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The Pitfalls of Polyamorous Parenting in Rhode Island: The Crime of Adultery and the Best Interests of the Child Under the Uniform Parentage Act

Thomas M. Wall*

INTRODUCTION

Aisha and Beth are a married couple who want to have a child with Carlos, a straight male, who will be the sperm donor. All three adults have good jobs and supportive families. All three adults seek recognition as the child's legal parents.

Now, imagine another group—Doris, Emily, and Fred. Imagine that this group is identical in every meaningful respect to the first group: Doris and Emily are already married and want to have a child with Fred, who will donate the sperm. All three adults have good jobs and supportive families, and all three seek recognition as the child's legal parents. Doris and Emily, however, are romantically involved with Fred. All three are in a polyamorous relationship and form a “triad,” more popularly known as a “throuple.”¹

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1. Edward Stein, *Adultery, Infidelity, and Consensual Non-Monogamy*, 55 WAKE FOREST L. REV. 147, 151 n.16 (2020). Marriage-like relationships in which more than two individuals are romantically involved with each other include relationships involving three people (a “triad or a “throuple”), four people (a “quad”), and more than four people (a “moresome”). *Id.*

The difference between the two relationships is straightforward. Aisha and Beth do not have a romantic connection with Carlos. They will raise their child with Carlos as a platonic co-parent. By contrast, Doris and Emily are romantically involved with Fred. They will raise their child with Fred as a romantic member of their household. As it stands today, under Rhode Island law courts can potentially treat these two groups differently in parentage determinations.

The Rhode Island Parentage Act (RIPA) passed in Rhode Island in July 2020 and took effect on January 1, 2021.² Rhode Island is the fourth state to pass a version of the Uniform Parentage Act of 2017 (UPA), which has been introduced in three more states as of this writing.³ The Uniform Law Commission's intent in revising UPA was to update and standardize parenting laws nationwide, to gender-neutralize parentage terms, and to smooth out custody determinations for gay parents as well as couples who use surrogates by adding a *de facto* parentage status, that, in effect, permits a child to have more than two legal parents.⁴ In other words, UPA was intended to make it easier for families like Aisha, Beth, and Carlos to establish full parentage. One might think that the same applies to Doris, Emily, and Fred, but their family has potential issues in cases of custody and parentage because Doris and Emily are married and in a polyamorous relationship with Fred, meaning every member of this family is technically committing the crime of adultery.

In Rhode Island, adultery is a criminal offense—the adultery statute states that “illicit sexual intercourse between any two (2) persons, where either of them is married, shall be deemed adultery in each” and makes the act a misdemeanor punishable by a \$500 fine.⁵ The Rhode Island statute does not account for consent, so

2. Uniform Parentage Act, ch. 59, 2020 R.I. Pub. Laws 211 (codified as amended at 15 R.I. GEN. LAWS § 15-8.1 (2020)).

3. See *Parentage Act*, UNIF. LAW COMM'N, <https://www.uniform-laws.org/committees/community-home?communitykey=c4f37d2d-4d20-4be0-8256-22dd73af068f&tab=groupdetails> [<https://perma.cc/CP9J-W3YA>] (last visited June 2, 2021). Versions of the 2017 UPA have passed in California, Vermont, Washington, and most recently, Rhode Island. *Id.* As of 2021, the legislation has also been introduced in Connecticut, Maine, Pennsylvania, and Nevada. *Id.*

4. UNIF. PARENTAGE ACT 1–3 prefatory n. (UNIF. LAW COMM'N 2017).

5. 11 R.I. GEN. LAWS § 11-6-2 (2020).

even if both partners to the marriage approve of and consent to the extramarital romantic liaisons, the act is criminal.⁶ Further, the Rhode Island statute does not distinguish between parties to a marriage and outsiders: Doris, Emily, and Fred are all equally guilty of adultery under the Rhode Island law.⁷ While adultery is rarely prosecuted on its own, the adultery statute implicates other areas of the law such as child custody determinations.⁸ Here, because Doris, Emily, and Fred are engaged in an adulterous relationship, and because adultery is a crime in Rhode Island, a court's moral view of this family's relationship will become part of the official discussion as to whether they should be allowed to establish tri-parenting rights.

The Rhode Island Legislature should repeal the adultery statute outright, or else rewrite the adultery statute to account for consent. Both approaches would eliminate consideration of the morality of parental relationships in custody matters. The legislature should also revise RIPA to clarify that courts may adjudicate a child to have more than two legal parents. At the very least, courts should consider the small but growing body of evidence suggesting that polyamory might not be detrimental to children and could even offer some benefits.⁹

Part I of this Comment will discuss the evolving state of families and relationships in the United States, in particular the growing phenomenon of consensually non-monogamous relationships. Part II will pivot to adultery statutes and the stigma they generate before discussing Rhode Island's adultery statute specifically. Part III examines key portions of the Rhode Island Parentage Act and its relationship to the "best interests of the child" analysis required in custody determinations, before then scrutinizing our two hypothetical families and the results they might expect under the new law. Part IV will consider workable

6. *State v. Karagavoorian*, 79 A. 1111, 1113 (R.I. 1911) (recognizing that an agreement between a husband and wife that condones the act of adultery does not release either party from criminal liability for the commission of the act).

7. See 11 R.I. GEN. LAWS § 11-6-2 (noting that "sexual intercourse between any two (2) persons . . . shall be deemed adultery in *each*." (emphasis added)).

8. See DAN MARKEL, JENNIFER M. COLLINS & ETHAN J. LEIB, PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 71–72 (2009).

9. See discussion *infra* Section II.B.1

solutions and recommend decriminalizing adultery in the state, or, alternately, rewriting the adultery statute to account for consent, as well as revising RIPA to permit adjudication of more than two legal parents for a child. This Comment concludes that these reforms are necessary to protect polyamorous families and “to ensure ‘that all children and all parents have equal rights with respect to each other.’”¹⁰

I. A BRIEF OVERVIEW OF FAMILY AND RELATIONSHIP STRUCTURES

American families are changing.¹¹ Until the 1920s, most Americans lived in “big sprawling households” composed of multi-generational groups of adults and children oriented around a central focus like running the family farm or business.¹² Although large families were hectic and often lacked privacy,¹³ they provided many benefits, from additional financial resources to additional help with raising children and performing household chores.¹⁴ As the post-World War II economy boomed, people moved to the cities and suburbs in droves and “a certain family ideal became engraved in our minds: a married couple with 2.5 kids.”¹⁵

There are signs that this ideal, too, may be evolving.¹⁶ One reporter noted, “[t]he idea that the default family unit consists of two straight parents and their children is outdated and doesn’t reflect the U.S. today.”¹⁷ The legal recognition of same-sex

10. UNIF. PARENTAGE ACT 1 prefatory n. (UNIF. L. COMM’N 2017) (quoting UNIF. PARENTAGE ACT § 2 cmt. (UNIF. L. COMM’N 1973)).

11. See David Brooks, *The Nuclear Family Was a Mistake*, THE ATLANTIC (Mar. 2020), <https://www.theatlantic.com/magazine/archive/2020/03/the-nuclear-family-was-a-mistake/605536/> [https://perma.cc/249V-XWS9] (noting that the nuclear family is on the decline while extended family structures and chosen family structures are rising).

12. See *id.*

13. *Id.*

14. Stephanie Kramer, *U.S. Has World’s Highest Rate of Children Living in Single-Parent Households*, PEW RESEARCH CTR. (Dec. 12, 2019), <https://www.pewresearch.org/fact-tank/2019/12/12/u-s-children-more-likely-than-children-in-other-countries-to-live-with-just-one-parent/> [https://perma.cc/W6UP-KCAV].

15. See Brooks, *supra* note 11.

16. See Brooks, *supra* note 11.

17. Angela Chen, *The Rise of the 3-Parent Family*, THE ATLANTIC (Sep. 22, 2020), <https://www.theatlantic.com/family/archive/2020/09/how-build-three->

marriage has brought about an explosion in gay parenting.¹⁸ Almost a quarter of children in the United States live in single-parent households—more than anywhere else in the world¹⁹—and the number of large multi-generational households is on the rise.²⁰ Indeed, traditional nuclear families are now a minority of U.S. households.²¹

At the same time that families are changing, adult relationships are changing too, and so is the way that we look at them.²² In the past, marriage was considered to be primarily about child-rearing, but family law in the United States has largely disaggregated the two concepts from each other, and thus marriage is often viewed as more about personal adult fulfillment than about raising children.²³ At this point it is helpful to review some basic adult relationship structures and terms before moving onto the discussion of adultery and polyamory.

parent-family-david-jay/616421/ [perma.cc/NHP3-852X]. One 2014 Pew Research report “found that fewer than half of American children lived in a so-called traditional family environment, with two married parents on their first marriage.” *Id.* (citing Gretchen Livingston, *Fewer than half of U.S. kids today live in a ‘traditional’ family*, PEW RESEARCH CTR. (Dec. 22, 2014), <https://www.pewresearch.org/fact-tank/2014/12/22/less-than-half-of-u-s-kids-today-live-in-a-traditional-family/> [https://perma.cc/FH53-HPAW]).

18. See Shoshana K. Goldberg & Kerith J. Conron, *How Many Same-Sex Couples in the U.S. are Raising Children?*, WILLIAMS INST. (July 2018), <https://williamsinstitute.law.ucla.edu/publications/same-sex-parents-us/> [https://perma.cc/2C5T-9B75].

