

Columbia Law School

Public Law & Legal Theory Working Paper Group

Paper Number 13-331

Forthcoming: Stanford Law Review, Vol. 66

Compulsory Sexuality

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March 7, 2013

COMPULSORY SEXUALITY

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Abstract

Asexuality is an emerging identity category that challenges the common assumption that everyone is defined by some type of sexual attraction. Asexuals—those who feel no sexual attraction to others—constitute one percent of the population, according to a prominent study. In recent years, some individuals have begun to identify as asexual and to connect around their experiences interacting with a sexual society. Asexuality has also become a protected classification under one state's antidiscrimination law, but legal scholarship has thus far neglected the subject.

This article introduces asexuality as a category of analysis, an object of empirical study, and a phenomenon of medical science. It then offers a close examination of the growing community of self-identified asexuals. Asexual identity has revealing intersections with the more familiar categories of gender, sexual orientation, and disability, and inspires new models for understanding sexuality.

Thinking about asexuality also sheds light on our legal system. Ours is arguably a sexual law, organized around the assumption that sex is important. The article traces several ways that our sexual law burdens, and occasionally benefits, asexuals. These indirect legal burdens combine with recent research on bias against asexuals to suggest a plausible case for legally protecting asexuals from discrimination. New York has included asexuality in its antidiscrimination law, and the article uses original research to tell the story of that legal innovation. The article concludes by exploring the common intuition that asexuality is a poor fit with existing antidiscrimination law. A close study of protected classifications identifies the core criteria that track the degrees of protection accorded to different identity categories, few of which are currently met by asexuality, though this could change with time. In so doing, the article provides a novel approach for understanding the landscape of antidiscrimination law.

* Professor of Law, Columbia Law School. For helpful conversations and comments on earlier drafts, I thank Susan Appleton, Noa Ben-Asher, Samuel Bray, Jessica Bulman-Pozen, Luis Chiesa, Bridget Crawford, Ariela Dubler, Richard Emens, Katie Eyer, Katherine Franke, Cary Franklin, Suzanne Goldberg, Bernard Harcourt, Adam Hickey, Bert Huang, Alan Hyde, Clare Huntington, David Jay, Suzanne Kim, Sarah Lawsky, Kimberly Mutcherson, Elizabeth Povinelli, Russell Robinson, Elizabeth Scott, Geoffrey Stone, Cass Sunstein, and participants in the Columbia Law School Faculty Workshop and Juniors Workshop, Columbia Law Women's Association, Columbia University Institute for Research on Women and Gender Feminist Interventions Lecture Series, Emerging Family Law Scholars Conference, the Fordham Legal Theory Workshop, Pace Law School Faculty Workshop, Rutgers School of Law–Camden Faculty Workshop, Rutgers School of Law–Newark Faculty Workshop, and my Employment Discrimination Law class. For excellent research assistance, I thank Timothy Gray, Johanna Hudgens, Maureen Kellett, Rachel Jones, Laura Mergenthal, and Bahrad Sokhansanj.

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INTRODUCTION

I'm trying to imagine never being hungry, but still living in a world that's obsessed with food. I can imagine people saying, "Hey, what did you think of the salmon?"

"Meh, it's okay, I don't really like food."

"Wait, you must mean you don't really like salmon. What do you mean you don't like food?"

"I just . . . I just don't see what's so great about food."

"Uhh, it's delicious."

"See, it's just not that appealing to me."¹

Asexuality is the middle child of the sexual orientation family, neglected until very recently by both sexuality studies and progressive politics. In the last few years, though, those who do "not experience sexual attraction"² have inspired increasing research attention and subcultural affiliation. Asexuality has featured on high-profile news and talk shows,³ and spurred a popular documentary film, *(A)sexual*.⁴ And the term has begun to enter our legal vocabulary: New York antidiscrimination law includes "asexuality" within its definition of "sexual orientation."⁵

What might our legal system look like through the eyes of someone who does not experience sexual attraction? And how might our social practices and expectations—our cultural laws—look to asexual eyes? Ours is arguably a *sexual law*, casting asexuals on the outside in a range of ways. This article considers our culture and laws through the lens of asexuality.

Asexuality has thus far received no attention in the legal literature. The article therefore presents a careful examination of the emergence of asexuality as a conceptual and cultural phenomenon. It introduces the key terms and trends surrounding asexuality in the burgeoning community of self-identified asexuals, then develops an understanding of the place of asexuality amidst our other identity categories and in the public imagination. Examining responses to asexuality, and the possible analogies to it, draws forth insights both about asexuality and about the broader culture.

¹ Asexual Q&A Forum, Post by blueskies, Asexual Visibility and Education Network, Jul. 15 & 21, 2008, at http://www.asexuality.org/en/index.php?/topic/32908-some-blunt-questions/page__st__30 (punctuation and capitalization altered). One participant (Ankh Ascendant) wrote: "That food analogy is perfect. . . ." Another participant in the forum didn't view the analogy as favorably, though, writing "Well, gosh, if you stop eating you rather die, don't you? But yeah, I suppose I see what you're saying." (quoting Forensic) (July 15, 2008) (emoticon omitted).

² Aven: The Asexual Visibility and Education Network, <http://www.asexuality.org/home/> (Jun. 27, 2010).

³ See, e.g., Lori A. Brotto et al., *Asexuality: A Mixed-Methods Approach*, 39 ARCH. SEX. BEHAV. 599, 599 (2010). (reporting that "[t]here have been at least seven primetime television features on asexuality in the past year").

⁴ *(A)SEXUAL* (Dir. Angela Tucker, 2011).

