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"Polyamory as a Sexual Orientation"

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# Polyamory as a Sexual Orientation

by Ann E. Tweedy

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Abstract of Polyamory as a Sexual Orientation

By Ann E. Tweedy

This article examines the possibility of expanding the definition of "sexual orientation" in employment discrimination statutes to include other disfavored sexual preferences, specifically polyamory. It first looks at the fact that the current definition of "sexual orientation" is very narrow, being limited to orientations based on the sex of those to whom one is attracted, and explores some of the conceptual and functional problems with the current definition. Next the article looks at the possibility of adding polyamory to current statutory definitions of sexual orientation, examining whether polyamory is a sufficiently embedded identity to be considered a sexual orientation and the degree of discrimination that polyamorists face. After concluding that expanding current statutory definitions of sexual orientation to include polyamory would be reasonable, the article looks at some of the complications to making such a move, including potential policy implications and the conflicting evidence as to whether polys want specific legal protections.
Polyamory as a Sexual Orientation

by Ann E. Tweedy*

I. Introduction.

This article addresses the question of whether the definitions of “sexual orientation” in anti-discrimination laws, particularly employment discrimination laws, should be amended to define the term as a much broader concept that would encompass a wide range of preferences, rather than being solely based on the sex of those to whom one is attracted. More specifically, this article asks whether polyamory, or the preference for having multiple romantic relationships simultaneously, should be defined as a type of sexual orientation for purposes of anti-discrimination law.

By way of background, I originally got the idea for this article several years ago from participating in discussions about identity within the bisexual women’s community in Seattle. Specifically, I remember one woman saying that she defended her bisexuality in discussions and arguments much more strongly (and much more often) than she did her polyamory, and she wondered why that was. Another woman responded that people commonly feel that some aspects of themselves are more important than others, and thus more worthy of defense, giving

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*Visiting Assistant Professor, Michigan State University College of Law. I would like to thank Steven J. Macias, Barbara Cox, Tiffany Graham, Gowri Ramachandran, Gerald Torres, Mary Anne Case, Nancy Polikoff, and Elizabeth Emens for reviewing drafts of this article. Thank you also to the participants at the 2009 Lavender Law Conference, where I first presented this material. Additionally, thank you to Clifford Rotsky for his very helpful feedback and to my fellow panelists and the other participants at the 2010 Law & Society Annual Meeting for their input. I am also grateful to Jeffery Mingo and Carol Guess for sharing their ideas during the initial planning stages of the article and to Elizabeth Glazer for sharing her ideas during that timeframe and for inviting me to present at Lavender Law. Finally, thank you to the Seattle Bisexual Women’s Network for making space for the discussions that planted the seed for this.
an example of an identity that the first speaker could espouse and defend but hadn’t. This discussion made me question whether polyamory was in fact an identity roughly on par with bisexuality and other sexual orientations and then, relatedly, led me to question what constitutes a sexual orientation and whether polyamory should be considered a sexual orientation in its own right. This article is an attempt to begin to answer those questions.

I focus on the possibility of amending state statutory definitions of “sexual orientation” because, if a change in the definition of “sexual orientation” is warranted, state statutes may be a good place to start. State statutes make a good starting point for several reasons. First, state legislative change tends to be easier to accomplish than federal legislative change. Second, many states already protect against sexual orientation discrimination by statute, whereas the federal government does not yet do so. And, third, the Supreme Court appears, at least for the near term, to be committed to the proposition that sexual orientation does not warrant heightened scrutiny under the equal protection clause.¹ Until sexual orientation receives such heightened scrutiny, expanding definitions of sexual orientation to include other types of preferences is likely to result in minimal, if any, gain in the equal protection context for these newly added groups. Finally, the focus on employment discrimination derives from the fact that employment is one of the most commonly protected contexts in anti-discrimination law. Thus, examining the possibility of

¹See, e.g., Lawrence v. Texas, 539 U.S. 558, 579-585 (2003) (applying rational basis review under the Equal Protection Clause to a statute that discriminated on the basis of sexual orientation); New Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).
amending definitions in state anti-discrimination statutes in the employment arena seemed like a good context in which to preliminarily examine the questions that are the subject of this article. However, it is hoped that this analysis will be largely transferrable to other contexts.

Part II of this paper critically examines the societal and legal concept of sexual orientation, exploring how the concept came into being as currently constructed and examining its implications. Part III examines polyamory, including the degree to which it is embedded as an identity and the degree of discrimination against polyamorists, and then explores the pros and cons of broadening the definition of “sexual orientation” to include polyamory and potentially other societally disfavored sexual preferences.

II. The Meaning of “Sexual Orientation.”

In this Part, I first look at the current meaning of “sexual orientation” in American culture and then turn to the apparent arbitrariness of the current definition based on the dictionary definitions of “sexual” and “orientation.” Next, I examine the practical and conceptual problems posed by the current meaning of “sexual orientation.” These issues are raised in order to help determine whether it makes sense to expand the current definition of “sexual orientation” to include other types of preferences such as polyamory.

A. The Current Meaning.

Today, one’s “sexual orientation” is almost universally understood to signify whether one is attracted to members of the same sex, the opposite sex, or both sexes.\(^2\) Thus, of the twenty-

\(^2\) See, e.g., Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Law*, 94 CALIF. L. REV. 1271, 1286 (2006) (“While there is disagreement over how to categorize different sexual minority groups, little disagreement exists over the definition of sexual orientation itself. According to the *American Heritage Dictionary*, sexual orientation is the ‘direction of one’s

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one states that had statewide statutes in place as of July 2010 prohibiting discrimination in employment based on sexual orientation, all eighteen of the states that statutorily defined “sexual orientation” defined it in terms of heterosexuality, homosexuality, and bisexuality.


CAL. GOV. CODE § 12926(q) (West 2009) (“‘Sexual orientation’ means heterosexuality, homosexuality, and bisexuality.”); COLO. REV. STAT. ANN. § 24-34-401(7.5) (“‘Sexual orientation’ means a person's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or an employer's perception thereof.”) (West 2009); CONN. GEN. STAT. ANN. § 46a-81a (West 2009) (“‘[S]exual orientation’ means having a preference for heterosexuality, homosexuality or bisexuality, having a history of such preference or being identified with such preference, but excludes any behavior which constitutes a violation of part VI of chapter 952.”); DEL. CODE ANN. tit. 6, § 4502(13) (2009) (“‘Sexual orientation’ exclusively means heterosexuality, homosexuality, or bisexuality.”); HAW. REV. STAT. § 378-1 (2009) (“‘Sexual orientation’ means having a preference for heterosexuality, homosexuality, or bisexuality, having a history of any one or more of these preferences, or being identified with any one or more of these preferences. ‘Sexual orientation’ shall not be construed to protect conduct otherwise proscribed by law.”); IOWA CODE ANN. § 216.2(14) (West 2009) (“‘Sexual orientation’ means actual or perceived heterosexuality, homosexuality, or bisexuality.”); ME. REV. STAT. ANN. tit. 5, § 4553(9-C) (West 2009) (“‘Sexual orientation’ means a person's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression.”); MD. CODE ANN., STATE GOV'T § 20-101(f) (2009) (“‘Sexual orientation’ means the identification of an individual as to male or female homosexuality, heterosexuality, or bisexuality.”); MINN. STAT. ANN. § 363A.03 Subdiv. 44 (West 2009) (“‘Sexual orientation’ means having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness. ‘Sexual orientation’ does not include a physical or sexual attachment to children by an adult.”); NEV. REV. STAT. ANN. § 613.310(6) (2009) (“‘Sexual orientation’ means having or being perceived as having an orientation for heterosexuality, homosexuality or bisexuality.”); N.H. REV. STAT. ANN. § 354-A:2(XIV-c) (2009) (“‘Sexual orientation’ means having or being perceived as having an orientation for heterosexuality, bisexuality, or homosexuality. This definition is intended to describe the status of persons and does not render lawful any conduct prohibited by the criminal laws of this state or impose any duty on a religious organization. This definition does not confer legislative approval of such status, but is intended to assure basic rights afforded under this chapter.”); N.J. STAT.
However, some of these same states also included gender identity as part of sexual orientation.  

ANN. § 10:5-5(hh) (West 2009) (“‘Affectional or sexual orientation’ means male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation.”); N.M. Stat. Ann. 1978 § 28-1-2(P) (2009) (“‘sexual orientation’ means heterosexuality, homosexuality or bisexuality, whether actual or perceived.”); N.Y. EXEC. LAW § 292 (McKinney 2009) (“The term ‘sexual orientation’ means heterosexuality, homosexuality, bisexuality or asexuality, whether actual or perceived. However, nothing contained herein shall be construed to protect conduct otherwise proscribed by law.”); R.I. GEN. LAWS § 28-5-6(15) (2009) (“‘Sexual orientation’ means having or being perceived as having an orientation for heterosexuality, bisexuality, or homosexuality. This definition is intended to describe the status of persons and does not render lawful any conduct prohibited by the criminal laws of this state nor impose any duty on a religious organization. This definition does not confer legislative approval of that status, but is intended to assure the basic human rights of persons to obtain and hold employment, regardless of that status.”); WASH. REV. CODE § 49-60-040(15) (2009) (“‘Sexual orientation’ means heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, ‘gender expression or identity’ means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.”); WISC. STAT. ANN. § 111.32(13m) (2009) (“‘Sexual orientation’ means having a preference for heterosexuality, homosexuality or bisexuality, having a history of such a preference or being identified with such a preference.”); see also D.C. St. § 2-1401.02(28) (2010) (“‘Sexual orientation’ means male or female homosexuality, heterosexuality and bisexuality, by preference or practice.”).

Of these nineteen definitions (including the District of Columbia’s), Minnesota’s is the only one that appears to be different than the others in that, taken literally, its requirement of attraction “without regard to the sex of” the object of attraction would appear to require a certain kind of bisexuality to qualify as part of the protected class. MINN. STAT. ANN. § 363A.03 Subdiv. 44 (West 2009). While the issue does not appear to have been raised directly, courts interpreting the law appear to view the definition to cover homosexuality and bisexuality, as well as gender identity, and therefore understand it to be basically the same as other statutory definitions of “sexual orientation.” See, e.g., Lussier v. Wal-Mart Stores, Inc., 2007 WL 2461932, *6-*7 (D. Minn. 2007) (unpublished); Goins v. West Group, 635 N.W.2d 717, 722-25 (Minn. S. Ct. 2001); Thorson v. Billy Graham Evangelistic Ass’n, 2004 WL 5621995 (Minn. Dist. Ct. 2004) (unpublished).

5See, e.g., COLO. REV. STAT. ANN. § 24-34-401(7.5); ME. REV. STAT. ANN. tit. 5, § 4553(9-C) (West 2009); WASH. REV. CODE § 49-60-040(15) (2009).

The inclusion of gender identity as a type of sexual orientation in some state statutes does broaden the definition of “sexual orientation,” see, e.g., ME. REV. STAT. ANN. tit. 5, § 4553(9-C) (West 2009), but it also muddies it to some extent, because gender identity is a not a true sexual preference at all, given that it does not imply anything about types of people that one would be
and, as will be discussed in more depth later, some states also included identity or perceived identity as an aspect of, or the basis of, the definition.\(^6\) The remaining three states did not statutorily define the term in their anti-discrimination provisions.\(^7\)

Therefore, aside from some states’ inclusion of gender identity in the definition of “sexual orientation” and some states’ requirement of identification or perceived identification with a particular orientation, these statutory definitions are unanimous in their basic conception of sexual orientation. Moreover, the proposed federal Employment Non-Discrimination Act

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\(^6\)See, e.g., CONN. GEN. STAT. ANN. § 46a-81a (West 2009) (“[S]exual orientation’ means having a preference for heterosexuality, homosexuality or bisexuality, having a history of such preference or being identified with such preference, but excludes any behavior which constitutes a violation of part VI of chapter 952.”) (emphasis added); IOWA CODE ANN. § 216.2(14) (West 2009) (“‘Sexual orientation’ means actual or perceived heterosexuality, homosexuality, or bisexuality.”); MD. CODE ANN., STATE GOV’T § 20-101(f) (2009) (“‘Sexual orientation’ means the identification of an individual as to male or female homosexuality, heterosexuality, or bisexuality.”).

\(^7\)The three states that protect against sexual orientation discrimination in the workplace but do not appear to statutorily define the term are Massachusetts, Vermont, and Oregon. See MASS. GEN. LAWS. ANN. ch. 151B, § 4(1) (West 2009); OR. REV. STAT. § 659A.030 (2009); VT. STAT. ANN. tit. 21, § 495 (2009).
utilizes the same concept of sexual orientation, and the same basic definition can be found in the dictionary. Collectively, these largely identical definitions reflect a cultural agreement that the term “sexual orientation” is used to describe the sex of those to whom we are attracted. The salience of the term in our culture in turn implies that the sex of the objects of each person’s attraction says something important about her or him.

B. Interrogating the Origins and Implications of the Current Meaning.

Although this basic definition of “sexual orientation,” with its attendant implications, is so common as to be taken for granted as correct, there is nothing intrinsic about either the noun “orientation” or the adjective “sexual” that would tie the term specifically to the sex of those to whom a person is attracted. Instead, as scholars such as Dr. Ruth Hubbard have explained, in the abstract, the limited use of the term employed in common usage appears to be somewhat


9See, e.g., MERRIAM-WEBSTER’S UNABRIDGED MEDICAL DICTIONARY, available at http://unabridged.merriam-webster.com/cgi-bin/medical?va=sexual+orientation&x=31&y=5 (Aug. 11, 2009) (“the inclination of an individual with respect to heterosexual, homosexual, and bisexual behavior”); see also Lau, supra note 2, at 1286 (“According to the American Heritage Dictionary, sexual orientation is the ‘direction of one’s sexual interest towards members of the same, opposite, or both sexes,’ and it seems that this definition is widely accepted”) (footnote omitted).

10For instance, the most relevant dictionary definitions of the word “orientation” appear to be “the settling of a sense of direction or relationship in moral or social concerns or in thought or art . . .” and “choice or adjustment of associations, connections, or dispositions . . .” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (2002), available at http://unabridged.merriam-webster.com/cgi-bin/unabridged?va=orientation (Aug. 11, 2009). Neither does the relevant definition of “sexual” particularly relate to the sex of those to whom one is attracted: “of or relating to the sphere of behavior associated with libidinal gratification.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (2002), available at http://unabridged.merriam-webster.com/cgi-bin/unabridged?va=sexual (Aug. 12, 2009).
arbitrary: “the 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.”

Indeed, as Michel Foucault argued, it appears that our contemporary cultural understanding of the concept of “sexual orientation” is rooted in the late 1800s, when, as the culmination of a movement to increasingly regulate sexuality, those who practiced sodomy began to be imputed with certain essential (and societally undesirable) characteristics:

As defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridicial subject of them. The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology. Nothing that went into his composition was unaffected by his sexuality. . . . It was cosubstantial with him, less as a habitual sin than as a singular nature. . . . [T]he psychological, psychiatric, medical category of homosexuality was constituted from the moment it was characterized . . . less by a type of sexual relations than by a certain quality of sexual sensibility, a certain way of inverting the masculine and the feminine in oneself. Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphrodism of the soul. The sodomite had been a temporary aberration; the homosexual was now a species.

In other words, the contemporary notion of sexual orientation as describing solely the sex of those to whom one is attracted, and the importance of this notion in our culture in terms of

11Ruth Hubbard and Elijsh Wald, “Gay Genes?” in RUTH HUBBARD, PROFITABLE PROMISES: ESSAYS ON WOMEN, SCIENCE, AND HEALTH 83 (1994); see also JENNIFER BAUMGARDNER, LOOK BOTH WAYS: BISEXUAL POLITICS 195-96 (2007) (“[S]ome lesbians date only bi women; you could call it a sexual preference”); id. at 216 (“Ellen [DeGeneres] did prove with Portia de Rossi that dating straight-looking blond starlets is, if anything, her sexual orientation.”).

12MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: VOLUME I: AN INTRODUCTION 37, 42-43 (1990) (emphasis added); see also Hubbard and Wald, supra note 11, at 82; accord Todd Brower, supra note 5, at 62 (“Openly gay people have cross-gender behaviors attributed to them even if they are not gender atypical”).

