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POLYAMORY AS A SEXUAL ORIENTATION

Ann E. Tweedy*

This Article examines, from a theoretical standpoint, the possibility of expanding the definition of “sexual orientation” in employment discrimination statutes to include other disfavored sexual preferences, specifically polyamory. First, it examines the current, very narrow definition of sexual orientation, which is limited to orientations that are 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 such an expansion would be reasonable, the Article briefly outlines some issues for further investigation, including potential policy implications and the conflicting evidence as to whether polyamorists want specific legal protections.

I. INTRODUCTION

This Article addresses, from a theoretical standpoint, the question of whether the definitions of sexual orientation in anti-discrimination laws, particularly employment discrimination statutes,¹ should be amended to

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1. This Article focuses 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 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 statutorily protect against sexual orientation discrimination, whereas the federal government does not yet do so. And, third, the Supreme

more broadly define the term to 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—a 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 as a result of participating in discussions about identity within the bisexual women's community in Seattle. Specifically, one woman said 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 an example of an identity that the first speaker could espouse and defend but had not. 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 (1) what constitutes a sexual orientation and (2) whether polyamory should be considered a sexual orientation in its own right. This Article is an attempt to begin to answer these questions.

Part II of this Article critically examines the societal and legal concept of sexual orientation, using legal theory to explore how the concept, as it is currently constructed, came into being. Part II also examines the implications of this construction. Next, Part III examines polyamory, including the degree to which it is embedded as an identity

Court has not yet affirmatively espoused the view that discrimination based on sexual orientation is subject to heightened scrutiny under the Equal Protection Clause. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 579–85 (2003) (O'Connor, J., concurring in the judgment) (applying rational basis review under the Equal Protection Clause, rather than joining the Court's due process analysis, to a statute that discriminated on the basis of sexual orientation); *New State 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."); *cf. Witt v. Dep't of the Air Force*, 527 F.3d 806, 813 (9th Cir. 2008) ("Having carefully considered *Lawrence* and the arguments of the parties, we hold that *Lawrence* requires something more than traditional rational basis review [in application of the Due Process Clause] and that remand is therefore appropriate."). Until sexual orientation is explicitly granted such heightened scrutiny, expanding definitions of sexual orientation to include other types of preferences is likely to result in little, 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, state anti-discrimination statutes that pertain to employment were chosen as the preliminary setting within which to examine the questions addressed by this Article. It is hoped, however, that this analysis will be largely transferrable to other contexts.

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and the degree of discrimination that polyamorists face. Part IV explores the pros and cons of broadening the definition of sexual orientation to include polyamory.

II. THE MEANING OF SEXUAL ORIENTATION

This Part first looks at the current meaning of sexual orientation in American culture and then turns to the apparent arbitrariness of the term's current definition. Next, it examines the practical and conceptual problems posed by the current definition, relying on the work of theorists such as Judith Butler, Michel Foucault, and others. These issues are raised in order to help determine whether it makes sense to expand the current definition of sexual orientation to include other sexual preferences such as polyamory.

A. *The Current Meaning*

Today, sexual orientation is almost universally understood to signify whether a person is attracted to members of the same sex, the opposite sex, or both sexes.² Thus, of the twenty-one states that had statewide statutes in place as of July 2010 prohibiting discrimination in employment based on sexual orientation,³ the eighteen states that statutorily defined sexual orientation defined it in terms of heterosexuality, homosexuality, and bisexuality.⁴ However, two

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 sexual interest towards members of the same, opposite, or both sexes,' and it seems that this definition is widely accepted." (footnote omitted)).

3. See, e.g., HUMAN RIGHTS CAMPAIGN, STATEWIDE EMPLOYMENT LAWS & POLICIES (2010), available at http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf.

4. CAL. GOV. CODE § 12926(q) (West 2011) ("Sexual orientation" means heterosexuality, homosexuality, and bisexuality.); COLO. REV. STAT. ANN. § 24-34-401(7.5) (West 2011) ("Sexual orientation" means a person's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or an employer's perception thereof.); CONN. GEN. STAT. ANN. § 46a-81a (West 2011) ("[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) (2011) ("Sexual orientation" exclusively means heterosexuality, homosexuality, or bisexuality.); HAW. REV. STAT. § 378-1 (2011) ("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 2011) ("Sexual orientation" means actual or perceived heterosexuality, homosexuality, or bisexuality.); ME. REV. STAT. ANN. tit. 5, § 4553(9-C) (West 2011) ("Sexual orientation" means a person's actual or

significant variations exist. First, some of these same states also included gender identity as part of sexual orientation,⁵ and, second, as

perceived heterosexuality, bisexuality, homosexuality or gender identity or expression.”); MD. CODE ANN., STATE GOV’T § 20-101(f) (2011) (“‘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 2011) (“‘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) (West 2011) (“‘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) (2011) (“‘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. ANN. § 10:5-5(hh) (West 2011) (“‘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) (West 2011) (“[S]exual orientation’ means heterosexuality, homosexuality or bisexuality, whether actual or perceived[.]”); N.Y. EXEC. LAW § 292 (McKinney 2011) (“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) (2011) (“‘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) (2011) (“‘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.”); WIS. 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. CODE § 2-1401.02(28) (2011) (“‘Sexual orientation’ means male or female homosexuality, heterosexuality and bisexuality, by preference or practice.”).

Of these nineteen definitions (including the District of Columbia’s), only Minnesota’s definition appears to be different 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 2011). While the issue does not appear to have been raised directly, courts interpreting the law appear to view the definition as covering homosexuality, bisexuality, and gender identity, thus rendering it functionally equivalent to other statutory definitions of sexual orientation. *See, e.g.,* Lussier v. Wal-Mart Stores, Inc., No. 06-1395 ADM/RLE, 2007 WL 2461932, at *6–*7 (D. Minn. Aug. 28, 2007); Goins v. West Group, 635 N.W.2d 717, 722–25 (2001); Thorson v. Billy Graham Evangelistic Ass’n, No. 03-12062, 2004 WL 5621995 (D. Minn. Jan. 12, 2004).

5. *See, e.g.,* COLO. REV. STAT. ANN. § 24-34-401(7.5) (West 2011); ME. REV. STAT. ANN. tit. 5, § 4553(9-C) (West 2011); WASH. REV. CODE § 49-60-040(15) (2011).

The inclusion of gender identity as a type of sexual orientation in some state statutes does broaden the definition of sexual orientation, *see, for example, ME. REV. STAT. ANN. tit. 5, § 4553(9-C)*

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will be discussed in more depth later, some states 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, both the proposed federal Employment Non-Discrimination Act⁸ and the dictionary use similar definitions.⁹ Collectively, these largely identical definitions reflect a cultural agreement that the term sexual orientation describes the sex of those to

(West 2011), but it also muddies it to some extent because gender identity is not a true sexual preference at all, given that it does not imply anything about types of people that one would be attracted to or the sexual practices that one would want to engage in. HUMAN RIGHTS CAMPAIGN FOUND., *THE STATE OF THE WORKPLACE FOR GAY, LESBIAN, BISEXUAL AND TRANSGENDER AMERICANS 2006–2007*, at 11 (2007), available at http://www.hrc.org/documents/State_of_the_Workplace.pdf (“Gender identity is generally defined as an individual’s internal, personal sense of being a man or a woman Gender identity and sexual orientation are not the same. Transgender people may be heterosexual, lesbian, gay, or bisexual.”). Conceptually, it appears to be preferable to protect gender identity separately from sexual orientation. See, e.g., IOWA CODE ANN. § 216.2(10), (14) (West 2011) (distinguishing between sexual orientation and gender identity). This conceptual distinction is potentially important given that lesbian, gay, and bisexual (LGB) persons are often erroneously associated with gender deviant behavior, and gender deviant persons are often assumed to be lesbian or gay. See, e.g., Todd Brower, *Social Cognition ‘At Work:’ Schema Theory and Lesbian and Gay Identity in Title VII*, 18 LAW & SEXUALITY 1, 39, 62 (2009); cf. LISA M. DIAMOND, *SEXUAL FLUIDITY: UNDERSTANDING WOMEN’S LOVE AND DESIRE* 43 (2008) (“[T]here is . . . evidence for a link between gender atypicality and same-sex sexuality, . . . among some individuals.”); *id.* at 45 (“[G]lobal associations between same-sex sexuality and gender atypicality are unsupportable.”).

6. See, e.g., CONN. GEN. STAT. ANN. § 46a-81a (West 2011) (“[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 2011) (“‘Sexual orientation’ means actual or perceived heterosexuality, homosexuality, or bisexuality.”); MD. CODE ANN., STATE GOV’T § 20-101(f) (West 2011) (“‘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 2011); OR. REV. STAT. § 659A.030 (2011); VT. STAT. ANN. tit. 21, § 495 (2011).

8. H.R. 3017, 111th Cong. § 3(a)(9) (2009) (“The term ‘sexual orientation’ means homosexuality, heterosexuality, or bisexuality.”); S. 1584, 111th Cong., § 3(a)(9) (2009) (“The term ‘sexual orientation’ means homosexuality, heterosexuality, or bisexuality.”).

9. See, e.g., MERRIAM-WEBSTER’S UNABRIDGED MEDICAL DICTIONARY (2006), available at <http://unabridged.merriam-webster.com/cgi-bin/medical?va=sexual+orientation&x=31&y=5> (“[T]he 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)).

whom a person is 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.¹⁰ 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 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."¹¹ 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 regulation of sexuality increased, 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 juridical 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

10. For 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>. 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>.

11. Ruth Hubbard & Elijah 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 more recently with Portia de Rossi that dating straight-looking blond starlets is, if anything, her sexual orientation.").

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.¹²

In other words, the contemporary notion of sexual orientation and the importance this notion carries in American culture in terms of individual identity appear to be a product of late nineteenth century prejudice that sought to radically other¹³ individuals who engaged in homosexual practices. As Foucault indicates, this process 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 the 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 LGB people

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

13. For a description of the psychological process of othering, see, for example, 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

At 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.

14. While I believe that transgenderism should be protected against discrimination, I do not address it here because it is conceptually distinct from even a broad view of sexual orientation. See, e.g., HUMAN RIGHTS CAMPAIGN FOUND., *supra* note 5.

15. See, e.g., Stanley Kurtz, *Beyond Gay Marriage*, WEEKLY STANDARD, Aug. 4, 2003, at 8, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/002/938xpsxy.asp> (citing

celebrate their differences 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 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 establish a more holistic notion. The next subsection discusses 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.

