

New York University

# Review of Law & Social Change

Monogamy's Law:  
Compulsory Monogamy and Polyamorous Existence

*Elizabeth F. Emens*

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

ELIZABETH F. EMENS<sup>†</sup>

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

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

<sup>†</sup> Bigelow Teaching Fellow and Lecturer in Law, University of Chicago School of Law, 2003–05, J.D., Yale Law School, 2002. Ph.D. in English, King's College, University of Cambridge, 2002. I am grateful to the following people for their contributions to the development of this project: Lisa Van Alstyne, Ian Ayres, Katharine K. Baker, Brian Bix, John Bronsteen, Mary Anne Case, Derek Dorn, Moon Duchin, J. Richard Emens, Katherine Franke, Carolyn Frantz, Kent Greenfield, Philip Hamburger, Bernard Harcourt, Adam Hickey, Morris Kaplan, Amy Kapczynski, Gregory Khalil, Sarah Lawsky, Liz Loeb, Sam Miller, Martha Nussbaum, Brett Phillips, Eric Posner, Jeff Redding, Bill Rubenstein, Natasha Rulyova, Reva Siegel, Rachel Smith, Sonja Shield, Stephanie Stern, Geoff Stone, Lior Strahilevitz, Jeannie Suk, Julie Suk, Cass Sunstein, Beatrice Wolper, Kenji Yoshino, and participants in workshops and classes at UCLA, the University of Cambridge, the University of Chicago, and Yale Law School. I also wish to thank the excellent staff of the *N.Y.U. Review of Law & Social Change*, especially Sonja Shield and Kate Griffith, and of the D'Angelo Law Library at the University of Chicago, especially Greg Nimmo. All errors and omissions are of course my own.

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

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

—Adam Phillips<sup>2</sup>

## I.

### INTRODUCTION

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

\*\*\*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28. See *infra* Section III.C.

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

30. See *infra* Section III.B.

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

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

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

31. See *infra* Part IV.

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

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

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

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

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

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

\*\*\*

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

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

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

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

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

## II. COMPULSORY MONOGAMY

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

### A. Monogamy's Mandate

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

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

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

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

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

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

1. *The Western Romance Tradition*

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

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

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

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

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

42. *Id.*

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

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

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

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

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

45. See, e.g., JANE AUSTEN, *EMMA* 407-08 (R.W. Chapman ed., Oxford Univ. Press 1966) ("Emma's eyes were instantly withdrawn, and she sat silently meditating, in a fixed attitude, for a few minutes. A few minutes were sufficient for making her acquainted with her own heart. . . . She touched—she admitted—she acknowledged the whole truth. Why was it so much worse that Harriet should be in love with Mr. Knightley, than with Frank Churchill? . . . It darted through her, with the speed of an arrow, that Mr. Knightley must marry no one but herself!"; *id.* at 432 ("Mr. Knightley] had been in love with Emma, and jealous of Frank Churchill, from about the same period, one sentiment having probably enlightened him as to the other."); WHEN HARRY MET SALLY (MGM/UA Studios 1969) (conveying to the audience that the protagonists are more than friends through their jealousy over each other's dates).

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

47. See *supra* text accompanying note 41.

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

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



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

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

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

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

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

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

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

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

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

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

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

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

58. *Id.* at 948.

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

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

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

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

---

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

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

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

63. *Id.* at 25.

64. *Id.*

65. *Id.* at 27.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

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

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

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

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

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

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

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

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

---

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

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

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

73. *Id.* at 28-29.

74. *Id.* at 29.

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

## 2. *Stories from Biological Anthropology*

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

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

75. Martha C. Nussbaum, *Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies*, 80 VA. L. REV. 1515, 1517-18 (1994). Nussbaum writes: On October 15, 1993, I found myself on the witness stand in a courtroom in Denver,

Colorado, telling Colorado District Judge H. Jeffrey Bayless about Plato's *Symposium*. Because I had a very short time to testify as an expert witness, I focused above all on the speech of Aristophanes, which I had elsewhere argued to be one of the speeches in which Plato expresses views that he wishes his reader to take especially seriously. I told the court the story of how human beings were once round and whole—but now, cut in half for their overambitiousness, they feel a sense of lost wholeness and run about searching for their "other half." There are, Aristophanes tells us, three types of search, corresponding to three original species of human beings. There are males whose other half is male, females whose other half is female, and people whose other half is of the opposite sex. The speech describes the feelings of intimacy and joy with which the lost other halves greet one another, and describes the activity of sexual intercourse as a joyful attempt to be restored to the lost unity of their original natures. This is so no less for the same-sex than for the opposite-sex couples; in all cases, lovemaking expresses a deep inner need coming from nature, and in all cases the couples, so uniting, have the potential to make a valuable civic contribution.

*Id.* (internal citations omitted).

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

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

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

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

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

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

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

79. *Id.*

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

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

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

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

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

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

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

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

Because compelling counternarratives about nonmonogamy are also told

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

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

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

90. *Id.*

91. *Id.*

92. *Id.*

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

#### B. Monogamy's Reality

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

#### 1. The Failures of Supermonogamy

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

93. *See supra* note 76.

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

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

96. *Id.* at 207. Ridley does not want his readers to think that he is endorsing adultery: By describing adultery as a force that shaped our mating system, I am not "justifying" it. Nothing is more "natural" than people evolving the tendency to object to being cuckolded or cheated on, so if my analysis were to be interpreted as justifying adultery, it would be even more obviously interpreted as justifying the social and legal mechanisms for discouraging adultery. What I am claiming is that adultery and its disapproval are both "natural."

*Id.* at 219.

97. Weis, *supra* note 38 (citing E. Berscheid, *Emotion*, in CLOSE RELATIONSHIPS 110–68 (H. H. Kelley et al. eds., 1983)). Weis reports that the rate of divorce has leveled since 1980. *Id.* (citing U.S. DEPT. OF COMMERCE BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS: MARITAL STATUS AND LIVING ARRANGEMENTS (1985)); *see also* P.C. Glick, *Marriage, Divorce, and Living Arrangements: Prospective Changes*, 5 J. FAM. ISSUES 7 (1984); A.J. Norton & J. E. Moorman, *Current Trends in Marriage and Divorce Among American Women*, 49 J. MARRIAGE & THE FAMILY 3 (1987); Shostak, *supra* note 52, at 355).

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

## 2. *The Failures of Simple Monogamy*

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

98. Weis, *supra* note 38.

99. *Id.*

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

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

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

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

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

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

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

124-25.

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

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

107. *Id.* at 1507.

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

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

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

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

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

\*\*\*

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

### III. CONTEMPORARY POLYAMORY

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

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

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

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

This Part discusses the scope, terms, and structures of polyamory today. Since such skeletal information does little to enrich our understanding of a practice, this Part also portrays several polyamorous relationships. These portraits aim to capture something of the feeling and experience of living inside these relationships by weaving together structural aspects and mundane details. How much anyone can understand another's experience is a question beyond the scope of this article, but despite the sage advice that you have to "go there [to] *know* there,"<sup>115</sup> this Part proceeds from the premise that words allow at least the possibility of seeing the world through the eyes of another. Finally, this Part discusses the ethical vision of polyamory, setting forth five ideas that I derive from writings by its practitioners.

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

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

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

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

The distinction Krauthammer draws here is instructive. American ideas of

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

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

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



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

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

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

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

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

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

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

122. See *supra* Part I.

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

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

#### A. Terms and Models

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

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

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

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

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

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

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

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