⁵ "The term 'sexual orientation' means heterosexuality, homosexuality, bisexuality or asexuality, whether actual or perceived." NY Sexual Orientation Non-Discrimination Act (SONDA), N.Y. Exec. Law § 292 (McKinney 2011).

In contrast to homosexuality, the law has not expressly punished asexuality. For this reason, asexuality may appear to have little connection to law. This project is the first to identify a range of legal intersections with asexuality. The law has inadvertently burdened asexuality in numerous ways, as well as benefitting it in a few. Examples include the voidability of marriage for lack of consummation in some jurisdictions, on the one hand, and the desexualizing of the workplace through sexual harassment law, on the other.⁶ More broadly, examining our culture from the perspective of asexuality sets into relief the sexual nature of many of our laws.

A recent study reports that asexuals face bias similar to, or greater than, that faced by homosexuals and bisexuals.⁷ This finding, combined with the burdens our laws place on asexuals, supports an argument for protecting asexuals under antidiscrimination law. New York law has already taken steps in this direction, and this article presents the first account of how and why New York made this change, based on first-hand accounts from participants in the lawmaking process. New York is unique in the world, however, in including asexuality in its law.

Although there is a plausible normative case for prohibiting discrimination on the basis of asexuality, there is a common intuition that asexuality is a poor fit with existing antidiscrimination law.⁸ This article therefore compares asexuality with more familiar protected categories—as well as two relatively unprotected ones, sexual orientation and personal appearance—in order to try to understand that intuition. This analysis identifies eight criteria that track the relative degrees of protection accorded to different identity categories. Asexuality currently meets very few of these criteria, though this could change over time.⁹

The article has four parts. Part I explains asexuality's emergence as an identity category through conceptual, empirical, clinical, and identity-based perspectives. Part II then maps the rise of asexuality as an identity movement. It introduces asexuality's core definitional axes before examining its linkages with other identity categories, the responses it engenders in contemporary culture, and the possible models for understanding it. Part III looks at our laws from the perspective of asexuality, identifying a set of ways that our laws burden (and occasionally benefit) people who experience themselves as asexual and the ways that their perspective casts into relief certain features of our laws. Part IV addresses the possibility of making our laws more responsive to asexuality. It tells the story of New York's unique move to protect asexuality from discrimination, then considers the stakes of legal recognition of asexuality both for asexuals and for everyone else, concluding that a reasonable case can be made for such protection. Finally, this Part analyzes current antidiscrimination law in order to understand the assumption that asexuality is a poor fit with existing law. In so doing, this analysis offers a novel approach to understanding the landscape of antidiscrimination law.

⁶ Cf. *infra* Part IV (discussing, and complicating, these points).

⁷ See *infra* Section IV.B.1 (discussing these results).

⁸ See *infra* Part IV.C.1.

⁹ See *infra* Part IV.C.4.

I. THE EMERGENCE OF ASEXUALITY

“The definition of asexual[] is ‘someone who does not experience sexual attraction.’”

—The Asexual Visibility and Education Network (AVEN)¹⁰

Asexuality emerged as an analytic category only recently. Four crucial contexts for its emergence recur in the literature: one conceptual, one empirical, one clinical, and one identity-based. These discourses of course intersect and inform each other, but to separate them helps to illuminate different perspectives on the growing interest in this field. This Part introduces asexuality by telling the story of its emergence as a category of analysis through these lenses.

A. Conceptual: The Fourth Sexual Orientation

The conceptual identification of asexuality is generally attributed to the psychologist Michael D. Storms, whose 1980 article located asexuality as a fourth sexual orientation, alongside homosexuality, heterosexuality, and bisexuality.¹¹ Storms challenged the Kinsey scale, which located everyone somewhere on a spectrum from exclusive heterosexual orientation (zero) to exclusive homosexual orientation (six). On the Kinsey scale, a greater amount of homosexuality implied a lesser amount of heterosexuality and vice versa: Or as Storms put it, “On Kinsey’s unidimensional scale an individual loses degrees of one orientation as he or she moves toward the opposite end of the scale; thus, bisexuals are seen as half heterosexual and half homosexual or a compromise somewhere between the two extremes.”¹² By contrast, Storms proposed a two-dimensional model in which homo-eroticism and hetero-eroticism were separate axes, along which any person could have greater or lesser amounts of either, independent of the other. Storms pointed out that this two-dimensional model overcame a problem that had hindered not only Kinsey’s work, but Masters and Johnson’s: the conflation of bisexuals and asexuals.¹³

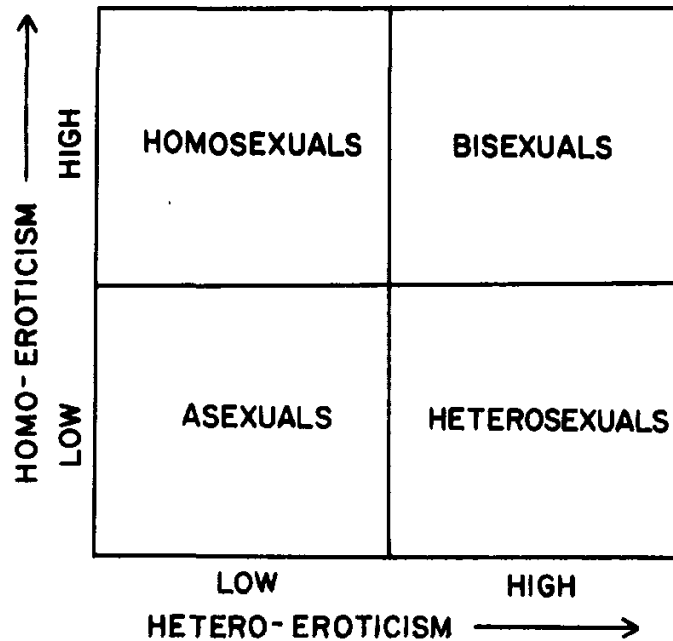
¹⁰ AVEN, *Am I Asexual?*, General FAQ, <http://www.asexuality.org/home/general.html#def1> (last visited Jan. 13, 2012).