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individual identity, appear to be a product of late nineteenth century prejudice that sought to radically other individuals who engaged in homosexual practices.13 As Foucault indicates, this othering was so successful that the importance of the sexual practices themselves was supplanted by the notion of homosexual identity. Thus, prejudice itself appears to have been responsible both for cementing the idea of the homosexual as someone who was inherently different from “normal” straight culture and for initially creating the notion of homosexual identity.

While the idea of homosexuals’ having separate identities persists today, in contemporary rubric, the notion of the lesbian, gay, or bisexual person (“LGB”)14 as inherently different is employed by both sides of gay rights movement, rather than serving solely as a tool of those who would oppress or marginalize members of the queer community. For example, conservatives who are hostile to gay rights, such as marriage equality, emphasize the differences between LGB persons and themselves in order to justify arguments that existing rights should remain exclusive to heterosexuals.15 Similarly, many queer or LGB people celebrate their group’s differences

13For a description of the psychological process of othering, see, e.g., Jonathan Todres, Law, Otherness, and Human Trafficking, 49 SANTA CLARA L. REV. 605, 611-18 (2009). As Professor Todres explains, othering occurs, especially in individualist cultures, at both the individual and collective levels, and “[a]t both . . . level[s], this Self/Other dichotomy functions to create (1) a devalued and dehumanized Other, enabling differential treatment of the Other; (2) a conception of a virtuous Self and corresponding assumption that the Self (or dominant group) is representative of the norm; and (3) a distancing of the Other from the Self.” Id. at 613-14.

14While I believe that transgenderism should be protected against discrimination, I do not include it here because it is conceptually distinct from even a broad view of sexual orientation. See, e.g., supra note 5 (quoting the Human Rights Campaign Foundation, “The State of the Workplace for Gay, Lesbian, Bisexual, and Transgender Americans 2006-2007” 11 (2007)).

15See, e.g., Stanley Kurtz, “Beyond Gay Marriage,” THE WEEKLY STANDARD vol. 8, issue 45, at 8 (Aug. 4, 2003), available at http://www.weeklystandard.com/Content/Public/Articles/000/000/002/938xpsxy.asp (citing gay male promiscuity as a reason to restrict marriage to heterosexuals, the idea being that allowing...
from mainstream, straight culture, thus perhaps choosing to live in metropolitan neighborhoods that have large populations of sexual minorities or criticizing heterosexual norms.¹⁶

Despite the fact that many LGB people have themselves embraced the idea of an essential queer identity,¹⁷ the concept as currently constructed is problematic, as explained below, in several ways for LGB people and others. Given the scope of these problems, it may ultimately be beneficial to LGB people to move beyond the current, narrow view of sexual orientation and open it into a more holistic concept. Below I discuss several of the problems that the essentialist view of gay identity poses for LGB people. This discussion is followed by a look at some of the conceptual problems with the identity category itself.


On a theoretical level, as Janet Halley explains, “within modern pro-gay movements,” there can be said to be two distinct ways of looking at identity-based thinking: minoritizing and

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¹⁶ See DAVINA COOPER, CHALLENGING DIVERSITY: RETHINKING EQUALITY AND THE VALUE OF DIFFERENCE 47 (2004) (alluding to the fact that “pride movements oriented around race, gender, [and] sexuality . . . highlight the ways in which subordinated or oppressed identities have been consciously revalued and reclaimed . . . .”); accord Eve Kosofsky Sedgwick, Epistemology of the Closet, in THE LESBIAN AND GAY STUDIES READER 55 (Henry Abelove et al. eds. 1993) ( “[S]ubstantial groups of women and men . . . have found that the normative category ‘homosexual’ . . . does have a real power to organize and describe their experience of their own sexuality and identity . . . .” ); Nathan Patrick Rambukkana, Uncomfortable Bridges: The Bisexual Politics of Outing Polyamory, 4 J. OF BISEXUALITY Issue 3, 141, 149 (2004) (discussing “a tendency in subcultural groups to privilege the authentic, the anti-mainstream–in a word, the underground . . . .”) (citation omitted).


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universalizing. Under the minoritizing view, which incorporates the idea of LGB people as inherently different, “homosexual and heterosexual modes of life are understood to be taxonomically and socially distinct.” The minoritizing understanding includes “civil rights models of homosexual difference,” such as the marriage equality movement, as well as “gay identity, essentialist, [and] third-sex models.” By contrast, the universalizing understanding “suppose[s] homoerotic potential to be characteristically human.”

Because the ability of a given class of plaintiffs to succeed in bringing anti-discrimination claims derives largely from the group’s ability to successfully analogize their situation to that of an oppressed racial group, the minoritizing understanding, with its view of sexual identity as

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19 Halley, supra note 18, at 48 (internal quotation marks and citations omitted).

20 Halley, supra note 18, at 48 (internal quotation marks and citations omitted).

21 While not explicitly describing it as such, Nancy Polikoff demonstrates that the marriage equality movement is minoritizing in that it breaks with the gay rights movement’s prior coalitions with other groups to obtain rights for diverse families, focusing instead on LGB access to marriage as it now exists. NANCY POLIKOFF, BEYOND (STRAIGHT & GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 7, 103-05, 107, 152 (2008); see also Schmeiser, supra note 17, at 1521 (“These days, few proponents of same-sex marriage predicate their strongest claims to access for gay and lesbian couples on the argument that this bundle of state-sponsored benefits should be broadly available to diverse family forms.”).

22 Halley, supra note 18, at 48 (internal quotation marks and citations omitted; alteration original).

23 Halley, supra note 18, at 48.

24 See, e.g., ANNA KIRKLAND, FAT RIGHTS 49-50 (2008) (“To claim that one’s group is like African Americans is to reach for the brass ring in the context of constitutional rights under the
similar to race,\textsuperscript{25} has obvious utility for the LGB rights movement.\textsuperscript{26} At the same time, however, the minoritizing view of LGB identity is problematic in a number of ways.\textsuperscript{27}

The most important set of problems for the purposes of this article pertains to how the minoritizing view of identity can affect LGB people and others’ perceptions of them.\textsuperscript{28} For instance, emphasizing the minoritizing view tends to deny, suppress, or hide other aspects of the

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14\textsuperscript{th} Amendment’s equal protection clause. . . . Policy development in civil rights traces the power of the ‘like race’ analogy, with groups who were most able to make the analogy convincingly also more easily able to obtain the same policy benefits . . . that had been designed with black Americans in mind.”); \textit{id.} at 16 (Under Title VII, “gender difference has borne an unsteady and derivative relationship to racial difference. . . . Gender has never really made a good analogy to race, and as a result judges have had to come up with somewhat awkward ways of talking about when it should and should not be allowed to make a difference.”); \textit{accord} Schmeiser, \textit{supra} note 17, at 1508 (“Immutability first surfaced as a litigation strategy in equal protection cases to highlight parallels between racism and sexism . . . as irrational prejudices predicated on stereotypes and unfounded assumptions.”); Kenji Yoshino, \textit{Assimilationist Bias in Equal Protection: The Visibility Presumption & the Case of ‘Don’t Ask, Don’t Tell,’} 108 \textit{Yale L.J.} 485, 559-561 (1998) (describing the Supreme Court’s approach to equal protection analysis under which “new groups are admitted by showing that they are like groups that have already established their claim to protection”) [hereinafter “Yoshino, \textit{Bias}”].

\textsuperscript{25}See Halley, \textit{supra} note 18, at 49-50.

\textsuperscript{26}But see Halley, \textit{supra} note 18, at 53 (criticizing the use of an immutability argument in the context of the struggle for LGB rights because “the resulting antidiscrimination case law could have left bisexuals out in the cold: after all, they can switch. And this is not merely a risk of future harm: the decision to run [the immutability argument] . . . displaced bisexuals as outsiders, nonmembers of the constituency on whose behalf gay and lesbian advocates spoke.”).

\textsuperscript{27}See generally Halley, \textit{supra} note 18; see also Schmeiser, \textit{supra} note 17, at 1521.

\textsuperscript{28}An additional set of problems with the notion of an essential gay identity posited by the minoritizing view relates to the fact that, as a legal strategy, the minoritizing view has the potential to negatively affect other groups, such as racial groups, whose identities gay rights advocates rely on by analogy. Halley, \textit{supra} note 18, at 54-64. These problems are beyond the scope of this article.

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realities of LGB lives. Thus, over-emphasis of the minoritizing view may whitewash the richness and complexity of LGB identity in order to project a more monolithic identity that will be (hopefully) saleable in a courtroom and in other contexts involving outsiders. This is damaging to LGB people whose identities do not conform to the accepted identity and whose realities therefore become obscured. Relatedly, this pressure to project a certain kind of gay identity can be oppressive to queer people in the sense that they face pressure to conform to the correct queer identity script. Additionally, as Janet Halley explains, taking the minoritizing view to the extreme also creates the more insidious danger of remaking how LGB persons understand themselves:

This tendency reached its apogee when gay-rights advocates claimed that some very preliminary and equivocal scientific studies suggesting that human sexual orientation might have some biological components proved decisively that homosexuality was a biological trait (supposedly like race). The coherentist criticism of these arguments would be that they are inaccurate. But they may have been worse than that: they may have “made up people” in the sense that they persuaded gay men and lesbians that they were “like that.” I think they did. In

29 Halley, supra note 18, at 52.

30 See, e.g., Nancy Levit, *Theorizing & Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 44 (2010) (“When we think outside the white-picket-fence plaintiffs’ box, people are afraid of the prospect of plaintiffs far removed from the norm . . . .”).

31 Halley, supra note 18, at 42-43 (quoting K. Anthony Appiah, “Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction” in *MULTICULTURALISM* 162-63 (Amy Gutmann ed. 1994)); accord Judith Butler, “Imitation and Gender Insubordination,” in *THE LESBIAN AND GAY STUDIES READER* 308 (Henry Abelove et al. eds. 1993) (“[I]dentity categories tend to be instruments of regulatory regimes whether as the normalizing categories of oppressive structures or as the rallying points for a liberatory contestation of that very oppression . . . . To install myself within the terms of an identity category would be to turn against the sexuality that the category purports to describe.”); cf. Ann Tweedy, “Ignoring Childhood Messages and Breaking the Rules of Feminism and Professionalism: The Femme as World-Straddling Outlaw” in *VISIBLE: A FEMMTHOLOGY* vol. two 44 (Jennifer Clare Burke ed. 2009) (describing how feminism can make similarly oppressive demands on women).
fact, I think they created a demand for gay gene experiments, which, in turn, did a
great deal of interpelling on their own.\textsuperscript{32}

Thus, an essentialist view of gay identity can be dangerous in the sense that it may actually
remake some members of the queer community into people that conform to that identity because
they come to believe that the prescribed identity necessarily describes them. Finally, taking
Foucault’s point that the idea of an essential gay identity was borne of prejudice at face value
suggests that it may be playing into the oppressors’ hands to celebrate such an identity. Dr.
Hubbard powerfully suggests as much when she discusses Nazi extermination efforts and gay
gene studies in the same breath:

Grounding difference in biology does not stem bigotry. African Americans, Jews,
people with disabilities, as well homosexuals have been persecuted for their
biological “flaws.” The Nazis exterminated such people precisely to prevent
them from “contaminating” the Aryan gene pool. Despite claims to the contrary,
this attitude hasn’t disappeared: The Daily Mail of London reported on the
Science article [purportedly linking certain DNA sequences to homosexuality]
under the headline “Abortion Hope After ‘Gay Genes’ Findings.”\textsuperscript{33}

\textsuperscript{32}Halley, \textit{supra} note 18, at 52 (footnote omitted; emphasis in original); \textit{see also} id. at 43
(acknowledging that identity politics can make people “become what they would not otherwise be”) (emphasis in original); Hubbard and Wald, \textit{supra} note 11, at 83-84 (noting that “the search
for gay genes comes directly out of the gay rights struggle” but arguing that the search for gay
genes is wrongheaded because “[g]rounding difference in biology does not stem bigotry”).

\textsuperscript{33}Hubbard and Wald, \textit{supra} note 11, at 83-84; \textit{see also} Halley, \textit{supra} note 18, at 42 (“[Q]ueer
theory suggests that homosexual identities create a necessary condition for the oppression
of homosexual people . . . .”); Schmeiser, \textit{supra} note 17, at 1521-22 (“[T]he psychiatric turn in
medico-legal reasoning cast homosexuality as a state of diminished will and impaired self-
governance. . . . Hence models of identity that posit sexual orientation as an innate condition
outside of human agency, despite their apparent expediency in arguments for equality, resonate
strongly with views of homosexuality as incompatible with self-control and therefore full
democratic citizenship”) (footnote omitted); accord \textit{MARK DOTY, FIREBIRD: A MEMOIR} 35 (2000)
(“[D]oesn't the need to understand the origins of desire arise from the impetus to control it?”).
\textit{But see} Schmeiser, \textit{supra} note 17, at 1499 (noting that, according to a 2007 poll, “‘Americans
who believe homosexuals are born with their sexual orientation tend to be much more supportive
of gay rights than are those who say homosexuality is due to upbringing and environment . . . .’”
) (citation omitted).
2. The Instability of Sexuality-Based Identity Categories.

Judith Butler has additionally argued that sexuality-based identity categories are inherently unstable first because they are performance-based and therefore of uncertain continuity and second because heterosexual identity and homosexual identity are mutually derivative.\(^{34}\) As Butler explains with respect to the performative aspect of sexuality:

> it is through the repeated play of this sexuality that the ‘I’ is insistently constituted as a lesbian ‘I’; paradoxically, it is precisely the repetition of that play that establishes as well the instability of the very category that it constitutes. . . . [T]he I is always displaced by the very repetition that sustains it.\(^{35}\)

In other words, because of sexual orientation’s conduct-based roots, the continuity of one’s identity is always theoretically in question, no matter how consistent one’s prior sexual behavior has been as a practical matter.\(^{36}\) Sexual orientation is also unstable as an identity because homosexuality and heterosexuality are dependent on each other for their meaning. Thus, as Butler explains, “the ‘reality’ of heterosexual identities is performatively constituted through an imitation that sets itself up as the ground of all imitations.”\(^{37}\) However,

> if it were not for the notion of the homosexual as copy, there would be no construct of heterosexuality as origin. . . . In other words, the entire framework of copy and origin proves radically unstable as each position inverts into the other and confounds the possibility of any stable way to locate the temporal or logical

\(^{34}\)Butler, supra note 31, at 309-313; see also Sedgwick, supra note 16, at 54 (“[E]rotic identity . . . can never not be relational . . . .”)

\(^{35}\)Butler, supra note 31, at 311.

\(^{36}\)Butler, supra note 31, at 310-11. Indeed, this inherent instability appears to be one of the reasons that bisexuality is understood to threaten both heterosexual and homosexual identity. See Kenji Yoshino, The Epistemic Contract of Bisexual Erasure, 52 STAN. L. REV. 353, 362, 400 (2000).

\(^{37}\)Butler, supra note 31, at 313.
priority of either term.\cite{38}

Butler thus identifies two conceptual problems with sexual orientation identity categories as currently constructed, both of which render the definitions of homosexuality and heterosexuality inherently unstable.

Like the practical problems with the minoritizing view discussed above, these conceptual problems call into question the utility of preserving the current conception of sexual orientation as an essentialist identity category, especially given that instability and essentialism are necessarily contradictory. The existence of these problems suggests that there may be something to be gained by opening up the concept of sexual orientation to include a wide array of sexual preferences. Such an opening up would appear to mesh with the universalist view of sexual orientation, which posits the potential universality of homoerotic desire.\cite{39} On the other hand, however, the analyses of Butler, Foucault, and Hubbard do raise the more elemental question of whether any conception of sexual orientation would be a valuable category; in other words, taking their analyses to their logical conclusion perhaps eventually leads to dispensing with the notion of sexual orientation altogether.\cite{40} While eradication of the category of sexual orientation altogether.

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\cite{38}Butler, supra note 31, at 313.
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\cite{39}Halley, supra note 18, at 48.
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\cite{40}See, e.g., Laurie Rose Kepros, Queer Theory: Weed or Seed in the Garden of Legal Theory, 9 L. & SEXUALITY 279, 283-84 (1999-2000) (noting that queer theory “critique[s] the concept of ‘identity’ and the identity-based rights discourses that rely on definitional and categorical identity closure” and that “[q]ueer theory unfolded from the work of social constructionist Michel Foucault”); Nancy J. Knauer, Heteronormativity & Federal Tax Policy, 101 W. VA. L. REV. 129, 140 (1998) (noting that queer theory “sees categorization [as gay or heterosexual] as not simply irrelevant, but counter-productive. The identity politics of gay and lesbian activism (and scholarship) reinforces what queer theory considers the artificial divide between the socially constructed polar extremes of sexual object choice.” ); John M. Ohle, Note: Constructing the
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may (or may not) be a worthwhile goal, as further explained below, my own goal in this article is more modest: namely, to determine whether the opening up of sexual orientation to include other types of preferences, specifically polyamory, is conceptually sound and whether it should be pursued as a policy goal.

