to her husband’s suggestion if she wants their marriage to continue and to preserve the status quo with respect to their lifestyle, their children (if any), and/or their finances. If actual consent to non-monogamy is not possible in situations like this, then, as many or most relationships involve some power imbalances, the deeper worry is whether true consent to non-monogamy is possible in a much wider range of cases.

While I acknowledge consent is a tricky concept,<sup>175</sup> I do not think consent is trickier in the case of extra-marital sex agreements (or prenuptial or postnuptial agreements with provisions relating to extra-marital sex) than it is with respect to prenuptial or postnuptial agreements generally.<sup>176</sup> If the state is willing to enforce marital agreements about financial matters without worrying about whether the less powerful parties in a marriage truly consented to the terms (issues of unconscionability aside), then the state should be willing to enforce such agreements about non-monogamy (issues of unconscionability aside). Further, and more significantly, given the frequency of infidelity, it is preferable to encourage conversations and agreements about extra-dyadic sex than it is to keep infidelity in the closest, both for public health reasons<sup>177</sup> and for fairness

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174. See, e.g., Catherine D. Perry, *What Works—Evidence from a Trial Judge’s Perspective*, 25 LITIG. 3, 3 (1999) (describing the factfinder’s role in evaluating the credibility of evidence).

175. See ESKRIDGE ET AL., *supra* note 18, at 267; Gan, *supra* note 18, at 658–60;

176. See Browne & Fister, *supra* note 80, at 205–06 (describing the interaction between subtle duress and consent in postnuptial contract formation between spouses); see also Gan, *supra* note 18, at 639–44 (arguing that consent in spousal agreements is highly contextual and that general contract rules are insufficiently nuanced for such agreements).

177. See *supra* notes 115–23 and accompanying text.

considerations. Returning to the example of the traditional different-sex couple discussed above, the wife in such a marriage would, compared to having her husband simply engage in infidelity (which is what often happens), surely prefer to have her husband admit his interest in extra-marital sex and then give her the opportunity to either (i) accept consensual non-monogamy on terms that are fair and agreeable to her or (ii) to reject such an arrangement entirely.

I am not claiming to have fleshed out all the details of a revisionist approach to the law of adultery. I have, however, sketched the revisionist approach and made theoretical and pragmatic arguments for this approach as an alternative both to the status quo of the law of adultery and the abolitionist approach to the law of adultery.

## VI. CONCLUSION

Given the changes in criminal law related to sex,<sup>178</sup> changes in the law of domestic relations<sup>179</sup> and, most significantly, changes in social mores,<sup>180</sup> the law of adultery is in serious need of reform. Strong arguments for abolishing the law of adultery have recently been made by various scholars,<sup>181</sup> and a few state legislatures have recently abolished significant parts of their state's laws relating to adultery.<sup>182</sup> But approximately thirty-eight states still have laws that in some way disincentivize adultery.<sup>183</sup> The way these states deal with adultery fails to distinguish between infidelity and consensual non-monogamy. Lumping infidelity and consensual non-monogamy together under the legal concept of adultery is problematic for public health and public policy. The revisionist approach to the law of adultery, in contrast to the abolitionist approach, focuses on driving a wedge between infidelity and consensual non-monogamy in the law. This approach to the law of adultery has some of the benefits of abolition, but it is more politically feasible, and it focuses on the aspect of extra-dyadic sex that is actually bad, namely the deception that often accompanies it. Laws relating to adultery are outdated.

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178. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 584 (2003).

179. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015); DiFONZO, *supra* note 47, at 173 (describing the shift toward no-fault divorce and some of its societal effects).

180. See *supra* notes 83–85 and accompanying text (describing how the legal status of conduct reinforces public attitudes about that conduct); Anderson, *supra* note 13, at 41 (“[I]deas about love, marriage, family and sexuality have changed drastically in the last century. Attitudes about premarital sexual activity, homosexuality, gender roles, parenting, contraception, and divorce have gone through major shifts.”).

181. See *supra* note 13 and accompanying text; RHODE, *supra* note 4, at 184–87.

182. See *supra* note 53 and accompanying text.

183. See *supra* note 11 and accompanying text.



The revisionist approach to reforming the law of adultery represents the most promising and appropriate way to reform this area of law.