

Adultery, Infidelity, and Consensual Non-Monogamy

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Americans dislike adultery. According to Gallup, which conducts an annual survey of the “values and beliefs” of Americans, in 2018, eighty-eight percent of Americans believe that it is “morally wrong” for a married man or woman to have an affair.<sup>1</sup> This is in contrast to twenty-eight percent of Americans who think that sex between an unmarried man and an unmarried woman is morally wrong, thirty percent who think that “gay and lesbian relations” are morally wrong, and fifty-four percent who think that “sex between teenagers” is morally wrong.<sup>2</sup> According to this survey, a greater percentage of Americans have a negative view of adultery than they do of abortion, pornography, suicide, the death penalty, and cloning.

This strong negative moral attitude towards adultery is reflected in the law. Adultery remains a crime in forty percent of the states,<sup>3</sup> although it is rarely—but not never—enforced.<sup>4</sup> Further, adultery remains a ground for divorce in almost two-thirds of the states.<sup>5</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>6</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>7</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>8</sup> sometimes,

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<sup>1</sup> Gallup News Service, *Gallup Poll Social Series: Values and Beliefs* (May 10, 2018), [http://news.gallup.com/file/poll/235274/180604MarijuanaAlcohol.pdf?g\\_source=link\\_news9&g\\_campaign=item\\_235250&g\\_medium=copy](http://news.gallup.com/file/poll/235274/180604MarijuanaAlcohol.pdf?g_source=link_news9&g_campaign=item_235250&g_medium=copy), at 2.

<sup>2</sup> *Id.*

<sup>3</sup> Twenty states. *See infra* note 42. Adultery is also a crime under U.S. military law. For discussion, *see, e.g.*, DEBORAH RHODE, *ADULTERY: INFIDELITY AND THE LAW*, chapter 4 (2016).

<sup>4</sup> *See RHODE supra* note 3, at 60-67.

<sup>5</sup> Thirty-two states. *See infra* note 48.

<sup>6</sup> N.J. STAT. ANN. § 3A:37-2.

<sup>7</sup> Seven or eight states. *See infra* notes 54 & 55.

<sup>8</sup> *See H. Hunter Bruton, The Questionable Constitutionality of Curtailing Cuckolding: Alienation-of-Affection and Criminal-Conversation Torts*, 65 DUKE L. J. 755 (2016); Lance McMillian, *Adultery as Tort*, 90 N.C. L. REV. 1987 (2012).

romantically-injured spouses win a substantial financial award, such as a North Carolina woman who was awarded nine million dollars from her husband's mistress.<sup>9</sup> Altogether, adultery remains a behavior with the potential for significant legal and social consequences in more than three-quarters of the states.<sup>10</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 who has committed adultery a smaller percentage of the marital property upon divorce than he or she would get otherwise.<sup>11</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>12</sup> Most recently, for example, 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 or alimony awards.”<sup>13</sup> While I have great sympathies with her “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 elided when, in fact, they are conceptually and importantly distinct. In particular, the law treats *consensual non-monogamy*—engaging in extra-marital sex with the consent of one’s spouse—like infidelity but consensual non-monogamy does not warrant the moral and legal treatment that it currently receives; consensual non-monogamy is, I argue, importantly different from infidelity. While infidelity—insofar as it is an instance of

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<sup>9</sup> Shackelford v. Lundquist, No. COA13-960, 2014 N.C. App. LEXIS 487, 2014 WL 1791267, at \*2, \*7 (N.C. Ct. App. May 6, 2014), *appeal denied*, 762 S.E.2d 460 (N.C. 2014).

<sup>10</sup> 38 states. 32 of these are states that have adultery as a ground for divorce (*see infra* note 48) 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 causes of action but where adultery is neither a ground for divorce or a crime (Maine).

<sup>11</sup> *See infra* notes 49-51.

<sup>12</sup> *See, e.g.*, Linda Anderson, *Marriage, Monogamy, and Affairs: Reassessing Intimate Relationships in Light of Growing Acceptance of Consensual Non-Monogamy*, 22 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 1 (2016); Bruton, *supra* note 8; Andrew Cohen, *How the Establishment Clause Can Influence Substantive Due Process: Adultery Bans After Lawrence*, 79 FORDHAM L. REV. 605 (2010); Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 364 (2004); Gabrielle Viator, *The Validity of Criminal Adultery Prohibitions After Lawrence v. Texas*, 39 SUFFOLK U. L. REV. 837 (2006).

<sup>13</sup> *See* RHODE, *supra* note 3, at 7.

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 the way it 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, a reform that prioritizes an end to the law’s negative approach to consensual non-monogamy rather than the complete abolition of laws related to adultery.

This essay proceeds as follows. I begin by exploring the conceptual landscape around adultery. I then turn to the legal treatment of adultery. I then discuss some empirical claims about and related to adultery. Finally, I make 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. I conclude by outlining a proposal for reforming these wrongheaded laws that is distinct from the complete abolition of all adultery laws.

### I. 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>14</sup>) and has sex with a person other than his or her spouse or partner is having *extra-dyadic sex*. If neither of the people in a couple engages in extra-dyadic sex, they are *monogamous*,<sup>15</sup> otherwise they are non-monogamous. If one’s spouse

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<sup>14</sup> For a (now outdated) discussion of civil unions and domestic partnerships, see Edward Stein, *The Topography of Legal Recognition of Same-Sex Relationships*, 50 FAMILY CT. REV. 181 (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).

<sup>15</sup> 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 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 last a significant period of time. *But see* Terri D. Conley, Ali Ziegler, Amy C. Moors, Jes L. Matsick & Brandon Valentine, *A Critical Examination of Popular Assumptions about the Benefits and Outcomes of Monogamous Relationships*, 17 PERSONALITY & SOC. PSYCH. REV. 124, 126 (2013) (describing—and implicitly critiquing—the view

or partner knows that one is having extra-dyadic sex, then this is *consensual* non-monogamy. If one's spouse or partner does not know he or she is having extra-dyadic sex, then this is *non-consensual* non-monogamy or more simply, *infidelity*. 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). 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. One of the central claims of this essay is that, in law and in morality, the concept of adultery is often mistakenly used; not all types of adultery are appropriate targets for moral and legal disapproval.

Adultery is about behavior, but underlying this sexual behavior is sexual desire.<sup>16</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>17</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 color, 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>18</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 and 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

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that almost any personal relationship is monogamous, even one in a series of relationships in quick succession).

<sup>16</sup> 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).

<sup>17</sup> *Id.*, at 39-61.

