**Marriage and Sexual Fidelity**

**Abstract for AALS Midyear Workshop “Shifting Foundations in Family Law”**

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Couples consisting of two men (whether married or not) seem to be more likely than other couples to have “consensual non-monogamous relationships,” that is, relationships in which it is explicitly agreed that, at least in some circumstances, a partner can have sex with people other than his spouse/partner. Advocates of the legal recognition of same-sex relationships have not focused on this difference between same-sex relationships and other relationships (choosing instead to focus on the *similarities* between same-sex and different-sex couples). In contrast, some opponents of such recognition have deployed this difference (unsuccessfully, for the most part) as an argument against same-sex marriage.

A significant percentage of people who are *not* in consensual non-monogamous relationships (whether with a person of the same or different sex) will at some point in their relationship have sex with someone other than his/her partner. Such non-consensual non-monogamy (that is, infidelity) occurs despite social stigma against it and despite the persistence of adultery as a legal concept in both criminal and family law. Specifically, adultery remains illegal in twenty-two states, adultery continues to be a ground for divorce in thirty-two states, and, in some states, the fact that one spouse has committed adultery has financial implications upon divorce or death and may affect parental rights. Not only do states endorse and incentivize sexual exclusivity among married people, states may discourage consensual non-monogamy by not enforcing agreements to have a consensual non-monogamous relationship.

I argue that the state should not endorse sexual exclusivity through laws and policies, in part, for privacy reasons and, in part, because monogamy is, practically speaking, an unattainable goal for many people and setting such an unattainable goal may serve to undermine relationships that might otherwise survive. Further, I argue against disincentivizing consensual non-monogamy, in part, because doing so incentivizes *non-consensual* non-monogamy. Instead, I suggest that, insofar as the state has an interest in the maintenance of “good” marriages and relationships, the state should encourage open communication about sexual exclusivity and to enforce at least some agreements that spouses make about such matters.