¹¹ Michael D. Storms, *Theories of Sexual Orientation*, 38 J. PERSONALITY & SOCIAL PSYCH. 783-92 (1980).

¹² Storms, *supra* note XX, at 785.

¹³ See Storms, *supra* note XX (discussing ambisexuals).

Figure 1 — Storms' 1980 Two-Dimensional Model¹⁴



Although Kinsey's work revealed a substantial population who reported no desire for either men or women, Kinsey had largely ignored these subjects, labeling them "X".¹⁵ (As a sign of the changing times, representatives of the Kinsey Institute now speak publicly in support of the plausibility of asexuality as a sexual orientation.¹⁶) Storms' 1980 study supported his theoretical model distinguishing bisexuals and asexuals by showing that the bisexuals in his study "actually reported just as much same-sex fantasy as homosexuals and just as much opposite-sex fantasy as heterosexuals, [data that] are better described by a two-dimensional model in which homoeroticism and heteroeroticism are viewed as separate variables and in which bisexuality is defined as scoring high on both dimensions."¹⁷ Although Storms' empirical project did not include asexuals, his theoretical model made a space for asexuals as those individuals who score low on both dimensions.¹⁸

¹⁴ Storms, *supra* note XX, at 784 (Figure 1).

¹⁵ See, e.g., Bootle, *supra* note XX ("Alfred Kinsey . . . labelled 1.5 per cent of adult males as "X" – neither homosexual nor heterosexual, nor anything in between. They were simply uninterested in sex.").

¹⁶ See, e.g., (A)SEXUAL (including comments by Cynthia Graham of the Kinsey Institute).

¹⁷ See Storms, *supra* note XX, at 790. This paper built on an earlier theoretical paper by Storms. See Michal D. Storms, *Sexual Orientation and Self-Perception*, in 5 ADVANCED IN THE STUDY OF COMMUNICATION AND AFFECT (P. Pliner et al. eds., Plenum 1978).

¹⁸ Storms was testing two hypotheses: "(a) that sexual orientation relates to a person's more general sex role orientation and (b) that sexual orientation relates to a person's erotic fantasies." *Id.* at 789. He found "very strong support" for the latter, which I've been discussing in the text, but much less support for the former. *Id.* (Indeed, there is reason to question his conclusion that the data on the latter support, rather than counter, his hypothesis. *Id.* at 789.)

Though Storms is often cited as initiating the study of asexuality, another scholar had published an article more directly focused on asexuality shortly before his. In 1977, Myra T. Johnson published “Asexual and Autoerotic Women: Two Invisible Groups.”¹⁹ Why Storms is cited more often than Johnson is an interesting question: Storms was particularly useful for his reconstruction of the Kinsey scale and his placement of asexuality in relation to other key sexual orientations; he may also have garnered more attention because he wrote about asexuality for both men and women, whereas Johnson focused principally on women.²⁰ (Asexuality in men is generally more surprising to people than asexuality in women, of which more later.²¹) Johnson’s account sounds squarely in the philosophy of the modern asexuality movement, as she argues that asexual women “have been oppressed by a societal consensus that says that they, as free and unique individuals, do not exist.”²² She traces the different roles that asexual women have been assigned—“‘ascetic,’ ‘neurotic,’ ‘unliberated,’ or ‘politically conscious’”—²³ concluding that “[t]heir sexual preferences are explained away in the rhetoric of whatever sexual ideology seems currently to be in vogue.”²⁴ Johnson is as critical of political lesbianism and celibacy in the women’s movement as she is of “sexual liberation” with its demand for “full sex lives” among “‘liberated’ women”:

A consensus that praises women who do not have sex with men as politically conscious might alleviate the oppression of traditionally assigned female functions, but would probably create new oppressive functions. The woman who still wants to have sex with men might function as a “scapegoat” and the woman who feels asexual or autosexual might function as a political symbol— her identity still lost in the slogans, and her reality going unnoticed.²⁵

Like the asexuality advocates who would follow her, Johnson seems to believe in a robust asexual identity that precedes and is oppressed by dominant social expectations.

B. Empirical: The One Percent Who Wants No One

The foundational empirical moment for asexuality came over two decades later. In 2004, social scientist Anthony Bogaert analyzed the data from a national probability sample of over 18,000 British residents and found that 1% of the subjects agreed with the statement “I have never felt sexually attracted to anyone at all.”²⁶ This rate was very similar to the rate of those with same-sex attractions (whether homosexual or bisexual), though further analysis revealed more gay and bi men than asexual men, and more

¹⁹ Myra T. Johnson, *Asexual and Autoerotic Women: Two Invisible Groups*, in *THE SEXUALLY OPPRESSED* 96 (edited by Harvey L. and Jean S. Grochos, 1977).

²⁰ Johnson did “recogniz[e] societal oppression of men” but said that her “focus” was women. Johnson, *supra* note XX, at 97.

²¹ See *infra* notes XX.

²² Johnson, *supra* note XX, at 104.