<sup>18</sup> *Id.*, at 49-67; Robin Dembroff, *What Is Sexual Orientation?*, 16:3 *PHILOSOPHERS' IMPRINT* 1 (2016); EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 22-27 (1990); Fredrick Suppe, *Curing Homosexuality*, in *PHILOSOPHY AND SEX* 394-97 (Robert Baker & Frederick Elliston eds., rev. ed., 1984).

person for an extended period of time.<sup>19</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 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>20</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 doesn't 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 the law of 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>21</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,

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<sup>19</sup> See, e.g., DAVID P. BARASH & JUDITH EVE LIPTON, *THE MYTH OF MONOGAMY: FIDELITY AND INFIDELITY IN ANIMALS AND PEOPLE passim* (2001); CHRISTOPHER RYAN & CACILDA JETHÁ, *SEX AT DAWN: HOW WE MATE, WHY WE STRAY, AND WHAT IT MEANS FOR MODERN RELATIONSHIPS passim* (2010). See *infra* Part III-A for a discussion of how common extra-dyadic sex is.

<sup>20</sup> See, e.g., DAN SAVAGE, *AMERICAN SAVAGE: INSIGHTS, SLIGHTS AND FIGHTS ON SEX, FAITH, LOVE AND POLITICS* 23-28 (2013).

<sup>21</sup> 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, *Virtual Adultery: No Physical Harm, No Foul?*, 46 U. RICH. L. REV. 667, 667 (2012); Sandi S. Varnado, *Avatars, Scarlet “A”s, and Adultery in the Technological Age*, 55 ARIZ. L. REV. 371, 412 (2013). For purposes of this essay, I do not count virtual sex as adultery.

when a couple agrees it is permissible for at least one of them to have sex with other people, at least under some circumstances, I call this *consensual non-monogamy*.<sup>22</sup>

Consensual non-monogamy takes many forms.<sup>23</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>24</sup> In contrast, some couples (including, it seems, a significant percentage of men in relationships with other men<sup>25</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>26</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>27</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>28</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>29</sup> Other couples have relationships that are even more “open,” namely they have fewer—or no—restrictions about when, where, and with whom they can have extra-dyadic sex.

There are two related concepts that are useful to distinguish for purposes of this discussion: *polyamory* and *monogamish*. Both of these concepts refer to types of non-monogamy and they 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

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<sup>22</sup> As an example of research that uses this terminology, see Conley et al., *supra* note 15, at 126.

<sup>23</sup> 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).

<sup>24</sup> *HALL PASS* (New Line Cinema 2011).

<sup>25</sup> See e.g., BLAKE SPEARS & LANZ LOWEN, *BEYOND MONOGAMY: LESSONS FROM LONG-TERM GAY MALE COUPLES IN NON-MONOGAMOUS RELATIONSHIPS* 1 (explaining that “non-monogamous relationships are very common in the gay community”).

<sup>26</sup> *Id.* at 11-13; SHEFF, *supra* note 23, at 8. This name of this type of consensual non-monogamy is a play on the informal name of the U.S. military’s policy towards lesbians, gays, and bisexuals from 1993 to 2011. The policy was codified at 10 U.S.C. § 654.

<sup>27</sup> See, e.g., *id.* at 37.

<sup>28</sup> See, e.g., *id.* at 9-10.

<sup>29</sup> See, e.g., Richard J. Jenks, *Swinging: A Review of the Literature*, 27 *ARCHIVES SEXUAL BEHAV.* 507 (1998); Dan Savage, *Swingers: A Love Story*, *CHICAGO READER* (Oct. 7, 2002) <https://www.chicagoreader.com/chicago/swingers-a-love-story/Content?oid=910051>; SHEFF, *supra* note 23, at 74-54; Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 *CAP. L. REV.* 439, 515 (2003).

sexual and romantic involvement with more than one person at a time.<sup>30</sup> But according to another—perhaps more widely used—definition, the non-monogamy involved in polyamory is *necessarily* consensual. 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>31</sup> Liz Emens, similarly, 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>32</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, not “actively looking” for extra-dyadic sex.<sup>33</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. 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 terminology in hand, I turn now to how the law deals with adultery and related concepts.

## II. 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>34</sup> Adultery was once a serious crime that drew significant legal penalties including capital punishment.<sup>35</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. 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

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<sup>30</sup> 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”).

<sup>31</sup> 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 23, at 1 (“Polyamory is consensual, openly conducted, multiple partner relationships... [involving] negotiated access to additional partners outside of the traditional committed couple”).

<sup>32</sup> See Emens, *supra* note 12, at 320.

<sup>33</sup> 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).

<sup>34</sup> 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 (2014).

<sup>35</sup> JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 28 (3d ed. 2012).

Melissa Murray nicely put it, “[C]riminal laws prohibiting adultery ... reflected marriage’s place as the lawful site for sexual expression; however, these laws were also intended to protect and stabilize the marital family from the destructive influences of extramarital sex.”<sup>36</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>37</sup> In the age of fault-based divorce, adultery was central to divorce law. Until the 1960’s, 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 he or she was “innocent” with respect to the marital breakup.<sup>38</sup> Until the “no-fault” revolution in family law,<sup>39</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>40</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. Heart balm suits supplemented the potential criminal penalties of adultery, the risk of divorce, and the financial implications associated with adultery in the context divorce. In particular, heart

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<sup>36</sup> Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1270 (2009).

<sup>37</sup> 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 Joanne Sweeny, *Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws*, 46 Loy. U. Chi. L.J. 127, 138-39 (explaining that one reason women were historically subject to stricter adultery laws was concerns of paternity) (2014).

<sup>38</sup> See, e.g., JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 161 (2011) (“[a]s of the 1930s, every state that recognized divorce ... listed adultery as one of the available grounds”). See generally GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION* 41 (1991).

<sup>39</sup> See, e.g., J. HERBIE DIFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA* (1997).

<sup>40</sup> In New York, for example, adultery was the sole ground for divorce until 1966. See N.Y. DOM. REL. LAW § 170 (McKinney 1967) (adding cruelty, abandonment, and extended confinement in prison as additional grounds for divorce).



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>41</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. 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 twenty states today and a felony in five of them.<sup>42</sup> Although Colorado, New Hampshire, and Massachusetts have repealed their adultery laws in the past several years,<sup>43</sup> other recent attempts to repeal adultery laws have failed.<sup>44</sup>

Further, while every jurisdiction now allows for a path to divorce without the requirement of proof of fault, adultery continues to be a ground for divorce in the majority of jurisdictions. As no-fault divorce swept through the United States starting with California in 1970,<sup>45</sup> states took two different approaches to reforming their divorce law. The more radical approach, pioneered by California, is what I call “pure” no-fault divorce, in which fault has no place in whether a divorce will be granted.<sup>46</sup> Other jurisdictions, instead of eliminating fault grounds like California did, simply added a no-fault pathway to the existing fault grounds. Such

<sup>41</sup> See, e.g., McMillian *supra* note 8; Bruton *supra* note 8.