19. See Kramer, *supra* note 14.

20. D’Vera Cohn & Jeffrey S. Passell, *Record 64 million Americans live in multi-generational households*, PEW RESEARCH CTR. (April 18, 2018), <https://www.pewresearch.org/fact-tank/2018/04/05/a-record-64-million-americans-live-in-multigenerational-households/> [perma.cc/P7JG-JKKK]; see also Anthony Cilluffo & D’Vera Cohn, *6 demographic trends shaping the U.S. and the world in 2019*, PEW RESEARCH CTR. (April 11, 2019), <https://www.pewresearch.org/fact-tank/2019/04/11/6-demographic-trends-shaping-the-u-s-and-the-world-in-2019/> [perma.cc/FP3C-77UD].

21. See Brooks, *supra* note 11.

22. Anna Brown, *Nearly Half of U.S. Adults Say Dating Has Gotten Harder for Most People in the Last 10 Years*, PEW RESEARCH CTR. (August 20, 2020), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2020/08/PSDT_08.20.20.dating-relationships.full_report.pdf [perma.cc/LR3Y-NZ65].

23. See Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 2031 (2010) (“[F]amily law already has disaggregated marriage from parenting.”).

A. *Monogamy and Non-monogamy*

Monogamy is when two people are in a relationship and neither engages in sexual activity with anyone outside the relationship.²⁴ Monogamy is both the cultural and legal norm in the United States.²⁵ One scholar noted that “[n]orms strongly urge people toward monogamy, and law contributes to that pressure in the various ways . . . namely criminal adultery laws, bigamy laws, marriage law, custody cases, legal workplace discrimination, and zoning laws.”²⁶

By contrast, non-monogamy is when one or more parties to a relationship engage in sexual or romantic relations with someone outside of the relationship.²⁷ People opt for non-monogamy for a variety of reasons. For one example, most people in relationships still experience feelings of attraction towards others regardless of their relationship status; in other words, most people report being “tempted” to engage in non-monogamous behavior and, “for a significant number of people, it is very difficult to resist this temptation and remain sexually active with just one person for an extended period of time.”²⁸ Further, sometimes people in relationships “seek sex outside of their relationship when their spouse or partner becomes uninterested in sex or suffers from a health problem that leaves them unable to have sex.”²⁹

24. See Stein, *supra* note 1, at 151.

25. See generally Elisabeth Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004). As one person put it, “I never opted into monogamy, it was assigned to me, like straightness.” Alice Hines, *Polyamory Works for Them*, N.Y. TIMES (Aug. 4, 2019), <https://www.nytimes.com/2019/08/03/style/polyamory-nonmonogamy-relationships.html?action=click&module=RelatedLinks&pgtype=Article> [perma.cc/ST7N-GZ49].

26. See Emens, *supra* note 25, at 284. Some states refuse to enforce pre-nuptial agreements if they have the effect of waiving adultery as a ground for divorce (or even the hint of it) because adultery is an enumerated ground for divorce; thus, courts tend to “view waiving adultery as a violation of public policy.” See Stein, *supra* note 1, at 163.

27. See *id.* at 152.

28. See *id.* at 153. The group of people who feel attraction to others while they are in a relationship may be further subdivided into those who remain sexually interested in their partners and those who do not; both may nevertheless crave sexual variety. *Id.*

29. See *id.* at 154.

Non-monogamy may be conceptually divided into two categories along an axis of consent. On the one hand is *non-consensual* non-monogamy, otherwise known as infidelity or “cheating.”³⁰ Cheating is when a person in a relationship has sex with someone outside the relationship and their partner has not consented to it.³¹ In the United States, rates of infidelity are high.³² One study estimated that about twenty-five percent of marriages see at least one incident of infidelity,³³ but another estimates the rate may be as high as sixty percent.³⁴ Moreover, because of the stigma attached to adultery and non-monogamy,³⁵ statistics likely underrepresent the extent of the behavior in the population.

On the other hand is *consensual* (or ethical) non-monogamy, an umbrella term that encompasses a constellation of relationship structures that permit the parties to a relationship to engage in outside sexual and romantic relations with the consent and knowledge of their primary partner.³⁶ Consensual non-monogamy encompasses a variety of relationship shapes including

30. See *id.* at 152.

31. See *id.*

32. Terri D. Conley, Amy C. Moors, Jes L. Matsick & Ali Ziegler, *The Fewer the Merrier?: Assessing Stigma Surrounding Consensually Non-Monogamous Romantic Relationships*, UNIV. MICH. ANALYSES SOC. ISSUES & PUB. POL’Y 1, 25 (2012).

33. See Adrian J. Blow & Kelley Hartnett, *Infidelity in Committed Relationships II: A Substantive Review*, 31 J. MARITAL & FAM. THERAPY 217, 220 (2005) (citing EDWARD O. LAUMANN, JOHN H. GAGNON, ROBERT T. MICHAEL & STUART MICHAELS, *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* (1994); Michael W. Wiederman, *Extramarital Sex: Prevalence and Correlates in a National Survey*, 34 J. SEX RES. 167, 167–74 (1997)).

34. Kevin T. Hutzler, Traci A. Giuliano, Jordan R. Herselman & Sarah M. Johnson, *Three’s a Crowd: Public Awareness and (Mis)perceptions of Polyamory*, 7 PSYCHOL. & SEXUALITY 69, 70 (2015) (citing Anita L. Vangelisti & Mandi Gerstenberger, *Communication and Marital Infidelity*, in *THE STATE OF AFFAIRS: EXPLORATIONS IN INFIDELITY & COMMITMENT* 59, 59–78 (Jean Duncombe et al. eds, 2004)).

35. See *infra* Part II.

36. See generally Emens, *supra* note 25 (providing an excellent overview of polyamory and non-monogamous relationship structures).

polygamous,³⁷ “monogamish,”³⁸ open,³⁹ swinging,⁴⁰ and polyamorous relationships.⁴¹ There are no set rules for what these relationships look like;⁴² rather, couples tend to form agreements with each other that outline such parameters as the times, places, and people with whom and conditions under which such interactions are permitted.⁴³

B. *Polygamy and Polyamory*

The most widely known form of consensual non-monogamy is polygamy, or one person with multiple spouses.⁴⁴ Polygamy in the United States is closely associated with Mormons, who practice a particular form of polygamy called polygyny (one man with multiple wives),⁴⁵ but the term also includes bigamy (marriage to two others),⁴⁶ and the less-common polyandry (one woman with

37. See generally Casey Faucon, *Polygamy After Windsor: What's Religion Got to Do with It?*, 9 HARV. L. & POL'Y REV. 471 (2015) (summarizing the state of polygamy in the United States today).

38. See Stein, *supra* note 1, at 156. Advice columnist Dan Savage coined the term *monogamish* to describe couples who are “mostly monogamous,” meaning that they are open to non-monogamy on occasion but, generally, are not “actively looking” for extra-dyadic sex. *Id.*

39. See Ethan Czuy Levine, Debby Herbenick, Omar Martinez, Tsung-Chieh Fu & Brian Dodge, *Open Relationships, Nonconsensual Nonmonogamy, and Monogamy Among U.S. Adults: Findings from the 2012 National Survey of Sexual Health and Behavior*, 47 ARCHIVES SEXUAL BEHAV. 1439, 1439–50 (2012).

40. See Stein, *supra* note 1, at 155.

41. See generally Emens, *supra* note 25 (summarizing the issues faced by polyamorous people).

42. Kelly Gonsalves, *What Ethical Non-Monogamy Really Means & Why People Practice It*, MINDBODYGREEN.COM (Oct. 27, 2020), <https://www.mindbodygreen.com/articles/ethical-non-monogamy-guide> [https://perma.cc/SQQ9-EN78].

43. See Stephanie Coontz, *How to Make Your Marriage Gay*, N.Y. TIMES (Feb. 13, 2020), <https://www.nytimes.com/2020/02/13/opinion/sunday/marriage-housework-gender-happiness.html> [perma.cc/228Y-GGDU].

44. See Faucon, *supra* note 37.

45. See Emens, *supra* note 25, at 282.

46. See R.I. GEN. LAWS § 11-6-1 (2020) (“Every person who shall be convicted of being married to another, or of cohabiting with another as husband and wife, having at the time a former husband or wife living, shall be fined not exceeding one thousand dollars (\$1000) . . .”).

multiple husbands).⁴⁷ Regardless of the sex of the people involved, “polygamy” refers to multiple contemporaneous marriages and has been heavily criticized.⁴⁸ It is illegal in all fifty states.⁴⁹

In contrast, polyamory is “the practice, state, or ability of having more than one sexual . . . relationships [sic] at the same time, with full knowledge and consent of all partners involved.”⁵⁰ This is markedly different from polygamy, where the husband is in a relationship with each of the wives, but they are not in relationships with each other; and, the nature of the relationship is typically governed by religious doctrine.⁵¹ Polyamorists, on the other hand, may partake in a variety of relationship structures but overall the nature of their relationships may be characterized by adherence to philosophical and ethical governing principles such as “self-knowledge, radical honesty, consent, self-possession, and privileging love and sex over other emotions and activities such as jealousy.”⁵² Many outsiders imagine polyamory as a state of constant orgies and sexual activity,⁵³ but, in fact, polyamorists spend a lot of time talking through these principles in the effort to supplant the negative emotion of jealousy with its opposite, “compersion.”⁵⁴

Over the past four decades, consensually non-monogamous relationships have become increasingly popular.⁵⁵ Both gay and heterosexual couples are known to make such relationship

47. See Emens, *supra* note 25, at 302.

48. See *infra* Part II.

49. See Shayna M. Sigman, *Everything Lawyers Know About Polygamy is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101, 108 (2006).