²³ Johnson, *supra* note XX, at 104.

²⁴ Johnson, *supra* note XX, at 104.

²⁵ Johnson, *supra* note XX, at 104. Cf. *infra* text accompanying note 47.

²⁶ Anthony F. Bogaert, *Asexuality: Prevalence and Associated Factors in a National Probability Sample*, 41 J. SEX RES. 279, 281 (2004).

asexual women than gay and bi women.²⁷ Bogaert found that the 1% who had felt no sexual attraction—whom he called “asexuals”—had had fewer sexual partners, a later age of first sexual activity (if any), and less frequent sexual activity with others, the combination of which Bogaert found to offer “some validation of the concept of asexuality.”²⁸ Though fewer asexuals than sexuals had current or past longterm relationships, a significant minority of the asexuals (33%) were currently married or cohabiting, and more still had past or current longterm relationships (44%).²⁹ Bogaert also found the following demographic features of his asexual sample: Asexuals were more likely to be female, older, lower socioeconomic status, non-white, less well-educated, religious (in terms of attending religious services), shorter, and with a later age of menarche among the women.³⁰ (For men, age and race dropped out.³¹) Asexual people were also more likely to have adverse health, but this result was apparently linked to social class and education.³²

The next significant study, by affiliates of the Kinsey Institute, targeted self-identified asexuals, and did not replicate various of Bogaert’s key demographic findings.³³ For example, these authors found that self-identified asexuals were more likely to have a college degree than sexuals, and they found no significant difference in lifetime sexual partners or relationship status.³⁴ The authors speculate that the latter finding may be due to their younger subject pool³⁵; self-identified asexuals are, on average, rather young.³⁶ This study also found no significant difference in the sex/gender of the asexual population,³⁷ though subsequent studies have been more consistent with Bogaert’s finding of more female asexuals, as I discuss later.³⁸ Interestingly, the Kinsey affiliates found that self-identified asexuals were more likely than sexuals to cite benefits as well as drawbacks of asexuality—though the latter finding is less surprising in light of the fact that a majority of the “drawbacks” supplied to subjects concerned difficult interactions with the (sexual) world.³⁹ Other research supports the anecdotal evidence that self-identified asexuals are not more likely to be religious than sexuals and that, instead, the contrary may be true.⁴⁰

²⁷ Bogaert (2004), *supra* note XX, at 282.

²⁸ Bogaert, *supra* note XX, at 282.

²⁹ Bogaert, *supra* note XX, at 282. The study collected no data on arousal or masturbation.

³⁰ Bogaert, *supra* note XX, at 282-83. Menarche is the start of menstruation, the “first period.”

³¹ Bogaert, *supra* note XX, at 283.

³² Bogaert, *supra* note XX, at 282-83.

³³ Nicole Prause & Cynthia A. Graham, *Asexuality: Classification and Characterization*, 36 ARCH. SEXUAL BEHAV. 341 (2007). The authors unfortunately did not report any findings on race.

³⁴ Prause & Graham, *supra* note XX, at 352.

³⁵ Prause & Graham, *supra* note XX, at 352.

³⁶ One recent poll of the self-identified asexual community found that 79% of respondents were age 25 or younger. See Tristan Miller, *Analysis of the 2011 Asexual Awareness Week Community Census* (2012), <http://www.asexualawarenessweek.com/census/SiggyAnalysis-AAWCensus.pdf>.

³⁷ Prause & Graham, *supra* note XX, at 352.

³⁸ See *infra* Section III.B.

³⁹ Prause & Graham, *supra* note XX, at 352.

⁴⁰ See Brotto et al., *supra* note XX, at 613 (finding, “contrary to our predictions, a disproportionately high number of atheists in our sample”); see also *id.* (“On the web site as well as there was an informal poll and there seemed to be a quite a lot of atheist people.” (quoting Participant 6)).

C. Clinical: Hypoactive Sexual Desire Disorder

Clinical psychology introduced its version of asexuality in 1980. The third edition of the APA's Diagnostic and Statistical Manual (DSM-III) included an entry for "Inhibited Sexual Desire," the title of which nicely captures the underlying clinical assumption that desire always exists, though pathologies may inhibit its expression.⁴¹ In 1987, the revised DSM-III shifted to the contemporary terminology of "Hypoactive Sexual Desire Disorder" (HSDD), replacing the clinical assumption of "inhibition" with a term signaling variation from the norm, "hypoactive."⁴² As presented in the most recent version of the manual, the DSM-IV-TR, the "essential feature" of HSDD is "a deficiency or absence of sexual fantasies and desire for sexual activity."⁴³ Notably, the "disturbance must cause marked distress or interpersonal difficulty."⁴⁴

HSDD is controversial in both feminist and asexual-identity circles. Those who support the diagnosis make strong claims, such as "Hypoactive sexual desire disorder (HSDD) is a common sexual complaint affecting approximately 1 in 10 adult women in the USA and its prevalence appears to be similar in Europe (7%-16%) and Australia (16%)."⁴⁵ By contrast, critics contend that the research in this area is driven by the pharmaceutical industry and a conflation of contemporary discourses surrounding female sexuality and the "healthicization" of sex.⁴⁶ One historian thus describes the cultural transformation in attitudes to female sexuality:

In earlier eras a woman had to worry that her sexual feelings were inappropriate and abnormal, and had to hide from everyone the fact of any sexual experience she might have had. In the post-sexologist era a woman has had to worry that her lack of sexual feelings is inappropriate and abnormal, and she must hide problems such as asexuality or "inhibited sexual response," another modern construct. . . .