<sup>42</sup> Alabama (Ala. Code § 13A-13-2), Arizona (Ariz. Rev. Stat. Ann. § 13-1408), Florida (Fla. Stat. Ann. § 798.01), Georgia (Ga. Code Ann. § 16-6-19), Idaho (Idaho Code Ann. § 18-6601), Illinois (720 Ill. Comp. Stat. Ann. 5/11-35), Kansas (Kan. Stat. Ann. § 21-5511), Maryland (Md. Crim. Law Code Ann. §10-501 (2018)), Michigan (Mich. Comp. Laws Ann. §§750.29-.30), Minnesota (Minn. Stat. Ann. § 609.36), Mississippi (Miss. Code Ann. § 97-29-1), New York (N.Y. Penal Law § 255.17), North Carolina (N.C. Gen. Stat. § 14-184), North Dakota (N.D. Cent. Code § 12.1-20-09), Oklahoma (Okla. Stat. tit. 21, §§ 871-872), Rhode Island (R.I. Gen. Law § 11-6-2), South Carolina (S.C. Code Ann. § 16-15-60), Utah (Utah Code Ann. § 76-7-103), Virginia (Va. Code Ann. § 18.2-365), and Wisconsin (Wis. Stat. Ann. § 944.16 (West 2005)). Adultery is a felony in Idaho, Michigan, Minnesota, Oklahoma, and Wisconsin.

<sup>43</sup> H. B. 13-1166 (1<sup>st</sup> Reg. Sess., 69<sup>th</sup> Gen. Assembly) (Col. 2013); H. B. 44:1 (2<sup>nd</sup> year, 163<sup>rd</sup> Sess. of Gen. Court) (N. H. 2014); and S. B. 2260 (190<sup>th</sup> Gen. Court, 2018 Reg. Session) (Mass. 2018) (signed July 27, 2018).

<sup>44</sup> See, e.g., Bill Sizemore, *Adultery Will Remain a Criminal Offense in Virginia*, *State Senate Committee Decides*, THE 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 are presently bills in Utah and Virginia to repeal their adultery laws. 2018 VA H.B. 1701 (NS); 2019 UT H.B. 40 (NS).

<sup>45</sup> See, e.g., GROSSMAN & FRIEDMAN, *supra* note 38, at 176-177.

<sup>46</sup> See, e.g., CAL. FAM. CODE §§ 2310-2311, 2335 (“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 62 (discussing *Diosdado* case).

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>47</sup> Thirty-two states adopted the hybrid approach. Adultery remains a ground for divorce in these states today.<sup>48</sup>

In addition, in some jurisdictions, the fact that one spouse has committed adultery may have important 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>49</sup> New Jersey denies to spouses who have committed adultery from receiving certain inheritance rights for which they would otherwise be qualified.<sup>50</sup> And, in Illinois, adultery is a ground for finding a person seeking to adopt a child to be unfit.<sup>51</sup>

Further, although most states have abolished heart balm suits either through legislative action<sup>52</sup> or judicial decision,<sup>53</sup> five or six states allow a married person whose spouse has committed adultery to sue the person who had sex with their

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<sup>47</sup> N. MEX. STAT. ANN. § 40-4-1 (“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.”).

<sup>48</sup> 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) (1982), and 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, 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 (2007); ARK. CODE ANN. §§ 9-11-803 to -811 (2009 & Supp. 2011); LA. REV. STAT. ANN. §§ 9:275, 9:307 (2008).

<sup>49</sup> S.C. CODE ANN. § 20-3-130 (“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. ANN. § 50-16.3A.

<sup>50</sup> N.J. STAT. ANN. § 3A:37-2 (“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.”)

<sup>51</sup> 750 ILL. COMP. STAT. § 50/1(D)(j) (listing “[o]pen and notorious adultery or fornication” as a ground for a person’s being “unfit” for adoption”).

<sup>52</sup> *See, e.g.*, 740 ILL. COMP. STAT. § 5/7.1 (repealing alienation of affections actions starting January 1, 2016).

<sup>53</sup> *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).

spouse for alienation of affection<sup>54</sup> and four states allow for a somewhat similar cause of action called “criminal conversation.”<sup>55</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>56</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>57</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>58</sup>—that a police officer (or fireman) who commits adultery may be fired even if he or she have not been prosecuted for (or convicted of) adultery (or for anything else).<sup>59</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>60</sup> Although such indirect legal consequences are less likely to

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<sup>54</sup> *Fitch v. Valentine*, 959 So.2d 1012, 1020 (Miss. 2007) (“in 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 in Mississippi.”); *Hunt v. Chang*, 594 P.2d 118 (Haw. 1979) (allowing an action for alienation of affection); *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 constitutional...”); *State Farm Fire & Cas. Co. v. Harbert*, 741 N.W.2d 228 (S.D. 2007); *Heiner v. Simpson*, 23 P.3d 1041 (Utah 2001). The New Mexico Court of Appeals has expressed “disfavor” with the tort of alienation of affections, *see, e.g., Padwa v. Hadley*, 981 P.2d 1234, 1240 (N.M. Ct. 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 8; *McMillian, supra* note 8, at 1991.

<sup>55</sup> *Republic of 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).

<sup>56</sup> *Malecek v. Williams*, 804 S.E.2d 592 (N.C. Ct. App. 2017); *Ammarell v. France*, Civ. Act. No. 3:16-CV-00708-RJC-DSC, 2018 U.S. Dist. LEXIS 98429, 2018 WL 2843441 (W.D.N.C. June 11, 2018).

<sup>57</sup> *See supra* note 10.

<sup>58</sup> 539 U.S. 558 (2003) (striking down, on due process grounds, Texas sodomy law, which criminalize same-sex sexual acts but not similar sexual acts between people of different sexes).

<sup>59</sup> *See, e.g., Marcum v. McWhorter*, 308 F.3d 635 (6th Cir. 2002); *Caruso v. City of Cocoa, Florida*, 260 F. Supp. 2d 1191 (M.D. Fla. 2003); *Beecham v. Henderson County* 422 F.3d 372 (6th Cir. 2005); *Starling v. Bd. Cty. Comm'rs.*, 602 F.3d 1257 (11th Cir. 2010); *Seegmiller v. Laverkin City* 528 F.3d 762 (10th Cir. 2008); *Stevens v. Holder*, 966 F. Supp.2d 622 (E.D. Va. 2013); *Coker v. Whittingham*, 858 F.3d 304 (5th Cir. 2017).

<sup>60</sup> *See, e.g., Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) (unmarried couple). For discussion of these types of cases, *see, e.g., Deborah A. Widiss, Intimate Liberties and Antidiscrimination Law*, 97 B. U. L. REV. 2083 (2017).

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 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 in a Louisiana divorce proceeding. 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 post-nuptial agreement in which he promised that, if he divorced her for any reason, he would pay her alimony of \$1,500/month. Four years later, Deno filed for divorce and asked the trial court to nullify the postnuptial agreement, which it did. 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>61</sup> A premarital or postmarital agreement cannot, the court held, repeal or amend the nature of marital obligations. Under Louisiana law, “married persons owe each other fidelity, support, and assistance.”<sup>62</sup> For this reason, the court held that a pre- or post-nuptial agreement that facilitates adultery, even indirectly by attempting to limit, restrict, or discourage divorce on the grounds of adultery, is unenforceable.