1. The Minoritizing View of Essential Gay Identity and the Problems it Poses for LGB People

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 universalizing.¹⁸ 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.”¹⁹ The minoritizing understanding includes “civil rights models of homosexual

gay male promiscuity as a reason to restrict marriage to heterosexuals, the idea being that allowing gay men to marry will result in a devaluation of the norm of monogamy among married people overall).

16. See DAVINA COOPER, CHALLENGING DIVERSITY: RETHINKING EQUALITY AND THE VALUE OF DIFFERENCE 47 (2004) (“[P]ride 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. BISEXUALITY 141, 149 (2004) (discussing “a tendency in subcultural groups to privilege the authentic, the anti-mainstream—in a word, the underground” (citation omitted)).

17. See, e.g., Susan R. Schmeiser, *Changing the Immutable*, 41 CONN. L. REV. 1495, 1520 (2009). The classic dichotomy between sexual orientation or identity types is that between essentialist and socially constructed identities or orientations. See, e.g., DIAMOND, *supra* note 5, at 19–21. Some social science researchers, however, argue that it is more accurate to see identity as a combination of both physical-biological and socio-cultural factors. *Id.* at 22.

18. Janet E. Halley, *‘Like Race’ Arguments*, in WHAT’S LEFT OF THEORY: NEW WORK ON THE POLITICS OF LITERARY THEORY 48 (Judith Butler et al. eds., 2000). Halley borrows the concepts of minoritizing and universalizing understandings from Eve Sedgwick. See, e.g., Sedgwick, *supra* note 16, at 56–58 (discussing minoritizing and universalizing views of gender and sexual orientation).

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

difference,”²⁰ such as the marriage equality movement,²¹ as well as “gay identity, essentialist, [and] third-sex models.”²² By contrast, the universalizing understanding “suppose[s] homoerotic potential to be characteristically human.”²³

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,²⁴ the minoritizing understanding, with its view of sexual identity as similar to race,²⁵ has obvious utility for the LGB rights movement.²⁶ At the same time, however, the minoritizing view of LGB identity is problematic in a number of ways.²⁷

The most important set of problems for the purposes of this Article

20. *Id.*

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 AND 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.”); accord Elizabeth M. Glazer, *Sexual Reorientation*, 100 GEO. L.J. (forthcoming 2012) (manuscript at 24) (“The debate about legally recognizing same-sex marriages is, at its root, a debate about category preservation.”), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1690590.

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

23. *Id.*

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 14th 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 achieve the same policy benefits . . . that had been designed with black Americans in mind.”); *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.”); accord Schmeiser, *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, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of ‘Don’t Ask, Don’t Tell,’* 108 YALE L.J. 485, 559–61 (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”).

25. See Halley, *supra* note 18, at 49–50.

26. But see *id.* 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.”).

27. See generally *id.*; see also Schmeiser, *supra* note 17, at 1521.

pertains to how the minoritizing view of identity can affect LGB people and others' perceptions of them.²⁸ For instance, emphasizing the minoritizing view tends to deny, suppress, or hide other aspects of the realities of LGB lives.²⁹ Thus, overemphasis of the minoritizing view may whitewash the richness and complexity of LGB identity in order to project a more monolithic identity that will be presumably saleable in a courtroom and in other contexts involving outsiders.³⁰ 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.³¹ 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 fact, I think they created a demand for gay gene experiments, which, in turn, did a great deal of interpellating on their own.³²

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, *supra* note 18, at 54–64. These problems are generally beyond the scope of this Article.

29. *Id.* at 52.

30. See, e.g., Nancy Levit, *Theorizing and 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 2 VISIBLE: A FEMMTHOLOGY 44 (Jennifer Clare Burke ed., 2009) (describing how feminism can make similarly oppressive demands on women).

32. Halley, *supra* note 18, at 52 (footnote omitted). See also *id.* at 43 (acknowledging that identity politics can make people "become [what] they would not otherwise be"); Hubbard & Wald, *supra* note 11, at 83–84 (noting that "the search for gay genes comes directly out of the successes of the

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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."³³

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

gay rights struggle" but arguing that the search for gay genes is wrongheaded because "[g]rounding difference in biology does not stem bigotry").

33. Hubbard & Wald, *supra* note 11, at 83–84; *see also* Halley, *supra* note 18, at 42 ("[Q]ueer theory suggests that homosexual identities create a necessary condition for the oppression of homosexual people . . ."); Schmeiser, *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* 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?"). *But see* Schmeiser, *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)).

34. Butler, *supra* note 31, at 309–13; *see also* Sedgwick, *supra* note 16, at 54 ("[E]rotic identity . . . can never not be relational . . ."). Recent scientific research on women's sexual orientation supports the hypothesis that women's sexual desires are fluid and that the sex of the objects of most women's attraction naturally varies over time depending in part on situational factors (although a woman's overall sexual orientation may generally remain constant). DIAMOND, *supra* note 5, at 82–85. The results of Dr. Diamond's empirical research appear to support Butler's theoretical concerns, although, importantly, Dr. Diamond does not argue that women's actual sexual orientations necessarily change over time. *Id.* at 84. Rather, she argues that most women's sexual identities do. *Id.* at 83, 87.

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, and despite the fact that a person may consistently espouse a given sexual orientation as a matter of personal identity.³⁶ This aspect of sexual orientation suggests that it may be different in kind than other types of identities, such as those based on race. 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 origin and 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 priority of either term.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, 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 incompatible. The existence of these problems suggests that there may be something to be gained by expanding the concept of sexual orientation to include a wide array of sexual preferences. Such an

35. Butler, *supra* note 31, at 311.

36. *Id.* 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).

Butler’s theoretical work meshes well with the emerging empirical evidence on women’s sexuality, which suggests that women’s sexual attractions may be much more fluid than previously thought. See, e.g., *supra* note 34 and accompanying text (describing Dr. Diamond’s work).

37. Butler, *supra* note 31, at 313.

38. *Id.*

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expansion would appear to mesh with the universalist view of sexual orientation, which posits the potential universality of homoerotic desire.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 conclusions perhaps eventually leads to dispensing with the notion of sexual orientation altogether.⁴⁰ While eradication of the category of sexual orientation may (or may not) be a worthwhile goal, as further explained below, the goal of this Article is more modest: namely, to determine whether expanding 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 this narrow construction, and the problems that result from it. This Part then turns to the possibilities for defining sexual orientation more expansively. Finally, the possibility of expanding sexual orientation definitions to include polyamory is specifically explored. Included in this section are analyses of the embeddedness of polyamory as an identity and of the level of discrimination that polyamorists face.

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

39. Halley, *supra* note 18, at 48.

40. See, e.g., Laurie Rose Kepros, *Queer Theory: Weed or Seed in the Garden of Legal Theory*, 9 LAW & SEXUALITY 279, 283–84 (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 and Federal Tax Policy*, 101 W. VA. L. REV. 129, 140 (1998) (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 Trannie: Transgender People and the Law*, 8 J. GENDER RACE & JUST. 237, 242 (2004) (describing Judith Butler as a principal architect of queer theory).

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 “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 “settled 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; you could call it a sexual preference.”⁴⁷ 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.”⁴⁸

These usages suggest that a person’s sexual orientation may, in actual

41. See *supra* note 10 and accompanying text (quoting dictionary definitions of “sexual” and “orientation”).

42. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (2002), available at <http://unabridged.merriam-webster.com/cgi-bin/unabridged?va=orientation> (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”).

43. *Id.*

44. Hubbard & Wald, *supra* note 11, at 83; see also Glazer, *supra* note 21 (manuscript at 40) (“Currently, sexual orientation is understood along a variety of axes – gender is of course the most obvious, but others include age, species, fetish, power, and number.”).

45. BAUMGARDNER, *supra* note 11, at 216.

46. MERRIAM-WEBSTER’S UNABRIDGED MEDICAL DICTIONARY (2006), available at <http://unabridged.merriam-webster.com/cgi-bin/medical?book=Medical&va=sexual%20preference> (defining “sexual preference” as “sexual orientation”).

47. BAUMGARDNER, *supra* note 11, at 195–96.

48. Rambukkana, *supra* note 16, at 151.

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application, be both broader and narrower than the common use of the term. 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 also 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 "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.⁴⁹

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.⁵⁰ The notion that individuals should be able to define their own sexual orientations is supported by recent empirical research on women's sexual identities.⁵¹ In this sense, sexual orientation may be more analogous to religion than race in that the individual has the ultimate right to define or name that aspect of him or herself.

49. Accord Glazer, *supra* note 21 (manuscript at 36–40) (explaining that society commonly accepts the phenomenon of individuals' being attracted to those who are not their traditional types except when the deviant characteristic is gender).

50. See, e.g., Ann Tweedy, *Subverting Normalcy: Living a Femme Identity*, in 1 *VISIBLE: A FEMMEHOLOGY* 69 (Jennifer Clare Burke ed., 2009) (arguing for the right to self-definition of one's sexual orientation).

51. DIAMOND, *supra* note 5, at 87 ("Instead of assuming that sexual identities represent enduring sexual 'truths,' it may be more productive to think of identity as 'the choice of a particular perspective from which to make sense of one's sexual feelings and behavior.'" (footnote omitted)); see also *id.* at 50 ("Women are also more likely than men to report sexual behaviors or attractions that are inconsistent with their identity . . .").

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

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 describe,⁵² however, 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 consistent⁵³ or sufficiently settled to technically qualify as a sexual orientation.⁵⁴ Rather, it could well be argued that only those sexual preferences that are likely to be the basis for discrimination should be protected by anti-discrimination law.⁵⁵

For example, one’s orientation may include being attracted to blondes, as Baumgardner’s comments suggest. The costs of protecting people from workplace discrimination based on their attraction to blondes, however, 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 such a 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’s taste or being a fan of a particular sports team.⁵⁶ 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 may not make sense to alter that rule solely in the context of sexual preferences while leaving it in place for other

52. See, 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 separate schema for heterosexuals; they are just ‘people’ and not a group characterized by their sexual behavior”).

53. Hubbard & Wald, *supra* note 11, at 83.

54. See *supra* note 10.

55. This view reflects a class-based, as opposed to a classification-based, approach to anti-discrimination law. See Yoshino, *supra* note 24, at 563 (distinguishing between the two approaches).