50. See Ann E. Tweedy, *Polyamory as a Sexual Orientation*, 79 U. CIN. L. REV. 1461, 1479 (2011).

51. See Emens, *supra* note 25, at 301. “Polygamy, with its rank inequality and female subservience . . . [I]nvites exploitation of and degrading competition among wives, with often baleful social and familial consequences.” *Id.*

52. See Emens, *supra* note 25, at 283.

53. See discussion *infra* Section II.B.

54. See Emens, *supra* note 25, at 330 (“Compersion . . . [is the] feeling of happiness in knowing that others you love share joy with each other, especially taking joy in the knowledge that your beloveds are expressing their love for one another. The opposite of jealousy.”).

55. Hutzler et al., *supra* note 34, at 69.

agreements.⁵⁶ One study found that four percent of people surveyed were in consensual, non-monogamous relationships⁵⁷ while another estimated twenty percent of U.S. adults had previously been in such a relationship.⁵⁸ Millions self-report that they engage in some form of non-monogamous sexual activity outside of the traditional two-person relationship format, and there may be as many as ten to twelve million polyamorists in the United States,⁵⁹ which researchers from the University of Michigan suggest represents the “potential to start a social movement for civil rights.”⁶⁰

II. HURDLES POLYAMOROUS PEOPLE FACE: THE CRIME OF ADULTERY AND SOCIAL STIGMA

Professor Elisabeth Emens observed that “[m]ost 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.”⁶¹ Indeed, the sheer number of issues facing polyamorous families precludes their discussion here. The remainder of this Comment focuses on the intersection of the social hostility identified by Professor Emens

56. See Coontz, *supra* note 43. Many gay couples work out detailed agreements about what kinds of sexual contact are permissible outside of the relationship, under what circumstances, and how often. *Id.*; see also Conley et al., *supra* note 32, at 42. Gay men report being equally happy in monogamous and consensually non-monogamous relationships. Conley et al., *supra* note 32, at 42.

57. See *id.* at 3.

58. See Levine et al., *supra* note 39, at 1440.

59. Jonathan Porter, Comment, *L'Amour for Four: Polygyny, Polyamory, and the States Compelling Economic Interest in Normative Monogamy*, 64 EMORY L.J. 2093, 2095–96 (2015) (citing Olga Khazan, *Multiple Lovers, Without Jealousy*, THE ATLANTIC (July 21, 2014), <https://www.theatlantic.com/health/archive/2014/07/multiple-lovers-no-jealousy/374697/> [<https://perma.cc/8BAU-MJXY>]).

60. Conley et al., *supra* note 32, at 3; see also Levine et al., *supra* note 39, at 1440. The numbers of people reporting involvement in consensually non-monogamous relationships represent a group of people comparable in size to the LGBTQ population. Levine et al., *supra* note 39, at 1440.

61. See Emens, *supra* note 25, at 283.

with two of these legal burdens: Rhode Island's adultery statutes and potential custody consequences under the newly passed RIPA.

A. Adultery

Adultery is "when a married person has sex with someone to whom he or she is not married."⁶² Nationally, adultery laws have been on the decline throughout the twentieth century.⁶³ After the American Law Institute declared adultery laws "subject to abuse" and removed the crime from the 1962 Model Penal Code, stating that "private immorality should be beyond the reach of the penal law," eleven states followed the recommendation and repealed their own criminal adultery statutes.⁶⁴ During the no-fault divorce wave in the 1970s, many states struck their adultery statutes and implemented a pure no-fault divorce regime in which spousal misconduct is not considered in divorce decisions while others adopted a hybrid approach that added "no-fault" to the list of reasons one may use to file for divorce while leaving the other reasons intact.⁶⁵ Rhode Island and thirty-one other states adopted the hybrid approach; adultery remains a ground for divorce in these states today.⁶⁶

In 2003, the Supreme Court decision in *Lawrence v. Texas* invalidated a state statute criminalizing consensual homosexual sodomy among adults on Fourteenth Amendment grounds.⁶⁷ In the wake of that decision, several states moved to remove or amend morality laws, including adultery laws.⁶⁸

Other states have found decriminalization "too symbolically problematic or politically unpopular to undertake."⁶⁹ Recent efforts

62. See Stein, *supra* note 1, at 148.

63. Gabrielle Viator, Note, *The Validity of Criminal Adultery Prohibitions After Lawrence v. Texas*, 39 SUFFOLK U. L. REV. 837, 842 (2006).

64. *Id.* at 842 n.42.

65. See Stein, *supra* note 1, at 159.

66. *Id.* at 159–60.

67. *Lawrence v. Texas*, 539 U.S. 558, 558 (2003).

68. See Viator, *supra* note 63, at 842–43; see also Joanne Sweeny, *Adultery and fornication: Why are states rushing to get these outdated laws off the books?*, SALON (May 6, 2019, 6:00 AM), <https://www.salon.com/2019/05/06/adultery-and-fornication-why-are-states-rushing-to-get-these-outdated-laws-off-the-books/> [perma.cc/YRT6-Y7KZ].

69. See Viator, *supra* note 63, at 843.

at repeal failed in both Virginia⁷⁰ and Rhode Island.⁷¹ “[A]lthough prosecutions are rare . . . adultery remains a crime in nineteen states today and a felony in five of them.”⁷² Moreover, adultery remains “a behavior with the potential for significant legal and social consequences in more than three-quarters of the states.”⁷³

In Rhode Island, the adultery statute provides that “[e]very person who shall commit adultery shall be fined not exceeding five hundred dollars (\$500); and illicit sexual intercourse between any two (2) persons, where either of them is married, shall be deemed adultery in each.”⁷⁴ The Rhode Island statute applies to any person who participates in the adulterous act, regardless of whether that person is married or not.⁷⁵ Further, the Rhode Island statute does not distinguish between consensual and non-consensual non-monogamy, instead, it treats all sexual activity with anyone outside of the marriage exactly the same.⁷⁶ Rhode Island law treats all adultery, regardless of consent, as though it were infidelity.⁷⁷ In Rhode Island, the indirect consequences of adultery are manifold: it is still grounds to file for divorce, is still weighed in alimony and

70. See Bill Sizemore, *Adultery will remain a criminal offense in Virginia, state Senate committee decides*, THE VIRGINIAN-PILOT (Jan. 18, 2016, 11:30 AM), https://www.pilotonline.com/government/virginia/article_909e3fa2-41c8-57ab-bb3c-fd332c2be594.html [<https://perma.cc/DA23-FYBK>].

71. See Jennifer McDermott, *That RI Law Against Dueling—Still Used, Lawmaker Learns*, PROVIDENCE JOURNAL (July 11, 2018), <https://www.providencejournal.com/news/20180711/that-ri-law-against-dueling---still-used-lawmaker-learns> [<https://perma.cc/TM83-WAQW>]. One legislator’s effort to repeal the Rhode Island adultery laws in 2018 failed at least in part because divorce lawyers argued in favor of the \$500 fine imposed by the law. *Id.*

72. Stein, *supra* note 1, at 158.

73. *Id.* at 149; see also Deborah L. Rhode, *Adultery: An Agenda for Legal Reform*, 11 STAN. J. CIV. RTS. & CIV. LIBERTIES 179, 181 (2015) (discussing variations between states in terms of defining adultery, setting penalties, and enforcing violations).

74. 11 R.I. GEN. LAWS § 11-6-2 (2020).

75. See *id.*

76. See *id.*

77. See *id.* Professor Emens notes that Rhode Island’s adultery statute is particularly problematic because it identifies “illicit sexual intercourse between any two (2) persons, whether either of them is married” as the behavior to be penalized but does not define the meaning of “illicit.” See Emens, *supra* note 25, at 365 n.446 (citing 11 R.I. GEN. LAWS § 11-6-2 (2002)). Thus the Rhode Island law is ambiguous in that it may include activity ranging from “secretive” to “open and notorious.” *Id.*

marital distribution proceedings,⁷⁸ and still affects child custody determinations.⁷⁹

B. *Stigma*

The stigma associated with consensually non-monogamous relationships is significant and associated with negative effects from chronic stress to lower self-esteem, lower levels of relationship success, and even loss of child custody.⁸⁰ As one scholar noted:

States, through their laws, say what is good and bad. Even when a law is rarely used or never enforced, as long as people know (or believe) that the law takes a negative attitude towards a behavior, it thereby shapes and reinforces social attitudes, pushes the behavior underground, and keeps it secret. The state is, in effect, saying adultery is bad and adultery undermines marriage by making adultery illegal, making adultery an explicit ground for divorce, and refusing to enforce prenuptial agreements that endorse adultery. This helps keep extramarital sex “in the closet,” contributes to the shame many people feel when they or their spouse engage in adultery and creates a stigma around marriages that are in any way non-monogamous.⁸¹

1. *Cultural Stigma*

Polyamory is often mischaracterized as hyper-sexualized and highly promiscuous.⁸² The desire for multiple romantic partners has been called “greedy.”⁸³ A recent study revealed that there are pervasive, negative views of polyamorous individuals not only in

78. Meghan Kruger, Comment, *Separation Anxiety: The Implications of Rhode Island’s Reluctance to Remove Fault from Divorce Proceedings*, 19 ROGER WILLIAMS U. L. REV. 808, 832 (2014).