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

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<sup>61</sup> *Boudreaux v. Boudreaux*, 745 So.2d 61, 63 (La. Ct. App. 1999).

<sup>62</sup> *Id.* For this reason, written agreements to have a consensual non-monogamous relationship like the “open union” contract proposed in *Anderson*, *supra* note 12, at 43-46, 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). The couple signed a written agreement wherein each promised to remain faithful to the other; the agreement also provided for \$50,000 liquidated damages, to be paid upon dissolution of the marriage, should either spouse breach the agreement. Contrary to his promise, the husband did not end his extra-marital relationship. When the couple divorced, the wife asked the trial court to enforce the liquidated damages clause. 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 dissolution proceedings ... to half the community property and appropriate support ... [but does not allow] hefty premiums for emotional angst.” *Id.* at 474. See also *In re Marriage of Cooper*, 769 N.W.2d 582 (Iowa 2009); *Parker v. Green*, No. 73176, 2018 WL 3211974 (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).

support, and virtually any other economic matters (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>63</sup> Despite, the general pro-enforcement attitude to 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 and thus they view waiving adultery as a violation of public policy. (Other states refuse to enforce agreements penalizing adultery because fault-based divorce is against that public policy of those states.)

The law of adultery has direct legal effects (relating to custody and distribution of property in case of divorce or death of a spouse), indirect legal effects (relating to, for example, effect on employment, housing, adoption, limiting the types of marital agreements couples can enter, and subtly influencing the distribution of marital assets upon divorce), and, 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 social attitudes, pushes the behavior underground and keeps it secret. That adultery is illegal, that adultery is an explicit ground for divorce, and that prenuptial agreements that seem to allow adultery will not be enforced are all ways of the state saying that adultery is bad and that adultery undermines marriages. This helps keeps extramarital sex “in the closet,” contributes to the shame many people feel when they or their spouse engage in adultery, and creates a stigma around marriages that are in any way non-monogamous.

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 2018, moral attitudes towards same-sex sexual activity shifted significantly, from 53% of Americans surveyed finding such activity morally wrong in 2001 to 30% finding it morally wrong in 2018;<sup>64</sup> during the same time period, laws criminalizing same-sex sodomy and laws

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<sup>63</sup> 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 define marital behavior).

<sup>64</sup> See Gallup News Service, *supra* note 1, at 10. For context, the most recent Gallup polls places Americans' view of same-sex sexual activity just in between the percentage of Americans who find sex between an *unmarried* man and *unmarried* woman morally wrong (28%) and who find having a child out of wedlock morally wrong (32%). *Id.* at 2.

limiting marriage to different-sex couples were both found unconstitutional.<sup>65</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.

### III. Social Scientific Research on Adultery and Consensual Non-Monogamy

In this Part, I turn to a variety of empirical questions that will inform the assessment of the current state of the law of adultery that I undertake in Part IV. I look at social scientific research regarding the frequency of adultery and consensual non-monogamy. I then consider 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.

#### A. Frequency of Adultery

There are two types of problems associated with social scientific studies of 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>66</sup> Compare, for example, the 2006 study by Elizabeth Allen and Donald Baucom that found that *sixty-nine percent* of participants had engaged in extra-dyadic sex,<sup>67</sup> with the 2007 study by Mark Whisman and colleagues that found just over *two percent* of participants had engaged in extra-dyadic sex.<sup>68</sup> The dramatically different rates of extra-dyadic sex are, in part, to be explained by the different populations surveyed (Allen and Baucom used a convenience sample<sup>69</sup> to survey college students—average age of nineteen—who were dating someone, while Whisman used a national probability sample<sup>70</sup> to survey married adults with an average age of thirty-seven), the definition of extra-dyadic sex used (Allen and Baucom asked participants if they had engaged in “romantic or sexual behavior” with someone other than the person they were dating,<sup>71</sup> while Whisman asked if they had engaged in sexual intercourse with someone other than their spouse<sup>72</sup>), and the time period covered (Allen and Baucom asked participants about their behavior in the past two years, while Whisman

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<sup>65</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

<sup>66</sup> Shanhong Luo, Melissa A. Cartun & Anthony G. Snider, *Assessing Extradynamic Behavior: A Review, a New Measure, and Two New Models*, 49 PERSONALITY & INDIVIDUAL DIFFERENCES 155 (2010).

<sup>67</sup> Elizabeth S. Allen & Donald H. Baucom, *Dating, Marital, and Hypothetical Extradynamic Involvements: How Do They Compare?*, 43 J. SEX RES. 307 (2006).

<sup>68</sup> Mark A. Whisman, K. C. Gordon, & Yael Chatav, *Predicting Sexual Infidelity in a Population-based Sample of Married Individuals*, 21 J. FAM. PSYCH. 320 (2007).

<sup>69</sup> Convenience sampling is a method of obtaining data by selecting subjects who are easy to reach.

<sup>70</sup> 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.

<sup>71</sup> Allen & Baucom, *supra* note 67, at 309.

<sup>72</sup> Whisman et al., *supra* note 68, at 321.

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 in America help keep people from being open about adultery; the continued vitality of the law of adultery has a similar effect.<sup>73</sup> 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 sex, 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>74</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 ten percent of married individuals reporting having engaged in extra-dyadic sex during the course of their marriage.<sup>75</sup>

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<sup>73</sup> See, e.g., David L. Weis, *Adult Heterosexuality*, in 3 INTERNATIONAL ENCYCLOPEDIA OF SEXOLOGY 1498, 1500-08 (Robert T. Francoeur ed., 1997), <http://www.sexarchive.info/IES/xmain.html>.

<sup>74</sup> Shirley P. Glass & Thomas L. Wright, *Sex Differences in Type of Extramarital Involvement and Marital Dissatisfaction*, 12 SEX ROLES 1101 (1985) used term sexual involvement (which included kissing, “petting” and intercourse) and found that fifty percent of the people surveyed had extramarital sexual involvement.

<sup>75</sup> Other types of studies get higher rates. For example, the classic Kinsey surveys, which use convenience samples rather than probability samples, found that 33% of husbands and 25% of wives engaged in adultery. ALFRED KINSEY, WARDELL POMEROY, & CLYDE MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948); ALFRED KINSEY, WARDELL POMEROY, CLYDE MARTIN & PAUL GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953). In a study of 918 men and women, almost a quarter of the men and almost twenty 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 relationship. K.P. Mark et al., *Infidelity in Heterosexual Couples: Demographic, Interpersonal, and Personality-Related Predictors of Extradynamic Sex*, 40 ARCHIVES SEXUAL BEHAV. 871 (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>76</sup>	19%	15%
Laumann (1994) <sup>77</sup>	25%	15%
Wiederman (1997) <sup>78</sup>	23%	12%
Treas & Giesen (2000) <sup>79</sup>	11%*	11%*
Atkins, et al. (2001) <sup>80</sup>	13%*	13%*
Atkins & Kessell (2008) <sup>81</sup>	23%	15%

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

A few observations about these social scientific studies are relevant. In all of these 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>82</sup>). Given that a marriage involves two people, it surely is the case that at least around fifteen percent of marriages involve at least one spouse who has engaged in extra-dyadic sex. The percentages of marriages in which at least one 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.