56. See Samuel A. Marcossan, *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 i]t 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).

employment decisions, especially in light of the fact that litigation expenses for each newly protected type of sexual preference 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 or otherwise express them without facing adverse consequences, should be considered a core personal freedom that warrants statutory or even constitutional protection.⁵⁷

Additionally, the requirement in some anti-discrimination statutes of identification or perceived identification with a certain sexual orientation⁵⁸ may indicate that, as a society, 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 self-identify in order "to help guide the uncertain future of non-monogamy," 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,⁵⁹ and in his very nuanced description of his own sexual orientation. Indeed, a person who was entirely closeted about his or 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 for anti-discrimination protections based on sexual orientation. Such a person could be viewed as having acceded to the demands of the mainstream hetero- and mono-normative society either to avoid the prospect of discrimination or, perhaps, in some cases, to appease his or her own internalized negative feelings about his or 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,⁶⁰ such a person makes herself

57. See, e.g., Moshe Landman, *Sixth Annual Review of Gender and Sexuality Law: I. Constitutional Chapter: Sexual Privacy After Lawrence: Co-habitation, Sodomy, and Adultery*, 6 GEO. J. GENDER & L. 379, 388–89 (2005) (describing proposals to expand *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 of the United States Constitution).

58. See *supra* note 6 and accompanying text (citing Connecticut's, Iowa's, and Maryland's statutes).

59. Rambukkana, *supra* note 16, at 152.

60. See *Gay Law Students Ass'n v. Pac. Telephone & Telegraph Co.*, 595 P.2d 592, 610 (Cal.

uniquely vulnerable to discrimination⁶¹ (or is made so in the case of involuntary identification). On the other hand, given that closeted homosexuality and other closeted sexual preferences cause significant harm to those who closet themselves,⁶² 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, such as pedophilia,⁶³ that are societally disfavored because they cause harm to others and to society at large.⁶⁴ Similarly, harmful sexual practices, such as parent-child incest, 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.⁶⁵ Thus, a holistic definition of “sexual orientation” in an anti-discrimination statute would, in some principled way, have to exclude harmful sexual preferences while protecting those that are societally disfavored simply because 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, but which 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

1979) (recognizing out homosexuality as, in part, a political activity), *superseded by statute as stated in In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

61. See, e.g., Rambukkana, *supra* note 16, at 149.

62. Yoshino, *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).

63. 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 and Economics Defense of Same-Sex Foster Care Adoptions*, 45 FAM. CT. REV. 133, 140–41 (2007).

64. See, e.g., COOPER, *supra* note 16, at 4 (acknowledging the difficulty that socially harmful identities and choices pose for equality advocates).

65. See, e.g., Mary Anne Case, *A Few Words in Favor of Cultivating an Incest Taboo in the Workplace*, in FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS 153, 153–54 (Martha Albertson Fineman et al. eds., 2009) (arguing that incest taboos are useful for society and that similar taboos should be developed to govern supervisor–subordinate relationships in the workplace).

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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 partners of other races, preferences for transgender partners, preferences for polyamorous relationships, and preferences for sadomasochistic relationships.⁶⁶ 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 subsection briefly introduces polyamory and then examines: (1) the embeddedness of polyamory as an identity; (2) the levels of discrimination that polyamorists face; and (3) the potential complications of 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 partners involved.”⁶⁷ Thus, polyamory, which literally means having more than one lover, is relationship-based and should be distinguished from more casual types of non-monogamy such as swinging.⁶⁸ It “is a lifestyle embraced by a

66. See, e.g., Erica Chito Childs, *Listening to the Interracial Canary: Contemporary Views on Interracial Relationships Among Blacks and Whites*, 76 *FORDHAM L. REV.* 2771, 2785 (2008) (discussing prejudice against interracial relationships among both black and white communities); see generally Jason Simms, *Bound and Flagged: Members of Seattle's Kink Community Face Discrimination in Custody Battles*, *STRANGER*, Feb. 21, 2007, available at <http://www.thestranger.com/seattle/Content?oid=162102> (documenting discrimination against those who prefer sadomasochistic relationships including workplace discrimination and discrimination against such parents in child custody disputes).

67. Hadar Aviram, *Make Love, Not Law: Perceptions of the Marriage Equality Struggle Among Polyamorous Activists*, 7 *J. BISEXUALITY* 261, 264 (2008) (citations and internal quotation marks omitted) (alteration in original); see also *MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY* (11th ed., 2005), available at <http://unabridged.merriam-webster.com/cgi-bin/collegiate?va=polyamory> (defining “polyamory” as “the state or practice of having more than one open romantic relationship at a time”).

68. See, e.g., Anne Bokma, *Polyamory: Inside an open marriage*, *MORE MAGAZINE*, Apr. 2010, available at <http://www.more.ca/relationships/married-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?*,” *INDEP. ON SUNDAY* (London), Sept. 13, 2009, at 20 (noting that polyamory is not “swinging or adultery” and that polys want “ongoing, honest, committed relationships”); Valerie Reiss, *Getting Over*

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.”⁶⁹ As suggested by these principles, polyamory is not only “a practice,” but is also, at least for some of its adherents, “a theory of relationships.”⁷⁰ As a theory, polyamory “has a decidedly feminist bent,”⁷¹ building “in part on a feminist understanding of monogamy as a historical mechanism for the control of women’s reproductive and other labor.”⁷²

It is estimated that there are more than half a million “openly polyamorous families in the United States . . . with thriving contingents in nearly every major city.”⁷³ In addition to the prevalence of polyamorists in the United States, polyamory has also received increasing attention in other countries, including Great Britain, Canada, and New Zealand.⁷⁴

Additionally, polyamory is often perceived to be linked to bisexuality,⁷⁵ although straight and homosexual persons also practice polyamory⁷⁶ and bisexuals may be polyamorous or monogamous.⁷⁷

Monogamy: Those Disenchanted With One-On-One Relationships are Finding a Way to Multiply, Share, and Sustain Love, BREATHE, Jan.–Feb. 2005, at 51–52 (“Unlike swinging or cheating, polyamory focuses on love first and sex second . . .”); 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*, BOSTON PHOENIX, Oct. 15, 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)).

69. Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 283 (2004).

70. *Id.* at 320.

71. Jessica Bennett, *Only You. And You. And You.: Polyamory—Relationships with Multiple, Mutually Consenting Partners—Has a Coming-Out Party*, NEWSWEEK, July 29, 2009, available at <http://www.newsweek.com/id/209164>.

72. Emens, *supra* note 69, at 325.

73. Bennett, *supra* note 71.

74. See, e.g., Nikki Watkins, Jessica Bateman, *I Kiss My Man Goodnight, Shut the Door . . . and Sleep with My Other Lover; Julianne’s Life with Two Partners*, SUN (London), Feb. 24, 2010, at 44; Zosia Bielski, *Love and Mixed Doubles; An Open Marriage has its Own Rules of Play*, NAT’L POST (Ontario), Sept. 20, 2008, at WP.3; Emily Watt, *When One Lover is not Enough*, DOMINION POST (Wellington), Mar. 15, 2008, at A.10.

75. See, e.g., Aviram, *supra* note 67, at 265; Elisabeth Sheff, *Polyamorous Women, Sexual Subjectivity and Power*, 34 J. CONTEMP. ETHNOGRAPHY 251, 268 (2005).

76. See, e.g., Adam Weber, *Survey Results: Who Are We? and Other Interesting Impressions*, LOVING MORE MAGAZINE, Summer 2007, at 4; Aviram, *supra* note 67, at 267; Rambukkana, *supra* note 16, at 145, 149; see also Geri Weitzman, *Therapy with Clients Who Are Bisexual and Polyamorous*, in AFFIRMATIVE PSYCHOTHERAPY WITH BISEXUAL WOMEN AND BISEXUAL MEN 137, 141–42 (Ronald C. Fox ed., 2006) (citing studies documenting rates of lesbians, gay men, and heterosexuals engaging in polyamory or non-monogamy).

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Finally, some polyamorists see themselves as “hardwired” that way,⁷⁸ while others do not necessarily see polyamory as an identity or, alternatively, see it as a constructed identity.⁷⁹

Before moving on, the question of whether polyamory includes polygamy should be addressed. This question has repeatedly been raised during my presentations of this material. To the extent polygamists ascribe to the basic definition of polyamory,⁸⁰ adhere to the values associated with polyamory, and identify themselves as polyamorists, they fall within the scope of polyamory. Conversely, if a polygamist did not ascribe to the basic definition of polyamory (for example, if he or she married two spouses but attempted to keep the multiplicity of marriages secret from each spouse or married underage persons who could not legally consent), he or she would clearly not fall within the definition of polyamory. There are, however, certainly cases between these two extremes for which there is no easy answer.⁸¹

77. Weitzman, *supra* note 76, 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).

78. Emens, *supra* note 69, at 304, 321, 351; see also Sheff, *supra* note 75, at 274 (describing one of the interviewees in her research as “identif[y]ing] as polyamorous since she was fourteen”).

79. Emens, *supra* note 69, at 321, 351. See also Aviram, *supra* note 67, at 271 (“The liberal argument, according to which gay people are ‘born gay’ and therefore do not have the choice to 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] . . . sometime 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 but 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.

80. The basic definition of “polyamory” is the practice, state, or ability of having more than one sexual loving relationship with the full knowledge and consent of all parties involved.

81. For example, Elizabeth Emens describes a Mormon woman who is one of her husband’s multiple wives and who finds the multi-party relationship empowering, although none of the participants call the relationship polyamorous. Emens, *supra* note 69, at 307. This is a difficult case. My own view is that a person who would not accept the label of polyamorous should probably not be defined as such. However, if it were revealed that the woman Emens describes largely espoused the principles associated with polyamory and identified as something like polyamorous (without naming it as such), it would seem that she could be argued to fall within the definition of polyamorous at least for some purposes. Moreover, as a practical matter, in the context of antidiscrimination statutes, it may be most feasible to utilize the basic definition of “polyamory,” without regard to the values associated with it. This would avoid thorny problems associated with courts’ having to examine plaintiffs’ values and with the

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, this Article examines 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 Identities

In order to analyze this issue, this Article posits a scale ranging from most embedded to least embedded. An essential identity, assuming such identities exist, would represent the most embedded extreme, with a constructed identity that was "so constraining and powerful that individuals . . . live[d] their assignment to one [identity] classification rather than another as wholly unchosen and unchangeable"⁸² being the next, or close to the next,⁸³ most embedded identity. 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

appearance of state sponsorship of specific values.