III. The Opening Up of Sexual Orientation to Include Other Types of Preferences.

This Part first explores the breadth of the definitions of “sexual” and “orientation” as a starting point for examining how narrowly “sexual orientation” has been constructed in our culture, the possible reasons for that narrow construction, and the problems that result from that narrow construction. The Part then turns to possibilities for defining “sexual orientation” more expansively. Next, the possibility of expanding “sexual orientation” definitions to include polyamory is explored. Included in this section are analyses of the embeddedness of polyamory as an identity and of the level of discrimination that polyamorists face, particularly, of whether discrimination against polyamorists constitutes an organizing principle of inequality. Finally, potential complications attendant on expanding the current definitions of “sexual orientation” to include polyamory are examined.

A. The Breadth of the Ordinary Meanings of “Sexual” and “Orientation.”

As discussed above, nothing in the definition of “sexual” or “orientation” suggests that the term “sexual orientation” should be limited to identifying the sex of the people to whom one is attracted.41 Rather, based on the ordinary meanings of its two constitutive words, the term

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41 See supra note 10 (quoting dictionary definitions of “sexual” and “orientation”).
“sexual orientation” should refer to any type of settled “sense of direction or relationship . . .” or “choice or adjustment of associations, connections, or dispositions . . .” that relates to “libidinal gratification.” ⁴² In other words, just about any sexual preference would appear to be covered by the term as a matter of ordinary meaning, provided it was abiding enough to constitute a “sett[ed] sense of [personal] direction” or a repeatedly chosen set “of associations, connections, or dispositions.” ⁴³

Indeed, although such an all-encompassing usage of the term is rare, some scholars and commentators have employed the term in this way. As quoted above, Dr. Hubbard has argued that “many of us have other strong and consistent sexual orientations—toward certain hair colors, body shapes, and racial types.” ⁴⁴ The bisexual theorist Jennifer Baumgardner has also used the term in an all-encompassing fashion, albeit without arguing explicitly for such usage. For example, Baumgardner has suggested with respect to Ellen DeGeneres that “dating straight-looking blond starlets is, if anything, her sexual orientation.” ⁴⁵ Similarly, Baumgardner has used the synonymous term “sexual preference” ⁴⁶ just as broadly: “some lesbians date only bi women;

⁴²See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (2002), available at http://unabridged.merriam-webster.com/cgi-bin/unabridged?va=orientation (Aug. 11, 2009) (defining “orientation” as “the settling of a sense of direction or relationship in moral or social concerns or in thought or art . . .” or “choice or adjustment of associations, connections, or dispositions . . .”); id., available at http://unabridged.merriam-webster.com/cgi-bin/unabridged?va=sexual (defining “sexual” as “of or relating to the sphere of behavior associated with libidinal gratification”).

⁴³Id.

⁴⁴Hubbard and Wald, supra note 11, at 83.

⁴⁵BAUMGARDNER, supra note 11, at 216.

⁴⁶MERRIAM-WEBSTER’S UNABRIDGED MEDICAL DICTIONARY, available at
you could call it a sexual preference.”

Additionally, the Canadian sexuality theorist Nathan Patrick Rambukkana has described his own sexual orientation as a straight male in a more nuanced way than one ordinarily hears in common parlance: “I believe that though my sexual orientation is straight, my ideological and political orientation towards sex is queer.”

These usages suggest that a person’s “sexual orientation” may, in actual application, be both broader and narrower than the common use of the term, which is limited to the sex of the objects of one’s attraction. Hubbard’s use, for example, would encompass any “strong and consistent” sexual preference, so it is broader in application than just the sex of the objects of one’s attraction. By contrast, Baumgardner’s usage suggests that one’s orientation may be narrower than the typical use of the term; one may be attracted to not just women for example, but only to “bi women,” or, even more specifically, to “straight-looking blond starlets.” Rambukkana’s statement calls to mind not just a very specific orientation but one with theoretical subtleties beyond what many would probably consider as a possibility.

Both Hubbard’s and Baumgardner’s uses appear to comport with common sense. With respect to Baumgardner’s usage, the person who was attracted to all women or to all men or to everyone regardless of sex would appear to be the exception rather than the rule, although this fact is arguably obscured—or at least devalued-- by the common usage of the term “sexual orientation.” Similarly, addressing Hubbard’s usage, people do commonly speak of having a


47BAUMGARDNER, supra note 11, at 195-96.

48Rambukkana, supra note 16, at 151.
“type” of person they are attracted to, the significance of which tends to include physical characteristics and personality traits; these characteristics and traits could easily be conceived of as aspects of one’s sexual orientation.

Rambukkana’s statement suggests that there may be facets to the notion of sexual orientation that are largely unexplored by the general populace. His description of his own sexual orientation also implies the need for self-definition—indeed the identification of such subtleties suggests that sexual orientation may be such a personal, value-laden concept that society would be best-served by each person’s being free to define her own.49

B. Reasons to Consider Expanding the Definition in a Piecemeal Fashion.

However, the facts that the current usage of the term “sexual orientation” is artificially limited and that it poses problems for those whom it is most often invoked to describe50 do not necessarily lead to the conclusion that, as a matter of anti-discrimination law, the definition should be opened up to include any and all sexual preferences that are either sufficiently “strong and consistent” to borrow from Dr. Hubbard’s proposal or sufficiently abiding or repeating to mine the dictionary definitions of “orientation” to technically qualify as a sexual orientation. Rather, it could well be argued that only those sexual preferences that are likely to be the bases


50See, e.g., Brower, supra note 5, at 18, 21 (noting that “[o]ur schema [or set of beliefs] for ‘sexual orientation’ typically includes lesbians, gays, and bisexuals,” that “we often forget that heterosexuals also have a sexual orientation,” and that “we do not have a schema for heterosexuals; they are just ‘people’ and not a group characterized by their sexual behavior”).
for discrimination should be protected by anti-discrimination law.\footnote{This view reflects a class-based (rather than a classification-based) approach to anti-discrimination law. See Yoshino, Bias, supra note 24, at 563 (distinguishing the two approaches).}

For example, one’s orientation may include being attracted to blondes, as Baumgardner’s comments suggest. However, the costs of protecting people from workplace discrimination based on their attraction to blondes may well outweigh the limited benefits. First, because this is not a common basis of discrimination, the rare person who was discriminated against because of this preference could presumably find another job relatively easily. Additionally, given the rarity of this type of discrimination (assuming it exists at all), it would be difficult to argue that the person who suffered it had suffered an egregious societal harm that was any deeper than that suffered by anyone else who was fired for an arbitrary but legal reason, such as not being outgoing enough for the boss’ taste or being a fan of a particular sports team.\footnote{See Samuel A. Marcosson, Constructive Immutability, 3 U. PA. J. CONST. L. 646, 676-77 (2001) (distinguishing between an employer’s permissible irrationality, such as making employment decisions based on hair color, from impermissible irrationality, such as requiring employees to have accepted Jesus Christ to be promoted); cf. COOPER, supra note 16, at 63-66 (arguing that it may not make sense to treat smokers as a protected class because “[t]here is no evidence that smoking, as the enactment and reproduction of socially asymmetrical positions, affects institutional forms such as education, local government, the military, or the law[, and it also does not render modes of power intelligible,” and further that smoking “fails to attain the status of an organising principle of inequality” because its relationship to social dynamics is a very mediated one).}

Finally, it is possible to argue that, given that an employee may generally be fired for any reason except membership in a suspect class, it does not make sense to alter that rule solely in the context of sexual preferences while leaving it in place for other employment decisions, especially in light of the fact that increased litigation expenses for all newly protected types of sexual preferences...
could be cumulatively significant. On the other hand, however, it is equally possible to argue that one’s sexual preferences, and the ability to act on them without facing adverse consequences, should be considered a core personal freedom that warrants statutory or even constitutional protection.\footnote{See, e.g., Moshe Landman, \textit{Sixth Annual Review of Gender & Sexuality Law: I. Constitutional Chapter: Sexual Privacy After Lawrence: Co-habitation, Sodomy, & Adultery}, 6 GEO. J. GENDER & L. 379, 388-89 (2005) (describing proposals to expand \textit{Lawrence v. Texas}, 539 U.S. 558 (2003), to make sexual privacy a fundamental constitutional right or, alternatively, to create a fundamental right to engage in consensual sex that would be based on either substantive due process or the Ninth Amendment to the Constitution).}

Additionally, the requirement in some anti-discrimination statutes of identification or perceived identification with a certain sexual orientation\footnote{See supra note 6 (citing Connecticut’s, Iowa’s, and Maryland’s statutes).} may indicate that we should consider including a person’s self-identification, along with perceived orientation, as part of any legal definition of “sexual orientation.” This idea finds support in Rambukkana’s admonition that “those [polyamorists] . . . who can afford to have the label ‘polyamorous’ linked to [their] . . . identities have a responsibility” to do self-identify in order “to help guide the uncertain future of non-monogamy” and in his suggestion that such self-identification will likely pave the way for closeted others both to understand and accept themselves and eventually to self-identify.\footnote{Rambukkana, \textit{supra} note 16, at 152.}

Indeed, a person who was entirely closeted about her sexual desires, manifesting or professing only those that were considered completely normal or mainstream and who could otherwise blend in, in terms of sexual orientation, with mainstream society would have no need of anti-discrimination protections based on sexual orientation. Such a person could be viewed as having
acceded to the demands of the mainstream hetero- and mononormative society either to avoid the prospect of discrimination or, perhaps, in some cases, to appease her own internalized negative feelings about her sexual orientation. Thus, it would appear to be the person who either self-identified with a societally disfavored sexual preference or who was involuntarily identified by others as exhibiting such a preference who would most need the protections of an anti-discrimination law. By engaging in the political act of expressing her identity, such a person makes herself uniquely vulnerable to discrimination (or is made so in the case of involuntary identification). On the other hand, however, given that closeted homosexuality (and other closeted sexual preferences as well) cause significant harm to those who closet themselves, closeted persons also warrant consideration. While they may not be able to directly benefit from anti-discrimination protections while remaining closeted, it is conceivable that the existence of anti-discrimination protections could lead them, at least in part, to come out of the closet regarding disfavored preferences and thus to avoid the continued harms of the closet.

Leaving these questions aside, a more difficult problem is posed by sexual orientations that are societally disfavored because they cause harm to others and to society at large, such as


57 See, e.g., Rambukkana, supra note 16, at 149.

58 Yoshino, Bias, supra note 24, at 527, 549; see also JULIANA SPAHR, THE TRANSFORMATION 176-79 (2007) (describing the author’s personal experiences of self-hatred, pain, and fear related to the closeting of her polyamorous relationship).

59 See, e.g., COOPER, supra note 16, at 4 (acknowledging the difficulty that socially harmful identities and choices pose for equality advocates).
pedophilia. Similarly, harmful sexual practices, such as parent-child incest, exist that may or may not rise to the level of consistency and strength that are arguably required for sexual orientations. Presumably in neither case would we want to prohibit employers from making negative employment decisions based on such preferences or practices. Thus, a holistic definition of “sexual orientation” in an anti-discrimination statute would, in some principled way, have to exclude from protection harmful sexual preferences while including those that are societally disfavored simply as a result of prejudice. Moreover, because unconventional sexual preferences are likely to be erroneously viewed as harmful by society at large, making such a distinction would almost certainly prove a difficult task.

Nonetheless, there are undoubtedly many sexual preferences that are societally disfavored, on which adverse employment decisions are frequently based, that do not appear to cause societal harm. Given the potential difficulty of arriving at an overarching principle by which to distinguish genuinely harmful sexual preferences from those that are disfavored because of prejudice, it may be more feasible to expand the definition of “sexual orientation” in a piecemeal way to include at least some of these preferences within the realm of anti-discrimination statutes. Some of the more promising possibilities include preferences for

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60 Pedophilia is an attraction to children as sex objects. While this predilection is often erroneously imputed to gay males, in fact, pedophilia appears to be rarely if ever perpetrated by men who identify as homosexual. See Richard R. Bradley, Making a Mountain Out of a Molehill: A Law & Economics Defense of Same-Sex Foster Care Adoptions, 45 FAM. CT. REV. 133, 140-41 (2007).

61 See, e.g., Mary Anne Case, A Few Words in Favor of Cultivating an Incest Taboo in the Workplace 153-54 in FEMINIST & QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS (Martha Albertson Finemen et al. eds. 2009) (arguing that incest taboos are societally useful and that similar taboos should be developed to govern supervisor-subordinate relationships in the workplace).
partners of other races, preferences for transgender partners, preferences for polyamorous relationships, and preferences for sadomasochistic (“S/M”) relationships, to name a few. What follows is an exploration of including the preference for polyamorous relationships within the definition of sexual orientation.

C. Polyamory as a Sexual Orientation.

This section briefly introduces the reader to polyamory and then examines (1) the embeddedness of polyamory as an identity, (2) the levels of discrimination that polyamorists face, and (3) finally, potential complications to redefining “sexual orientation” to include polyamory.

1. Introduction to Polyamory.

Polyamory, which is commonly shortened to “poly,” “in general describes the practice, state or ability of having more than one sexual [or, for some, romantic] loving relationships at the same time, with the full knowledge and consent of all parties involved.” Thus, polyamory, which literally means having more than one or several loves, is relationship-based and should be

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It is a lifestyle embraced by a minority of individuals who exhibit a wide variety of relationship models and who articulate an ethical vision that . . . encompass[es] five main principles: self-knowledge, radical honesty, consent, self-possession, and privileging love and sex over other emotions and activities such as jealousy." As suggested by these five principles, polyamory is not only “a practice,” but is also, at least for some of its adherents, “a theory of relationships.” As a theory, polyamory “has a decidedly feminist bent,” building “in part on a feminist understanding of monogamy as a historical mechanism for the control of women's reproductive and other labor.”

It is estimated that there are more than half a million “openly polyamorous families in the

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64See, e.g., Anne Bokma, Polyamory: Inside an open marriage, MORE MAGAZINE (April 2010), available at http://www.more.ca/relationships/3married-life/polyamory-inside-an-open-marriage/a/29927/print (stating that “[p]olyamory is not swinging, swapping or an orgiastic free-for-all” and that it “involves negotiating agreements, processing emotions with multiple lovers, and honest communication . . . .”) (internal quotation marks omitted); “Why can’t you love more than one partner?” THE INDEPENDENT ON SUNDAY (London), Sept. 13, 2009, at 20 (noting that polyamory is not “swinging or adultery” and that polys want “ongoing, honest, committed relationships”); Alicia Potter. Free love grows up: Free love might sound like a euphemism for group sex, but to Boston’s polyamory community, it’s just like marriage–only bigger, THE BOSTON PHOENIX, Oct. 15-22, 1998, available at http://www.bostonphoenix.com/archive/features/98/10/15/polyamorists.html (“I don’t consider [swinging] . . . polyamory, because it doesn’t focus on the relationship”) (quoting author Deborah M. Anapol).


66Emens, supra note 65, at 320.