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 indicated that infidelity is the most frequently mentioned self-reported cause of relationship dissolution and divorce.<sup>83</sup>

<sup>76</sup> M. Clements, *Sex in America Today: A New National Survey Reveals How Our Attitudes Are Changing*, PARADE MAGAZINE, at 4–6 (Aug. 7, 1994).

<sup>77</sup> EDWARD LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICE IN THE UNITED STATES 216 (1994).

<sup>78</sup> Michael W. Wiederman, *Extramarital Sex: Prevalence and Correlates in a National Survey*, 34 J. SEX RES. 167 (1997).

<sup>79</sup> Judith Treas & Deirdre Giesen, *Sexual Infidelity Among Married and Cohabiting Americans*, 62 J. MARRIAGE & FAM. 48 (2000).

<sup>80</sup> David C. Atkins, Donald H. Baucom & Neil S. Jacobson, *Understanding Infidelity: Correlates in a National Random Sample*, 15 J. FAM. PSYCH. 735 (2001).

<sup>81</sup> David C. Atkins & Deborah E. Kessel, *Religiousness and Infidelity: Attendance, but not Faith and Prayer, Predict Marital Fidelity*, 70 J. MARRIAGE & FAM. 407 (2008).

<sup>82</sup> See, e.g., Frank D. Fincham & Ross W. May, *Infidelity in Romantic Relationships*, 13 CURRENT OPINION PSYCH., 70, 71 (2017).

<sup>83</sup> 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 (2003); Laura Betzig, *Causes of Conjugal Dissolution: A Cross-Cultural Study*, 30 CURRENT ANTHROPOLOGY 654 (1989); Denise Previti & Paul R. Amato, *Is Infidelity a Cause or a Consequence of Poor Marital Quality*, 21 J. SOC. & PERS. RELATIONSHIPS 217 (2004); Shelby B. Scott, Galena K. Rhoades, Scott M. Stanley, Elizabeth S. Allen, & Howard J. Markman, *Reasons for Divorce and Recollection of Premarital Intervention: Implications for Improving Relationship*



## B. Number of People in Consensual Non-monogamous Relationships

Data on how many people are in consensual 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>84</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 single adults in the United States in a pair of studies. Respondents<sup>85</sup> were asked whether they had engaged in consensual non-monogamy during their lifetime.<sup>86</sup> *Twenty-one percent* of those surveyed said that they had.<sup>87</sup> Second, Jennifer Rubin and colleagues used

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*Education*, 2 COUPLE FAM. PSYCH. 131 (2013); Mark A. Whisman, Amy E. Dixon, & Benjamin Johnson, *Therapists’ Perspectives of Couple Problems and Treatment Issues in Couple Therapy*, 62 J. FAM. PSYCH. 48 (1997). These studies provide further indication of the frequency of adultery.

<sup>84</sup> See, e.g., Terri D. Conley, Amy C. Moors, Jes L. Matsick, & Ali Ziegler, *The Fewer the Merrier?: Assessing Stigma Surrounding Consensually Non-Monogamous Romantic Relationships*, 13 ANALYSES SOC. ISSUES & PUBL. POL’Y 1 (2013); Derrell W. Cox, Jim Fleckenstein & Curtis R. Bergstrand, *What Do Polys Want? An Overview of the 2012 Loving More Survey*, LOVING MORE MAG. (2013), <https://www.lovingmorenonprofit.org/polyamory-articles/2012-lovingmore-polyamory-survey/> (finding that more than 25% of people in polyamorous relationships experienced discrimination in the past decade based on their plural relationships).

<sup>85</sup> In one of these studies, individuals had to be at least 21 years of age and legally single at the time of the survey; for the other, individuals had to be at least 18 years of age and either single and not seeing anyone, or single and casually dating. Margaret L. Hauptert, Amy C. Moors, Helen E. Fisher & Justin Garcia, *Prevalence of Experiences with Consensual Nonmonogamous Relationships: Findings from Two National Samples of Single Americans*, 43 J. SEX & MARITAL THERAPY, 424, 430-431 (2017).

<sup>86</sup> 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.

<sup>87</sup> *Id.* at 435-436. Participants in this study were “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

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>88</sup> Averaging across these two studies, just over *five percent* of participants indicated they were currently part of a consensual non-monogamous relationship.<sup>89</sup> (The remaining 94.7% 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>90</sup>

### 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. Several studies have confirmed that the majority of people believe monogamous relationships are more emotionally and physically healthy, less risky when it comes to sexually-transmitted diseases, more trusting, more committed, more sexually satisfying, and less likely to involve jealousy than consensual non-monogamous relationships.<sup>91</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 the overall relationship quality, people in consensual non-monogamous relationships fare roughly the same as, if not better than, people in other sorts of relationships. In fact, a recent review concludes as follows:

the majority of research suggests that the psychological well-being and

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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.

<sup>88</sup> Jennifer D. Rubin, Amy C. Moors, Jes L. Matsick, Ali Ziegler, and Terri D. Conley, *On the Margins: Considering Diversity Among Consensually Non-Monogamous Relationships*, 22 J. FÜR PSYCHOLOGIE 1 (2014). Both studies used convenience sampling techniques using postings on Craigslist and Facebook; the content of the studies used was not specific to consensual non-monogamy.

<sup>89</sup> 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.

<sup>90</sup> *Id.* at 10-11 & 13-14; Hauptert, *supra* note 85, at 433 & 435.

<sup>91</sup> Christopher T. Burris, *Torn Between Two Lovers? Lay Perceptions of Polyamorous Individuals*, 5 PSYCH. & SEXUALITY 258 (2014); Conley et al., *supra* note 15; K. Grunt-Mejer & C. Campbell, *Around Consensual Nonmonogamies: Assessing Attitudes Toward Nonexclusive Relationships*. 53 J. SEX RES. 45 (2016); K. T. Hutzler, T.A. Giuliano, J. R. Herselman, & S.M. Johnson, *Three's a Crowd: Public Awareness and (Mis)perceptions of Polyamory*, 7 PSYCH. & SEXUALITY 1 (2015); Jes L. Matsick, Terri D. Conley, Ali Ziegler, Amy C. Moors & Jennifer D. Rubin, *Love and Sex: Polyamorous Relationships Are Perceived More Favourably than Swinging and Open Relationships*, 5 PSYCH. & SEXUALITY 339 (2014); Amy C. Moors, Jes L. Matsick, & Heath A. Schechinger, *Unique and Shared Relationship Benefits of Consensually Non-Monogamous and Monogamous Relationships: A Review and Insights for Moving Forward*, 22 EUR. PSYCHOLOGIST 55 (2017); D. Joyce Swan & Suzanne C. Thompson, *Monogamy, the Protective Fallacy: Sexual Versus Emotional Exclusivity and the Implication for Sexual Health Risk*, 53 J. SEX RES. 64 (2016).