Emens also makes the important point that perceptions of polygamist, specifically polygynist, relationships among Mormons and Muslims as sexist appears to drive much of the prejudice against polyamory in this country. *Id.* at 301–03.

82. Marcossan, *supra* note 56, at 682.

83. An identity that was comprised of a combination of both physical-biological and socio-cultural factors would probably be the next most embedded identity, after an essential identity, see, for example, DIAMOND, *supra* note 5, at 22, but such an identity would be very close, in terms of embeddedness, to the powerfully socially constructed identity described above.

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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 this continuum. Thus, it is necessary to examine just how deeply embedded polyamory appears to be based on the available evidence.

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 those that think it is an identity express differing views regarding whether it is a “hardwired” or constructed identity.⁸⁴ Moreover, some evidence suggests that many polyamorists are resistant to the idea that polyamory is an essential identity, instead preferring to focus on the “freedom, fluidity, and individualism” afforded by membership in the polyamorous community.⁸⁵ It is impossible, however, to make generalizations because some polyamorists do view polyamory as an essential identity,⁸⁶ sometimes linking the highest degree of individual polyamorous tendencies to “a hardwired absence of jealousy.”⁸⁷

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.⁸⁸ It appears from the limited research available on polyamory, however, 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

84. See *supra* notes 78–79 and accompanying text (discussing the statements of polyamorists regarding their poly identities).

85. Aviram, *supra* note 67, at 272–73, 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 arguably an identity nonetheless.

86. Emens, *supra* note 69, at 349–52.

87. *Id.* at 351.

88. See, e.g., Marcossan, *supra* note 56, at 708, 710; see also Halley, *supra* note 18, at 42 (describing queer theory’s critique of the notion of homosexual identity); *id.* at 48–49 (distinguishing between minoritizing and universalizing understandings of homosexuality).

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community respectively, universalizing language about polyamory tends to be much more common than does similar language about homosexuality.⁸⁹

ii. Summary of Outsider Views of Polyamory

Outside of polyamorous communities, polyamory is rarely thought of as an identity, let alone as either an essential or immutable one.⁹⁰ 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.”⁹¹ Thus, in accord with Rauch’s comments, polyamory identity is commonly thought of as “so superficial as to be frivolous” and “polys are generally not seen as a discrete group of individuals.”⁹²

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 partially 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, regardless of whether polyamory is typically understood as an essential identity, it is at least somewhere near the middle of the scale described above and that it may be closer to the most

89. See Emens, *supra* note 69, 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.”).

90. *Id.* at 342.

91. *Id.*

92. *Id.*; Hadar Aviram, *Geeks, Goddesses, and Green Eggs: Political Mobilization and the Cultural Locus of the Polyamorous Community in the San Francisco Bay Area*, in UNDERSTANDING NON-MONOGAMIES 87 (Meg Barker & Darren Langdridge eds., 2009); see generally William Saletan, *Don’t Do Unto Others: The Difference Between Gay Marriage and Polygamy*, SLATE, Mar. 26, 2006, available at <http://www.slate.com/id/2138482>; see also Lee Stranahan, *Why Are Gay Marriage Advocates Not Defending Polyamory?*, 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 71 (relating the popular view that “polyamory is a choice; homosexuality is not”).

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embedded pole. These sources of evidence include: (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 American 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 non-mongamous desire⁹³ compared with the much smaller subset of people who act on it polyamorously may suggest that at least the desire aspect of polyamory is not unique, a fact which may make it harder for polyamorists to convincingly describe themselves as a unique group, at least one based on polyamorous desires. This apparent universality of non-monogamous desires may also make it difficult for polyamorists to claim the most entrenched form of a constructed identity, under which the individual experiences his or 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.”⁹⁴ The legal scholar Elizabeth Emens has characterized such discourse as a “minoritizing *strand* in contemporary writings”⁹⁵ on polyamory, thus suggesting that the minoritizing way of looking at polyamory is not the norm within the community. Other evidence, which is limited in geographical scope, appears to confirm this view,⁹⁶ 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.⁹⁷

For at least the subset of polyamorists described above, then, there is

93. Emens, *supra* note 69, at 345.

94. *Id.* at 350; *see also* Sheff, *supra* note 75, at 274; *accord* Weitzman, *supra* note 76, at 144 (describing a previous study in which, of 2,169 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 Am. Psychological Ass’n et al. at *7, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (“[C]ore feelings and attractions that form the basis for adult sexual orientation typically emerge between middle childhood and early adolescence.”).

95. Emens, *supra* note 69, at 349–50 (emphasis added).

96. *See, e.g.,* Aviram, *supra* note 67, 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”).

97. Weitzman, *supra* note 76, at 144.

support for placing their poly identities on the most embedded end of the 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 an essentialist one.⁹⁸ He understands polyamory, like bisexuality, to occupy a “liminial position.”⁹⁹ 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.”¹⁰⁰ 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.¹⁰¹ 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 him “queer,” a label he sees as reserved for homosexual desire.¹⁰² 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.¹⁰³ 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 for those

98. Rambukkana, *supra* note 16, at 151. See also Reiss, *supra* note 68, at 51–52 (describing and quoting interviews with participants at New York City’s Poly Pride Day). The very existence of a Poly Pride Day tends to suggest a view of polyamory as an identity. See, e.g., COOPER, *supra* note 16, at 47.

99. Rambukkana, *supra* note 16, at 151; see also Emens, *supra* note 69, at 343, 346 (drawing comparisons between societal prejudice towards polyamory and that towards bisexuality).

100. Rambukkana, *supra* note 16, at 151.

101. *Id.*

102. *Id.* 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” and “Queer” Legal Theories*, in FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS 179, 192 (Martha Albertson Fineman et al. eds., 2009) (“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.”).

103. Rambukkana, *supra* note 16, at 146.

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like” him.¹⁰⁴

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”¹⁰⁵ and describes the alienation one risks in “com[ing] out of the poly closet.”¹⁰⁶ This language suggests that avowing polyamory, like other disfavored identities, can have oppressive social consequences, which are presumably constructed but 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 can be expected 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,¹⁰⁷ 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 constraint 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 that it is more towards the embedded end of the scale.

104. *See id.* at 152.

105. *Id.* at 144.

106. *Id.* at 149.

107. Additionally, 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 coming out of the closet. Weitzman, *supra* note 76, at 148.

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 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.¹⁰⁸ A similar diversity exists within the LGB community,¹⁰⁹ and some scholars have suggested that it should be viewed as a strength rather than a weakness.¹¹⁰

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."¹¹¹ Other scholars, such as Hadar Aviram, have linked polyamory to "a utopian, visionary background,"¹¹² and to values such as originality, individualism, tolerance, freedom, fluidity, and pluralism.¹¹³ 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 1848,¹¹⁴ as well as in science fiction and fantasy literature, especially the works of the author Robert Heinlein.¹¹⁵ The values encompassed in this vision, which are apparently at least partially socially constructed, are likely to be deep-seated.¹¹⁶ For example, most people could with some

108. See Tweedy, *supra* note 50, at 69 (arguing that each person has a right to define her own identity in the context of sexual orientation and other attributes).

109. See, e.g., Marcossan, *supra* note 56, at 708, 710.

110. See, e.g., Emens, *supra* note 69, at 353.

111. *Id.* at 283.

112. Aviram, *supra* note 67, at 277.

113. *Id.* at 273, 281. See also Weitzman, *supra* note 76, 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").

114. Bennett, *supra* note 71; Emens, *supra* note 69, at 303 n.127. But see Rambukkana, *supra* note 16, at 146 ("In reality, rather than an unbroken line from one group of sex radicals to the next, the acculturation of individuals into certain ways of being can be (and usually is) much more eclectic.").

115. Aviram, *supra* note 67, at 275.

116. See, e.g., Jesse Graham et al., *Liberals and Conservatives Rely on Different Sets of Moral Foundations*, 96 J. PERSONALITY & SOC. PSYCHOL. 1029, 1031 (2009) (arguing that moral foundations,

consistency over time, be described as honest, dishonest, or some variation thereof, such as honest except in certain, identifiable 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 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 am going to be honest with everyone with whom I enter a relationship, will embrace tolerance, self-knowledge, and self-possession, will privilege love over jealousy, and 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, evidence suggests that polyamorists engage in significant risks in order 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.¹¹⁷ Employment discrimination is also a

in other words “the psychological systems that give children feelings and intuitions that make local stories, practices, and moral arguments more or less appealing,” are likely innate and that values are based on a combination of these foundations and individual experience); *see generally* Roger P. Claxton et al., *Cognitive Style as a Potential Antecedent to Values*, 11 J. SOC. BEHAV. & PERSONALITY 355 (1996) (arguing that values stem to some extent from one’s cognitive style and that cognitive style appears to be innate); *see id.* at 359 (“People are almost never guided by a single value Thus many researchers . . . belie[ve] that ‘single values are salient only in the context of an entire value system.’” (citations omitted)).

117. Bennett, *supra* note 71. *See also* Emens, *supra* note 69, 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”); William C. Duncan, *The More the Merrier?*, AM. SPECTATOR, Sept. 2, 2010, available at <http://spectator.org/archives/2010/09/02/the-more-the-merrier> (arguing that polyamory likely harms children based on research on the effects of non-marital serial monogamy on children); Stanley Kurtz, *Rick Santorum was Right: Meet the Future of Marriage in America*, NAT’L REV., Mar. 23, 2005, available at <http://www.nationalreview.com/kurtz/kurtz200503230746.asp> (suggesting that the

potential consequence of openly espousing polyamory,¹¹⁸ with the result that many polyamorists appear to remain closeted at work.¹¹⁹ Additionally, in one survey, polyamorists identified “employment nondiscrimination as one of their three highest priority legal issues.”¹²⁰ Furthermore, there is evidence that children of poly parents face harassment at school.¹²¹ Finally, out polyamory has been associated generally with social “stigma and attendant loss of power within monogamous society,” such that poly individuals report losing their friends, being alienated from their families, and being ostracized from spiritual and other communities as a result of revealing their polyamory.¹²² Indeed, forty-three percent of polys in one study reported

assumed effects of polyamory on children are one of the strongest reasons to oppose the right to polyamorous marriages).