68Emens, supra note 65, at 325.
United States . . . with thriving contingents in nearly every major city.\footnote{Bennett, supra note 67.} In addition to the prevalence of polyamorists in the United States, polyamory has also gotten increasing attention in other countries such as Britain, Canada, and New Zealand.\footnote{See, e.g., Nikki Watkins, Jessica Bateman, \textit{I kiss my man goodnight, shut the door . . . and sleep with my other lover; Julianne’s Life with Two Partners}, \textsc{The Sun} (London), Feb. 24, 2010, at 44; Zosia Bielski, \textit{Love & Mixed Doubles; An open marriage has its own rules of play}, \textsc{Nat’l Post} (Ontario), Sept. 20, 2008, at WP.3; Emily Watt, \textit{When one lover is not enough}, \textsc{Dominion Post} (Wellington), March 15, 2008, at A.10.}

Additionally, polyamory is often perceived as being linked to bisexuality,\footnote{See, e.g., Aviram, supra note 63, at 265; Elisabeth Sheff, \textit{Polyamorous Women, Sexual Subjectivity and Power}, 34 \textsc{Journal of Contemporary Ethnography} 251, 268 (2005).} although straight and homosexual persons also practice polyamory\footnote{See, e.g., Adam Weber, “Survey Results: Who Are We? & Other Interesting Impressions, \textsc{Loving More Magazine} #30, at 4 (Summer 2007); Aviram, supra note 63, at 267; Rambukkana, \textit{supra} note 16, at 145, 149; \textit{see also} Geri Weitzman, \textit{Therapy with Clients Who Are Bisexual and Polyamorous in Affirmative Psychotherapy with Bisexual Women and Bisexual Men} 141-42 (citing studies documenting rates of lesbians, gay men, and heterosexuals engaging in polyamory or nonmonogamy) (Ronald C. Fox ed. 2006).} and bisexuals may be polyamorous or monogamous.\footnote{Weitzman, \textit{supra} note 72, at 141 (discussing a study in which thirty-three percent of bisexual respondents reported being in polyamorous relationships and fifty-four percent reported that polyamory represented their ideal form of relationship).} Finally, some polyamorists see themselves as “hardwired” that way,\footnote{Emens, \textit{supra} note 65, at 304, 321, 351; \textit{see also} Sheff, \textit{supra} note 71, at 274 (describing one of the interviewees in her research as “identif[i]ing as polyamorous since she was fourteen . . . .”).} while others do not necessarily see polyamory as an identity or, alternatively, see it as a constructed identity.\footnote{Emens, \textit{supra} note 65, at 321, 351; \textit{see also} Aviram, \textit{supra} note 63, at 271 (“The liberal argument, according to which gay people are ‘born gay’ and therefore do not have the choice to . . . .”).}
2. **Is Polyamory Deep-Seated Enough to Be Considered a Sexual Orientation?**

This subsection examines the extent to which an identity category may be embedded or, in other words, integral to an individual’s personal identity. After examining this concept generally, I turn to an examination of how embedded polyamory appears to be in the lives of the individuals who practice it. The purpose of this subsection is to determine whether it makes sense to consider polyamory to be a sexual orientation on the theory that the more embedded a way of being is the more sense it makes to consider it an identity and specifically a sexual orientation.

**a. The Continuum of Embeddedness for Various Types of Identity.**

In order to analyze this issue, I posit a scale ranging from most embedded to least embedded. Here we might assume that an essential identity, assuming such identities exist, would represent the most embedded extreme, with a constructed identity that was “so

marry someone from the other sex, seems, to some poly activists, problematic . . . . Regardless of whether they believe they are genetically ‘wired poly’, or whether they chose their lifestyle, they argue that, if their relationships are to be recognized, it is not because they have been born ‘different’ or ‘defective’); *id.* (“Polyamorist activists lean toward a framework that rejects identity politics and strives to go beyond it”); Rambukkana, *supra* note 16, at 147-48 (noting that, “[w]hile most people do [non-monogamy] . . . at some point in their lives . . . few people want it linked to their identity” and tying this fact to societal prejudice as well as potentially “serious social and legal consequences”). The documentary film *Three of Hearts: A Postmodern Family* provides an example of three people who participated in a thirteen-year polyamorous relationship together and yet do not consider themselves to have a polyamorous identity. *THREE OF HEARTS: A POSTMODERN FAMILY* (THINKfilm 2005). At the end of the film, the female member of the relationship, which had since dissolved, characterized herself as having been engaged in a protracted period of “experiment[ation],” while the two males seemed to suggest that they were naturally monogamous with other males. *Id.* That being said, immediately after the break-up of an unconventional relationship may not be the best time to question people about their commitment to the lifestyle that the relationship embodied.
constraining and powerful that individuals . . . live[d] their assignment to one [identity] classification rather than another as wholly unchosen and unchangeable” being the next most embedded on the scale from most embedded to most casual or superficial. The other extreme of casual or superficial classifications would be represented by designations that individuals experienced as wholly extraneous to their identities. For example, someone may take the bus to work for a brief period out of sheer necessity but may not see this activity as representing anything significant about him- or herself, while another person could take the bus regularly as an expression of deep-seated environmentalism. In the first case, the bus-taking would be at the far extreme of casual or superficial identity, while, in the second, the same activity would fall somewhere in the middle between the two poles because, in the second case, being a bus-taker would likely be a designation that the individual associated herself with and was proud of. Presumably, the more embedded an identity was, the more likely it would be to manifest as strong and consistent (as Dr. Hubbard suggested would be required for a sexual orientation) or settled and repeated (the requirements implied by the dictionary definitions of “orientation”).

A predilection for polyamorous relationships could fall at various points along the continuum, depending on whether it constitutes an essential identity, a constructed identity that is lived at the individual level as wholly unchosen and unchangeable, an expression of beliefs and values that the individual perceives as important to her or his identity (as in the case of the environmentalist who takes the bus regularly), or a casual and fleeting preference borne out of current circumstances. Thus, I turn to an examination of just how deeply embedded polyamory appears to be based on the available evidence.

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76Marcosson, supra note 52, at 682.
b. How Deeply Embedded Is Polyamory?

i. Summary of Views of Whether Polyamory Is an Identity from Within the Polyamorous Community.

Polyamorists express differing views about whether polyamory should be considered an identity and, for those that think it is an identity, whether it is a “hardwired” or constructed identity. Moreover, some evidence suggests that many polyamorists are particularly resistant to the idea of polyamory as an essential identity, instead preferring to focus on the “freedom, fluidity, and individualism” afforded by membership in the polyamorous community. However, it is impossible to make generalizations because some polyamorists do view polyamory to be an essential identity, sometimes linking the highest degree of individual polyamorous tendencies to “a hardwired absence of jealousy.”

This diversity of views about polyamorous identity among those who practice it is reminiscent of the diversity of views on LGB identity that exists within that community.

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77 See supra notes 52 and 53 and associated text.

78 Aviram, supra note 63, at 272, 273, 281; accord Rambukkana, supra note 16, at 146 (“[T]here are as many styles of polyamory as there are polyamorists”). Aviram’s research was limited to the San Francisco Bay Area’s polyamory community and so may not be reflective of polyamorists generally. See id. at 264.

While the values of freedom, fluidity, and individualism could themselves conceivably comprise an identity, an identity based on them would be almost the opposite of a traditional essentialist identity, which tends to be based on a conception of shared traits that are both static and monolithic. By contrast, an identity based on freedom, fluidity, and individualism would likely functionally result in a high degree of actual diversity among group members; thus, it would constitute a kind of anti-identity, although an identity nonetheless.

79 Emens, supra note 65, at 349-352.

80 Emens, supra note 65, at 351.

81 See, e.g., Marcosson, supra note 52, at 708, 710; see also Halley, supra note 18, at 42
However, it appears from the limited research available on polyamory that the essentialist view of polyamory is considerably less popular in polyamorist circles than is the essentialist view of homosexuality in LGB circles, and that, within each community respectively, universalizing language about polyamory tends to be much more common than does similar language about homosexuality.  

ii. Summary of Outsider Views of Polyamory.

Outside of polyamorous communities, in the larger culture, polyamory is rarely thought of even as an identity, let alone as either an essential or immutable one.  

For example, Jonathan Rauch has argued that “no serious person claims there are people constitutively attracted only to . . . groups rather than individuals. . . . People who insist on marrying . . . several lovers want an additional (and weird) marital option. . . . A demand for polygamous . . . marriage is thus frivolous in a way that the demand for gay marriage is not.” Thus, in accord with Rauch’s comments, poly identity is commonly thought of as “so superficial as to be frivolous” and “polys are generally not seen as a discrete group of individuals.”

(describing queer theory’s critique of the notion of homosexual identity); id. at 48-49 (distinguishing between minoritizing and universalizing understandings of homosexuality).

82 See Emens, supra note 65, at 343-46 (discussing the prevalence of universalizing language in polyamorous discourse); see also id. at 342 (“I would . . . posit that the contemporary view of homosexuality is highly minoritizing relative to the general view of polyamory.”).

83 Emens, supra note 65, at 342.

84 Emens, supra note 65, at 342.

85 Emens, supra note 65, at 342; Hadar Aviram, Geeks, Goddesses, & Green Eggs: Political Mobilization & the Cultural Locus of the Polyamorous Community in the San Francisco Bay Area, in UNDERSTANDING NON-MONOGAMIES 87 (Meg Barker & Darren Langdridge eds. 2010); see generally William Saletan, “Don’t Do Unto Others: The Difference Between Gay Marriage
iii. Evidence Suggests that Polyamory Is at Least Moderately Embedded.

These outsider views of polyamory may partially reflect prejudice against polyamorous people (in which case the views themselves would support the need for anti-discrimination laws to protect polyamorous people) or they may be, at least to some degree, a defensive reaction borne out of fears that a struggle for poly rights will reduce the chances for success of LGB struggles. At any rate, five sources of evidence suggest that, whether or not polyamory is typically understood as an essential identity, it is at least somewhere near the middle of the embeddedness scale described above and that it may be closer to the most embedded pole: (1) the statements of some polyamorists regarding their identities; (2) the value system that polyamory embodies; (3) the risks that polyamorous people take to engage in that lifestyle; (4) the importance placed on romantic relationships in our culture and the extent to which individual identity tends to flow from such relationships; and (5) legal and psychological research suggesting that polyamory has important parallels with homosexuality. On the other hand, the nearly universal character of nonmongamous desire\textsuperscript{86} compared with the much smaller subset of people who act on it polyamorously may suggest that at least the desire portion of polyamory is not unique, a fact which may make it harder for polyamorists to convincingly describe

and Polygamy,” SLATE (March 26, 2006), available at http://www.slate.com/id/2138482; see also Lee Stranahan, “Why Are Gay Marriage Advocates Not Defending Polyamory?” THE HUFFINGTON POST (Jan. 6, 2009), available at http://www.huffingtonpost.com/lee-stranahan/why-are-gay-marriage-advo_b_155476.html?view=screen (arguing that, as a matter of logic, same-sex marriage advocates should also support polyamorous marriages and expressing confusion that there is not greater support among such advocates); Bennett, supra note 67 (relating the view that “polyamory is a choice; homosexuality is not”).

\textsuperscript{86}Emens, supra note 65, at 345.

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themselves as a unique group, at least one based on polyamorous desires. This apparent universality of nonmonogamous desires may also make it difficult for polyamorists to claim the most entrenched form of a constructed identity, under which the individual experiences her identity classification as unchosen and unchangeable, although some polyamorists do experience their identities in that way.

First, as noted above, some polyamorists describe themselves as having been poly since early adolescence or even earlier and make other essentialist-sounding statements about their identities such as “[m]onogamy is just not my nature.”87 The legal scholar Elizabeth Emens has characterized such discourse as a “minoritizing strand in contemporary writings”88 on polyamory, thus suggesting that the minoritizing way of looking at polyamory is not the norm within the community. Other evidence, although limited in geographical scope, appears to confirm this view,89 although a very significant minority (thirty-six percent) of polyamorous bisexuals in one study reported that they had never preferred monogamy at any point in their lives.

87 Emens, supra note 65, at 350; see also Sheff, supra note 71, at 274; accord Weitzman, supra note 72, at 144 (describing a previous study in which, of 2169 bisexual and polyamorous respondents, thirty-six percent reported “that they had never preferred monogamy at any point in their lives”).

Early adolescence is also a time period in which many homosexuals first feel same-sex attraction. See Brief of Amicus Curiae American Psychological Ass’n et al. at *7, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102) [hereinafter “American Psychological Ass’n Brief”] (stating that “core feelings and attractions that form the basis for adult sexual orientation typically emerge between middle childhood and early adolescence”).

88 Emens, supra note 65, at 349-350 (emphasis added).

89 See, e.g., Aviram, supra note 63, at 264 (noting that author’s research focuses on San Francisco Bay Area polyamorists); id. at 271-72 (discussing the fact that San Francisco Bay Area “[p]olyamorous activists lean toward a framework that rejects identity politics and strives to go beyond it”).
lives.  

For at least the subset of polyamorists described above, then, there is support for placing their poly identities on the far (most embedded) end of the embeddedness scale. Their experiences of understanding, from an early age, that they wanted types of relationships that differed from the societal norm are at least somewhat reminiscent of the classic homosexual experience of growing up knowing that one lacks the societally-prescribed interest in the opposite sex, although arguably wanting multiple relationships rather than one is less radical than wanting a relationship with someone of the same sex.

Additionally, some poly activists, such as Rambukkana, have described polyamory as an identity, although not necessarily as an essentialist one. He understands polyamory, like bisexuality, to occupy a “liminal position.” In the case of polyamory, that liminal position is one “caught between underground radicalism and public discourse” as well as between “queer and straight discourses of desire” and “forms of relationship.” For Rambukkana, polyamory is part of his identity as “a sex radical” and he considers his “ideological and political orientation towards sex” to be queer. However, though he believes, through his polyamory, he is “queering the concept of love or partnership,” at the same time he does not view this as enough to make

90Weitzman, supra note 72, at 144.

91Rambukkana, supra note 16, at 151; see also Emens, supra note 65, at 343, 346 (drawing comparisons between societal prejudice towards polyamory and that towards bisexuality).

92Rambukkana, supra note 16, at 151.

93Rambukkana, supra note 16, at 151.
him “queer,” a label he sees as reserved for homosexual desire. Rambukkana notes that his practice of polyamory is shaped by the experiences he had once he and his partner decided to have an open relationship. He also describes polyamory as “a form[] of sexuality,” advocates that those polyamorists “who can afford to have the label ‘polyamorous linked to [their] . . . identities’” do so, and, finally, states that, “[a]s a straight, out polyamorist, [he is] . . . exercising [his] . . . existential right to self-name and forge a subject position for [himself] . . . and those like” him.

Although Rambukkana does not explicitly label polyamory as a constructed identity, his descriptions seem to indicate that understanding. He speaks of the difficulty of polyamory’s liminal position, noting that this position is at least part of what makes polyamory a “particularly difficult social mantle[] to take on” and describes the alienation one risks in “com[ing] out of the poly closet.” This language suggests that avowing polyamory, like other disfavored identities, can have oppressive social consequences, which are presumably constructed but

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94 Rambukkana, *supra* note 16, at 151. Rambukkana’s definition of “queer” would be challenged by some queer theorists, who see “queer” as a much broader term. See, e.g., Adam P. Romero, *Methodological Descriptions: “Feminist” & “Queer” Legal Theories in FEMINIST & QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS* (Martha Albertson Fineman et al., eds. 2009) 192 (Queer . . . positions in opposition to, or at least at odds with, that which is normal, dominant, or hegemonic, but there is nothing to which ‘queer’ necessarily refers . . ..”) (citation omitted); *id.* at 193 (“To define queer legal theory in terms of sexual orientation, the interests of sexual minorities, or, most broadly, sexuality, will . . . prove short sighted.”).


entrenched in society. An important ramification of such consequences, to be explored further below, is that they are likely to discourage people from espousing polyamory in a superficial or haphazard way–the costs are simply likely to be too great. Thus, such consequences indirectly suggest that polyamory would not be at the superficial or extraneous extreme of the embeddedness scale. Moreover, the terminology of the closet draws an implicit comparison between polyamory and homosexuality, and Rambukkana also explicitly compares polyamory to bisexuality; these comparisons evoke an identity that, like homosexuality and bisexuality, appears to be considerably embedded. Further, Rambukkana’s use of the language “caught between” with reference to polyamory’s “liminal position” suggests some of the lack of choice and constraintment that are tied to the type of constructed identity that would come next after an essential identity on the embeddedness scale. His use of the language “ideological and political orientation” also suggests a potentially deep-seated constructed identity but, this time, one with elements of personal choice. While his statement that his experiences influenced his practice of polyamory, on first blush, may suggest a less embedded identity, in fact it would be hard to argue that any individual’s experiences did not influence her practice of heterosexuality or homosexuality. Thus, this statement probably does not indicate a lack of embeddedness of poly identity. Finally, his description of polyamory as a sexuality and his linkage between avowing polyamory and exercising his right to self-name and to form a subject position suggest that polyamory is a deep and integral part of his identity and therefore more towards the embedded end of the embeddedness scale.