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>92</sup>

The most robust findings concern safe-sex practices and the risk of sexually-transmitted infections. Several studies have shown that individuals in consensual non-monogamous relationships are much less likely to engage in risky sexual behaviors than those who engage in *non-consensual* extra-dyadic sexual behaviors.<sup>93</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>94</sup> Another Conley study established that people in consensual non-monogamous relationships were more likely to use condoms properly than people in relationships who were engaged in extra-dyadic sex without the knowledge or consent of their spouse/partner.<sup>95</sup> Further, a study by Justin Lehmiller showed that people in consensual non-monogamous relationships had rates of sexually transmitted infections similar to people in other sorts of relationships—monogamous and non-consensual non-monogamous relationships (that is, relationships where there is infidelity)—even though people in consensual non-monogamous relationships report more sexual partners than those in other sorts of relationships.<sup>96</sup> Part of this is due to the fact that a frequent expected pathway for long-term monogamous couples includes 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>97</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 part of being non-monogamous.<sup>98</sup>

<sup>92</sup> Alicia N. Rubel & Anthony G. Bogaert, *Consensual Nonmonogamy: Psychological Well-Being and Relationship Quality Correlates*, 52 J. SEX RES. 961 (2015).

<sup>93</sup> Moors, et al., *supra* note 91; Swan & Thompson, *supra* note 91.

<sup>94</sup> Terri D. Conley, Amy C. Moors, Ali Ziegler & Constantina Karathanasis, *Unfaithful Individuals Are Less Likely to Practice Safer Sex Than Openly Nonmonogamous Individuals*, 9 J. SEXUAL MED. 1559, 1563 (2012).

<sup>95</sup> Conley, et al., *supra* note 15.

<sup>96</sup> Justin Lehmiller, *A Comparison of Sexual Health History and Practices among Monogamous and Consensually Nonmonogamous Sexual Partners*, 12 J. SEXUAL MED. 2022 (2015).

<sup>97</sup> See, e.g., A. M. Corbett, J. Dickson-Gómez, H. Hilario & M. R. Weeks, *A Little Thing Called Love: Condom Use in High-risk Primary Heterosexual Relationships*, 41 PERSP. SEXUAL & REPRODUCTIVE HEALTH 218 (2009); J. Manlove, K. Welti, M. Barry, K. Peterson, E. Schelar & E. Wildsmith, *Relationship Characteristics and Contraceptive Use Among Young Adults*, 43 PERSP. SEXUAL & REPROD. HEALTH 119 (2011).

<sup>98</sup> This has somewhat changed in certain communities of gay and bisexual men where use of pre-exposure prophylaxis drugs (PrEP) like Truvada have become common. See, e.g., Luke A. Boso, *Dignity, Inequality, and Stereotypes*, 92 WASH. L. REV. 1119, 1154 (explaining that the federal government recommends Truvada as PrEP for non-monogamous gay men); Rachel Mills, *New Study*

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 that are at least on par with those reported by people in monogamous relationship.<sup>99</sup> Other studies suggest, perhaps counterintuitively, that people in consensual non-monogamous relationships experience less jealousy than those in relationships that are supposed to be monogamous.<sup>100</sup> Apparently, for some people, having negotiated and agreed upon non-monogamy with one's spouse/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>101</sup> Other studies have suggested that consensual non-monogamy encourages honesty and greater communication among spouses and partners. As Terri 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>102</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>103</sup>

One of the arguments most frequently made by opponents of non-monogamy is

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*in Lancet HIV Journal Ties PrEP to Drop in Condom Use*, AHF (June 14, 2018), <https://www.aidshealth.org/2018/06/new-study-in-lancet-hiv-journal-ties-prep-to-drop-in-condom-use/>.

<sup>99</sup> Rubel & Bogaert, *supra* note 92. See also C. Bergstrand & J.B. Williams, *Today's Alternative Marriage Styles: The Case of Swingers*, 3 ELECTRONIC J. HUM. SEXUALITY (2000), <http://www.ejhs.org/volume3/swing/body.htm>; D. Blasband & L. Peplau, *Sexual Exclusivity Versus Openness in Gay Male Couples*, 14 ARCHIVES SEXUAL BEHAV. 395 (1985); B. Buunk, *Sexually Open Marriages*, 3 ALTERNATIVE LIFESTYLES 312 (1980); D. Dixon, *Perceived Sexual Satisfaction and Marital Happiness of Bisexual and Heterosexual Swinging Husbands*, 11 J. HOMOSEXUALITY 209 (1985); B.G. Gilmartin, *Sexual Deviance and Social Networks: A Study of Social, Family, and Marital Interaction Patterns Among Co-Marital Sex Participants* in BEYOND MONOGAMY 291 (J. R. Smith & L. G. Smith, eds. 1974); W. 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 (2013); J.W. Ramey, *Intimate Groups and Networks: Frequent Consequences of Sexually Open Marriage*, 24 FAM. COORDINATOR 515 (1975). A.M. Rubin, *Sexually Open Versus Sexually Exclusive Marriage: A Comparison of Dyadic Adjustment*, 5 ALTERNATIVE LIFESTYLES 101 (1982); A.M. Rubin & J. R. Adams, *Outcomes of Sexually Open Marriages*, 22 J. SEX RES. 311 (1986).

<sup>100</sup> M. 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 (2005); K. Bonello & M. C. Cross, *Gay Monogamy: I Love You but I Can't Have Sex with Only You*, 57 J. HOMOSEXUALITY 117 (2010); C. Klesse, *Polyamory and Its "Others": Contesting the Terms of Non-Monogamy*, 9 SEXUALITIES 565, (2006); R. Visser & D. McDonald, *Swings and Roundabouts: Management of Jealousy in Heterosexual 'Swinging' Couples*, 46 BRIT. J. SOC. PSYCH. 459 (2007).

<sup>101</sup> See, e.g., Conley, et al, *supra* note 15, at 133; JILLIAN DERI, *LOVE'S REFRACTION: JEALOUSY AND COMPERSION IN QUEER WOMEN'S POLYAMOROUS RELATIONSHIPS* (2015).

<sup>102</sup> See, e.g., Conley et al., *supra* note 84, at 4.