While only limited research exists at this time on the potential effects on children of having polyamorous parents, it appears that the assumptions of harm are unwarranted. *See generally* Elisabeth Sheff, *Strategies in Polyamorous Parenting*, in UNDERSTANDING NON-MONOGAMIES 169 (Meg Barker & Darren Langdrige eds., 2009). *But see* Maura Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. U. L. REV. 439, 509–15 (2003) (describing and quoting from one therapist’s depiction of various harms she experienced in the course of her upbringing in a polyamorous family). Dr. Sheff, a sociologist, is currently engaged in a study on the effects on children of being brought up by polyamorous parents. Although the study is not yet complete and the results are preliminary, she reports that her findings to date indicate that “poly families are no more harmful [than monogamous families], and might be beneficial in some ways” and that “preliminary accounts indicate that polyness does not loom large in these kids’ lives.” Email from Elisabeth Sheff, Assistant Professor, Ga. State Univ., to author (June 30, 2010, 7:43 AM) (on file with author).

118. Rambukkana, *supra* note 16, at 148; *see also* Emens, *supra* note 69, at 362.

119. Sheff, *supra* note 75, at 277–78. Polyamorists also may be choosing to remain closeted in other facets of their lives. Rambukkana, *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 [non-monogamy] linked to their identity”). *See also* Aviram, *supra* note 67, at 278 (describing the poly practice of living “under the radar” in order to avoid government intrusion into one’s personal life); Reiss, *supra* note 68, at 51 (“[M]ost polys are, perhaps not surprisingly, closeted.”). *But see* Emens, *supra* note 69, 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).

120. Emens, *supra* note 69, at 331 n.316.

121. *See generally* Maria Pallotta-Chiarolli, ‘To Pass, Border or Pollute,’ *Polyfamilies Go to School*, in UNDERSTANDING NON-MONOGAMIES 182 (Meg Barker & Darren Langdrige eds., 2009).

122. Sheff, *supra* note 75, at 277; *see also* Sheff, *supra* note 117, at 177–79 (documenting the stigma that polyamorous families face); Weitzman, *supra* note 76, at 142 (documenting the fact that polyamorous people often have difficulty finding responsive psychotherapists); Rambukkana, *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 interviewee reported that her friends were critical of her polyamory and sympathetic to the problems it caused her partner. The other interviewee reported receiving criticisms from his partner’s friends as a result of his polyamory. Christian Klesse, *Paradoxes in Gender Relations*, in UNDERSTANDING NON-MONOGAMIES 109, 115–16 (Meg Barker & Darren Langdrige eds., 2009). 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].” SPAHR, *supra* note 62, at 16, 217.

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having directly experienced prejudice as a result of being poly and about a quarter of the respondents had experienced verbal abuse based on their polyamorism.¹²³ Although these potential consequences mirror many of those associated with out homosexuality, the consequences of 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.¹²⁴ Nonetheless, the consequences for out polyamory are sufficiently severe and, based on the available evidence, appear to cause sufficient fear among polyamorists that it 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 Holning Lau in the context of LGB identity, romantic and sexual relationships play a constitutive role in personal identity in American culture.¹²⁵ Lau has 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.”¹²⁶ 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;¹²⁷ this

123. Weber, *supra* note 76, at 5.

124. See, e.g., Emens, *supra* note 69, 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” (citation and internal quotation marks omitted)); see also Aviram, *supra* note 67, at 272 (noting that “polyamory has not, historically, suffered the social stigma associated with heterosexuality”). But see Weitzman, *supra* note 76, at 142 (stating that, in the therapy field, “polyamory is often pathologized”).

125. See generally Lau, *supra* note 2; see also Brief of Amicus Curiae Am. Psychological Ass’n et al. at *4, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (“Sexual attraction and expression are important components of romantic relationships,” and close relationship bonds are formed to meet “personal needs for love, attachment, and intimacy.”).

126. Lau, *supra* note 2, at 1273.

127. *Id.* at 1309.

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.”¹²⁸ 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.”¹²⁹

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 culture. For instance, in describing the theory of group rights that he is extending to support the right to recognition of same-sex couples, he explains 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.”¹³⁰ 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.¹³¹ 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.”¹³² 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.¹³³

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 on: (1) the importance of the relationship itself and cultural recognition of the

128. *Id.* 1273.

129. *Id.* at 1300–01.

130. *Id.* at 1282.

131. *Id.* at 1289–90.

132. *Id.* at 1288 (citations and internal quotation marks omitted).

133. 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)).

relationship to the individuals involved and (2) the ways in which the relationship and its recognition support individual self-development. Were it not for the centrality of personal relationships in American 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 the 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.¹³⁴ 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.”¹³⁵ 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, but perhaps less severe, injury than non-recognition or misrecognition.¹³⁶ Indeed research on polyamory suggests that polyamorous relationships may aid the participant’s self-development,¹³⁷ 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.¹³⁸ Thus, by demonstrating the centrality of the personal romantic relationship in American culture, Lau’s research indirectly affirms that polyamorous identity, which is based largely on having multiple simultaneous relationships, is likely to

134. See, e.g., SPAHR, *supra* note 62, 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.”).

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

136. See SPAHR, *supra* note 62, 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).

137. Weitzman, *supra* note 76, at 140 (“New aspects of self sometimes emerge as one relates closely to additional people.”); see also Reiss, *supra* note 68, at 51 (“[F]or many of today’s multi-lovers, poly is chosen as a path toward personal evolution and spiritual enlightenment.”).

138. Lau, *supra* note 2, at 1289–90.

be a considerably embedded identity.¹³⁹ 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, by drawing significant parallels with LGB identity, both Elizabeth Emens's legal scholarship and Geri Weitzman's psychological research demonstrate that polyamorous identity is likely considerably embedded in the individual. Examining Emens's research first, she has theorized a scale of polyamorous dispositions similar to the Kinsey scale for homosexuality.¹⁴⁰

A consideration of "poly" and "mono" identity, on a theoretical level, suggests that few people's desires fall squarely into either camp. In theory at least, a completely poly disposition might be understood to involve not only desires for multiple sexual and domestic partners, but desires for one's partner(s) to have multiple sexual and domestic partners. A person with this disposition would presumably be happier in nonmonogamous relationships, and perhaps happy only in nonmonogamous relationships. By contrast, a completely mono disposition might be understood to involve exclusive sexual and domestic desire for just one other person, as well as the desire for that person to have only oneself as a sexual and domestic partner. A person with this disposition would presumably be happier in—and perhaps happy *only* in—a monogamous relationship. Few people are likely to embody either disposition completely.¹⁴¹

Emens goes on to suggest that the polyamorous to monogamous continuum has four components: (1) the scope of one's own sexual desire (i.e., does a person sexually desire only one or multiple people); (2) one's wishes for his or her partner with respect to the scope of his or her partner's sexual desires; (3) the number of ongoing domestic/romantic partners that one personally desires; and (4) the number of ongoing domestic/romantic partners that one desires for his or her partner.¹⁴² 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 partners to only

139. 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, Univ. of Calif., Irvine, & Trina Jones, Univ. of Calif., Irvine/Duke Univ., Singlism: Do the Rights of Unmarried Workers Need Protection?, Presentation at the Law & Society Ass'n 2010 Annual Meeting (May 27, 2010).

140. Emens, *supra* note 69, at 284, 355–61.

141. *Id.* at 284.

142. *Id.* at 356–59.

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desire one person.¹⁴³ 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.¹⁴⁴

Although there are important differences between the two approaches, Emens's 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 Alfred Kinsey.¹⁴⁵ Unlike Emens's 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.¹⁴⁶ However, like Kinsey's measure of heterosexual and homosexual dispositions, Emens's scale attempts to measure individuals' dispositions toward monogamy and polyamory.¹⁴⁷

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."¹⁴⁸ Homosexuality and heterosexuality, however, can be (and often are) similarly defined by desire alone.¹⁴⁹ Moreover, Emens's 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's work demonstrates that polyamory is properly thought of as an identity that is similar in many respects to heterosexuality and homosexuality.¹⁵⁰

The psychotherapist Geri Weitzman also draws important parallels between polyamorous and homosexual identities. She suggests that people either are or are not disposed to polyamory, although she

143. *Id.* at 359.

144. *Id.* at 359.

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

146. See, e.g., Martin J. Katz, *Reconsidering Attraction in Sexual Harassment*, 79 IND. L.J. 101, 132 (2004); Hermann, *supra* note 145, at 533.

147. Emens, *supra* note 69, at 355–59.

148. *Id.* at 355.

149. 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); DIAMOND, *supra* note 5, at 12 ("Most scientists consider desire, not behavior, the marker of sexual orientation.").

150. Kurtz, *supra* note 117.

describes the phenomenon in less detail than does Emens.¹⁵¹ 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.”¹⁵² 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.¹⁵³

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 as an identity.¹⁵⁴ While the term “identity development” may 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.¹⁵⁵ 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

151. Weitzman, *supra* note 76, at 140.

152. *Id.*

153. *Id.* at 148.

154. See also SPAHR, *supra* note 62, 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.”).

155. See, e.g., DIAMOND, *supra* note 5, at 11; see generally Brief of Amicus Curiae Am. Psychological Ass’n et al., *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); see also Emens, *supra* note 69, at 342 (“Gay identity is viewed by many to be a deeply rooted element of identity . . .”).

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's 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 one's personal identity and development flows from romantic and sexual relationships in American 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 polyamorous people undertake to practice polyamory suggest an identity that is at least moderately embedded.

The fact that one of the keystones of polyamory, sexual desire for more than one person, however, 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.¹⁵⁶ As Emens explains with respect to non-monogamous behavior: "[t]he poly ethic of honesty posits that many more people engage in non[-]monogamous behavior than own up to it. From this perspective, polys may seem less a distinct minority than outspoken representatives of the masses."¹⁵⁷ In this sense, one of Emens's 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 even 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's other three components of polyamory—wanting one's partner to have sexual desires for others, 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 be much more unique. Moreover, these three components are likely to be at least somewhat deeply embedded, although the first and the third may be considerably less embedded than sexual desire.¹⁵⁸ The second—wanting more than one ongoing

156. See Emens, *supra* note 69, at 343, 353; 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.").

157. *Id.* at 343.