99 Additionally, the Psychotherapist Geri Weitzman has discussed the phenomenon of coming out as polyamorous to oneself and has explicitly compared this experience to that of LGB people in
Thus, the essentialist-sounding statements of polyamorists quoted above and Rambukkana’s descriptions of his own poly identity support placing polyamory, in the first case, at the most embedded end of the embeddedness scale and, in the second, somewhere between the most embedded end and the middle. Although these views may not be representative of the poly community as a whole, they demonstrate, at least with respect to the individuals involved, that poly identity is far from frivolous or superficial. Importantly, the fact that there is diversity among polyamorists about how they view their own practice of polyamory, whether they conceive of it as an identity, and, if so, what type of identity, does not necessarily detract from the validity of the points of view of those who do view poly as an identity.\(^{100}\) A similar diversity exists within the LGB community,\(^{101}\) and some scholars have suggested that it should be viewed as a strength rather than a weakness.\(^{102}\)

Secondly, the values associated with polyamory also suggest that it is not a superficial or extraneous identity. Emens has identified five principles that are encompassed within the “ethical vision” of polyamory: “self-knowledge, radical honesty, consent, self-possession, and privileging love and sex over other emotions such as jealousy.”\(^{103}\) Other scholars, such as Hadar coming out of the closet. Weitzman, supra note 72, at 148.

\(^{100}\) See Tweedy, supra note 49, at 69 (arguing that each person has a right to define her own identity in the context of sexual orientation and other attributes).

\(^{101}\) See, e.g., Marcosson, supra note 52, at 708, 710.

\(^{102}\) See, e.g., Emens, supra note 65, at 353.

\(^{103}\) Emens, supra note 65, at 283.
Aviram, have linked polyamory to “a utopian, visionary background,”\textsuperscript{104} and to values such as originality, individualism, tolerance, freedom, fluidity, and pluralism.\textsuperscript{105} Under these scholars’ views, it is apparent that polyamory is at least partially about embracing a worldview that has specific cultural roots in “the utopian Oneida commune of upstate New York,” which was founded in 1848,\textsuperscript{106} as well as in science fiction and fantasy literature, especially the works of the author Robert Heinlein.\textsuperscript{107} The values encompassed in this vision, which are apparently socially constructed,\textsuperscript{108} are likely to be deep-seated. For example, most people could, with some stability over time, be described as honest or dishonest or some variation thereof, such as honest except in \textsc{X} circumstances. Similarly, the values of pluralism, tolerance, individualism, and originality, as well as pursuit of self-knowledge appear to generally be present in a person or not. While experiences could potentially lead a person to become more or less tolerant, for instance, or more or less inclined to pursue self-knowledge, one would expect these values to change in an

\textsuperscript{104}Aviram, \textit{supra} note 63, at 277.

\textsuperscript{105}Aviram, \textit{supra} note 63, at 273, 281; \textit{see also} Weitzman, \textit{supra} note 72, at 147 (noting based on survey results that “within the bi-poly [bisexual-poly] community there is a higher degree of acceptance for people’s differences than there is within the mainstream”).

\textsuperscript{106}Bennett, \textit{supra} note 67; Emens, \textit{supra} note 65, at 303 n.127. \textit{But see} Rambukkana, \textit{supra} note 16, at 146 (“In reality, rather than an unbroken line from one groups of sex radicals to the next, the acculturation of individuals into certain ways of being can be (and usually is) much more eclectic.”).

\textsuperscript{107}Aviram, \textit{supra} note 63, at 275.

\textsuperscript{108}\textit{See}, e.g., Brook K. Baker, \textit{Traditional Issues of Professional Responsibility and a Transformative Ethic of Client Empowerment for Legal Discourse}, 34 \textsc{New Eng. L. Rev.} 809, 874 (2000); \textit{see also} John Lawrence Hill, \textit{Law & the Concept of the Core Self: Toward a Reconciliation of Naturalism & Humanism}, 80 \textsc{Marq. L. Rev.} 289, 324 (1997) (describing personal values as being “the result of social influences”).

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individual, if at all, gradually over time. It is difficult to imagine the opposite occurring--waking up one morning and saying, “despite my conflicting values up until now, for the next month, I’m going to be honest with everyone with whom I enter a relationship, I’ll embrace tolerance, self-knowledge, and self-possession, and will privilege love over jealousy, etc. and also will pursue more than one relationship simultaneously.” If polyamory were entirely superficial, as some have argued, then such a sudden change could easily occur and would not require a major life-changing event to spur it on. Instead, the opposite appears to be true. A person could not embrace polyamory without either having had a consonant set of values already in place for some time or having come gradually to espouse them. The importance of such values to polyamory, and the relative difficulty of changing one’s value system, suggest that polyamory must be at least somewhere around the middle of the embeddedness scale described above.

Thirdly, much evidence suggests that polyamorists engage in significant risks to pursue that lifestyle. These risks make it unlikely that a significant percentage of polyamorists have embraced polyamory in a haphazard or superficial way. Poly parents’ potential loss of custody due to arguments that polyamory will harm their children is one of the most important of such risks. 109 Employment discrimination is also a potential consequence of openly espousing

109 Bennett, supra note 67; see also Emens, supra note 65 at 310-12 (describing a high-profile custody battle between a poly mother and the child’s paternal grandmother); Rambukkana, supra note 16, at 148 (citing loss of custody of children as one of the potential “serious . . . legal consequences” of “public polyamory”); Stanley Kurtz, “Rick Santorum Was Right: meet the future of marriage in America,” NATIONAL REVIEW ONLINE (March 23, 2005), available at http://www.nationalreview.com/kurtz/kurtz200503230746.asp (suggesting that the assumed effects of polyamory on children are one of the strongest reasons to oppose the right to polyamorous marriages).
polyamory,\textsuperscript{110} with the result that many polyamorists appear to remain closeted at work.\textsuperscript{111} Additionally, in one survey, polyamorists identified “employment nondiscrimination as one of their three highest priority legal issues.”\textsuperscript{112} Furthermore, there is evidence that children of poly parents face harassment at school.\textsuperscript{113} Finally, out polyamory has been associated generally with social “stigma and attendant loss of power within monogamous society,” such that poly individuals report having lost friends, being alienated from their families, and being ostracized from spiritual and other communities as a result of revealing their polyamory.\textsuperscript{114}

\textsuperscript{110}Rambukkana, \textit{supra} note 16, at 148; \textit{see also} Emens, \textit{supra} note 65, at 362.

\textsuperscript{111}Sheff, \textit{supra} note 71, at 277-78. Polyamorists also may be choosing to remain closeted in other facets of their lives. Rambukkana, \textit{supra} note 16, at 148 (noting that “[o]ften, if a polyamorous person is single, or in a couple, passing is the preferred strategy” and that “few people want [nonmonogamy] linked to their identity”); \textit{see also} Aviram, \textit{supra} note 63, at 278 (describing the poly practice of living “under the radar” in order to avoid government intrusion into one’s personal life). \textit{But see} Emens, \textit{supra} note 65, at 331 n.316 (quoting from a magazine article in which a lawyer advising a poly readership notes that “[m]ost people are not ‘comfortable’ being closeted” at work).

\textsuperscript{112}Emens, \textit{supra} note 65, at 331 n.316.

\textsuperscript{113}\textit{See generally} Maria Pallotta-Chiarolli, \textit{‘To Pass, Border or Pollute,’ Polyfamilies Go to School, in UNDERSTANDING NON-MONOGAMIES 182-87} (Meg Barker & Darren Langdridge, eds. 2010).

\textsuperscript{114}Sheff, \textit{supra} note 71, at 277; \textit{see also} Weitzman, \textit{supra} note 72, at 142 (documenting the fact that polyamorous people often have difficulty finding responsive psychotherapists); Rambukkana, \textit{supra} note 16, at 148 (describing loss of friends as a potential social consequence of “public polyamory”). Similarly, Christian Klesse describes two bisexual polyamorous interviewees one of whom experienced her friends being critical of her polyamory and sympathetic to the problems it caused her partner and the other of whom reported criticisms from his former partner’s friends. Christian Klesse, \textit{Paradoxes in Gender Relations, in UNDERSTANDING NON-MONOGAMIES 115-16} (Meg Barker & Darren Langdridge eds. 2010). More generally, in her “barely truthful” poetic memoir about embarking on a polyamorous relationship contemporaneously with moving to Hawaii, Juliana Spahr states that “[l]ack of understanding was all around. It defined them [the participants in the polyamorous relationship].” \textit{Spahr, supra} note 58, at 16, 217.

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three percent of polys in one study reported having directly experienced prejudice as a result of being poly and about a quarter of respondents had experienced verbal abuse based on their polyamorism.\textsuperscript{115} Although these potential consequences mirror many of those of out homosexuality, the consequences for out polyamory are probably nowhere near as prevalent as those for homosexuality, a fact which is likely due in large part to the greater salience of homosexuality within our culture.\textsuperscript{116} Nonetheless, the consequences for out polyamory are sufficiently severe and, based on the available evidence, appear to cause sufficient fear among polyamorists that is unlikely that anyone, much less a significant number of people, would take on the lifestyle or identity of polyamory lightly. Thus, these potentially severe consequences indirectly affirm that polyamory is most likely at least somewhere near the middle of the embeddedness scale and that it is almost certainly not at the superficial or extraneous end.

The fourth reason that polyamory is likely to be considerably embedded in individual identity is that, as documented by Holnig Lau in the context of LGB identity, romantic and sexual relationships play a constitutive role in personal identity in our culture.\textsuperscript{117} Lau has

\textsuperscript{115}Weber, \textit{supra} note 72, at 5.

\textsuperscript{116}See, e.g., Emens, \textit{supra} note 65, at 352-53 (noting that polyamorists have not undergone the “perverse implantation” described by Foucault that “fixed homosexuals with a perceived pathology in the eyes of sexology and, ultimately, the broader culture” and that it is neither “feasible ([n]or presumably desirable) to recommend that they pursue one”); \textit{see also} Aviram, \textit{supra} note 63, at 272 (noting that “polyamory has not, historically, suffered the social stigma associated with heterosexuality”). \textit{But see} Weitzman, \textit{supra} note 72, at 142 (stating that, in the therapy field, “polyamory is often pathologized”).

\textsuperscript{117}See generally Lau, \textit{supra} note 2; \textit{see also} American Psychological Ass’n Brief, \textit{supra} note 87, at *4 (noting that “[s]exual attraction and expression are important components of romantic relationships” and describing close relationship bonds as being formed to meet “personal needs for love, attachment, and intimacy”).
documented this phenomenon as applied to LGB couples in the public accommodations context, but his research applies with some force to the context of polyamory as well. Borrowing from collective rights theories traditionally applied to protect minority cultures, Lau argues that “an individual’s identity is inextricably linked to her memberships in certain social collectives. Accordingly, protecting that individual requires not only protecting her individual right to associate with those collective entities, but also protecting those entities’ aggregate rights to develop.”\textsuperscript{118} For Lau, the paradigmatic collective entity in the LGB public accommodations context is the same-sex couple, including the long-term couple, the short-term couple, and the potential couple;\textsuperscript{119} this is “because one’s sexual orientation classification is necessarily defined by whom she desires to partner with, regardless of whether she identifies with a larger sexual orientation group.”\textsuperscript{120} Thus, in one hypothetical, he describes a bisexual woman in a same-sex couple who wants to go to a resort that discriminates against same-sex couples with her partner. Lau explains that, even if the woman does not view “her membership in a same-sex couple as an expression of bisexuality,” she and her partner want the resort “to recognize their union, not because it expresses membership in a gay or bisexual community, but because the union is a collective entity that is important in and of itself.”\textsuperscript{121} 

Moreover, in analogizing LGB rights to recognition of same-sex couples to the rights of minority cultures, Lau’s work implicitly recognizes the central importance of relationships in our

\textsuperscript{118}Lau, supra note 2, at 1273.
\textsuperscript{119}Lau, supra note 2, at 1309.
\textsuperscript{120}Lau, supra note 2, at 1273.
\textsuperscript{121}Lau, supra note 2, at 1300-01.
culture. For instance, he explains, in describing the theory of group rights that he is extending to support the right to recognition of same-sex couples, that “to protect the individual’s right to self-development, it is imperative to protect the cultural group on which the individual relies to develop her sense of self. Without the larger cultural group, the individual can no longer fully develop herself as an individual.” Later, he speaks of the role of a same-sex relationship in an individual’s self-development and particularly the development of her sexual identity. He also describes the “identity-defining bonds” that develop between members of a couple and the evidence that they are formed through sex, physical affection, “shared goals and values, mutual support and ongoing commitment.” Thus, Lau’s comparison between couples and minority cultures resonates because romantic and sexual relationships are culturally valued as integral to personal development, and there is no reason that his insight should not apply to polyamorous relationships as well.

In fact, Lau’s work on couples is largely transferrable to the context of polyamory. He recognizes in the hypothetical cited above that the union is important to the individuals involved in and of itself, regardless of whether the individuals identify themselves or their relationship with the larger LGB community. Thus, his theory is largely based (1) on the importance of the relationship itself and cultural recognition of the relationship to the individuals involved and (2)

122 Lau, supra note 2, at 1282.
123 Lau, supra note 2, at 1289-1290.
124 Lau, supra note 2, at 1288 (citations and internal quotation marks omitted).
125 The view of relationships as integral to personal development and happiness appears to have gained some traction in the Supreme Court as well. See, e.g., Levit, supra note 30, at 30 (discussing Lawrence v. Texas, 539 U.S. 538 (2003)).
on the ways in which the relationship and its recognition support individual self-development. Were it not for the centrality of personal relationships in our culture, Lau would have no basis to argue that protection of LGB individuals from discrimination was insufficient to protect their rights as LGB persons and that application of a couples-rights theory was therefore necessary. Moreover, in recognizing homosexuality to be relationship-based, Lau reveals sexual orientation as traditionally understood to be substantially relationship-based, thus revealing an important parallel between polyamory and our current concept of sexual orientation.

Polyamory is of course centered on relationships, and it is reasonable to conclude that polyamorists, like LGB persons, suffer dignitary harms when their relationships are not supported or recognized. Quoting Charles Taylor, Lau states that “[n]onrecognition or misrecognition ... can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.” In the context of polyamory, where only one of a person’s two or more relationships would likely be publicly recognized, the injury may be better described as partial recognition, which could be expected to be a similar injury, but perhaps less severe, than nonrecognition or misrecognition. Indeed research on polyamory suggests that polyamorous

126 See, e.g., SPAHR, supra note 58, at 19-20 (“There were awkward moments, moments that they did not . . . really know how to deal with . . . . There were those moments such as when one of them put down two names on the guest slot for the office holiday party and were told that only partners could come, not roommates.”).

127 Lau, supra note 2, at 1275 (citation and internal quotation marks omitted).

128 See SPAHR, supra note 58, at 16 (reporting that the three members of the polyamorous relationship she describes were “defined” by “misunderstanding”); id. at 177-79 (alluding to the pain and fear resulting from being closeted about one’s poly relationship when meeting new people and in relatively public contexts, such as a Spanish class).
relationships may aid the participant’s self-development, which Lau’s work indicates is the case for relationships generally and specifically for same-sex relationships. Moreover, Lau’s work, while focused exclusively on same-sex relationships, explicitly seeks to protect non-monogamous couples as well as monogamous ones. Thus, Lau’s research, by demonstrating the centrality of the personal romantic relationship in American culture, indirectly affirms that polyamorous identity, which is based largely on having multiple simultaneous relationships, is likely to be a considerably embedded identity. His work also reveals polyamory to be similar to traditional sexual orientation in its focus on relationships, a fact which supports defining polyamory as a type of sexual orientation.

Finally, Elizabeth Emens’ legal scholarship and Geri Weitzman’s psychological research, by drawing significant parallels with LGB identity, demonstrate that polyamorous identity is likely considerably embedded in the individual. Taking Emens’ research first, she has theorized a scale of polyamorous dispositions similar to the Kinsey scale for homosexuality:

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...

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129 Weitzman, supra note 72, at 140 (“New aspects of self sometimes emerge as one relates closely to additional people.”).

130 Lau, supra note 2, at 1289-1290.

131 This discussion is not meant to imply anything negative about singleness or to validate in any sense the discrimination that single people may face in various segments of society. See, e.g., Mario L. Barnes, University of California, Irvine and Trina Jones, University of California, Irvine/Duke University, Singlism: Do the Rights of Unmarried Workers Need Protection?, Presentation at the Law & Society Ass’n 2010 Annual Meeting (May 27, 2010).