<sup>103</sup> See, e.g., Moors, et al., *supra* note 91, at 60-62.

that children are harmed when their parents are not monogamous.<sup>104</sup> This argument assumes that the effect of 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>105</sup> and because parental relationship dissolution, on some views, often has negative impact on children,<sup>106</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 of 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>107</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. Rather, such young children primarily related to adults in their household through their individual relationship with each adult and that adult's utility to them.<sup>108</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 eight-year-olds<sup>109</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

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<sup>104</sup> See, e.g., BHIKHO PAREKH, RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY 290 (2d. 2d. 2006) ("polygamous marriage ... is ... unlikely to create an environment conducive to the balanced growth of children"); William C. Duncan, *The More the Merrier?*, AM. SPECTATOR, Sept. 2, 2010, available at <http://spectator.org/the-more-the-merrier>; Stanley Kurtz, *Rick Santorum was Right: Meet the Future of Marriage in America*, NAT'L REV., Mar. 23, 2005, available at <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 in the context of polygamy, see RONALD C. DEN OTTER, IN DEFENSE OF PLURAL MARRIAGE 147-158 (2015).

<sup>105</sup> See *supra* note 83.

<sup>106</sup> 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. CT. REV. 368 (2005); Judith S. Wallerstein & Julia M. Lewis, *The Unexpected Legacy of Divorce: Report of a 25-Year Study*, 21 PSYCHOANAL. PSYCHOL. 353 (2004). Wallerstein's conclusions 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, ET AL., FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED (2002); Paul R. Amato, *Reconciling Divergent Perspectives: Judith Wallerstein, Quantitative Family Research, and Children of Divorce*, 52 FAM. REL. 332 (2003); Sol R. Rappaport, *Deconstructing the Impact of Divorce on Children*, 47 FAM. L. Q. 353 (2013).

<sup>107</sup> See SHEFF, *supra* note 23, at 135-163; 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 CONSTANTINE & JOAN CONSTANTINE, GROUP MARRIAGE: A STUDY OF CONTEMPORARY MULTILATERAL MARRIAGE 148-161 (1973); MARIA PALLOTTA-CHIAROLLI, BORDER SEXUALITIES, BORDER FAMILIES IN SCHOOLS 161- 220 (2010).

<sup>108</sup> See Marc Goldfeder & Elisabeth Sheff, *Children of Polyamorous Families: A First Empirical Look*, 5 J.L. & SOC. DEVIANCE 150, 200-202 (2013).

<sup>109</sup> *Id.* at 202-07.

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 type of support.<sup>110</sup> They also noted that their parent(s) 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>111</sup> These children also perceived 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>112</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>113</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>114</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>115</sup> That said, while it used to be the case that many courts viewed a person who was involved in more than one sexual/romantic relationship at the same time as either unfit to be a parent or less fit than a parent not so involved,<sup>116</sup> in the last twenty years or so, this approach has been abandoned for a more fact-specific analysis focused on the best interest of the child.<sup>117</sup> Further, several states, either through statute or case law, now allow that a child can have

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<sup>110</sup> *Id.* at 207-17.

<sup>111</sup> *Id.* at 218-219.

<sup>112</sup> *Id.* at 220-36.

<sup>113</sup> *Id.* at 238. The village reference to is an African proverb made famous by HILLARY RODMAN CLINTON, *IT TAKES A VILLAGE: AND OTHER LESSONS CHILDREN TEACH US* (1996).

<sup>114</sup> See Hadar Aviram, *Make Love, Not Law: Perceptions of the Marriage Equality Struggle Among Polyamorous Activists*, 7 J. BISEXUALITY 261, 269 (2008); Nathan Patrick Rambukkana, *Uncomfortable Bridges: The Bisexual Politics of Outing Polyamory*, 4 J. BISEXUALITY 141, 148 (2004).

<sup>115</sup> See Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 309-313 (2004) (describing Tennessee case where a child was removed from her mother and placed in the custody of the Department of Child's Services on the grounds that that mother's polyamorous relationship with two men was "detrimental to the child.")

<sup>116</sup> See, e.g., *In re State in Interest in Black*, 283 P.2d 887 (Utah 1955) (polygamous parent deemed unfit solely on grounds of being polygamous).

<sup>117</sup> See, e.g., *Sanderson v. Tryon*, 739 P.2d 623 (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 (Utah 1991) (polygamous parents not excluded from consideration as adoptive parents in virtue of being polygamous).

more than two parents.<sup>118</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>119</sup>), legal recognition that a child could have more than two parents does, at a minimum, show greater openness in several jurisdictions to a variety of non-traditional family formations that is based on a consensus that there is no single right way to be a parent.<sup>120</sup>

The commonly-held beliefs that people in relationships that are non-monogamous are less happy, less healthy, and less good parents<sup>121</sup> than people in monogamous relationships are not supported by social scientific research. This becomes especially clear when non-monogamy is studied in a way that distinguishes between consensual non-monogamy and *non-consensual* non-monogamy (infidelity).

#### IV. Law and Policy Implications

Part II of this essay showed how the law of adultery and the associated stigma and social disapprobation create incentives for people to be monogamous. Part III, section A showed that, despite these incentives, non-monogamy is quite common.

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<sup>118</sup> There are five U.S. jurisdictions with statutes that explicitly recognize three or more parents: California (CAL. FAM. CODE § 7612(c) (2017)), Louisiana (LA. CIV. CODE ANN. 185 & 195 (2005)), Maine (ME. REV. STAT. ANN. tit. 19-A § 1853 (2) (2016)), Vermont (15C Vt. Stat. Ann. § 206), and Washington (SB 6037 (2017)). 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) give 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 (Minn. Ct. App. 2000)), New Jersey (D.G. v. K.S., 133 A.3d 703 (N.J. Super. Ct. 2015)), New York (Dawn M. v. Michael M., 55 Misc. 3d 865 (N.Y. Sup. Ct. 2017)), North Dakota (McAllister v. McAllister, 779 N.W. 2d 652 (N.D. 2010)), and Pennsylvania (Jacob v. Schultz-Jacob, 923 A.2d 473 (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 and Mommy: Assisted Reproductive Technologies & the Evolving Legal Recognition of Tri-Parenting*, 31 J. AMER. 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, *eg.*, *id.*; 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 CHI.-KENT L. REV. 9 (2017); Melanie Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309 (2007); Susan F. Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11 (2009).

<sup>119</sup> *Dawn M.*, 55 Misc. 3d at 866.

<sup>120</sup> Several legal scholars have argued for more openness in our view of what makes a parent. See, *eg.*, Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L. J. 2260 (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.

<sup>121</sup> See *supra* notes 91 & 104.

Part I offered 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 III, sections B and C, respectively, presented social scientific evidence that a substantial 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. These insights are in tension with the fact that the law of adultery and attitudes about non-monogamy (even consensual non-monogamy) 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, married to a woman, who is sexually attracted to other women and who would like to act on this desire. At one level, he would like to discuss his desires with his wife, but knowing 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 doesn't want to get a divorce. Despite not getting his wife's consent, such a man might still eventually have extra-dyadic sex. The combination of his sexual drives and interests, which are fairly common,<sup>122</sup> and the law of adultery thereby push him toward infidelity. For reasons discussed above in Part III, section 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:

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<sup>122</sup> See, e.g., BARASH & LIPTON, *supra* note 19; RYAN & JETHÁ, *supra* note 19.