158. See, e.g., *id.* at 330. Emens explains the poly term "compersion," or a "feeling of happiness

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 the individual and that sometimes it will fall near 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, loss of friends, alienation from their families, and ostracism from spiritual and other communities as a result of revealing their polyamory. In addition, their children often face discrimination at school. Indeed, in one study, nearly half of poly respondents reported having experienced prejudice as a result of their polyamory.¹⁵⁹ 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.”¹⁶⁰ 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

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’s formulation would still be at least moderately embedded and perhaps more so. For evidence that sexual desire itself is deeply embedded, see, for example, DIAMOND, *supra* note 5, at 11 (“Even when women undergo significant shifts in their patterns of erotic response, they typically report that such changes are unexpected and beyond their control . . . This finding is consistent with the extensive evidence . . . showing that efforts to change sexual orientation through ‘reparative therapy’ simply do not work.”).

159. See *supra* notes 117–123 and accompanying text.

160. Emens, *supra* note 69, at 283.

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the group was a “recruitment machine” that sucked people in ““with promises of sex and more sex.””¹⁶¹ 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.¹⁶²

The reactions of the columnist in the school newspaper suggest that polyamory is likely to be erroneously associated with hyper-sexuality¹⁶³ and that cultural shame regarding sexuality may therefore be triggered by public polyamory, which in turn is used to denigrate polyamorists.¹⁶⁴ 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.”¹⁶⁵ In other words, to the extent that one is identified with or allied with the Lesbian, Gay, Bisexual, and Transgender (LGBT) community, coming out as polyamorous could also result in one’s alienation from that community.¹⁶⁶

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,¹⁶⁷ and other social mechanisms that penalize polyamory,

161. Rambukkana, *supra* note 16, at 145.

162. *Id.* at 146, 149.

163. *See also In re Aleksandree M.M.*, No. M2010-01084-COA-R3-PT, 2010 WL 3749423, at *4 (Tenn. Ct. App. Sept. 27, 2010) (describing a parent’s polyamory as having contributed to a “sexually charged, abusive and dangerous environment in which the children were being raised”); Emens, *supra* note 69, 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 68 (describing the popular misperception that “polyamory is like having your cake and then having more cake—endless cake forever” (quoting Jillian Deri)).

164. *Accord Klesse*, *supra* note 122, 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, African-American, or Jewish, are disproportionately burdened).

165. Rambukkana, *supra* note 16, at 149.

166. *See id.* at 149–51.

167. As the Court has explained, criminal laws place 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

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“polyamory has not, historically, suffered the social stigma associated with homosexuality.”¹⁶⁸ How then should it be decided whether polyamory warrants protection?

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

Davina Cooper has developed a method for evaluating whether a class designation is “emerging as an organising principle of inequality in its own right” and therefore warrants special protection under the law.¹⁶⁹ 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, “smoking’s more general impact on modes of power, institutional structures, and social dynamics” should be examined.¹⁷⁰ 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.”¹⁷¹ 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 non-smoking binary counterparts?¹⁷²

Cooper concludes that it is not possible to intelligibly talk about cultures being saturated with smoking and 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.¹⁷³ 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

that “[t]he stigma . . . impose[d by Texas’s law criminalizing homosexual sodomy] is not trivial” and describing the law’s import “for the dignity of the persons charged”).

168. Aviram, *supra* note 67, at 272.

169. COOPER, *supra* note 16, at 63.

170. *Id.* at 62–63.

171. *Id.* at 63.

172. *Id.* at 63.

173. *Id.* at 63–64.

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smoking and these social dynamics “exist independently of each other.”¹⁷⁴ Thus, “the social response toward smoking is far more fluid and revisable than is the case with other social constituencies.”¹⁷⁵ 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.¹⁷⁶ By contrast, “where organising principles of inequality . . . are at stake, we cannot trust our processes of evaluation and judgment.”¹⁷⁷

Published cases explicitly discussing polyamory appear to be few and far between. While these cases generally portray polyamory in a negative light, they are too few in number to warrant a conclusion, on their own, that polyamory constitutes an organizing principle of inequality.¹⁷⁸ There is, however, a wealth of law pertaining to non-

174. *Id.* at 64.

175. *Id.*

176. *Id.* at 66.

177. *Id.* at 66.

178. The most in-depth discussion of polyamory occurred in *In re Aleksandree M.M.*, No. M2010-01084-COA-R3-PT, 2010 WL 3749423 (Tenn. Ct. App. Sept. 27, 2010), a case in which the court upheld the termination of a mother’s parental rights to her four children. The court upheld the termination of parental rights on the basis that the mother had failed to protect the oldest child from abuse, specifically rape by her stepfather, which started on the child’s ninth birthday. *Id.* at *3–*4. While such grounds for termination appear to be more than sufficient, the court used the mother’s polyamorous lifestyle, which the biological father had also previously participated in, to bolster the termination decision, indicating that the mother’s practice of polyamory and sadomasochism contributed to her unfitness as a parent and her inability to protect her daughter from abuse. *Id.* at *4 (“Mother’s participation in the polyamory lifestyle and her master/slave relationship with Paul M. [the abusive stepfather] no doubt colored her perspective of the sexually charged, abusive and dangerous environment in which the children were being raised, the reality of which resulted in Paul M.’s abuse of the child.”); *id.* (“[E]ach of the children were [sic] exposed to an environment, based in substantial part on Mother’s lifestyle choices, that put them at risk of abuse . . .”). Notably, the juvenile court had awarded custody of the two older children to their biological father, who had also, at least in the past, practiced polyamory. His custody, however, was not an issue on appeal. *Id.* at *1 n.3.

Less involved discussions of polyamory occurred in two dissents in child custody cases where the majority opinions allowed visitation rights to someone who was not a biological parent; in these cases, the dissenters raised the spectre of polyamory in arguing that the majority opinions had inadvertently sanctioned allowing parental rights to groups of more than two polyamorous parents. *Kulstad v. Manaci*, 220 P.3d 595, 617 (Mont. 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*, 91 P.3d 312, 334–35 (Ariz. Ct. App. 2004) (Barker, J., dissenting) (arguing that, in awarding visitation rights to the stepmother 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. *Id.* at 316.

Polyamory also came up in one custody case where the parties had engaged in the practice. *Cross v. Cross*, 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 ultimately led to the dissolution of both marriages; Mrs. Cross eventually moved in with the Iowa couple

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monogamy that demonstrates 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,¹⁷⁹ it is nevertheless a *sine qua non* of polyamory as well as the practice that appears to drive most of the prejudice against polyamorists.¹⁸⁰ Moreover, polyamorists have overtly embraced non-monogamy in a way that many others who engage in non-monogamous

and the Iowa wife temporarily stayed 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.* It stated, however, that the parties had both willingly engaged in the conduct and were thus equally to blame for the resulting marital breakdown.

Three criminal cases also mention polyamory. In one case, 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. State*, No. 2007-SC-000376-MR, 2008 WL 4691629, at *1, *3 (Ky. Oct. 23, 2008). 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. *State v. Rhoades*, No. 35408-0-II, 2008 WL 933494, at *1–*2, *6 (Wash. Ct. App., Apr. 8, 2008). 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, in a third case, in which a husband was charged with murdering his wife, the court held that testimony regarding the wife’s negative views of her husband’s polyamory was neither hearsay nor unduly prejudicial. *State v. Petrick*, 652 S.E.2d 688, 692 (N.C. Ct. App. 2007). I identified only one other case in which polyamory was mentioned. In this case, the court referred to polyamory merely to explain the interest of an organizational plaintiff in an obscenity case. *Nitke v. Gonzales*, 413 F. Supp. 2d 262, 264 (S.D.N.Y. 2005).

The termination case and the custody cases in particular demonstrate negative judicial views of polyamory. In *In re Aleksandree M.M.*, the court used the mother’s polyamorous lifestyle to bolster a termination decision, despite the fact that nothing about polyamory lends itself to child rape, and, indeed, its requirement of consent definitionally precludes polyamorists from making sexual advances on children. *In re Aleksandree M.M.*, 2010 WL 3749423, at *4. Cf. Jonathan Turley, *Polygamy Laws Expose Our Own Hypocrisy*, USA TODAY, Oct. 4, 2004, at A.13 (“[B]anning polygamy is no more a solution to child abuse than banning marriage would be a solution to spousal abuse.”). The court’s conclusion appears to have been driven by a combination of a misunderstanding of polyamory, a conflation of hyper-sexuality with polyamory, and a general prejudice against unconventional sexuality as embodied in polyamory. Given the stepfather’s egregious misconduct in *In re Aleksandree M.M.* and the mother’s continued state of denial about it, however, it is hard to evaluate how much the judge’s prejudice against polyamory weighed into the decision, which would most likely have been a foregone conclusion even without the presence of polyamory and sadomasochism. 2010 WL 3749423, at *5.

The *Kulstad* and *Riepe* dissents also gratuitously attack 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 against. See *Kulstad*, 220 P.3d at 617; *Riepe*, 91 P.3d at 334–35. In *Cross*, the court took pains to express strong disapproval of polyamory (which it also misconstrued), terming it “grossly inappropriate.” *Cross*, 5 Pa. D. & C. 5th 12. Although the criminal cases are harder to evaluate, the courts’ and individual judges’ negative treatment of polyamory in the custody and termination cases remains striking.

179. See, e.g., Emens, *supra* note 69, at 344 (describing an author’s “blur[ring of] the distinction between nonmonogamy and polyamory”).

180. See, e.g., *id.* at 347–49.

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actions have not. For instance, while there may be good reasons to decriminalize adultery even when practiced in its traditional form,¹⁸¹ 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 while harming the other party to the monogamous relationship). Finally, at the very least, the prototypical adulterer is not challenging the framework of monogamy, but instead, by continuing to live under a pledge of monogamy, he or she overtly supports the framework, while secretly falling short of, or violating, it. By contrast, polyamorists have rejected the framework and consciously attempt to live outside of it.¹⁸² Because polyamorists explicitly embrace non-monogamy and, at a minimum, let everyone with whom they enter a romantic relationship know of this preference, polyamorists are uniquely likely to be subject to discrimination, including *de jure* discrimination against non-monogamists, and it is arguably particularly unfair to burden polyamorists with criminal sanctions, given that they have been honest with those who would otherwise stand to be hurt by their lifestyle and that they have made a conscious decision to reject the strictures of monogamy, which would seemingly be a decision every person has the right, as a matter of personal liberty, to make.

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.¹⁸³ 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 and instead embraces 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

181. See, e.g., Jennifer M. Collins et al., *Punishing Family Status*, 88 B.U. L. REV. 1327, 1414–16 (2008).

182. See, e.g., Potter, *supra* note 68 (describing monogamy not as a “goal” but as “a point of departure” for polyamorists).