132 Emens, supra note 65, at 284, 355-361.
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.¹³³

Emens goes onto suggest that the polyamorous to monogamous continuum has four components:

(1) the scope of one’s own sexual desire (i.e., does a person desire sexually only one or multiple people); (2) one’s wishes for her partner with respect to the scope of her partner’s sexual desires; (3) the number of ongoing domestic/romantic partners that one desires for herself (one or multiple); and (4) the number of ongoing domestic/romantic partners that one desires for her partner.¹³⁴ She then theorizes that most people are polyamorous in their own personal sexual desires, in other words that they sexually desire more than one person, but that they wish their partner to only desire one person.¹³⁵ Similarly, she concludes from the scarcity of polyamorous relationships that most people both desire only one ongoing domestic/romantic partnership and desire that their partners have only one such relationship.¹³⁶

Although there are important differences between the two approaches, Emens’ four-point determination for polyamorous dispositions is roughly analogous to the scale for measuring levels of homosexuality and heterosexuality developed in the 1940s by the pioneering sexologist

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¹³³Emens, supra note 65 at 284.
¹³⁴Emens, supra note 65, at 356-59.
¹³⁵Emens, supra note 65, at 359.
¹³⁶Emens, supra note 65, at 359.

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Alfred Kinsey. Unlike Emens’ four-point inquiry in which each point appears to operate in isolation, Kinsey’s seven-point scale is a linear progression from pure heterosexuality to pure homosexuality based on levels of attraction and sexual experience. However, like Kinsey’s measure of hetero- and homosexual dispositions, Emens’ scale attempts to measure individuals’ dispositions toward monogamy and polyamory.

Another difference in approach between Emens and Kinsey is that Emens is not focused on sexual experiences but rather on “identit[ies] defined by the desires of the participants.” However, homosexuality and heterosexuality can be (and often are) similarly defined by desire alone. Moreover, Emens’ formulation of the components of a polyamorous disposition demonstrates that it is possible to conceive of individuals as more or less polyamorous independently of their behavior, just as essentialists and strong constructivists currently conceive of sexual orientation. Thus, as recognized by one of her critics, Emens’ work demonstrates that polyamory is properly thought of as an identity that is similar in many respects to hetero- and

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137 See, e.g., Donald H.J. Hermann, Legal Incorporation and Cinematic Reflections of Psychological Conceptions of Homosexuality, 70 UMKC L. Rev. 495, 533 (2002).


139 Emens, supra note 65, at 355-59.

140 Emens, supra note 65, at 355.

141 See, e.g., MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2005), available at http://unabridged.merriam-webster.com/cgi-bin/collegiate (defining “homosexual” as “of, relating to, or characterized by a tendency to direct sexual desire toward another of the same sex,” among other definitions).
homosexuality.\textsuperscript{142}

The psychotherapist Geri Weitzman also draws important parallels between polyamorous and homosexual identity. She suggests that people either are or are not disposed to polyamory, although she describes the phenomenon in less detail than does Emens.\textsuperscript{143} For instance, Weitzman refers to “[p]olyamorously inclined people” and draws an explicit comparison with sexual orientation when she states that “just as people vary in sexual orientation, so too do they vary in preference for intimacies with one vs. multiple partners.”\textsuperscript{144} Weitzman also describes the process of coming out to oneself as polyamorous as similar to the coming out process that an LGB person goes through:

There are many milestones along the path of polyamory identity development. The first is the process of coming out to oneself about one’s interest in a polyamorous lifestyle—similar to the coming out process that is experienced by bisexual, lesbian, transgender and gay people. There is a recognition that one’s identity is changing along with one’s romantic preferences, and that one’s evolution is taking a different path from what the mainstream society expects.\textsuperscript{145}

Thus Weitzman perceives the seminal queer experience of coming out as having a close parallel in polyamory. Moreover, she refers to “polyamory identity development,” demonstrating that she sees polyamory to be an identity.\textsuperscript{146} While the term “identity development” can be understood to

\textsuperscript{142}Kurtz, supra note 109.

\textsuperscript{143}Weitzman, supra note 72, at 140.

\textsuperscript{144}Weitzman, supra note 72, at 140.

\textsuperscript{145}Weitzman, supra note 72, at 148.

\textsuperscript{146}See also SPAHR, supra note 58, at 22 (“[I]t is a story of [three participants in a polyamorous relationship] . . . coming to an identity, coming to realize that they not only had a gender . . . , but they also had a . . . sexuality that was decided for them without their consent and by historical events . . . . So it is also a story of finding ease in discomfort”).
invoke a constructed identity, rather than black and white essentialism, the constructed identity that she describes appears to be deep-seated: the idea that a person would recognize that her own identity was changing and “taking a different path” than society expected suggests a lack of control on the individual’s part. Thus, Weitzman describes polyamory as a deeply embedded identity in two ways. First, she draws explicit comparisons with homosexuality, which, in the world of psychology at least, is considered a deep-seated identity. Such comparisons therefore implicitly suggest that polyamory is also a deep-seated identity. Secondly, she speaks explicitly of polyamorous identity and does so in a way that suggests that an individual’s identity as polyamorous is largely a matter of personal evolution rather than a choice.

These five sources tend to suggest that polyamory is deeply embedded to varying degrees and overall that, at a minimum, it is somewhere around the middle of the embeddedness scale. The statements of polyamorous individuals indicating personal histories of polyamorous tendencies that date back to adolescence suggest a strongly embedded identity, located near the most embedded pole on the scale. Similarly, Emens’ theory of a polyamorous disposition and the parallels drawn by Weitzman with LGB identity also support an understanding of polyamorous identity as deeply embedded. Rambukkana’s discussion of his own polyamorous identity may suggest a slightly less embedded identity but still one that is considerably embedded. The extent to which personal identity and development flows from romantic and sexual relationships in our culture, as explored by Lau, also supports a notion of polyamory as a considerably embedded identity. Finally, the values that polyamory embodies and the risks that

147 See generally American Psychological Ass’n Brief, supra note 87; see also Emens, supra note 65, at 342 (“Gay identity is viewed by many to be a deeply rooted element of identity . . . .”)

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polyamorous people undertake to practice polyamory suggest an identity that is at least moderately embedded.

However, the fact that one of the keystones of polyamory, sexual desire for more than one person, is also shared by virtually every member of society may be understood to suggest that polyamorists are not distinct from the general population, at least based on this trait, although the trait is likely deeply embedded.\footnote{As Emens explains with respect to nonmonogamous behavior: “[t]he poly ethic of honesty posits that many more people engage in nonmonogamous behavior than own up to it. From that perspective, polys may seem less a distinct minority than outspoken representatives of the masses.”\footnote{Emens, \textit{supra} note 65, at 343.}} In this sense, one of Emens’ four components of polyamory—sexual desire for more than one person—while it may well be deeply embedded as a constructed (or potentially essentialist) identity trait and may be immutable, is by no means unique to polyamorists. This is problematic because it will likely cause polyamorists difficulty in arguing that a central component of their polyamorist identity sets them apart and is a basis of discrimination. On the other hand, however, Emens’ other three components of polyamory (wanting one’s partner to have other sexual desires, wanting to have more than one continuing romantic/domestic partnership, and wanting one’s partner to have more than one such partnership) do appear to much more unique. Moreover, these three components are likely to be at least somewhat deeply embedded as well, although the first and the third may be considerably

\footnote{\textit{See} Emens, \textit{supra} note 65, at 343, 353; \textit{see also id.} at 345 (“[I]t seems a fair assumption that almost everyone has at some time felt desire for more than one person.”).}

\footnote{Emens, \textit{supra} note 65, at 343.}

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less embedded than sexual desire. The second, wanting more than one ongoing romantic/domestic partnership for oneself, may be between the most embedded pole and the mid-point of the scale.

Thus, the ubiquity of sexual desire for more than one person, which is one of the central and most embedded components of polyamory, does not mean that polyamory cannot be a unique identity. Even ignoring this component of poly identity as formulated by Emens, the other three components still appear to be at least moderately embedded or perhaps more so. Thus, it appears that the embeddedness of polyamory varies to some degree by individual and that sometimes it will fall at the most embedded end of the scale. In many (and perhaps most) other cases, however, it will be at least at a moderately embedded level.

3. Is Discrimination Against Polyamorous Individuals Sufficient to Warrant Anti-Discrimination Protections?

As discussed above, polyamorists risk custody loss, workplace discrimination, the harassment of their children in school, loss of friends, alienation from their families, and ostracization from spiritual and other communities as a result of revealing their polyamory, and nearly half of poly respondents in one study reported having experienced prejudice as a result of

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150 See, e.g., Emens, supra note 65, at 330. Emens explains the poly term “compersion,” or a “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” and then states that “[p]olys generally aim to develop and expand their compersion, while understanding, working through, and getting past jealous responses.” Id. The idea that polyamorous individuals could “develop and expand” their compersion suggests that their desire for their partners to have more than one sexual relationship and more than one ongoing romantic/domestic partnership is, to some degree, dependent on personal choice. This element of personal choice indicates a lower degree of embeddedness, but, because deep-seated values are driving the personal choice and because it is unlikely that one’s desires for one’s partner are completely subject to personal choice, these two elements of Emens’ formulation would still be at least moderately embedded.

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their polyamory. Additionally, Emens has noted that the “social hostility [against relationships involving more than two people] sustains various legal burdens on polyamorists, including two-person marriage and partnership laws, adultery and bigamy laws, [and] residential zoning laws . . .” Furthermore, Rambukkana documented negative reactions to the formation of an on-campus polyamory group that included the university newspaper’s public ridicule of the group on the basis that the group was comprised of “a bunch of ‘culty’ sex maniacs” and the suggestion that the group was a “recruitment machine” that sucked people in “‘with promises of sex and more sex.’” Rambukkana also documented resistance to the group among lesbian polyamorists and others who dismissed the group as a “straight pickup scene[],” apparently objecting to the group’s mainstreaming a practice that was perceived to be the rightful province of sex radicals. The reactions of the columnist in the school newspaper suggest that polyamory is likely to be erroneously associated with hyper-sexuality and that cultural shame regarding sexuality may therefore be triggered by public polyamory and then used to denigrate and perhaps more so.

151 See supra note 109-115 and associated text.

152 Emens, supra note 65, at 283.

153 Rambukkana, supra note 16, at 145.

154 Rambukkana, supra note 16, at 146, 149.

155 See also Emens, supra note 65, at 343 (“The universalizing account of nonmonogamy may seem obvious: Of course most people want to sleep with others; they just resist that impulse. From this perspective, polyamory may seem, like bisexuality, to be a form of greed or indulgence.”); Bokma, supra note 64 (describing the popular misperception that “‘polyamory is like having your cake and then having more cake – endless cake forever’”) (quoting Jillian Deri).
polyamorists.\textsuperscript{156} The reactions of lesbian polyamorists suggest that public polyamory, especially involving opposite-sex relationships, may incite disapproval and distancing tactics among lesbian and other queer-identified groups who perceive such polyamory “as a corruption of something pure . . . that arose in its essential form in the utter rejection of heterosexist culture, that is in lesbian feminism.”\textsuperscript{157} In other words, to the extent that one is identified with or allied with the LGB community, coming out as polyamorous could also result in one’s alienation from that community.\textsuperscript{158}

These forms of discrimination are considerable, and they have the potential to impose severe, indeed devastating, burdens on individuals who espouse polyamory. On the other hand, however, it does seem clear that, despite the existence of laws, including criminal adultery and bigamy laws,\textsuperscript{159} and other social mechanisms that penalize polyamory, “polyamory has not, historically, suffered the social stigma associated with homosexuality.”\textsuperscript{160} How then to decide

\textsuperscript{156} Accord Klesse, supra note 114, at 110 (detailing the prejudice that women in particular are exposed to in patriarchal culture as a result of non-monogamy and suggesting that certain groups of women such as those who are working-class, black, or Jewish, are disproportionately burdened).

\textsuperscript{157} Rambukkana, supra note 16, at 149.

\textsuperscript{158} See Rambukkana, supra note 16, at 149-151.

\textsuperscript{159} As the Court has explained, the imposition of criminal laws places a severe burden on an individual. See, e.g., Duro v. Reina, 495 U.S. 676, 688 (1990) (recognizing that criminal jurisdiction “involves a far more direct intrusion on personal liberties” than civil jurisdiction), superseded by statute as stated in United States v. Lara, 541 U.S. 193 (2004); see also Lawrence v. Texas, 539 U.S. 558, 575-76 (2003) (stating that “the stigma imposed [by Texas’ law criminalizing homosexual sodomy] is not trivial” and describing the law’s import “for the dignity of the persons charged”).

\textsuperscript{160} Aviram, supra note 63, at 272.
whether it warrants protection?

a. **Cooper’s Methodology for Examining Whether Protections Should Be Extended to a Given Group.**

Davina Cooper has suggested one way to evaluate the question of whether a class designation is “emerging as an organising principle of inequality in its own right” and therefore warrants special protection under the law.\(^{161}\) Using cigarette smokers as an example, Cooper argues that, even assuming “that cigarette smokers are subject to significant discrimination, marginalisation and other kinds of disadvantage,” to evaluate whether smokers need special protection, we should look at “smoking’s more general impact on modes of power, institutional structures, and social dynamics.”\(^{162}\) She notes that “[t]here is no evidence that smoking, as the enactment and reproduction of socially asymmetrical positions, affects institutional forms such as education, local government, the military or law” and that [i]t also does not render modes of power intelligible . . . \(^{163}\) Finally, she asks whether, just as we talk about institutional or national cultures being gendered in ways that reproduce the asymmetry of values and norms associated with femininity and masculinity, could we talk about them equally as being ‘smoked’, where the values and meanings associated with smoking are prescribed less value than their  

\(^{161}\)COOPER, *supra* note 16, at 63.  
\(^{163}\)COOPER, *supra* note 16, at 63.
non-smoking binary counterparts?\[164]\n
\[164\] COOPER, supra note 16, at 63.
Cooper concludes that it is not possible to intelligibly talk about cultures being saturated with smoking/non-smoking-based binaries where the smoking portion is consistently devalued. Although such binaries (e.g., habit/non-addiction and chemical/natural) are applied to denigrate smoking and smokers, they are not driven by smoking imagery; rather the imagery is borrowed from other contexts. Cooper further concludes that, although smoking is linked to “conduct-based stigmatisation, status-building, and the more general dynamic processes of community formation,” that the linkage is “very mediated” in that smoking and these social dynamics “exist independently of each other.” Thus, “the social response toward smoking is far more fluid and revisable than is the case with other social constituencies.” In Cooper’s view, because smoking does not appear to be tied to “an organising principle[] of inequality,” “a more evaluative process” is required to determine whether legal protections need to be extended to smokers. By contrast, “where organising principles of inequality . . . are at stake, we cannot trust our processes of evaluation and judgment.”

Published cases explicitly discussing polyamory appear to be few and far between. While these cases generally portray polyamory in a negative light, they are not sufficient in number to warrant a conclusion, on their own, that polyamory constitutes an organizing principle of

165 COOPER, supra note 16, at 63-64.
166 COOPER, supra note 16, at 64.
167 COOPER, supra note 16, at 64.
168 COOPER, supra note 16, at 66.
169 COOPER, supra note 16, at 66.
inequality. However, there is a wealth of law pertaining to nonmonogamy that demonstrates

For instance, two dissents mentioned polyamory in child custody cases where the majority opinions allowed visitation rights to someone who was not a biological parent in order to raise the possibility that the majority opinions had inadvertently sanctioned allowing parental rights to groups of more than two polyamorous parents. Kulstad v. Manaci, 352 Mont. 513, 547-48, 220 P.3d 595, 617 (2009), Rice, J., dissenting (arguing that the court had improperly awarded parental rights to a lesbian non-adoptive co-parent after the dissolution of her relationship with the adoptive parent); Riepe v. Riepe, 208 Ariz. 90, 112-13, 91 P.3d 312, 334-35 (Ariz. App. 2004), Barker, J., dissenting (arguing that, in awarding visitation rights to the step-mother after the biological father’s death, the court had inadvertently paved the way for awards of such rights to groups of more than two polyamorous parents). Notably, the Riepe majority attempted to rebut the Dissent’s contentions regarding polyamory. Riepe, 91 P.3d at 316.