⁴¹ AM. PSYCHIATRIC ASSOC., TASK FORCE ON NOMENCLATURE AND STATISTICS & AM. PSYCHIATRIC ASSOC., COMMITTEE ON NOMENCLATURE AND STATISTICS, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS 278-79 (3d ed. 1980) (defining it as "[p]ersistent and pervasive inhibition of sexual desire . . . In actual practice this diagnosis will rarely be made unless the lack of desire is a source of distress to either the individual or his or her partner. . . .").

⁴² AM. PSYCHIATRIC ASSOC., WORK GROUP TO REVISE DSM-III, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS 293 (3d ed., rev. 1987).

⁴³ DSM-IV-TR, 302.71, p. 539.

⁴⁴ DSM-IV-TR, 302.71, p. 539.

⁴⁵ Anita H. Clayton, *The Pathophysiology of Hypoactive Sexual Desire Disorder in Women*, 110 INTERNAT'L J. GYNECOLOGY & OBSTETRICS 7, 7 (2010) (citations omitted).

⁴⁶ Thea Cacchioni, *Heterosexuality and 'the Labour of Love': A Contribution to Recent Debates on Female Sexual Dysfunction*, 10 SEXUALITIES 299, 306 (2007) ("The term 'healthicization' (Conrad, 1992) refers to the role of health promotion, as opposed to medical intervention, in regulating constructions of health and illness, and is particularly relevant in western, predominantly middle-class locales, where sex is increasingly 'talked of in the idiom of health promotion and lifestyle choices' (Jackson and Scott, 1997: 557-58)."); see also ORGASM INC.(dir. Liz Canner, First Run Features 2009) (asserting, for example, that "the Berman sisters [sexologists] were paid up to \$75,000 per day by pharmaceutical companies to promote sexual diseases on television").

In popular wisdom, sexual pleasure has become something of a medical necessity.⁴⁷

In the wry words of another scholar, “[T]he pharmaceutical industry alone could not make the diagnosis [of female HSDD] a wider concern if, for example, female sexuality were still generally taken as woman’s duty to her spouse and nation.”⁴⁸

The overlap between clinical HSDD and self-identified asexuality is also contested. Research on asexuality provides a basis for distinguishing the two, because the feature of “distress” important to an HSDD diagnosis is absent in many self-identified asexuals.⁴⁹ Interestingly, researchers drawing this distinction have neglected to mention that HSDD requires either “marked distress or interpersonal difficulty,”⁵⁰ which would seem to leave room for diagnoses of HSDD even in the absence of distress in the asexual individual. The intriguing changes proposed for the DSM-V⁵¹—which include the notable decision to create separate low-desire diagnoses for men and women⁵²—take care of this, however, by changing the language to “clinically significant distress or impairment.”⁵³ As this brief discussion shows, the research on clinical intersections with asexuality is highly politicized and in constant flux.

D. Self-Identified: Aces Find Themselves and Each Other

Asexuality as an identity group emerged through internet-based communities.⁵⁴ The most prominent of these is AVEN, the Asexuality Visibility and Education Network,

⁴⁷ Lillian Faderman, *Nineteenth Century Boston Marriage as a Possible Lesson for Today*, in BOSTON MARRIAGES 29, 36-37 (Esther D. Rothblum & Kathleen A. Brehony eds., 1993).

⁴⁸ Annemarie Jutel, *Framing Diseases: The Example of Female Hypoactive Sexual Desire Disorder*, 70 SOC. SCI. & MED. 1084, 1089 (2010) (quoting Stewart, 1814, p. 540).

⁴⁹ See Brotto et al.; Lori A. Brotto & Morag A. Yule, *Physiological and Subjective Sexual Arousal in Self-Identified Asexual Women*.

⁵⁰ DSM-IV-TR, 302.71, p. 539 (emphasis added).

⁵¹ The DSM-V is scheduled for publication in May 2013. See <http://www.dsm5.org/>.

⁵² Interestingly, the proposed male version of low-desire disorder tracks the current HSDD diagnosis almost exactly, and the DSM-V will add a newly minted diagnosis for women called “Female Sexual Interest/Arousal Disorder.” Compare

<http://www.dsm5.org/ProposedRevision/Pages/proposedrevision.aspx?rid=60> with

<http://www.dsm5.org/ProposedRevision/Pages/proposedrevision.aspx?rid=432>. The female version includes changes such as eliminating lack of sexual fantasies as a criteria, on the basis that many women have few or no sexual fantasies. Also notable is the removal of “sexual aversion disorder” from the proposed DSM-V, on the basis that it folds readily into “Sexual Dysfunction Not Otherwise Specified” and shares few characteristics with HSDD. APA, DSM-5 Development, 302.79 Sexual Aversion Disorder, <http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=61#> (last visited July 25, 2012).

⁵³ See <http://www.dsm5.org/proposedrevision/Pages/SexualDysfunctions.aspx>. This was a change that asexual advocates lobbied to achieve. See David Jay, personal communication (Feb. 11, 2013).