79. See *infra* Part III.

80. Hutzler et al., *supra* note 34, at 70–71.

81. See Stein, *supra* note 1, at 163–64.

82. Hutzler et al., *supra* note 34, at 74.

83. See Edward Stein, *Plural Marriage, Group Marriage and Immutability in Obergefell v. Hodges and Beyond*, 84 UMKC L. REV. 871, 886 (2016) (noting that current norms allow for “serial polygamy” if a person’s spouse dies or their marriage ends in divorce but stigmatize “contemporaneous polygamy” and suggesting that one is not necessarily more “greedy” than the other).

general but with respect to their personal characteristics (*e.g.*, that they are immoral and untrustworthy) and sexual behavior.⁸⁴ Consensually non-monogamous relationships are often regarded as less moral, less sexually satisfying, lower in quality, and more sexually risky than monogamous relationships.⁸⁵ Another study found that the stigma attached to consensually non-monogamous relationships actually “leaked” out into other unrelated areas of perception, whereas monogamous relationships maintained a metaphorical “halo” of positive perception.⁸⁶ For example, people in consensually non-monogamous relationships were rated as worse dog-walkers than those in traditional monogamous relationships.⁸⁷

Some of the stigma experienced by polyamorous families in the United States is the result of conflation with Mormon polygamy, which typically features one man married to multiple women and has been criticized for creating coercive and abusive conditions for women and children.⁸⁸ Defenders of modern polygamy argue that these critiques are outdated⁸⁹ and point to benefits including additional community resources to provide for the family, support raising the children, and flexibility for polygamous women to

84. Hutzler et al., *supra* note 34, at 80.

85. See Levine et al., *supra* note 39, at 1440.

86. See Conley et al., *supra* note 32, at 3, 5. “Ample research suggests that a trait that is socially extolled or desired . . . imparts an (often unwarranted) overall positive impression of a person who possesses that trait . . .” *Id.* at 5–6 (citations omitted). A “halo effect” is a “heuristic whereby a person evaluates an individual (or object) positively based on a single, obvious attribute, such as attractiveness or intelligence.” *Id.* at 6.

87. *Id.* at 25.

88. Rose McDermott & Valerie Hudson, *Don't legalize polygamy*, PROVIDENCE JOURNAL (Aug. 23, 2015), <https://infoweb-newsbank-com.rwulaw.idm.oclc.org/apps/news/document-view?p=AMNEWS&docref=news/15767D1C23B92FF8> [<https://perma.cc/ZP3X-NP6U>]. “[I]n polygamous societies, more women die in childbirth. More children are poorly educated. People live shorter lives. Violence against women is more common.” *Id.*

89. See generally Shayna M. Sigman, *Everything Lawyers Know About Polygamy is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101, 143 (2006) (examining polygamy from demographic, economic, biological, political, and religious perspectives and concluding that conventional understandings of polygamy, as well as its causes and effects, are faulty and often mired in “chicken and egg” logic).

pursue professional careers.⁹⁰ Some have pointed to the positive impact of informal polygamy in some black communities due to historical and cultural factors such as mass incarceration of black males.⁹¹ Further, there are some indications that attitudes may be changing: a recent case in Utah decriminalized informal polygamy.⁹² While such decisions benefit polyamorous families indirectly, it is important to remember that polygamy and polyamory are not the same: they differ considerably in terms of their religious character and relationship structure.⁹³

There is an overall dearth of scientific literature on the topic of parenting and child welfare in polyamorous families.⁹⁴ One recent study, however, found that most young children do not even realize there is anything different about the adult relationships in their family until their late adolescence.⁹⁵ Despite the widespread societal and institutional stigma experienced by polyamorous families, “there [is] nothing to suggest that children in these situations are faring any better or worse.”⁹⁶

In fact, there is some indication that the opposite is true.⁹⁷ For example, children who participated in the above study identified a

90. Mark Goldfeder & Elisabeth Sheff, *Children of Polyamorous Families: A First Empirical Look*, 5 J.L. & SOC. DEVIANCE 150, 186–87 (2013); see also Sigman, *supra* note 89, at 171 (“The societal decision to remove the choice of polygyny from women was and is paternalistic.”)

91. Funlayo E. Wood-Menzies, *A Look at Polygamy in Black America*, MEDIUM (Feb. 14, 2019), <https://medium.com/s/story/dating-while-married-an-inside-look-at-poly-gamy-in-black-america-16049c79a96b> [perma.cc/TQY9-BH3Q].

92. See *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1233–34 (D. Utah 2013) (decriminalizing informal polygamy in Utah).

93. See discussion *supra* Section I.B.2; see also Sigman, *supra* note 89, at n.10 (noting that most arguments against polyamory are really arguments against polygyny, which is not egalitarian because it permits men to do something that women may not—explore the idea of multiple partners—whereas polyamory permits both genders to do this).

94. Hadar Aviram & Gwendolyn M. Leachman, *The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle*, 38 HARV. J.L. & GENDER 269, 316 (2015).

95. Goldfeder & Sheff, *supra* note 90, at 202.

96. Cynthia McKelvey, *The Challenges of Polyamorous Parenting*, N.Y. TIMES (Aug. 4, 2020), <https://www.nytimes.com/2020/08/04/parenting/polyamorous-parenting.html> [perma.cc/F8SP-XBCE].

97. Hutzler et al., *supra* note 34, at 81–82.

number of advantages that their poly families seemed to have over their peers' more traditional families, including practical, emotional, and personal benefits.⁹⁸ Practical benefits include things like ride-sharing, additional money and resources, and help with homework.⁹⁹ Among the "emotional and personal" benefits identified were additional emphasis on honesty and communication, additional adult role models and more personal attention from those adults, as well as greater diversity.¹⁰⁰ These advantages echo those offered by multi-generational households.¹⁰¹ One polyamorist summed up the benefits, "[t]hree incomes. Three parents. No one feels like they're drowning in responsibility And the kid[] [is] surrounded by more loving adults. I think this is really beneficial—a good life hack."¹⁰² Other polyamorous parents echo this sentiment, "[a]t the top of the list [of benefits] is resources, in every sense: more parents mean more time, more love, more experience, more finances, and, best of all, more sleep."¹⁰³

A growing body of scholarly literature has come to the defense of polyamorists and includes arguments based on substantive due process¹⁰⁴ and equal protection.¹⁰⁵ Some scholars have argued that polyamory may be a form of sexual orientation,¹⁰⁶ although the statistically-high rates of cheating among aspirationally monogamous couples and the prevalence of non-monogamous desire cuts against the idea that it could be an orientation in the traditional sense.¹⁰⁷ Others argue that there is more to sexual

98. See Goldfeder & Sheff, *supra* note 90, at 207.

99. *Id.* at 208.

100. *Id.* at 208–15.

101. See Brooks, *supra* note 11.

102. See Hines, *supra* note 25.

103. See McKelvey, *supra* note 96.

104. See, e.g., Elizabeth Cannon Leshner, Comment, *Protecting Poly: Applying the Fourteenth Amendment to the Nonmonogamous*, 22 TUL. J.L. & SEXUALITY 127, 140–44 (2013).

105. See, e.g., Andrew D. Cohen, Note, *How the Establishment Clause Can Influence Substantive Due Process: Adultery Bans After Lawrence*, 79 FORDHAM L. REV. 605, 630–40 (2011).

106. Tweedy, *supra* note 50, at 1485 (outlining five ways in which a polyamorous identity may be embedded in individuals).

107. *Id.*

orientation than simply the sex of the other person.¹⁰⁸ For example, most people, when asked, say that they have a “type,”¹⁰⁹ and some evidence suggests that there may even be a biological predisposition towards non-monogamy.¹¹⁰ Finally, polyamorists counter that just about any critique leveled at them applies to monogamous relationships, for example, monogamous marriages experience stressful times and fall apart, too.¹¹¹

2. *Judicial Stigma in the Supreme Court*

Given all of this, it is perhaps unsurprising that courts tend to frown on non-monogamy. Indeed, the topic has come up unbidden in the dissents of two important Supreme Court cases, *Obergefell v. Hodges*¹¹² and *Lawrence v. Texas*,¹¹³ while the violation of the monogamous norm was at the heart of the decision to strip a biological father of his parentage rights in *Michael H. v. Gerald D.*¹¹⁴ Each case is discussed in turn.

Obergefell famously held that it is unconstitutional to deny marriage to gay couples.¹¹⁵ Two justices joined Chief Justice

108. *Id.* at 1466. Use of the phrase “sexual orientation” to describe only a person’s having sex with members of their own, or the other, sex obscures the fact that many of us have other strong and consistent sexual orientations—toward certain hair colors, body shapes, and racial types. *Id.*

109. See Stein, *supra* note 1, at 153. As Professor Stein put it:

Some people are particularly or primarily attracted to people of certain age ranges, body types, races, hair colors, personality types and/or professions in addition to being attracted to people of a certain sex, gender, gender identity and/or certain sexual orientation. People are not only sexually interested in certain sorts of people, but some [people] also have quite specific interests in certain sorts of sexual acts, sex in certain venues, and certain frequency of having sex.

Id.

110. See Susan Dominus, *Is an Open Marriage a Happier Marriage?*, N.Y. TIMES MAGAZINE (May 11, 2017), <https://www.nytimes.com/2017/05/11/magazine/is-an-open-marriage-a-happier-marriage.html?action=click&module=RelatedLinks&pgtype=Article> [perma.cc/F9LZ-CUND].

111. *Id.*

112. *Obergefell v. Hodges*, 576 U.S. 644, 704 (2015) (Roberts, C.J., dissenting).

113. *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

114. *Michael H. v. Gerald D.*, 491 U.S. 110, 126–30 (1989) (plurality opinion).