Polyamory also came up in one custody case where the parties actually engaged in the practice. Cross v. Cross, 2008 WL 4491492, 5 Pa. D. & C. 5th 12 (Pa. Com. Pl. 2008). In Cross, a married Pennsylvania couple had apparently engaged in a polyamorous relationship with another married couple in Iowa, which apparently ultimately led to the dissolution of both marriages, with Mrs. Cross ultimately moving in with the Iowa couple and the Iowa wife temporarily staying in the marital home for financial reasons, despite no longer being in a romantic relationship with her husband. Id. The court, which awarded custody to the wife, mischaracterized polyamory as “wife swapping” and described it as “grossly inappropriate conduct.” Id. However, it stated that the parties had both willingly engaged in the conduct and were equally to blame for it and the resulting marital breakdown. As discussed further below, negative views of polyamory are more than evident in the Cross opinion, the Kulstad dissent, and both the Riepe dissent and the majority opinion.

Three criminal cases also mention polyamory. In one, the court held that the victim’s online profession of polyamory was inadmissible and did not fall under an exception to the rape shield law. Truitt v. Kentucky, 2008 WL 4691629, *1, *3 (Ky. 2008) (Unpublished). Another involved a mother who was appealing her murder conviction and who had engaged in polyamorous relationships while her seventeen-month-old daughter, who ultimately died due to her mother’s neglect, was very ill and shortly after she had died. State v. Rhoades, 2008 WL 933494, *1-*2, *6 (Wash. App. 2008) (Unpublished). The polyamorous activity was apparently used to show the mother’s ability to function and thus to rebut her diminished capacity defense. Id. at *6. Finally, a third case held that, in a case in which a husband was charged with murdering his wife, testimony regarding the wife’s negative views of her husband’s polyamory was neither hearsay nor unduly prejudicial. State v. Petrick, 186 N.C. App. 597, 603, 652 S.E.2d 688, 692 (2007). The only other case I identified in which polyamory was mentioned referred to it merely to explain the interest of a organizational plaintiff in an obscenity case. Nitke v. Gonzales, 413 F. Supp. 2d 262, 264 (S.D.N.Y. 2005).

The custody cases in particular evidence negative judicial views of polyamory. In Kulstad and Riepe, polyamory was not remotely at issue, and yet the dissenting judges saw the potential recognition of the rights of polyamorous co-parents as an evil that had to be guarded.

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that, unlike the smoking/non-smoking distinction, the monogamy/non-monogamy distinction does have significant impact upon modes of power, institutional structures, and social dynamics. While non-monogamy is not synonymous with polyamory,\textsuperscript{171} it is nevertheless a \textit{sine qua non} of polyamory, as well as being the practice that appears to drive most of the prejudice against polyamorists.\textsuperscript{172} Moreover, polyamorists have overtly embraced nonmonogamy in a way that many others who engage in nonmonogamous actions have not. For instance, while there may be good reasons to decriminalize adultery even when practiced in its traditional form,\textsuperscript{173} the traditional adulterer, who commits to a monogamous relationship with a spouse and then secretly engages in a sexual relationship with a third person, is acquiescing to the societal framework of monogamy in a way that the polyamorist is not. By lying and sneaking around to engage in the relationship with a third party, the traditional adulterer could be said to tacitly acquiesce in the societal view that his or her additional relationship is wrong or at least socially unacceptable. Moreover, by hiding his or her actions, such a person attempts to have this illicit relationship without facing any social consequences for it (and presumably while harming the other party to the monogamous relationship). Finally, at the very least, the prototypical adulterer is not against. In \textit{Cross}, the court took pains to express strong disapproval of polyamory (which it also misconstrued), terming it “grossly inappropriate.” Although the criminal cases are harder to evaluate, the courts’ and individual judges’ negative treatment of polyamory in the custody cases remains striking.

\textsuperscript{171}See, e.g., Emens, \textit{supra} note 65, at 344 (describing an author’s “blur[ring of] the distinction between nonmonogamy and polyamory”).

\textsuperscript{172}See, e.g., Emens, \textit{supra} note 65, at 347-49.

challenging the framework of monogamy; rather he or she, by continuing to live under a pledge of monogamy, overtly supports the framework, while privately falling short of, or violating, it. By contrast, the polyamorist has rejected the framework and consciously attempts to live his or her life outside of it.\(^{174}\) Because the polyamorist explicitly embraces nonmonogamy and, at a minimum, lets everyone with whom she enters a romantic relationship know of this preference, the polyamorist is uniquely likely to be subject to discrimination, including \textit{de jure} discrimination against nonmonogamists, and it is arguably particularly unfair to burden the polyamorist with criminal sanctions, given that she been honest with those who would otherwise stand to be hurt by her lifestyle and that she has made a conscious decision to reject the strictures of monogamy, which would seemingly be a decision that she has the right, as a matter of personal liberty, to make for herself.

In this sense, the traditional adulterer is similar to the individual who experiences same-sex desires and occasionally acts on them but lives as a straight person, in other words on the down-low.\(^{175}\) In the vast majority of cases, such an individual has little need for anti-discrimination laws that protect against sexual orientation discrimination because he or she overtly rejects that lifestyle and identity, instead embracing traditional heterosexuality. Those who put themselves at risk by adopting and overtly performing a proscribed identity appear to be more in need of, and arguably may be more entitled to, specific legal protections.\(^{176}\)

\(^{174}\textit{See},\ e.g.,\ Potter, \textit{supra} note 64 (describing monogamy not as a “goal” but as “a point of departure” for polyamorists).

\(^{175}\textit{Oxford English Dictionary Online} (defining “down-low” as “of or relating to men who secretly engage in homosexual activity”) (March 2006 draft entry).

\(^{176}\textit{A similar analysis would apply to those who are erroneously perceived to be polyamorous.}
Nonetheless, anti-discrimination protections for polyamory may beneficially encourage those who desire to live the overtly non-monogamous lifestyle that polyamory embodies but who previously did not have the courage to do so or perhaps did not know such a life was possible to make their desires known to those with whom they are involved and to others.\textsuperscript{177} Because of the harm that closeting causes to closeted individuals,\textsuperscript{178} this would be a socially desirable consequence of anti-discrimination protections.

Thus, it is useful and appropriate to apply Cooper’s analysis to the monogamy/non-monogamy binary in order to see whether polyamory potentially warrants anti-discrimination protections. Although our culture privileges monogamy in innumerable ways,\textsuperscript{179} In terms of assuming there is a substantial risk of such a perception, because, to the degree it is socially desirable to protect against discrimination based on polyamory, we would want to protect against such discrimination regardless of whether the victim were actually polyamorous, in order to stake out a place for polyamory in our culture. On the other hand, however, in cases where the victim does not actually espouse polyamory, it may be difficult to sort out the difference between discrimination based on perceived polyamory and based on perceived non-monogamy more generally. Assuming that we do not necessarily want to protect all those who are non-monogamous from discrimination, this may be a reason to not include the perceived category in anti-discrimination provisions that include polyamory.

\textsuperscript{177} Cf. Rambukkana, \textit{supra} note 16, at 152 (describing the empowering effect of naming new forms of sexuality).

\textsuperscript{178} See, \textit{e.g.}, Yoshino, \textit{Bias, supra} note 24, at 527, 549.

\textsuperscript{179} In addition to laws such as those enforcing monogamy by criminalizing bigamy and adultery, Emens points to statements in caselaw that emphasize the importance of monogamy. Emens, \textit{supra} note 65, at 291. For instance, the Tenth Circuit has described monogamy as “the bedrock upon which our culture is built,” and the Supreme Judicial Court of Massachusetts, in its opinion upholding the right to same sex marriage, used the word “exclusive” six times. Emens, \textit{supra} note 65, at 291 (quoting Potter v. Murray City, 760 F.2d 1065, 1070 (1985), and citing Goodridge v. Dep’t of Pub. Health, 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003)). She further describes “condemnation of divorce, both historical and extant” as evidence of the enforcement of monogamy. Emens, \textit{supra} note 65, at 291. For an example of a court’s enforcing a harsh divorce law and tying its decision to the norms of monogamy, see Lantham v. Lantham, 136 Wis.
examples that pertain to American culture more broadly, Emens describes the pervasiveness of the ideas “that jealousy is . . . evidence of love, and . . . that jealousy may be understood to define romantic love” to demonstrate the “cultural law” of monogamy. Emens, supra note 65, at 289-290. Additionally, one need only think of the cultural force of terms like “slut” and “whore” to understand the force of the prescription of monogamy. Below I discuss a few key examples that particularly relate to law.

b. Criminal Law Is Currently and Has Historically Been Used to Enforce the Requirement of Monogamy.

Marriage has been described as “monogamy’s core institution.” Accordingly, laws designed to protect or encourage monogamous marriage or to penalize violations of its principles are properly seen as mechanisms to enforce monogamy. Thus, the bigamy and adultery laws discussed by Emens are explicitly designed to enforce monogamy as a cultural requirement. These laws are examples of society, through the coercive mechanism of the criminal law, explicitly punishing non-monogamy in order to privilege and cultivate monogamy. As the Court has recognized, applying the sanctions of criminal law to a type of conduct severely burdens the right to engage in that conduct, irrespective of the magnitude of the criminal penalty imposed.

360, 117 N.W. 787 (1908). In Lantham, the court stated that the “sacredness of marriage and the stability of the marriage lie at the very foundation of Christian civilization and social order.” Id. at 788. The court further explained that, if it were to allow easy divorces, it would be allowing “those who have become tired of one union . . . to collusively procure the severance [of it] . . . for the purpose of experimenting with another partner, and perhaps another, thus accomplishing what may be called progressive polygamy.” Id. at 788.

180 Emens, supra note 65, at 187.

181 Emens, supra note 65, at 284, 355.

182 See, e.g., Lawrence v. Texas, 539 U.S. 558, 575-76 (2003) (stating that “the stigma imposed...
Additionally, the United States historically also used criminal sanctions to force a monogamous conception of marriage on Native cultures. In 1892, for example, federal courts set up on Indian reservations were authorized to prosecute any Indian “who shall hereafter contract or enter into any plural or polygamous marriage . . . .”183 The punishment prescribed was a fine or hard labor (or both), as well as withholding of the individual’s rations during the course of the marriage.184 Given Indians’ dependence on the government during this period, the withholding of rations was a particularly harsh punishment.

These laws demonstrate the extent to which the norms of monogamy are, and have been historically, entrenched in the law and thus the extent to which such norms affect the law, one of the questions that Cooper asks. Additionally, as the above examples show, the law can be properly thought of as creating two classes of people—those who abide by the prescription of monogamy and are allowed to go free and those who violate it and have their freedom, and in the historical case of Indians subject to federal control, their ability to survive, compromised. Finally, the federal government’s selection of monogamy as one of the cultural norms to impose on Native cultures also reflects the cultural importance, even centrality, of monogamy in our culture.185

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184 ANDERSON, supra note 183, at 101-02.
185 Cf. Robert Laurence, Don’t Think of a Hippopotamus: An Essay on First-Year Contracts, -63-
c. The Special Rights Attendant on Marriage.

It is widely recognized that the law confers on married couples a host of special rights. In terms of federal law alone, the General Accounting Office has identified 1,138 provisions of the United States Code in which “marital status is a factor in determining or receiving benefits, rights, and privileges.” In addition to federal rights, such as tax breaks and social security benefits, available solely to married persons, states grant numerous exclusive privileges and rights as well. For example, in Goodridge v. Department of Public Health, the Supreme Judicial Court of Massachusetts, “[w]ith no attempt to be comprehensive,” listed many of the rights and benefits available exclusively to married persons under Massachusetts law, which, as the court noted, “touch[] nearly every aspect of life and death”:

Earthquake Prediction, Gun Control in Baghdad, the Indian Civil Rights Act, the Clean Water Act, and Justice Thomas’s Separate Opinion in United States v. Lara, 40 TULSA L. REV. 137, 142-44 (2004) (suggesting that Congress’ failure to include a Second Amendment corollary in the Indian Civil Rights Act, which imposed quasi-constitutional obligations on tribal governments, probably represented an understanding that the Second Amendment was less important than the rights that Congress did elect to include in the Indian Civil Rights Act).

186 See, e.g., Kara S. Suffredini & Madeleine V. Findley, Speak Now: Progressive Considerations on the Advent of Civil Marriage for Same-Sex Couples, 45 B.C.L. REV. 595, 598-99 & 598 n.10 (2004); see also Goodridge v. Dep’t Pub. Health, 440 Mass. 309, 323, 798 N.E.2d 941 (2003) (“The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death”); POLIKOFF, supra note 21, at 7-8 (explaining that “people in any relationship other than marriage suffer [due to the legal privileging of marriage], sometimes to a level of economic or emotional devastation” and noting some of the rights and privileges that marriage confers).

187 Suffredini & Findley, supra note 186, at 598 n.10 (internal quotation marks & citations omitted).

188 See Suffredini & Findley, supra note 186, at 598 n.10.

We note that some of the statutory benefits conferred by the Legislature on those who enter into civil marriage include, as to property: joint Massachusetts income tax filing; tenancy by the entirety (a form of ownership that provides certain protections against creditors and allows for the automatic descent of property to the surviving spouse without probate); extension of the benefit of the homestead protection (securing up to $300,000 in equity from creditors) to one's spouse and children; automatic rights to inherit the property of a deceased spouse who does not leave a will; the rights of elective share and of dower (which allow surviving spouses certain property rights where the decedent spouse has not made adequate provision for the survivor in a will); entitlement to wages owed to a deceased employee; eligibility to continue certain businesses of a deceased spouse; the right to share the medical policy of one's spouse; thirty-nine week continuation of health coverage for the spouse of a person who is laid off or dies; preferential options under the Commonwealth's pension system; preferential benefits in the Commonwealth's medical program, MassHealth; access to veterans' spousal benefits and preferences; financial protections for spouses of certain Commonwealth employees (fire fighters, police officers, and prosecutors, among others) killed in the performance of duty; the equitable division of marital property on divorce; temporary and permanent alimony rights; the right to separate support on separation of the parties that does not result in divorce; and the right to bring claims for wrongful death and loss of consortium, and for funeral and burial expenses and punitive damages resulting from tort actions.

Exclusive marital benefits that are not directly tied to property rights include the presumptions of legitimacy and parentage of children born to a married couple; and evidentiary rights, such as the prohibition against spouses testifying against one another about their private conversations, applicable in both civil and criminal cases. Other statutory benefits of a personal nature available only to married individuals include qualification for bereavement or medical leave to care for individuals related by blood or marriage; an automatic "family member" preference to make medical decisions for an incompetent or disabled spouse who does not have a contrary health care proxy; the application of predictable rules of child custody, visitation, support, and removal out-of-State when married parents divorce; priority rights to administer the estate of a deceased spouse who dies without a will, and the requirement that a surviving spouse must consent to the appointment of any other person as administrator; and the right to interment in the lot or tomb owned by one's deceased spouse.\textsuperscript{190}

The breadth of these laws conferring exclusive rights on married persons demonstrates that the class of married persons is privileged, while the opposing category of unmarried persons is

\textsuperscript{190} Goodridge, 440 Mass. at 323-25 (citations omitted).
correspondingly disfavored under the law. Because marriage as defined in our culture is necessarily a two-person relationship, premised on and reifying monogamy, the numerosity requirement of which is virtually beyond dispute, the disfavored class necessarily includes polyamorists and other non-monogamists, who are stained by their refusal to abide by this core societal norm.

d. The Burdening of Non-Marital Children.

Non-marital children are definitionally the product of a relationship that lacked the imprimatur of monogamy that marriage provides. The extent to which the law has historically, and to some extent continues to, oppress such children demonstrates Western culture’s extreme veneration of monogamy.

In the Middle Ages, the non-marital child was regarded as “living sin” and “deprived . . . of the ordinary rights of man . . . .” as well as of “a legal relationship with either parent.”

Under early English common law, the non-marital child was denied the right to her family name,

191 See, e.g., Emens, supra note 65, at 281; accord Kurtz, supra note 15, at 2 (“Americans still take it for granted that marriage means monogamy.”).

192 Of course, legal benefits conferred on married persons harm others besides nonmonogamists. See Polikoff, supra note 21, at 7; cf. id., at 50-51 (discussing efforts in Madison, Wisconsin to craft a domestic partnership ordinance that would be inclusive of diverse types of families). However, it appears that such laws may well have been designed to harm those who did not engage in monogamy in order to encourage monogamy. See, e.g., Polikoff, supra note 21, at 8, 21.