183. See, e.g., OXFORD ENGLISH DICTIONARY (March 2006 draft entry) (defining “down-low” as “of or relating to men who secretly engage in homosexual activity”).

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more entitled to, specific legal protections.¹⁸⁴ Nonetheless, anti-discrimination protections for polyamory may have the incidental beneficial effect of encouraging 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.¹⁸⁵ Because of the harm that closeting causes to closeted individuals,¹⁸⁶ this would be a socially desirable consequence of anti-discrimination protections.

Thus, application of Cooper's analysis to the monogamy/non-monogamy binary helps us to determine whether polyamory potentially warrants anti-discrimination protections. Although American culture privileges monogamy in innumerable ways,¹⁸⁷ several key examples that particularly relate to the law are discussed below.

184. A similar analysis would apply to those who are erroneously perceived to be polyamorous, 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, society should protect against such discrimination regardless of whether the victim was actually polyamorous in order to stake out a place for polyamory in American 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 that based on perceived non-monogamy more generally. Assuming that it is not socially desirable at this time to protect all those who are non-monogamous from discrimination, the perceived category should arguably be omitted from any anti-discrimination provisions that include polyamory.

185. Cf. Rambukkana, *supra* note 16, at 152 (describing the empowering effect of naming new forms of sexuality).

186. See, e.g., Yoshino, *supra* note 24, at 527, 549.

187. In addition to laws such as those enforcing monogamy by criminalizing bigamy and adultery, Emens points to statements in case law that emphasize the importance of monogamy. Emens, *supra* note 69, 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. *Id.* (quoting *Potter v. Murray City*, 760 F.2d 1065, 1070 (10th Cir. 1985)) (citing *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003)). She further describes "condemnation of divorce, both historical and extant" as evidence of the enforcement of monogamy. *Id.* For an example of a court's enforcing a harsh divorce law and tying its decision to the norms of monogamy, see *Lanham v. Lanham*, 117 N.W. 787 (Wis. 1908). In *Lanham*, 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 yet another, thus accomplishing what may be called progressive polygamy." *Id.* at 789. In terms of 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 69, at 289-90. Additionally, one need only think of the cultural force of terms like "slut" and "whore" to understand the force of the prescription of monogamy.

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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.”¹⁸⁸ 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, bigamy and adultery laws are explicitly designed to enforce monogamy as a cultural requirement.¹⁸⁹ These laws are examples of society, through the coercive mechanism of criminal law, explicitly punishing non-monogamy in order to privilege and cultivate monogamy. As the United States Supreme 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.¹⁹⁰ Such 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, which are important questions according to Cooper’s methodology. Additionally, such examples show that 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 compromised.

c. The Special Rights Attendant on Marriage

The law confers on married couples a host of special rights.¹⁹¹ 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.”¹⁹² In

188. Emens, *supra* note 69, at 187.

189. *Id.* at 284, 355. Additionally, the United States historically also used criminal sanctions to force a monogamous conception of marriage on Native cultures. ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 101–02 (2008).

190. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 575–76 (2003) (stating that “the stigma imposed [by Texas’s law criminalizing homosexual sodomy] is not trivial” and describing the law’s import “for the dignity of the persons charged”); see also *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).

191. 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*, 798 N.E.2d 941, 955 (Mass. 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).

192. Suffredini & Findley, *supra* note 191, at 598 n.10 (internal quotation marks & citations

addition to the rights and privileges conferred by federal law, such as tax breaks and social security benefits, available solely to married persons, states grant numerous exclusive privileges and rights.¹⁹³ For example, in *Goodridge v. Department of Public Health*,¹⁹⁴ the Supreme Judicial Court of Massachusetts, “[w]ith no attempt to be comprehensive,” listed an impressive array of rights and benefits available exclusively to married persons under Massachusetts law, noting that they “touch[ed] nearly every aspect of life and death.”¹⁹⁵ The acknowledged breadth of laws conferring exclusive rights on married persons demonstrates that the class of married persons is privileged, while the opposing category of unmarried persons is 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,¹⁹⁶ the disfavored class necessarily includes polyamorists and other non-monogamists, who are stained by their refusal to abide by this core societal norm.¹⁹⁷

d. The Burdening of Non-Marital Children

By definition, non-marital children are the product of a relationship that lacked the imprimatur of monogamy that marriage provides. The extent to which the law has historically,¹⁹⁸ and to some extent continues to, oppress such children¹⁹⁹ demonstrates Western culture’s extreme

omitted).

193. *See id.*

194. 798 N.E.2d 941.

195. *Id.* at 955–56 (citations omitted).

196. *See, e.g.,* Emens, *supra* note 69, at 281; *accord* Kurtz, *supra* note 15, at 2 (“Americans still take it for granted that marriage means monogamy.”).

197. Of course, legal benefits conferred on married persons harm others besides non-monogamists. *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); Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining*, 15 WIS. WOMEN’S L.J. 93, 131 (2000) (discussing the content of the Madison, Wisconsin ordinance). It appears, however, that such laws may well have been designed to harm those who do 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 75, at 277 (discussing a polyamorous woman’s difficulty in getting her child’s natural father’s name listed on the child’s birth certificate because the woman was married to someone else at the time of the child’s birth); Bennett, *supra* note 71 (discussing a married couple who engage in polyamory).

198. Susan E. Satava, *Discrimination Against the Unacknowledged Illegitimate Child and the Wrongful Death Statute*, 25 CAP. U. L. REV. 933, 935–36, 937, 939 (1996).

199. *Id.* at 942–43, 948. *See also* Edward Stein, *Marriage or Liberation?: Reflections on Two Strategies in the Struggle for Lesbian and Gay Rights and Relationship Recognition*, 61 RUTGERS L.

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vation of monogamy. The continuing 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 also indicates that an "organising principle of inequality" is at stake when it comes to those who practice non-monogamy, including polyamorists.²⁰⁰

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

In *Michael H. v. Gerald D.*,²⁰¹ the United States Supreme Court upheld California's filiation law under which judicial determinations of paternity are made. A biological father challenged the law, asserting claims under: (1) the Equal Protection Clause; (2) substantive due process; and (3) procedural due process. The child also challenged the law based on her substantive due process and Equal Protection Clause rights. The Court held that the law, which had been used to deprive the natural father of his parental rights, was constitutional because the biological father 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."²⁰² He also attempted to reify monogamy as a law of nature, stating that "California law, like nature itself, makes no provision for dual fatherhood."²⁰³ Thus, the plurality, alluding to the "sanctity" "traditionally accorded to the relationships that develop within the unitary family," rejected the biological father's argument that the Court had previously recognized a liberty interest "created by biological fatherhood plus an established parental relationship."²⁰⁴

REV. 567, 580 n.68 (2009) (discussing the use of intermediate scrutiny to evaluate distinctions based on legitimacy); *Goodridge v. Dep't Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (discussing the meaningfulness of the marital/non-marital distinction in social contexts and the fact that marital children still have an easier time demonstrating eligibility for government benefits).

200. COOPER, *supra* note 16, at 66.

201. 491 U.S. 110 (1989).

202. *Id.* at 113 (Scalia, J., plurality opinion).

203. *Id.* at 118. Nancy Levit describes *Michael H.* as an opinion "that may have gotten it flat wrong on love." Levit, *supra* note 30, at 26.

204. *Michael H.*, 491 U.S. at 123.

Additionally, the plurality explained that the “‘unitary family[]’ is typified . . . by the marital family” and that it would “bear no resemblance to traditionally respected relationships—and [would] cease to have any constitutional significance—if it [were] stretched so far as to include the relationship established between a married woman, her lover, and their child.”²⁰⁵

Given the importance that the Court places on the rights of biological parents in other contexts,²⁰⁶ *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.²⁰⁷ 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.²⁰⁸ The opposing binary, represented by the unmarried adulterous biological father, is utterly stripped of rights because his relationship with the child’s mother and their daughter “bear[s] no resemblance to traditionally respected relationships.”²⁰⁹ Given the plurality’s focus on tradition, it can be inferred 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 case law provides strong evidence of the continuing force of the norms of monogamy in both the legal system and popular culture.²¹⁰ 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.”²¹¹ Her conclusion is

205. *Id.* at 123 n.3; see also Alice Ristoph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1252 (2010) (“Constitutional doctrine’s clear preference for the marital nuclear family . . . is evident in a number of contexts.”).

206. See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000). Murray and Ristoph note that *Troxel* may be “understood as endorsing the primacy of the nuclear family model over claims for alternative family structures.” Ristoph & Murray, *supra* note 205, at 1255.

207. 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.

208. See, e.g., Ristoph & Murray, *supra* note 205, at 1256 (arguing that, in cases where the Supreme Court has recognized unmarried fathers’ rights, the recognition was due to the fact that the fathers acted as though they were married to the mothers of the children at issue).

209. *Michael H.*, 491 U.S. at 123 n.3.

210. See generally Ummi Kahn, *A Woman’s Right to be Spanked: Testing the Limits of Tolerance of SM in the Socio-Legal Imaginary*, 18 LAW & SEXUALITY 79 (2009).

211. *Id.* at 82.

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based on her examination of several British criminal cases involving S/M and one such case from the United States.²¹² Kahn explains that “only marital love[] seems to operate as a kind of emotional alibi to justify the unusual behavior” that comprises S/M practices²¹³ and further that “being married, heterosexual and monogamous” appears to “buy some leniency” in an S/M case.²¹⁴ Given S/M’s status as a suspect, fringe practice, “guilty until proven innocent in the socio-legal imaginary,”²¹⁵ 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, at least if they fall into the privileged categories. In short, Kahn’s research demonstrates the privilege that monogamy affords and, conversely, the disadvantage that non-monogamy necessarily carries with it.²¹⁶

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. Notably, the above analysis may also support protecting a broader class of non-monogamous persons than simply polyamorous persons; however, more analysis is necessary to determine whether the types of non-monogamies that would be protected represent identities that are 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, the legal distinctions between monogamy and non-monogamy are only used to support protections for polyamory.

IV. QUESTIONS WARRANTING FURTHER INVESTIGATION

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 those to whom one is attracted, appears to be somewhat arbitrary as a conceptual matter. Moreover, there are problems with the current notion of sexual orientation, particularly with attempts to essentialize the category. It is possible that these problems could be ameliorated, at least to some

212. *Id.* at 102–03.