115. See *Obergefell*, 576 U.S. at 665.

Roberts's dissent, which criticized the arguments in favor of gay marriage by pointing out "how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage."¹¹⁶ The Chief Justice wrote, "[i]f a same-sex couple has the constitutional right to marry because their children would otherwise 'suffer the stigma of knowing their families are somehow lesser,' why wouldn't the same reasoning apply to a family of three or more persons raising children?"¹¹⁷ Notably, gay rights activists, anticipating this argument, made a strategic decision to eschew comparisons to plural marriage in their arguments before the Supreme Court, believing the connection between the two would weaken the case and jeopardize the chances of success for gay marriage.¹¹⁸

Ten years earlier, in *Lawrence v. Texas*, the Supreme Court held a Texas sodomy statute unconstitutional as a violation of the Due Process Clause.¹¹⁹ The majority opinion stated:

The stigma the . . . statute imposes, moreover, is not trivial. Although the offense is but a minor misdemeanor, it remains a criminal offense with all that imports for the dignity of the persons charged, including notation of convictions on their records and on job application forms, and registration as sex offenders under state law.¹²⁰

With the exception of the "registration as sex offenders" provision, this summary perfectly encapsulates the consequences of the Rhode Island adultery statute.¹²¹ In dissent, Justice Scalia invoked the specter of bigamous marriage in a "slippery slope" argument, arguing that the connection between "[s]tate laws

116. *Id.* at 686, 704 (Roberts, C.J., dissenting) (quoting *Id.* at 668 (majority opinion)) (citation omitted).

117. *Id.* at 704 (citation omitted).

118. See Aviram & Leachman, *supra* note 94, at 275; see also Jamie M. Gher, *Polygamy and Same-Sex Marriage—Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559, 562 (2008) ("[M]ost same-sex marriage advocates zealously deny any connection between polygamy and LGBTQ relationships."). Indeed, the holding in *Obergefell* explicitly refers to "couples" and to relationships between "two" people. See *Obergefell*, 576 U.S. at 665–66.

119. See *Lawrence v. Texas*, 539 U.S. 558, 564–67 (2003).

120. *Id.* at 560.

121. See 11 R.I. GEN. LAWS § 11-6-2 (2020).

against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of . . . [the] validation of laws based on moral choices.”¹²²

One particularly poignant case is *Michael H. v. Gerald D.*, in which a man named Michael had an adulterous affair with his married neighbor with the knowledge of her husband.¹²³ Soon after giving birth to a baby girl, the woman told the neighbor that he was likely the child’s father.¹²⁴ During the first few years of her life the child was always with her mother but the two spent time with three different men in living arrangements that the Court termed “quasi-family units.”¹²⁵ Michael eventually sought and was denied visitation rights under California law, and the Court upheld the decision, reasoning that where a child is born into an “extant marital family” it is not unconstitutional for the state to give “categorical preference” to the husband of the marriage when determining legal parentage.¹²⁶ Justice Stevens’s concurrence asserted that the courts below did not abuse their discretion by finding the existence of two fathers would “confuse the child and be counter-productive to her best interests” based on the facts of the case,¹²⁷ while Justice Brennan’s dissent points to a “freedom not to conform” to cultural norms.¹²⁸

122. See *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

123. *Michael H. v. Gerald D.*, 491 U.S. 110, 162 (1989) (White, J., dissenting) (“On the facts of this case . . . Gerald was aware of the liaison between Carole and Michael.”).

124. *Id.* at 114 (plurality opinion).

125. *Id.*

126. *Id.* at 129.

127. *Id.* at 135 (Stevens, J., concurring) (quoting Supp. App. to Juris. Statement A-90–A-91).

128. *Id.* at 141 (Brennan, J., dissenting). Justice Brennan poignantly stated:

We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else’s unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncracies [sic]. Even if we can agree, therefore, that “family” and “parenthood” are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do. In a community such as ours, “liberty” must include the freedom not to conform.

Id.

3. *Stigma in the Lower Courts*

Lower courts have also tended to stigmatize non-monogamous behavior, weighing it against parents as a moral consideration in custody determinations. In *Burak v. Burak*, the Maryland Court of Appeals found that the trial justice abused his discretion in awarding custody of a child to their grandparents in part by improperly weighing the parents' polyamorous activities against them without evidence.¹²⁹ The trial justice described the life the grandparents offered the child as "they're raising him and he'll learn good values and good morals in a Christian church."¹³⁰ Although the decision was ultimately overturned by the Maryland Court of Appeals, this case and others like it show lower courts can also be guilty of stigma towards non-monogamy, and even if some of these issues might be corrected by appellate courts, most family court cases do not get appealed.¹³¹ Even in those cases that are appealed, the time delay can cause great harm to children involved as well as rights of parents.¹³²

In *Kulstad v. Maniaci*, a Montana Supreme Court case, the dissenting justice, in a slippery-slope argument concerning the "long, far-reaching and negative impacts" of the court's decision to grant parental rights to a nonbiological parent, notes that "polyamorous 'families' are the next wave in societal relationship experimentation" and concludes that, "while it may be at least a little while before a trial court concludes that such claims [to multiple parenting interests] are in a child's best interest," such claims are inevitable.¹³³ In *Cross v. Cross*, the Pennsylvania Court

129. *Burak v. Burak*, 168 A.3d 883, 938 (Md. 2017) ("[T]he hearing judge erred in . . . his determination that Petitioner was unfit because Petitioner's sexual relationships were irrelevant to the unfitness inquiry absent evidence indicating that her sexual relationships were detrimental to the Child or that the Child was even aware of Petitioner's sexual activities.").

130. *Id.* at 905.

131. *See id.* at 938 (holding that the trial judge abused his discretion in finding that Petitioner was an unfit parent because of Petitioner's drug use and "sex things with her child in the house").

132. Many parents simply cannot afford to appeal; for many people obtaining representation at the trial level is too expensive. *See* Martha Bergmark, *We don't need fewer lawyers. We need cheaper ones.*, WASH. POST (June 2, 2015, 6:00 AM), <https://www.washingtonpost.com/posteverything/wp/2015/06/02/we-dont-need-fewer-lawyers-we-need-cheaper-ones/> [perma.cc/Z3C2-4P6R].

133. *Kulstad v. Maniaci*, 220 P.3d 595, 617 (2009) (Rice, J., dissenting).

of Common Pleas reprimanded the parents for their polyamory throughout its decision, referring to the practice as “wife swapping” and “grossly inappropriate conduct.”¹³⁴ The court assumed that the relationship is “likely a source of embarrassment” for the children.¹³⁵ Further, referring to the “[Mother’s] moral and marital status issues” and admonishing the parents to “remember that they cannot teach their children *proper moral conduct* by indulging in improper conduct themselves.”¹³⁶

In each of these cases, the court or part of the court assigns a negative moral value to non-monogamous behavior and connects this negative moral value to families and to children. Such stereotyping may be due to conflation of consensual non-monogamy with non-consensual non-monogamy (i.e., infidelity or cheating).¹³⁷ But this elision with adultery and infidelity is a significant practical and conceptual mistake¹³⁸ because infidelity—and its inherent deception—is probably worse for children than non-monogamy.¹³⁹ Further, “by pushing non-monogamy into the closet, the law of adultery disincentivizes *consensual* non-monogamy and, thereby, perversely encourages infidelity.”¹⁴⁰

134. See *Cross v. Cross*, No. 07-13227, 2008 WL 4491492, at *12, *21 (Pa. Com. Pl. Aug. 14, 2008).

135. *Id.* at *21.

136. *Id.* at *22, *26 (emphasis added); see also *In re Aleksandree M.M.*, No. M2010-01084-COA-R3-PT, 2010 WL 3749423, at *3–*4 (Tenn. Ct. App. Sept. 27, 2010) (holding that a mother’s participation in the polyamory lifestyle colored her perspective and led to her failure to protect the child from conduct that constituted severe child abuse). “It is Mother’s conduct and choices . . . that violate the statute.” *Id.* at *4.

137. See Levine et al., *supra* note 39, at 1440.

138. See Stein, *supra* note 1, at 150.

139. See *id.* at 173–74. As Professor Stein put it:

[O]ne of the arguments most frequently made by opponents of non-monogamy is that children are harmed when their parents are not monogamous. This argument assumes that the effect of parents’ non-monogamy will be the same whether it is consensual or non-consensual. In fact, because infidelity is the most frequently cited cause of divorce and because parental relationship dissolution sometimes has a negative impact on children, infidelity (that is, *non-consensual* non-monogamy) is probably worse for children than consensual non-monogamy.

Id.

140. See *id.* at 177.

III. DE FACTO PARENTAGE UNDER THE RHODE ISLAND PARENTAGE ACT

The Uniform Law Commission first proposed a nationwide Uniform Parentage Act in 1973 and one of its core principles “was to ensure that ‘all children and all parents have equal rights with respect to each other.’”¹⁴¹ The UPA was updated again in 2002,¹⁴² and the most recent update in 2017 made five major changes to the 2002 version.¹⁴³ The most significant change in the law for the purposes of this Comment is the inclusion of a provision for the “establishment of a de facto parent” as a child’s legal parent.¹⁴⁴ RIPA requires the family court to adjudicate a potential *de facto* parent twice under the statute¹⁴⁵ and then again under the “best interests of the child” analysis required by *Pettinato v. Pettinato*.¹⁴⁶

A. *The Rhode Island Parentage Act*

In 2020, the General Assembly passed the Rhode Island Parentage Act, which repealed the nearly forty-year-old Uniform Law on Paternity.¹⁴⁷ RIPA took effect on January 1, 2021¹⁴⁸ and was modeled on the Vermont parentage law,¹⁴⁹ which itself was based on the 2017 UPA.¹⁵⁰ In RIPA the new section on *de facto* parentage is section 15-8.1-501, based on section 609 of UPA.¹⁵¹ The comments to section 609 state that the intent is to create a statutory path to parentage for an “individual who has functioned

141. See UNIF. LAW COMM’N, *supra* note 4, at 1 prefatory n.

142. *Id.*

143. See *generally id.* at 1–3.

144. *Id.* at 2.