It is also worth noting that some married persons do engage in polyamory, thus breaching the norms and ideals of traditional marriage. See, e.g., Sheff, supra note 71, at 277 (discussing a polyamorous woman’s difficulty, because she was married to someone else at the time of the child’s birth, in getting her child’s natural father’s name listed on the child’s birth certificate); Bennett, supra note 67 (discussing a married couple who are engaging in polyamory).

the right to support from her family, and the right to inherit from her family.\textsuperscript{194} Increasingly, however, distinctions between legitimate and non-marital children came to be regarded as unjust with the result that English common law evolved to recognize that non-marital children retained all rights of legitimate children except the right to inherit.\textsuperscript{195} Nonetheless, as common law expanded and new substantive rights were created, new distinctions between non-marital and legitimate children emerged.\textsuperscript{196} The common law rule that non-marital children could not inherit from their parents persisted in the United States until 1968, when the Supreme Court held, in two separate cases, that it violated Equal Protection for a wrongful death statute to bar a non-marital child from bringing such an action to recover for the death of his mother and that it also violated Equal Protection not to allow a mother to bring such an action to recover for the death of her non-marital child.\textsuperscript{197} These two cases were followed by a third in 1977, \textit{Trimble v. Gordon},\textsuperscript{198} in which the Supreme Court directly struck down a state statute barring a non-marital child from inheriting from her natural father.\textsuperscript{199} Despite these holdings, however, the Court has continued to allow some distinctions to be made between legitimate and non-marital children,\textsuperscript{200} and it

\textsuperscript{194} Satava, \textit{supra} note 193, at 937.

\textsuperscript{195} Satava, \textit{supra} note 193, at 937.

\textsuperscript{196} Satava, \textit{supra} note 193, at 939.


\textsuperscript{198} 430 U.S. 762 (1977).


\textsuperscript{200} Satava, \textit{supra} note 193, at 942-48.
evaluates distinctions based on legitimacy under only an intermediate level of scrutiny.\textsuperscript{201} Thus, the Court has denied a father the right to recover for the wrongful death of his non-marital child when the father had not taken steps to legitimate the child during the child’s life and it also has allowed some distinctions to be made between legitimate and non-marital children in the context of inheritance.\textsuperscript{202} Additionally, in 2001, the Supreme Court upheld, against a sex-based Equal Protection challenge, a statute that required fathers of non-marital children born abroad to non-citizen mothers to take steps to verify their paternity before the child turned eighteen or the child would lose the right to United States citizenship.\textsuperscript{203} Finally, the court in \textit{Goodridge} noted that, despite Massachusetts’ efforts to obliterate all legal distinctions between legitimate and non-marital children, the marital/non-marital distinction was still meaningful in social contexts and that marital children still had an easier time demonstrating eligibility for government benefits.\textsuperscript{204}

The significance of legitimacy, and particularly the historical oppression of non-marital children under the law, presents one of the most poignant examples of the structuring of the law to materially favor those who are associated with monogamy and to correspondingly burden those who lack the association, even when the legal distinctions being made pertain to children who had no choice in their parents’ actions. Thus, the distinction between marital and non-marital children indicates that an “organising principle of inequality” is at stake when it comes to

\begin{thebibliography}{9}
\bibitem{Satava} Satava, \textit{supra} note 193, at 942-43, 948.
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those who practice non-monogamy, including polyamorists.  

**e. Michael H. v. Gerald D. and Marriage, Monogamy, and Filiation.**

In the Supreme Court case *Michael H. v. Gerald D.*, the Court upheld California’s filiation law against a natural father’s equal protection and substantive and procedural due process challenge and the child’s substantive due process and equal protection challenge. The Court held that the California law could constitutionally be used to deprive the natural father of parental rights because he had procreated with a woman who was already married, and the child was therefore, under California law, presumptively the child of the mother’s husband. In a plurality opinion, Justice Scalia paternalistically expressed alarm at the wife’s multiple affairs, exclaiming that “[t]he facts of this case are, we must hope, extraordinary.” He also attempted to reify monogamy as a law of nature, stating that “California law, like nature itself, makes no provision for dual fatherhood.” In rejecting the natural father’s arguments that the Court had previously recognized a liberty interest “created by biological fatherhood plus an established parental relationship,” the plurality alluded to the “sanctity” “traditionally accorded to the relationships that develop within the unitary family.” It explained that the “‘unitary family[]’ is typified . . . by the marital family . . . .” and that it would “bear no resemblance to traditionally

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205 COOPER, supra note 16, at 66.
207 491 U.S. at 113 (Scalia, J., plurality opinion).
208 *Michael H.*, 491 U.S. at 118 (Scalia, J., plurality opinion). Nancy Levit describes *Michael H.* as an opinion “that” may have gotten it flat wrong on love . . . .” Levit, supra note 30, at 26.
209 *Michael H.*, 491 U.S. at 123.
respected relationships-and . . . [would] cease to have any constitutional significance-if it [were] . . . stretched so far as to include the relationship between a married woman, her lover, and their child.”  

Given the importance that the Court places on biological parental rights in other contexts, Michael H. stands out as a striking example of the extent to which a natural parent may be punished for violating the laws of monogamy. Moreover, the opinion clearly sets out married persons as a privileged class when it comes to parental rights, and these privileges are undoubtedly tied to the presumption of monogamy that comes with marriage. The opposing binary, represented by the unmarried adulterous natural father, is utterly stripped of rights because his relationship with the child’s mother and his daughter “bear[s] no resemblance to traditionally respected relationships.” Given the plurality’s focus on tradition, we can only imagine that the Court would have a similar reaction if faced with natural parents who were engaged in polyamorous relationships.

f. Monogamy’s Power to Make Sadomasochism Palatable to Courts.

Finally, Ummi Kahn’s examination of societal tolerance for sadomasochistic (“S/M”) relationships through the lenses of both film and caselaw provides strong evidence of the

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210 Michael H., 491 U.S. at 123 n.3.


212 The putative father, Michael H., had had a blood test that “showed a 98.07% probability” that he was the child’s natural father. Michael H., 491 U.S. at 114.

213 Michael H., 491 U.S. at 123 n
continuing force of the norms of monogamy in both the legal system and popular culture.\textsuperscript{214} Specifically, with respect to the legal system, she concludes that “the judging community . . . is more lenient with SM that is positioned within heterosexual, marital, and monogamous confines.”\textsuperscript{215} Her conclusion is based on her examination of several British criminal cases involving S/M and one such case from the United States.\textsuperscript{216} Kahn explains that “only marital love[] seems to operate as a kind of emotional alibi to justify the unusual behavior” that comprises S/M practices\textsuperscript{217} and further that “being married, heterosexual and monogamous” appears to “buy some leniency” in an S/M case.\textsuperscript{218} Given S/M’s status as a suspect, fringe practice, “guilty until proven innocent in the socio-legal imaginary,”\textsuperscript{219} it is remarkable that opposite-sex marriage can, at least to some degree, ameliorate the practice in the eyes of the law and mitigate the penalties for those charged, should they be lucky enough to fall into the privileged categories. In short, Kahn’s research demonstrates the power of the privilege that monogamy affords and, conversely, the disadvantage that non-monogamy necessarily carries with it.\textsuperscript{220}

\textsuperscript{214}See generally Ummi Kahn, A Woman’s Right to Be Spanked: Testing the Limits of Tolerance of SM in the Socio-Legal Imaginary, 18 L. & SEXUALITY 79 (2009).

\textsuperscript{215}Kahn, supra note 214, at 82.

\textsuperscript{216}Kahn, supra note 214, at 102-03.

\textsuperscript{217}Kahn, supra note 214, at 110.

\textsuperscript{218}Kahn, supra note 214, at 112.

\textsuperscript{219}Kahn, supra note 214, at 118.

\textsuperscript{220}See Kahn, supra note 214, at 112-16 (discussing Twyman v. Twyman, 790 S.W.2d 819 (Tex. Ct. App. 1990)).

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The many ways that monogamy (as represented by marriage) is privileged under the law, while non-monogamy is burdened, demonstrate that non-monogamous persons, including polyamorists, are oppressed under an “organising principle of inequality” and therefore that they meet Cooper’s test for extension of legal protections. For example, as described by the Goodridge Court, many benefits, including property rights, employment benefits, and evidentiary privileges, accrue to married persons and are denied to unmarried persons. Additionally, as Kahn’s research demonstrates, monogamous (and specifically married) status appears to, at a minimum, serve as an unstated mitigating factor in a criminal prosecution for S/M practices. The burdens imposed on non-monogamous persons include criminal sanctions for adultery and bigamy, the historical (and to some extent current) burdens imposed on non-marital children, and the denial of rights to natural fathers who adulterously procreate with married women. The extensive privileging of monogamy and the corresponding burdening of non-monogamy demonstrate that an organizing principle of American culture is indeed the monogamy/non-monogamy binary and thus that anti-discrimination protections are warranted for non-monogamist persons, specifically polyamorists.

Notably, the above analysis may also support protecting a broader class of non-monogamous persons than simply polyamorous persons; however, more analysis would need to be done to determine whether the types of non-monogamies that would be protected represented identities that were sufficiently deeply embedded and whether these other types of non-monogamies could be reasonably expected not to harm others. Therefore, for the purposes of this article, I only use the legal distinctions between monogamy and non-monogamy to support
4. **Potential Complications to Protecting Against Discrimination Based on Polyamory Under the Rubric of Sexual Orientation.**

As demonstrated above, expanding the definition of “sexual orientation” to include polyamory for purposes of anti-discrimination law appears to be a reasonable choice. The current definition of “sexual orientation,” specifically its exclusive focus on the sex of one’s partners or potential partners, appears to be somewhat arbitrary as a conceptual matter. Moreover, there are existing problems with the category of sexual orientation as it currently exists, particularly with attempts to essentialize the category. These problems could be ameliorated, at least to some extent, by opening up the category to other types of sexual preferences, thereby broadening the focus and potentially lessening the conceptual weight that attraction to one sex or the other or both is expected to carry. The considerable discrimination that polyamorists face and the fact that they, along with other nonmonogamists, are burdened by an organizing principle of inequality support the move to expand the definition.

On the other hand, however, polyamory appears to be a somewhat less embedded identity than traditional sexual orientation. To the extent that a high level of embeddedness is an important characteristic of a protected class, this factor could cut against expanding the definition.221 Relatedly, if polyamory is added to the definition of “sexual orientation,” there is a

221For example, including polyamory within the ambit of sexual orientation for purposes of anti-discrimination law could potentially reduce the ability of advocates for homosexual rights to make essentialist arguments. *See, e.g.*, Halley, *supra* note 18, at 65-66. It may well be that such arguments are ultimately destructive to LGB rights, that they should be abandoned across the board in anti-discrimination law, or that making them on behalf of LGB plaintiffs has negative reverberations in other areas of anti-discrimination law, *id.*, but the potential for reducing the viability of making such arguments should nonetheless be taken into account and may cut against

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danger that identities based on same-sex attraction will become irrevocably associated in judicial, political, and popular discourse with polyamorous identity, and further, that other protected classes will also become associated with the perceived negative characteristics of polyamory, especially to the extent that lawyers arguing on behalf of polyamorists draw explicit or implicit comparisons with other protected groups.\textsuperscript{222} A careful examination of the possible effects of both types of conflation (between polyamory and LGB identities and between polyamory and other protected categories) would need to be made before polyamory was added to the definition of “sexual orientation.”\textsuperscript{223} Indeed, polyamory appears to be a different type of identity than others that are currently protected in that it is explicitly based on values such as honesty and in that one of its central components, nonmonogamy, is shared--in at least its nascent form of nonmonogamous desire--by virtually everyone. In this sense, opening up the category of “sexual orientation” to include polyamory could “place the ontology of identity itself at risk . . . .”\textsuperscript{224} Indeed, adding polyamory to the definition of sexual orientation could well increase the perception that sexual orientation is a chosen or ideological matter, which could be detrimental to the fight to gain more protections against sexual orientation discrimination, at least in the short expanding the definition of sexual orientation to include polyamory at least at this time.

\textsuperscript{222}Halley, \textit{supra} note 18, at 62-68.

\textsuperscript{223}Halley, \textit{supra} note 18, at 64 (“[I]magining a rights-claiming project without anticipating or resisting the racial resignifications it may produce is to fail to imagine well at all.”).

One immediately obvious possible point of conflation is that LGB persons could come to be more readily perceived as nonmonogamous. This conflation between the identities would most likely further tarnish the image of LGB persons in the public eye and reinforce the stereotype that LGB persons, especially men, are promiscuous.

\textsuperscript{224}Halley, \textit{supra} note 18, at 65.
Thus, the considerable embeddedness of polyamory and the discrimination that polyamorists face show that special legal protections for polyamory are warranted. However, more research on the likely effects of adding polyamory to the definition of “sexual orientation” on existing protections should be done before a decision is made whether to advocate for such a change in a given state statute or in another venue. Additionally, alternative routes to protecting polyamory, such as forging a new axis of protection like relationship status, should be explored in order to identify the best path to pursue both in terms of effects on other protections and likelihood of success. However, it should be clear from the above analysis that polyamory is sufficiently embedded to be considered an identity, and specifically a sexual orientation, and that discrimination against polyamorous people is pervasive and deep-seated enough to warrant legal protections.

A related and equally crucial question that warrants additional research is whether polys desire protection. The evidence collected so far appears to be conflicting. For instance, Rambukkana has explicitly resisted making any claim to a queer identity because he believes “it is not politically viable with respect to current identity politics and [it] might erode the radical potential of the queer subject position.”

225 For instance, there is an emerging literature on discrimination against single people. See, e.g., Barnes & Jones, supra note 131; see generally Lily Kahng, One Is the Loneliest Number: The Single Taxpayer in a Joint Return World, 61 HASTINGS L.J. 651 (2010). If further research were to reveal that it was strategically undesirable to define “sexual orientation” to include polyamory, a new category of protections based on relationship status could be forged that would include singles, polys, and other types of disfavored relationships. Other viable options for protecting polyamory undoubtedly exist as well.

226 Rambukkana, supra note 16, at 151; see also SPAHR, supra note 58, at 173 (expressing similar
limited view of queerness, other polyamorists, at least in the Bay Area, have also “expressed an unwillingness to raise their public profile, in fear that such a move might . . . ‘sabotage[e] (sic) the case of our gay and lesbian brothers and sisters’.” Aviram also argues that Bay Area polyamorists’ values are inconsistent with advocating a rights-based view of identity. On the other hand, polyamorists in one survey listed employment discrimination as one of their top three legal issues, thus suggesting that they do desire legal protections. It is possible that the views of the polyamorists in Aviram’s research are largely unique to the Bay Area, given the relative tolerance there for diversity of sexual preferences (or that these views are limited to the context of the struggle for marriage equality). Indeed, it may well be that in less tolerant geographical areas, polys do not feel that they have the luxury to forego efforts to gain legal protections.

Additionally, polys’ apparent lack of vocalness in general may be due to a tendency to remain closeted out of fear. If this is the case, the harm that they experience as a result of closteting is probably significant and may be a reason in itself to seek to include them in legal protections.

It is, however, clear that more research into polyamorists’ views regarding, and interest in, anti-discrimination protections must be done before any major effort to secure such rights is

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227 See, e.g., Romero, supra note 94, at 192-93.

228 Aviram, supra note 63, at 273.

229 See generally, Aviram, supra note 85.

230 Emens, supra note 66, at 331 n.316.

231 See, e.g., Sheff, supra note 71, at 277-78 (discussing interviewees who remained closeted at work out of fear).
undertaken.

IV. Conclusion.

Because polyamory appears to be at least moderately embedded as an identity and because polyamorists face considerable discrimination and non-monogamy is a organizing principle of inequality in our culture, anti-discrimination protections for polyamorists are warranted. Moreover, due to the arbitrariness of the current definition of sexual orientation and the fact that the functioning of the current definition poses problems for LGB persons, it appears to be reasonable to amend statutory definitions of sexual orientation to include polyamory and perhaps other societally disfavored preferences. However, before taking this step, more research should be done on what the likely effects on existing anti-discrimination protections will be and on whether polys in fact desire legal protections.

232 See, e.g., Yoshino, Bias, supra note 24, at 527, 549.