⁵⁴ In addition to AVEN (<http://www.asexuality.org/>), these sites include, for example, Apositive (apostive.org), Asexuality Live Journal (asexuality.livejournal.com), Asexual Explorations (asexualexplorations.net), the Asexual Sexologist (<http://asexualsexologist.wordpress.com/>), Avenwiki (http://www.asexuality.org/wiki/index.php?title=Main_Page), Asexual News (<http://asexualnews.com/>).

which was founded by David Jay in 2001.⁵⁵ AVEN's membership has grown exponentially in the past decade—from 134 members in 2002, to 26,780 members in 2011,⁵⁶ to over 70,000 members in 2013.⁵⁷ What began as a “small page on [David Jay's] university account” has developed into a focal point for social and political organizing that reaches beyond the internet to local meetings, workshops, and participation in LGBT Pride marches.⁵⁸ AVEN is now only one of many websites dedicated to asexuality and asexuals.⁵⁹

Many asexuals describe their discovery of AVEN as a revelation. Finding a community of asexuals was a watershed moment—a sign that they are not alone.⁶⁰ In some ways this is like gay people talking about finding gay bars or porn or people and realizing there are others like them.⁶¹ But there are unique reasons an internet community might be especially important for asexuals. An identity characterized by a lack of attraction means that spontaneous encounters and venues won't arise through sexual desire—by definition, sexual attraction won't bring those without sexual attraction together. So the stories of asexual meetings are more likely to be mediated through the articulation of the identity per se, rather than through common activities. As one prominent asexual writer, who goes by Swankivy, says, “I personally have not accidentally met another asexual.”⁶² In light of growing numbers and increasing attention, asexuals may not be able to say this for much longer, however.

The next Part develops a richer account of identity-based asexuality, which intersects with the conceptual, empirical, and diagnostic contexts, and is the most legally relevant.

⁵⁵ Aven: The Asexual Visibility and Education Network, <http://www.asexuality.org/home/> (Jun. 27, 2010); Mark Carrigan, *There's More to Life Than Sex?: Difference and Commonality Within the Asexual Community*, 14 *SEXUALITIES* 462, 462 (2011).

⁵⁶ (A)SEXUAL, *supra* note XX.

⁵⁷ See AVEN, *Employment Discrimination Against the Asexual Community: A Growing Trend*, presented to the National Center for Transgender Equality, at 2 (Jan. 26, 2013) (unpublished manuscript on file with author) [hereinafter AVEN Memo].

⁵⁸ See Carrigan, *supra* note XX, at 362-63; Brotto et al. 2010; (A)SEXUAL (documenting the AVEN-based asexuality community's first time participating in a Pride march, in San Francisco in 2009, with a banner that read “AVEN asexuality.org”).

⁵⁹ See *supra* note XX (listing examples).

⁶⁰ See, e.g., Brotto et al., *supra* note XX, at 610 (“Many [study participants] added that once they discovered AVEN and the large community of other asexuals, they felt that the asexual label explained them and their experiences completely.”).

⁶¹ See, e.g., Jeffrey Sherman, *Love Speech: The Social Utility of Pornography*.

⁶² Swankivy, in (A)SEXUAL, *supra* note XX.

II. MAPPING ASEXUAL IDENTITY

“If you’re not having sex, what’s there to talk about?”
 —Star Jones, to David Jay, on *The View*⁶³

The birth of asexuality as an identity category and social movement has not been addressed in the legal literature, although asexuality has begun to enter U.S. law.⁶⁴ The previous Part introduced asexuality by discussing four contexts of its emergence. This Part closely examines the last of these—the growing movement of self-identified asexuals—first through the elements of community self-definition, and then in relation to the sexual world and other prominent axes of identity. This analysis of asexual identity lays the groundwork for the legal questions addressed in Parts III and IV.

A. Defining Asexuality as an Identity: Elements and Distinctions

This Section defines asexuality by identifying its important elements as well as the key distinctions that form its boundaries. Note that asexuals, in their own terms, have defined everyone else as *sexuals*. In this way, the previously unmarked (and therefore naturalized) category now has a name, little known though it is thus far.

1) *Principal Elements.*

The precise contours of asexuality are not easy to establish. Those who identify as asexuals—sometimes “aces” for short⁶⁵—question the boundaries of the category, and a common theme is the “diversity of experience within the community.”⁶⁶ But asexual identity is generally defined by two related ideas: lack of sexual attraction and lack of choice.

a) Lack of Attraction. First, asexual identity turns on the lack of attraction: “The definition of asexual[] is ‘someone who does not experience sexual attraction,’”⁶⁷ Attraction is often distinguished from arousal (or desire); as one researcher put it, “If sexual desire or arousal were present, asexuals argued that they were not ‘directed’ at anyone.”⁶⁸ How little attraction is enough to qualify for asexuality is unclear. Sometimes AVEN characterizes asexuality as if it involves zero attraction, as in the definition just quoted; sometimes, very little attraction suffices, as in this line from the

⁶³ Rosie Swash, *Life Among the Asexuals*, THE OBSERVER (London), Feb. 25, 2012.

⁶⁴ See *infra* Part IV.

⁶⁵ Shawn Landis, *Why Are Asexuals Aces?*, Asexuality 101, Aug. 9, 2011, <http://asexualnews.com/index.php/asexuality-101/410-asexualaces>.

⁶⁶ *Why Do We Need an Asexual Community?*, General FAQ, AVEN, <http://www.asexuality.org/home/general.html> (last visited Jan. 13, 2012); see also Carrigan 2011, *supra* note XX, at 467.

⁶⁷ *Am I Asexual?*, General FAQ, AVEN, <http://www.asexuality.org/home/general.html#def1> (last visited Jan. 13, 2012).