145. See *infra* Section III.A.

146. See *infra* Section III.B.

147. Uniform Law on Paternity, ch. 185, 1979 R.I. Gen. Laws 722, *repealed by* Uniform Parentage Act, ch. 59, sec. 1 2020 R.I. Pub. Laws 211, 211–18; see Katie Mulvaney, *R.I. lawmakers pass parentage equality act*, PROVIDENCE JOURNAL (July 16, 2020, 7:34 PM), <https://www.providencejournal.com/story/news/courts/2020/07/16/ri-lawmakers-pass-parentage-equality-act/113770260/> [perma.cc/MNZ8-PSST].

148. 15 R.I. GEN. LAWS ANN. § 15-8.1-206 (2021).

149. Mulvaney, *supra* note 147; see VT. STAT. ANN. tit. 15C §§ 101–809 (West, Westlaw through Act 28 2021-2022 Reg. Sess.).

150. See *generally* UNIF. PARENTAGE ACT (UNIF. LAW COMM’N 2017).

151. Compare UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM’N 2017) with 15 R.I. GEN. LAWS ANN. § 15-8.1-501 (2021)

as a child's parent for a significant period such that the individual formed a bonded and dependent parent-child relationship. . . . with the consent and encouragement of the child's legal parent."¹⁵²

Section 15-8.1-502 outlines the process to petition for *de facto* parentage.¹⁵³ The family court initially must determine whether the petitioner has standing.¹⁵⁴ Before the child reaches the age of eighteen years old, the petitioner must file a complaint with the family court "alleging facts to support the existence of a *de facto* relationship with the child" and the complaint must be served on all the child's legal guardians.¹⁵⁵ An adverse party or legal guardian may then file a pleading and verified affidavit in response to the petitioner's complaint.¹⁵⁶ The family court then determines, based on the complaint and affidavits, "whether the person seeking to be adjudicated a *de facto* parent has presented *prima facie* evidence of the seven requirements for *de facto* parentage as provided in section 15-8.1-501(a)."¹⁵⁷ If so, the petitioner has standing to proceed with a parentage action.¹⁵⁸

Section 15-8.1-501(a) describes a proceeding to adjudicate the parentage for an individual claiming *de facto* parentage when there is only one other individual who is a parent or has a claim to parentage of the child; it provides seven statutory requirements.¹⁵⁹ The individual must demonstrate the following by clear and convincing evidence: (i) they resided with the child for a significant period; (ii) they engaged in caretaking of the child; (iii) they undertook full and permanent responsibilities of a parent without any expectation of compensation; (iv) they held the child out as their own child; (v) they established a bonded and dependent relationship with the child that is parental in nature; (vi) the relationship was fostered by both the person claiming *de facto* parentage as well as another of the child's parents; and (vii)

152. UNIF. PARENTAGE ACT § 609 cmt. background (UNIF. LAW COMM'N 2017).

153. 15 R.I. GEN. LAWS § 15-8.1-502 (2021).

154. *Id.* § 15-8.1-502(c).

155. *Id.* § 15-8.1-502(a).

156. *Id.* § 15-8.1-502(b).

157. *Id.* § 15-8.1-502(c).

158. *See id.*

159. *See id.* § 15-8.1-501(a)(1).

continuing the relationship is in the child's best interests.¹⁶⁰ Thus, the bar to be adjudicated a *de facto* parent is quite high.¹⁶¹

It is crucial to note that section 15-8.1-501(b) specifically distinguishes between situations where there is only one other parent and those where there is "more than one" other parent.¹⁶² Under section 15-8.1-501(a), when there is only one other parent or individual with a claim to parentage of the child, then the court's analysis ends once the court has determined that the individual has demonstrated the seven requirements by clear and convincing evidence. If there is more than one other parent, however, the family court first must conclude that the petitioner has satisfied the requirements of section 15-8.1-501(a), the claim must *then* be adjudicated under section 15-8.1-206, entitled "Adjudicating Competing Claims of Parentage."¹⁶³

Under section 15-8.1-206, the court is tasked with adjudicating the parentage claim in the best interests of the child based on another seven factors.¹⁶⁴ Those are: (1) the age of the child; (2) the length of time during which each individual assumed the role of parent of the child; (3) the nature of the relationship between the child and each individual; (4) the harm to the child if the relationship between the child and each individual is not recognized; (5) the basis for each individual's claim to parentage of the child; (6) other considerations arising from the disruption of the relationship between the child and each individual or the likelihood of other harm to the child; and (7) other equitable factors that the court deems relevant to the child's best interests.¹⁶⁵ The last factor

160. *Id.* § 15-8.1-501(a)(1)(i)–(vii).

161. Note that UPA recommends a clear and convincing evidence standard in section 609, and while Rhode Island and Vermont have adopted that standard, Washington uses a preponderance of the evidence standard for its *de facto* parentage analysis. Compare UNIF. PARENTAGE ACT § 609(d) (UNIF. LAW COMM'N 2017), and 15 R.I. GEN. LAWS § 15-8.1-501(a)(1) (2021), and VT. STAT. ANN. tit. 15C § 501(a)(1) (West, Westlaw through Act 28 2021-2022 Reg. Sess.), with WASH. REV. CODE ANN. § 26.26A.440(4) (West, Westlaw through ch. 292 of the Reg. Sess.).

162. See 15 R.I. GEN. LAWS § 15-8.1-501(b) (2021).

163. *Id.* § 15-8.1-501(b); 15-8.1-206.

164. *Id.* § 15-8.1-206. Section 15-8.1-206 largely tracks the language from section 613 of the 2017 version of UPA. Cf. UNIF. PARENTAGE ACT § 613 (UNIF. LAW COMM'N 2017).

165. *Id.* § 15-8.1-206(a).

points to the state's "best interests of the child" analysis. In Rhode Island, this analysis is not statutory; it is found in the Rhode Island Supreme Court's decision *Pettinato v. Pettinato*.¹⁶⁶

RIPA section 15-8.1-206 is modeled on the 2017 UPA's section 613.¹⁶⁷ There is a significant difference, however, between section 613 of the 2017 UPA and section 15-8.1-206 of RIPA in that section 613 provides two alternatives for states to consider when confronted with the question of whether a child may have more than two legal parents: Option A prohibits a court from adjudicating a child to have more than two parents while Option B permits a court to adjudicate a child to have more than two parents "if the court finds that failure to recognize more than two parents would be detrimental to the child."¹⁶⁸ The comment to section 613 of UPA acknowledges that these options are "consistent with an emerging trend permitting courts to recognize more than two people as a child's parents."¹⁶⁹

While neither of these alternatives appears anywhere in the final version of RIPA,¹⁷⁰ the Option B language appeared in the initial drafts of both the Rhode Island House of Representatives and Senate bills.¹⁷¹ The Rhode Island Senate considered multiple versions of the language,¹⁷² and the first version of the bill that it

166. See *infra* Section III.B.

167. Compare 15 R.I. GEN. LAWS § 15-8.1-206, with UNIF. PARENTAGE ACT § 613.

168. UNIF. PARENTAGE ACT § 613.

169. See UNIF. PARENTAGE ACT § 613 cmt. (noting that while four states—California, Delaware, D.C., and Louisiana—expressly permit courts to declare a child has more than two legal parents, several other states—Texas, Pennsylvania, Washington, and North Dakota—permit a child to have two legal parents and a third "equitable" parent).

170. See 15 R.I. GEN. LAWS § 15-8.1-206.

171. Compare H.B. 7541, Gen. Assemb., Jan. Sess. (R.I. 2020) ("[A] court may determine that a child has more than two (2) parents if the court finds that failure to recognize more than two (2) parents would be *detrimental* to the child." (emphasis added)), with S.B. 2136, Gen. Assemb., Jan. Sess. (R.I. 2020) ("[A] court may determine that a child has more than two (2) parents if the court finds that *it is in the best interests of the child to do so.*" (emphasis added)).

172. Compare S.B. 2136, Gen. Assemb., Jan. Sess. (R.I. 2020) ("[A] court may determine that a child has more than two (2) parents if the court finds that *it is in the best interests of the child to do so.*" (emphasis added)), with S.B. 2136A, Gen. Assemb., Jan. Sess. (R.I. 2020) ("[A] court may determine that a child has more than two (2) parents if the court finds that failure to recognize

passed even contained a version of the Option B language.¹⁷³ Neither option made it into the final bill.

Nevertheless, the final version directly contemplates the possibility that a child may have more than two legal parents in several ways. Section 15-8.1-206 assumes that at some point there will be “competing claims” of parentage while at no point restricting the number of legal parents a child may have.¹⁷⁴ Further, section 15-8.1-501 delineates two categories of potential *de facto* parentage petitioners: those who make a claim when there is only one other parent or individual with a claim to parentage and those who make a claim when there are already two individuals with a claim to parentage.¹⁷⁵ Crucially, section 15-8.1-501(c) makes it clear that even if multiple individuals claim *de facto* parentage, the adjudication of one individual as a *de facto* parent does not nullify the parentage status or “disestablish the parentage of any other parent.”¹⁷⁶

B. *Best Interests of the Child Under Pettinato v. Pettinato*

Once a potential *de facto* parent has made it through the two adjudications required by RIPA, the final step in the process is an adjudication of the best interests of the child. In Rhode Island, the best interests of the child factors are not statutory—rather, they are stated in *Pettinato v. Pettinato*.¹⁷⁷ No one *Pettinato* factor

more than two (2) parents would be *detrimental* to the child.” (emphasis added)).

