

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

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

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

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

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

want sexually from the situation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Much thinking and writing from within poly communities also sounds in a universalizing register. Most notably, the idea of radical honesty³⁶³ is universalizing about people's involvement in nonmonogamous activity, through serial monogamy and adultery. The poly ethic of honesty posits that many more people engage in nonmonogamous behavior than own up to it. From this perspective, polys seem less a distinct minority than outspoken representatives of the masses. Poly thinking thus shifts scrutiny to monogamy, asking how it is constructed and why people lie about their nonmonogamous behavior and desires.

The idea of privileging love and sex³⁶⁴ also seems to offer benefits to anyone willing and able to experience them. Rather than proposing that some small subset of people might grow and enrich their lives through further sexual and loving relationships, the poly commitment to experiencing love and sex seems a credo of expansiveness, a manifesto of living that has no obvious stopping point or confinement to those who espouse it. Moreover, the poly ethic of self-possession offers a resounding critique of the strictures of monogamy—of its jealousy, possessiveness, and patriarchy—a critique that implicates mainstream institutions.³⁶⁵

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

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

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

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

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

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

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

355. *Id.*

356. *Id.*

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

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

359. *Id.*

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

remarriage cycle remains the best solution.

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

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

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

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

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

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

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

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

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

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

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

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

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

tbl. 131 (1953).

369. See *supra* notes 106–09.

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

371. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

378. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

388. See *supra* note 316.

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

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

391. *Id.*

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

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

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

C. Alternatives and Implications

Alongside its universalizing aspect, polyamory has a minoritizing strand in

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

393. See *infra* Section V.A.

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

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

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

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

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

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

397. See *supra* text accompanying note 366.

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

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

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

propose marriage to him!⁴⁰¹

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

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

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

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

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

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

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

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

friends, he observes:

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

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

The suggestion of an essential poly identity presents intriguing possibilities for a politics based on an ingenious or a strategic essentialism⁴⁰⁸ through which polys could try to build an image of themselves as a discrete minority. Convincing the mainstream nonmonogamists that polyanomorists are a recognizable group with a distinct identity might be polys' best chance of overcoming the effects of the paradox of prevalence.

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

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

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

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

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

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

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

Second, this view of polyanomy may not be minoritizing enough. The jealousy-poly continuum looks more like a sexual-orientation spectrum that recognizes a blurring of categories and a wide middle range of bisexuality. Eddie's "grey scale" of jealousy—and thus of polyanomy—is reminiscent of Kinsey's sexual continuum⁴¹¹ and ideas of universal bisexuality.⁴¹² Like bisexuality, polyanomy founded on this idea of a continuum is unlikely to reassure its putative outsiders that they are safe from the threat of falling into this state that they deem undesirable.

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

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

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

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

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

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

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

at the expense of a more radical vision.⁴¹⁵

* * *

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

V.

DISPOSITIONS: SEXUAL AND LEGAL

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

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

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

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

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

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

A. A Dispositional Model of Poly and Mono Desire

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

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

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

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

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

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

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

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

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

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

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

Table 1 presents one idea of an extreme poly disposition. We can use this table to imagine an individual whose desires tip in the poly direction in each of the four boxes. In Box A, which concerns the question of exclusivity for oneself, this individual desires more than one sexual partner for herself, perhaps out of a desire for sexual variety or because she finds many people sexually attractive. In Box B, which concerns exclusivity with regard to one's partner, she desires her partner to have more than one sexual partner. That is, the person with a complete poly disposition wants her partner to have sex with people in addition to her. Factors contributing to this desire might be sexual excitement at the idea of her partner's having sex with someone else⁴²² or the emotion of compersion, the poly term for the opposite of jealousy, for empathetic pleasure in one's partner's sexual satisfaction.⁴²³

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

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

⁴²³ See *supra* text accompanying note 315.

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

⁴²¹ See *supra* Section II.A.1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

430. See *supra* notes 50–51.

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

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

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

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

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

433. See *supra* note 316.

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

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

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

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

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

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

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

438. See *supra* Section V.A.

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