⁶⁸ Brotto et al., *supra* note XX, at 609.

same AVEN page: “This community is [for] people who share the common factor of having very little or absolutely no sexual attraction to other people.”⁶⁹

AVEN’s information pages are quick to assure readers that “there is no hierarchy of asexuality.”⁷⁰ But the need to broadcast this claim betrays the particular anxieties of authenticity that haunt this community.⁷¹ Replies to a new-member question about whether most asexuals are “virgins” prompt many relativistic assertions about diversity, but also a few replies attributing false consciousness or excessive compromise to those who have sex. For instance, one member replied, “A lot are. But not all. I think some people try real hard to ‘fit in’ [in] this society, but are never really happy not being true to themselves.”⁷² This member implies that having sex with someone else would involve “not being true” to oneself—suggesting that, under one view, the true asexuals have no sexual urges involving other people, and so sex is a pure compromise.⁷³

b) Lack of Choice. Second, self-identified asexuals understand asexuality to involve no choice about this lack of attraction. “Unlike celibacy, which is a choice,” AVEN reports, “asexuality is a sexual orientation.”⁷⁴ The contrast with celibacy is frequently drawn.⁷⁵ The following comment, from a participant in a 2008 study, is typical: “I don’t desire sex, so I am asexual. I am not celibate, as this implies a desire for sex that is repressed.”⁷⁶ An important idea among asexuals is that they are not resisting their desires. Unlike many people who choose celibacy—whether for personal or emotional or religious reasons—asexuals have not *decided* to avoid sex despite sexual attraction. They simply do not feel attracted to other people. Note that some asexuals choose to have sex, despite not wanting it, typically because it is important to a partner (as sexuals also choose to do sometimes).⁷⁷ Thus, for asexuals, it is a choice whether to *do* sex, but it is not a choice whether to *want* sex.⁷⁸

Choice is therefore a key axis in the discourse on asexuality. However, the discourse of choice here operates somewhat differently than in the “not a choice” discourse about homosexuality.⁷⁹ In the context of homosexuality, gays (sometimes) want to say that gayness isn’t a choice, because anti-gay moralism thinks that the

⁶⁹ *Id.*

⁷⁰ General FAQ, AVEN, <http://www.asexuality.org/home/general.html#def1> (last visited Jan. 13, 2012).

⁷¹ Cf. Randy Kennedy, *Sell-Out*; J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997).

⁷² Tylacine, *supra* note XX (July 16, 2008).

⁷³ For another example of the compromise position, see AVENCakes (July 15, 2008) (“I wouldn’t say most. Not all are repulsed by sex, so if they’re willing to compromise with/enjoy pleasing their partner it’s likely they wouldn’t totally be virgins. Not that that’s the only one.”).

⁷⁴ AVEN FAQ, *supra* note XX.

⁷⁵ See, e.g., *id.*; (A)SEXUAL, *supra* note XX; Natalie Cassidy’s Real Britain, BBC Productions, Mar. 30, 2009.

⁷⁶ Kristin S. Scherrer, *Coming to an Asexual Identity: Negotiating Identity, Negotiating Desire*, 11 SEXUALITIES 621, at *8 (2008) (quoting a study participant, Callie).

⁷⁷ On this, see *infra* notes XX; see also Robin West.

⁷⁸ I thank Susan Appleton for this way of formulating the distinction.

⁷⁹ On the “not a choice” versus “born that way” arguments, see Edward Stein, *Born That Way? Not a Choice?: Problems with Biological and Psychological Arguments for Gay Rights* (unpublished manuscript, on file with author).

“choice” of gayness is immoral.⁸⁰ Gays (sometimes) say, in response, that their indulgence in (what some think is) immoral sexual activity is natural for them and therefore unavoidable. By contrast, rather than making immoral choices, asexuals appear to be aligned with the super-moral celibates who choose not to have sex. Asexuals feel misunderstood by this characterization, with many defending the rights of other people to have whatever sex they like, and defending themselves against charges of repression or prudishness.⁸¹ Like some homosexuals, asexuals typically assert that their “sexual orientation” is an essential identity, not a choice. But unlike homosexuals, asexuals argue against an implied accusation of hyper-morality rather than against immorality.

2) Key Distinctions.

Two key distinctions also help to shape the category of asexual identity: sex with self versus sex with others, and romantic versus aromantic.

a) Distinguishing Sex with Oneself from Sex with Other People. Lack of sexual attraction is importantly distinguished from lack of sexual activity. Some self-identified asexuals are sexually active, whether with themselves or with others, and some are not.⁸² One recent study found that the rates of masturbation among asexuals were comparable to the rates in the non-asexual population.⁸³ The study observed, however, that asexuals talked about masturbation in ways that were highly clinical or mechanical, using metaphors like cleaning out the plumbing.⁸⁴ “Physical” urges are distinguished from erotic attraction. For instance, these questions about masturbation posted on AVEN—“Do asexuals masturbate? Do they want to?”—engender replies like “Sure, many do. Most seem to do it for a physical need, or like I do, to sleep”⁸⁵; or “I don’t. I have no sexual urges or sexual needs. Some asexual people feel physical ‘urges’ and some don’t. I don’t.”⁸⁶ On the one hand, one might ask how robust this distinction between sexuals and asexuals is; in other words, how erotic is the language that *sexual* people use to describe masturbation?⁸⁷ On the other hand, some descriptions of masturbation by asexuals would be more surprising among sexuals: for instance, one AVEN member

⁸⁰ I use “gays” here as shorthand for gay men and lesbians. This analysis applies to some bisexuals as well.

⁸¹ An AVEN question and answer thread included the question “Do many asexuals agree with religious groups who advocate no sex before marriage?,” to which nearly all respondents said they did not agree with that view. <http://www.asexuality.org/en/index.php?topic/32908-some-blunt-questions/>. See also *infra* Section II.B (discussing linkages with polyamory).