173. See S.B. 2136A as amended, Gen. Assemb., Jan. Sess. (R.I. 2020). The Rhode Island Senate passed an amended version of Senate Bill 2136A, stating that “a court may determine that a child has more than two (2) parents if the court finds that failure to recognize more than two (2) parents would be detrimental to the child,” on February 11, 2020. *Id.*; see also *Rhode Island Senate Bill 2136*, LEGISCAN, <https://legiscan.com/RI/bill/S2136/2020> [<https://perma.cc/BZQ4-TNZZ>] (last visited June 2, 2021).

174. See 15 R.I. GEN. LAWS § 15-8.1-206.

175. Compare *id.* § 15-8.1-501(a), with *id.* § 15-8.1-501(b).

176. *Id.* § 15-8.1-501(c).

177. *Pettinato v. Pettinato*, 582 A.2d 909, 913–14 (R.I. 1990). These factors include:

- (1) the wishes of the child’s parent or parents regarding the child’s custody;

should be considered dispositive, and the judge should consider all the relevant factors.¹⁷⁸

The factor at issue here is “the moral fitness of the child’s parents.”¹⁷⁹ Generally, the moral fitness factor includes consideration of the parent’s “attitudes and moral standards, attitude towards criminal activity, drug abuse, as well as sexual promiscuity in the home.”¹⁸⁰ The importance attached to moral issues “may depend to a large extent upon the judge’s personal mores.”¹⁸¹ In *Pettinato*, the Rhode Island Supreme Court noted that “in this state, the best interests of the child standard remains amorphous and its implementation has been left to the sound discretion of the trial justices.”¹⁸²

The inclusion of morality in this analysis raises several concerns. First, an evaluation of the moral fitness of the child’s parents necessarily includes consideration of the attitudes of the parents towards “criminal activity.”¹⁸³ In Rhode Island, adultery

(2) the reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference;

(3) the interaction and interrelationship of the child with the child’s parent or parents, the child’s siblings, and any other person who may significantly affect the child’s best interest;

(4) the child’s adjustment to the child’s home, school, and community;

(5) the mental and physical health of all individuals involved;

(6) the stability of the child’s home environment;

(7) the moral fitness of the child’s parents; and

(8) the willingness and ability of each parent to facilitate a close and continuous parent-child relationship between the child and the other parent.

Id.

178. *See id.* at 914 (“The best interests of the child should not be determined by assessing any one factor. The trial justice must consider a combination of and an interaction among all the relevant factors that affect the child’s best interests.”); *see also* Saltzman v. Saltzman, 213 A.3d 551, 561 (R.I. 2019) (“[A] single statutory factor should not control a trial justice’s decision.” (internal quotations omitted)).

179. *Pettinato*, 582 A.2d at 913–14.

180. *See* 3 FAMILY LAW AND PRACTICE § 32.06(f), LexisNexis (database updated Dec. 2020).

181. *See id.*

182. *See Pettinato*, 582 A.2d at 913.

183. 3 FAMILY LAW AND PRACTICE, *supra* note 180, at § 32.06(f).

is defined as a crime.¹⁸⁴ Second, the “moral fitness” determination considers “sexual promiscuity in the home.”¹⁸⁵ Third, the determination may depend to a large extent on the judge’s attitudes towards these issues.¹⁸⁶ More generally, not all states evaluate morality in their best interests of the child analysis,¹⁸⁷ which leads to the question of whether this factor is necessary or appropriate at all as a parentage consideration.

RIPA was only passed last year, so there are not yet any Rhode Island cases petitioning for three-parent recognition. In seeking guidance as to how Rhode Island courts might view the issue of adultery as it relates to parentage and family relationships, it is useful, though not dispositive, to consider Rhode Island’s divorce statute, section 15-5-16.1.¹⁸⁸ The statute contains a factor known as “the conduct of the parties during the marriage” that is like *Pettinato*’s “moral fitness” consideration in that it considers adultery and other morality conduct in making alimony and custody determinations.¹⁸⁹ It is dissimilar in that a divorce proceeding is not the same thing as a parentage determination.¹⁹⁰

1. *The Conduct of the Parties During the Marriage*

A useful analogue for the “moral fitness of the parents” factor in *Pettinato* is the statutory morality clause that pertains to alimony in divorce proceedings, “the conduct of the parties during the marriage.”¹⁹¹ The Rhode Island Supreme Court has held that “[c]onduct’ is not limited to bad conduct or marital fault but also encompasses good conduct during the term of the marriage.”¹⁹² However, when adultery is part of the equation, courts tend to

184. See generally 11 R.I. GEN. LAWS § 11-6-2 (2020) (“Every person who shall commit adultery shall be fined not exceeding five hundred dollars . . .”).

185. 3 FAMILY LAW AND PRACTICE, *supra* note 180, at § 32.06(f).

186. *Id.*

187. See *id.* § 32.06(b) (noting that “a few states” evaluate moral fitness as a factor in this context).

188. 15 R.I. GEN. LAWS § 15-5-16 (2020).

189. *Id.*

190. See *id.*

191. *Id.*

192. See *Tarro v. Tarro*, 485 A.2d 558, 561 (R.I. 1984).

assign blame for the breakdown of the marital relationship on the adulterous party.¹⁹³ The following cases illustrate the trend.

In *Saltzman v. Saltzman*, the Rhode Island Supreme Court upheld a trial justice's award of seventy percent of a marital estate to a wife partially based on the husband's "illicit" relationship which began during one of the wife's many trips to visit family in Ohio.¹⁹⁴ Despite finding that the wife's frequent long distance trips "exacerbated" the domestic difficulties, the trial justice found that the husband's infidelity ultimately led to the couple's separation.¹⁹⁵ In *Deangelis v. Deangelis*, the Rhode Island Supreme Court held that the trial court did not abuse its discretion when it awarded eighty percent of the marital estate to a wife partly because of her husband's "philandering."¹⁹⁶ In this case, the wife was diagnosed with breast cancer, an illness that required "numerous" and ongoing hospitalizations and surgeries.¹⁹⁷ The husband had not been living in the marital home for over two years.¹⁹⁸

In these cases, and others, a pattern emerges in which the courts hold the husband's extramarital affair responsible for the breakdown of the marital relationship even in the presence of other factors that likely contributed to the divorce.¹⁹⁹ For example, considerable time apart from each other due to a variety of factors—such as excessive work obligations²⁰⁰ or frequent travel²⁰¹—is a commonly cited reason that couples choose to divorce. It is also one reason that couples engage in non-monogamy, consensually or not.²⁰² While it is possible that the stigma discussed above²⁰³ contributed to an overweighing of adultery as a factor in these

193. See, e.g., *Saltzman v. Saltzman*, 218 A.3d 551, 555 (R.I. 2019).

194. *Id.*

195. *Id.*

196. See *DeAngelis v. DeAngelis*, 923 A.2d 1274, 1282 (R.I. 2007).

197. *Id.* at 1276.

198. *Id.*

199. See *Vicario v. Vicario*, 901 A.2d 603, 610 (R.I. 2006) (the wife's conduct was "exemplary" and the husband's was not because of his extramarital affair); see also *Whited v. Whited*, 478 A.2d 567, 570 (R.I. 1984) (the husband's affair was "deleterious" to the marriage).

200. See, e.g., *Wrobleski v. Wrobleski*, 653 A.2d 732, 733 (R.I. 1995).

201. See, e.g., *Saltzman v. Saltzman*, 218 A.3d 551, 555 (R.I. 2019).

202. See *supra* Part II.

203. See *infra* Section II.B.

cases, putting speculation aside, there is nevertheless a real danger that the family court will import its disapproval of adulterous behavior—regardless of consent—into the “best interests of the child” analysis required by *Pettinato* and UPA.

C. *Analyzing a Claim of De Facto Parentage for Two Hypothetical Families*

There is a polyamorous presence in Rhode Island.²⁰⁴ Therefore, it is likely only a matter of time before these cases start to appear. We will now return to our two families from the Introduction and apply the current analysis under RIPA.

Aisha and Beth are married and want to have a child with Carlos, a straight man who is the biological father. All three of them want to be recognized as the child’s legal parents. Under RIPA, Aisha and Beth will be presumed to be the child’s parents because they are married, and Carlos, the sperm donor, will have to file a petition to be recognized as a *de facto* parent.²⁰⁵ This family has the most commonly approved tri-parent arrangement.²⁰⁶ Indeed, children of same-sex marriages, and families who use surrogates and sperm donors are the type of families this version of UPA was designed to help, as stated in the first goal outlined in the prefatory note of the 2017 UPA amendments.²⁰⁷ So, when Carlos files his petition for *de facto* parentage, it is likely that a court would approve the arrangement and grant his request.

On the other hand, we have Doris, Emily, and Fred. Remember, Doris and Emily are married to each other but also

204. Poly Providence, FACEBOOK (Jan. 20, 2021), <https://www.facebook.com/Poly-Providence-140396109346635/about>. The Poly Providence Facebook group has 2,697 likes and 2,771 followers as of this writing. *Id.* A polyamory-themed meetup group in Providence has 837 members as of this writing. Providence Polyamory and Open Relationships Meetup, MEETUP.COM (Jan. 23, 2021), <https://www.meetup.com/Providence-Polyamory-Meetup/> [perma.cc/9WVJ-8VYV].

205. 15 R.I. GEN. LAWS § 15-8.1-501(a)(2)(b)–(c) (2021).

206. See Chen, *supra* note 17. Applications for three-parent adoption most often succeed when the triad consists of a same-sex couple—usually female—and the male sperm provider who plans to be a platonic co-parent. *Id.*; see generally Jennifer Peltz, *Modern Family: More Courts Allowing 3 Parents of 1 Child*, ASSOC. PRESS (June 18, 2017), <https://apnews.com/article/e000774bb14445ab991ce6ea2f94f85a> [https://perma.cc/T2BS-TXN7].