213. *Id.* at 110.

214. *Id.* at 112.

215. *Id.* at 118.

216. *See id.* at 112–16 (discussing *Twyman v. Twyman*, 790 S.W.2d 819 (Tex. Ct. App. 1990)).

extent, by opening up the category to other types of sexual preferences, thereby broadening the focus and potentially softening the rigid expectations that are now placed on an individual based on her attraction to one sex, the other, or both.

A. Similarities Between Traditional Sexual Orientation and Polyamory

As previously demonstrated, polyamory shares some of the attributes of sexual orientation as currently understood. First, as is evident from Lau's work, both sexual orientation and polyamory are relationship-based. Moreover, polyamory appears to share both of the potentially problematic aspects of sexual orientation identified by Butler. For one, polyamory, like sexual orientation, has a significant performative component, in the sense that having, or at least desiring, multiple relationships is a central part of the essence of polyamory.

As Butler's work suggests, given the performative aspect of sexual orientation, there may be something incongruous about portraying it as a static identity, because it has to be continually reaffirmed through future performance. Relatedly, on a more practical level, women's sexual desires are subject to a considerable degree of fluidity.²¹⁷ This means that a significant portion of, or perhaps most, women are likely to experience changes in their sexual identities during the course of their adult lives.²¹⁸ The fact that the performative aspect of sexual orientation identified by Butler accords with empirical evidence as to women's sexual identities suggests that, rather than trying to minimize the performative aspect of sexual orientation (and the concomitant potential for fluctuations in the objects of a person's desires), as legal strategies likening sexual orientation to race and other more static identities have traditionally sought to do, society and the legal system should embrace the performative aspect of sexual orientation.²¹⁹ In turn, the fact that polyamory also has a performative aspect may mean that: (1) it makes logical sense to group protections for sexual orientation discrimination,

217. DIAMOND, *supra* note 5, at 84–86; *see also* Glazer, *supra* note 21 (manuscript at 34) (“Understanding sexual orientation to fit within a rigid binary has been deemed problematic because that binary is too rigid to capture the actual human experience of sexual orientation, which is dynamic and fluid.”).

218. DIAMOND, *supra* note 5, at 82–88.

219. *Id.* at 16 (“The well-being of all women will be improved through a more accurate, comprehensive understanding of female sexuality in all its diverse and fluid manifestations.”). For an example of an attorney's strategic portrayal of sexual orientation as static in the courtroom in the hopes of gaining legal protections, see Glazer, *supra* note 21 (manuscript at 30) (discussing the trial in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), and documenting the plaintiffs' attorney's implicit concession that one of the plaintiffs was entitled to protection “if and only if her gay identity [was] stable”).

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as traditionally understood, with any such protections that might be established for polyamory; and (2) although such a move may make the performative aspect of sexual orientation more visible, this could well be desirable rather than problematic.

Professor Butler also pointed out that homosexual sexual orientation is inherently unstable because it is the derided opposite of heterosexual sexual orientation, and both are mutually dependent on each other for their meanings. Similarly, polyamory, or, more broadly, non-monogamy, has been socially constructed as the derided copy of monogamy,²²⁰ and yet the concept of monogamy would itself not exist without its culturally scorned opposite. This similarity reveals that both types of identity derive their meanings from the larger culture, and it thus demonstrates that polyamory shares another important attribute of homosexuality, namely its conceptual instability.

While, at first glance, these problems may seem like reasons not to expand the category of sexual orientation to include polyamory, in fact it may be beneficial to come to terms with the inherent instability of sexual orientation and the related fact that it is an identity that is different in kind than race and ethnicity, the more traditional types of identity. To the extent that American culture can come to a deeper and more nuanced understanding of sexual orientation and begin to protect against discrimination based on sexual orientation not because the category is like race and other protected categories but simply because it warrants protection, it will be better off. Lau's work demonstrating that sexual orientation is relationship-based also provides support for grouping polyamory and traditional sexual orientation together. The considerable discrimination that polyamorists face and the fact that they, along with other non-monogamists, are burdened by an organizing principle of inequality further support the move to expand the definition.

B. Potential Drawbacks to Expanding the Definition of Sexual Orientation

Despite the preceding analysis, polyamory appears to be a somewhat less embedded identity than traditional sexual orientation. If a high level of embeddedness continues to be seen as an important characteristic of a protected class, this factor could cut against expanding the definition.²²¹

220. See, e.g., Emens, *supra* note 69, at 294–97 (describing biological anthropologists' attempts to describe monogamy as natural and non-monogamy as unnatural for humans).

221. For 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

The recent evidence discussed above, however, demonstrates that women's sexual identities, in many cases, are fluid and subject to change,²²² a fact which may indicate that what is important about sexual orientation, namely the capacity of desires and intimate relationships to shape the individual and her sense of self, is unrelated to its level of embeddedness. As this view of sexual orientation comes to be more widely embraced, adding to the definition to include preferences such as polyamory should become correspondingly less risky.

Relatedly, if polyamory is added to the definition of "sexual orientation," there is a danger that identities based on same-sex attraction and other protected classes will become irrevocably associated in judicial, political, and popular discourse with polyamorous identity, especially to the extent that lawyers arguing on behalf of polyamorists draw explicit or implicit comparisons with these other groups.²²³ For example, adding polyamory to the definition of sexual orientation could increase the perception that sexual orientation is a chosen or ideological matter,²²⁴ which could be detrimental to the fight to gain more protections against sexual orientation discrimination, at least in the short term. 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."²²⁵

Indeed, polyamory is a somewhat 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, non-monogamy, is shared—in at least its nascent form of non-monogamous desire—by virtually everyone. In this sense, expanding the definition of sexual orientation to include polyamory could "place the ontology of identity itself at risk."²²⁶ While values also often play a role in

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 evaluated carefully before any decisions are made.

222. See, e.g., *supra* note 34 (discussing Lisa Diamond's work).

223. Halley, *supra* note 18, at 62–68.

224. Diamond explains that the fluidity of women's sexual desires does not mean that they are chosen by women or subject to the individual woman's control. DIAMOND, *supra* note 5, at 11.

225. Halley, *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 non-monogamous. 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.

226. *Id.* at 65.

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individuals' conceptions of their sexual orientations,²²⁷ it probably cannot be said that values are as significant a part of sexual orientation as they are of polyamory. Again, perhaps ideally, sexual orientation could be understood as more analogous to religion²²⁸—not necessarily as something that never changes but as something that the state should simply not ask a person to try to change, and indeed should support, as a crucial aspect of an individual's self-development. As this view becomes more widely embraced,²²⁹ the risks of adding polyamory to the definition of sexual orientation will decrease. The question is what to do in the meantime. While there are no easy answers, careful evaluations of risk are surely warranted. If it turns out that it is considered too risky to add polyamory to existing definitions of sexual orientation, other possibilities for protecting polyamory should be explored.²³⁰

C. Do Polyamorists Want Specific Legal Protections?

A related and equally crucial question that warrants additional research is whether polyamorists desire protection. The evidence collected so far appears to be conflicting. For instance, Rambukkana has explicitly resisted making any claim to a queer identity based on his polyamory 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.”²³¹ While some queer theorists may disagree with his limited view of queerness,²³² 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[.]’”²³³ Aviram also argues that

227. See, e.g., *supra* note 16 and accompanying text (citing COOPER, *supra* note 16; Sedgwick, *supra* note 16; Rambukkana, *supra* note 16).

228. Cf. Ristoph & Murray, *supra* note 205, at 1276 (“Religious beliefs often are not a matter of choice [and] that is why they should be protected . . .”).

229. Similar views appear to be gaining traction. See, e.g., M.K.B. Darmer & Tiffany Chang, *Moving Beyond the “Immutability Debate” in the Fight for Equality After Proposition 8*, 12 SCHOLAR 1, 27–33 (2009).

230. For instance, there is an emerging literature on discrimination against single people. See, e.g., Barnes & Jones, *supra* note 139; 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.

231. Rambukkana, *supra* note 16, at 151; see also SPAHR, *supra* note 62, at 173 (expressing similar sentiments).

232. See, e.g., Romero, *supra* note 102, at 192–93.

233. Aviram, *supra* note 67, at 273.

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Bay Area polyamorists' values are inconsistent with advocating a rights-based view of identity.²³⁴ On the other hand, polyamorists in one survey listed employment discrimination as one of their top three legal issues,²³⁵ a fact which suggests a desire for legal protections. It is possible that the views of the polyamorists in Aviram's research are largely unique to the Bay Area, given the region's relative tolerance 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, polyamorists do not feel that they have the luxury of foregoing efforts to gain legal protection. Additionally, the group's failure to speak up may be due to a tendency to remain closeted out of fear.²³⁶ If this is the case, the harm that they experience as a result of closeting is probably significant and may be a reason in itself to seek to include them in legal protections.²³⁷ 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 undertaken.

V. CONCLUSION

Because polyamory appears to be at least moderately embedded as an identity, because polyamorists face considerable discrimination, and because non-monogamy is an organizing principle of inequality in American culture, anti-discrimination protections for polyamorists are warranted. Moreover, polyamory shares some of the important attributes of sexual orientation as traditionally understood, so it makes conceptual sense for polyamory to be viewed as part of sexual orientation. On the other hand, however, some of our culture's cherished myths about sexual orientation, especially its unchangeableness, would have to be given up to make such a change. In the short-term, this could well be very risky for existing sexual orientation protections and it could make some legal strategies in sexual orientation cases, such as analogizing sexual orientation to race, obsolete. In the long run, however, it would arguably be better culturally to come to a deeper and more nuanced understanding of sexual orientation that is not based on its similarity to other identities. Moreover, to the extent that polyamorists want legal protection, an issue

234. See generally Aviram, *supra* note 92.

235. Emens, *supra* note 69, at 331 n.316.

236. See, e.g., Sheff, *supra* note 75, at 277–78 (discussing interviewees who remained closeted at work out of fear).

237. See, e.g., Yoshino, *supra* note 24, at 527, 549.

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that needs further investigation, it would be a beneficial move in terms of social justice to add polyamory to definitions of sexual orientation and thereby protect a societally disfavored group from discrimination. Finally, assuming polyamorists do desire legal protections, there may be ways to obtain them without defining polyamory as a sexual orientation.²³⁸ Such possibilities should also be investigated.

238. See, e.g., *supra* note 230.