- decriminalize adultery;
- abolish alienation of affection and criminal conversation causes of action;
- eliminate adultery as a ground for divorce;
- stop enforcement of prenuptial agreements that penalize adultery<sup>123</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;
- leave in place the few remaining heart balm causes of action in cases of infidelity, but a person in a consensual non-monogamous relationship would not be able to bring a heart balm suit;<sup>124</sup>
- retain adultery as a ground for divorce when there is infidelity, but eliminate adultery as a ground for divorce consensually non-monogamous couples;
- permit enforcement of prenuptial agreements that penalize adultery only for couples who are not consensually non-monogamous;
- and leave in place other domestic relations laws that punish adultery, but 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>125</sup> After thirty years of marriage, Charlean Eason filed a complaint seeking a legal separation from her husband, Fredrick, and requested alimony. After mediation, the parties signed a separation agreement that said neither would file for divorce on grounds of adultery. This mattered, in part, because, under an aforementioned South Carolina law,<sup>126</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). Subsequently, Charlean filed for divorce on the ground of continuous separation for a period of one year and again requested alimony. Fredrick then counter-claimed for divorce on the ground of adultery and sought the denial of his wife's request for alimony because she had committed adultery. Fredrick initially prevailed: the family court denied Charlean alimony because she had committed adultery. The family court reasoned that the separation agreement contravened public policy and was, therefore, unenforceable; this left in place the statutory prohibition against granting alimony to an adulterous spouse. Ultimately, however, Charlean won: the South Carolina Supreme Court reversed the family court, finding

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<sup>123</sup> This is in accord with the approach that the California appellate court took in *Diosdado v. Diosdado*, 97 Cal.App.4th 470 (Cal. 2002). See *supra* note 62.

<sup>124</sup> 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.

<sup>125</sup> 682 S.E.2d 804 (S.C. 2009).

<sup>126</sup> S.C. CODE. ANN. § 20-3-130. See *supra* note 49.

the separation agreement to be a valid waiver of the “right to use adultery as a bar to alimony”<sup>127</sup> and not a violation of public policy. In South Carolina, in light of *Eason* and § 20-3-130 (the law that disqualifies 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.

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*, 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>128</sup>

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 an 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 an equal footing with monogamy (or consensual non-monogamy) in terms of public policy and morality. Lying to one’s spouse/partner about something that he or she cares about—what infidelity is for many people—may be morally and

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<sup>127</sup> *Eason*, 682 S.E.2d at 807.

<sup>128</sup> *Bowers v. Hardwick*, 478 US 186, 205 (1986) (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 (2003)—seems an appropriate theoretical position to undergird the revisionist approach to the law of adultery.

ethically problematic.<sup>129</sup> Lying (or deception) is part of what distinguishes infidelity, on the one hand, from monogamy and consensual non-monogamy, on the other. To put this point another way, the state has no legitimate interest to oppose sexual fidelity for couples who opt for consensual non-monogamy, sexual fidelity for couples who sometimes have *ménage à trois* or other sorts of group sex activities (activities that constitute adultery), or to oppose sexual fidelity for a couple involving a person who is no longer 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 also not discourage 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. While lying to one's spouse is in general not a good thing to do, the state does not specifically police lying to one's spouse<sup>130</sup> and it has many reasons for not doing so. Consider, for example, financial deception. Imagine a married couple who has agreed to share income with each other and make joint decisions about major expenditures. If one spouse has been hiding some income

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<sup>129</sup> See, e.g., Richard Wasserstrom, *Is Adultery Immoral?* in *PHILOSOPHY AND SEX* 93 (Robert Baker & Frederick Elliston, eds., 2d. ed., 1984). In contrast, Dan Savage, *supra* note 20, 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!"

<sup>130</sup> 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, however, uncommon and, at least historically, were granted only under “extreme” situations. See, e.g., GROSSMAN & FRIEDMAN, *supra* note 38, at 183-87.

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 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>131</sup> The same type of point could be made against the law of adultery's treatment of infidelity, namely that deception by a spouse about extra-dyadic sex is not generally the state's business and the state should have no role to play when such deception occurs (unless the extra-dyadic sex somehow dissipates marital property).

Although I agree 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>132</sup> Further, significant pressure is unlikely to be applied to legislators or other elected officials to repeal these laws and politicians are unlikely to support reform in this area because they are likely worried that doing so shows support for adultery, something they might reasonably believe carries risk of harm to their political careers.<sup>133</sup> In contrast, it is much easier to put a positive spin on the revisionist approach to the law of adultery: the revisionist approach leaves the law of adultery in place except for those people who opt out of it. The revisionist approach can be characterized as giving people a choice to opt out of the existing legal regime but otherwise leaving the current approach to adultery in place as a default rule.

I am not claiming to have fleshed out all the details of a revisionist approach to the law of adultery. In particular, I acknowledge not having given an account of consent<sup>134</sup> that might be needed to buttress the central role of the distinction between *consensual* non-monogamy and *non-consensual* non-monogamy in the 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 to the status quo of the law of adultery and the abolitionist approach to the law of adultery.

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<sup>131</sup> If the financial deception involved the dissipation 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 1067 (6th ed. 2012).

<sup>132</sup> See Sweeney, *supra* note 34, at 170-174.

<sup>133</sup> See, e.g., Anderson, *supra* note 12, at 15 (discussing why legislators and other politicians are unlikely to advocate for reform the law of adultery and related laws).

<sup>134</sup> Giving such an account may be a challenge since "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).

## V. Conclusion

Given the changes in criminal law related to sex,<sup>135</sup> changes in the law of domestic relations,<sup>136</sup> and, most significantly, changes in social mores,<sup>137</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>138</sup> and a few state legislatures have recently abolished significant parts of their state's laws relating to adultery.<sup>139</sup> But approximately thirty-eight states still have laws that in some way disincentivize adultery.<sup>140</sup> The way these states deal with adultery fails to distinguish between infidelity and consensual non-monogamy. Grouping infidelity and consensual non-monogamy 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. The revisionist approach represents the most promising and appropriate way to reform this area of law.

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<sup>135</sup> See, e.g., *Lawrence*, 539 U.S. 558.

<sup>136</sup> See, e.g., *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015); DiFONZO, *supra* note 39.

<sup>137</sup> See, e.g., *supra* text accompanying note 64; and Anderson, *supra* note 12, at 41 (“ideas about love, marriage, family and sexuality have changed drastically in the last century[;] [a]ttitudes about premarital sexual activity, homosexuality, gender roles, parenting, contraception, and divorce have gone through major shifts”).

<sup>138</sup> See *supra* note 12 & RHODE, *supra* note 3.

<sup>139</sup> See *supra* note 43.

<sup>140</sup> See *supra* note 10.