207. See UNIF. LAW COMM’N, *supra* note 4, at 1–2 prefatory n.

involved in three-way polyamorous relationship with Fred, a straight man. They all want to have a child together and be recognized as the child's legal parents. Under RIPA, Doris and Emily will be presumed to be the child's parents because they are married.²⁰⁸ Fred will have to file a petition to be recognized as a *de facto* parent.²⁰⁹ This triggers the same analysis as above, however, since Doris and Emily are married but also involved romantically with Fred, *all three* are engaged in adulterous behavior under Rhode Island law.²¹⁰ Since adultery in Rhode Island is a misdemeanor that carries a \$500 fine, all three of these parents are guilty of adultery, and unless they omit any reference to their relationship to the court²¹¹ it is all but certain that this situation will trigger the "moral fitness of the parents" analysis required by the statute,²¹² which means that in the absence of clear guidance, it is possible that courts will import any or all of the negative qualities attributed to polyamory that are discussed above²¹³ to the case at bar.

To achieve the goal of UPA of ensuring that all parents and children have equal rights with respect to each other, it is imperative that Rhode Island courts do not import the negative views of polyamory and adultery espoused by the Supreme Court dissents in *Obergefell* and *Lawrence*, or, for that matter, the moral opprobrium expressed by many trial courts across the country, into the *de facto* parentage analysis.²¹⁴ If stigma against polyamory is not carefully checked, courts could allow relatives who simply disapprove of a polyamorous lifestyle to strip parental rights from

208. 15 R.I. GEN. LAWS § 15-8.1-401(a)(1).

209. *Id.* § 15-8.1-501(b)-(c).

210. 11 R.I. GEN. LAWS § 11-6-2 (2020).

211. Diana Adams, *What Polyamorous & Multi-Parent Families Should Do to Protect Their Rights*, LGBTQBAR.ORG (Dec. 11, 2018), <https://lgbtbar.org/bar-news/what-polyamorous-multi-parent-families-should-do-to-protect-their-rights/> [perma.cc/F95X-Z8WQ] (advising families coming before the court to focus away from the polyamorous relationship and back to the connections and commitments to the child).

212. *Pettinato v. Pettinato*, 582 A.2d 909, 913 (R.I. 1990).

213. *See supra* Section II.B.

214. *See supra* Part II.

polyamorous parents where a child is in an otherwise loving and supportive family.²¹⁵

IV. SOLUTIONS

Professor Edward Stein argues that “insofar as the law of adultery treats . . . distinct types of non-monogamy the same, the law of adultery is deeply problematic and in need of revision.”²¹⁶ He outlines both an “abolitionist” approach and a “revisionist” approach to the problem.²¹⁷

The abolitionist approach asserts that “adultery should not be the basis for criminal or civil liability, employment decisions, or custody and alimony awards,” and would decriminalize adultery, eliminate adultery as grounds for divorce, end enforcement of prenuptial agreements that penalize adultery, and repeal other domestic relations laws that punish adultery.²¹⁸ For the purposes of this Comment, application of the abolitionist approach in Rhode Island would solve the problem at hand by removing consideration of the morality of consensually non-monogamous relationships from RIPA’s *de facto* parentage adjudication process. In effect, the abolitionist approach would eliminate the statute’s effects on custody and would immediately resolve the custody issues under examination in this Comment. Stein points out that the abolitionist approach is unlikely to happen, however, because of political pressures: politicians do not want to appear to be pro-adultery.²¹⁹ It is worth noting again that a Rhode Island state legislator tried to remove adultery from the books in 2018 and the effort failed.²²⁰

215. See Elisabeth A. Sheff, *Polyamorous Families*, PSYCHOL. TODAY (May 7, 2015), <https://www.psychologytoday.com/us/blog/the-polyamorists-next-door/201505/child-custody-issues-polyamorous-families> [perma.cc/F7TV-X7XU]. “Sexual minorities have traditionally fared poorly in court when family members (often an ex-spouse or parent/grandparent) or institutional representative from Child Protective Services challenge their custody of their children.” *Id.*

216. See Stein, *supra* note 1, at 178.

217. See *id.*

218. See *id.* at 150 (quoting Deborah L. Rhode, ADULTERY: INFIDELITY AND THE LAW 7 (2016)).

219. *Id.* at 183.

220. See McDermott, *supra* note 71.

This failure perfectly illustrates the problems with the abolitionist approach.

By contrast, Professor Stein's revisionist approach²²¹ concedes that there are state interests in monogamous marriage.²²² The revisionist approach recognizes these interests and "decriminalize[s] consensual extra-dyadic sex for consensually non-monogamous [relationships] but leave[s] untouched criminal prohibitions against infidelity."²²³ This seems much more likely to work in Rhode Island since the state has had several opportunities to do away with the adultery law but has not done so.²²⁴ Beyond Stein's revisionist approach, scholars have proposed a dizzying array of solutions to the puzzle of polyamorous recognition, nearly all of which would work to one extent or another in Rhode Island.²²⁵

In addition to making necessary revisions to Rhode Island's outdated adultery law, the legislature should also adopt some form

221. Stein, *supra* note 1, at 178. Stein calls this the "less dramatic approach." *Id.*

222. *See id.* 178–79; *see also* Porter, *supra* note 59, at 2093.

223. *See* Stein, *supra* note 1, at 178.

224. *See* discussion *supra* Section II.A.

225. *See* Deborah Zelesne & Adam Dexter, *From Marriage to Households: Towards Equal Treatment of Intimate Forms of Life*, 66 BUFFALO L. REV. 909, 910–11 (2018) (proposing a shift from "marriage" as a unique status with state approval to a concept of "households" in which family members define for themselves who is a member of the household); *see also* Aviram & Leachman, *supra* note 94, at 304 (discussing the use of contracts by polyamorous family units to mimic some aspects of marriage); Edward Stein, *A Symposium on Nonmarriage and the Law: How U.S. Family Law Might Deal with Spousal Relationships of Three (or More) People*, 51 ARIZ. ST. L.J. 1395, 1396 (2019) (proposing the repurposing of old civil union laws to protect triads and other group and plural relationships); Laura A. Rosenbury, *Friends With Benefits?*, 106 MICH. L. REV. 189, 189 (2007) (considering functional approaches to government recognition of friendships and relationships that are economically interdependent but not sexual in nature). *But see* Jonathan E. Fields, *Forbidden Provisions in Prenuptial Agreements: Legal and Practical Considerations for the Matrimonial Lawyer*, 21 J. AM. ACAD. MATRIM. L. 413, 428 (2008) (explaining that courts are generally reluctant to enforce lifestyle provisions in prenuptial and postnuptial agreements). Rhode Island law prohibits parties to premarital agreements from contracting with respect to matters in violation of public policy, thus in Rhode Island a couple may not contract with respect to or waive adultery in a premarital agreement. *See* 15 R.I. GEN. LAWS § 15-17-3(a)(8) (2019) (stating that parties to a premarital agreement may contract with respect to any personal matter "which [is] not in violation of public policy or a statute imposing a criminal penalty" (emphasis added)); 11 R.I. GEN. LAWS § 11-6-2 (2020) (statute imposing a criminal penalty for adultery).

of the language it considered—but which did not make it into the final version of RIPA²²⁶—which would codify the rights of children to an adjudication of more than two legal parents when the family court finds such an adjudication appropriate.

CONCLUSION

There is a polyamorous presence in the Ocean State and in New England generally.²²⁷ The city council of nearby Somerville, Massachusetts has just recognized polyamorous families for the purposes of medical insurance coverage,²²⁸ while states like Massachusetts and New Hampshire have recently made changes to their own adultery laws: New Hampshire eliminated its adultery statute in 2014 and Massachusetts did so in 2018.²²⁹

For the reasons expounded upon in this Comment, the Rhode Island legislature should repeal the adultery statute outright. Otherwise, the legislature must rewrite the adultery statute to account for consent. At the very least, courts should consider the growing body of evidence suggesting that the dynamics of polyamorous families confer multiple benefits on children including additional financial and emotional support, and these relationships should not be automatically considered detrimental to the best interests of children and families.

In so doing, the state will protect polyamorous parents and their children from meddlesome relatives who do not approve of polyamory; this action will also safeguard the parental rights of all members of the adult relationship if they ever split and go their separate ways. In addition, adoption of these changes will ensure that well-adjusted children in the state of Rhode Island are not removed from their homes because of a disagreement between adults as to the morality of polyamory. Perhaps most important of

226. See *supra* Section III.A.

227. See Poly Providence, *supra* note 203; see also POLY BOSTON, <http://poly-boston.org/> (last visited Apr. 26, 2021); Boston Poly Speed Dating (@bostonPSD), TWITTER, <https://twitter.com/bostonPSD> [<https://perma.cc/7G3E-8T5E>].

228. Ellen Barry, *A Massachusetts City Decides to Recognize Polyamorous Relationships*, N.Y. TIMES (July 1, 2020), <https://www.ny-times.com/2020/07/01/us/somerville-polyamorous-domestic-partnership.html> [<https://perma.cc/PAB7-MQRK>].

229. See Stein, *supra* note 1, at 158–159.

all, by recognizing that sometimes children have more than two parents in practice, these fixes will help to achieve the goal set forth in the first version of UPA way back in 1973: “to ensure that *all children and all parents* have equal rights with respect to each other.”²³⁰

230. UNIF. LAW COMM’N *supra* note 4, at 1 prefatory n. (emphasis added).