⁸² See, e.g., Kristin S. Scherrer, *Coming to an Asexual Identity: Negotiating Identity, Negotiating Desire*, 11 *SEXUALITIES* 621 (2008).

⁸³ Brotto et al., *supra* note XX. The data on this point are hard to interpret across the studies, however.

⁸⁴ Brotto et al., *supra* note XX, at 612 (on “technical language”).

⁸⁵ Aven q&a, response to blueskies from Forensic (July 15, 2008). <http://www.asexuality.org/en/index.php?topic/32908-some-blunt-questions/>.

⁸⁶ Aven q&a, response to blueskies from thylacine (July 16, 2008). <http://www.asexuality.org/en/index.php?topic/32908-some-blunt-questions/>.

⁸⁷ One might think here of popular representations of people masturbating for instrumental reasons, such as to fall asleep. See, e.g., *SEINFELD* Episode 51, Season 4 (“The Contest”).

writes, “Yes, I masturbate... but my mind is blank when I do so. No hot guys or girls or anything in there.”⁸⁸

b) Distinguishing Romance from Sex and Friendship. Asexuals divide themselves into the subtypes of romantic and aromantic. Some asexuals feel romantic attractions, fall in love, and pursue romantic relationships;⁸⁹ some do not.⁹⁰ (Some also have sexual relationships, but cast in the language of compromise rather than desire, as noted earlier.⁹¹) The axis of romantic versus aromantic is an important one among asexuals.

This axis of identity raises the question of what distinguishes romance from sex, on the one hand, or friendship, on the other. As to what counts as sex, one scholar thinks that asexuals have an unusually narrow idea of what counts as sex.⁹² There is something to this. A broad definition of sex would presumably include masturbation, which asexuals generally do not count as sex, and many engage in, as discussed above.⁹³ Moreover, many asexuals explicitly embrace a traditional definition of sex as requiring penetration. In theory, some asexuals might identify as asexual because they define sex narrowly. But I think it is more likely that many asexuals define sex narrowly because they understand themselves to be asexual. That is, because they are not very interested in sex and its details, they choose the prevailing cultural definition of “sex”—which still seems to be vaginal or anal penetration.⁹⁴ Other asexuals take a broader definition, however.⁹⁵

On the other side, what distinguishes romance from friendship? One asexual answered this question with another question: “What is the difference between a romantic sexual partner and a friend with benefits?”⁹⁶ This rhetorical question draws an analogy to the sexual world, offering only the answer to both that,

They’re not the same. Romance and friendship just feel qualitatively different, even without involving sexual attraction. The difference between an asexual romance and a friendship is in the type of attraction experienced. This can also translate to behaviour like wanting to give and receive hugs, kisses, cuddles,

⁸⁸ *Id.* (quoting kt8 from 7/28/08).

⁸⁹ See, e.g., Scherrer; Bogaert; Chasin; AVEN FAQs.

⁹⁰ See, e.g., Aven q&a, response to blueskies from Dame du Lac (July 15, 2008), <http://www.asexuality.org/en/index.php?/topic/32908-some-blunt-questions/> (“Some asexuals class themselves as ‘aromantic,’ meaning they don’t seek romantic relationships. Some aromantics do end up in relationships, but their experience of romance seems to be different to that of other peoples.”).

⁹¹ See *supra* notes XX.

⁹² See Kristin S. Scherrer, *Coming to an Asexual Identity: Negotiating Identity, Negotiating Desire*, 11 *SEXUALITIES* 621, 627 (2008).

⁹³ See *supra* XX.

⁹⁴ Thea Cacchioni, *Heterosexuality and ‘the Labour of Love’: A Contribution to Recent Debates on Female Sexual Dysfunction*, 10 *SEXUALITIES* 299, 304 (2007). Within mainstream culture, think of the uses of the terms “lost their virginity” or “had sex.”

⁹⁵ See, e.g., P.V.P., *Define Sex Please*, AVEN q&a, <http://www.asexuality.org/en/index.php?/topic/22445-define-sex-please/>.

⁹⁶ No longer blogging, *Asexuality 101*, <http://cfgreyace.wordpress.com/ace101/>.

etc.—many asexuals enjoy physical, non-sexual closeness whether they are romantic or aromantic. And no, sex is not necessary for romance.⁹⁷

As this passage suggests, this question appears no easier to answer in the asexual world than in the sexual one. But the asexual context sets the question more starkly into relief, inspiring innovative and interesting thinking. For example, David Jay recently wrote a short essay arguing that we need a more robust vocabulary for distinguishing types of nonsexual touch.⁹⁸

3) Identity in Relation.

“I was twenty-six when I learned I was very tall. For most of my life I had been considered normal height. But at twenty-six, suddenly, strangers in elevators began leaning toward me conspiratorially and asking, ‘How tall are you anyway?’ as if we’d been having a conversation on the subject. . . . What had happened was that I’d started being read by others ‘as a woman.’ . . . In many ways I imagine what happened to me is not so much different from what happens to many teenagers once their bodies hit puberty and are seized by the cultural machine.”

— Riki Ann Wilchins, *What Does It Cost To Tell the Truth?*⁹⁹

Asexuality is importantly shaped by its position on the outside of a sexual society. This interplay has implications both for our understanding of the identity and experience of asexuality, and for our understanding of the contours of the broader culture. This Section analyzes that interaction, laying the groundwork to examine intersections and analogies with other identity categories that have some overlap with asexuality.

For many self-identified asexuals, puberty was a critical developmental moment. The particular importance of that period for aces is less about their own physical changes, though, than about other people’s emotional and behavioral changes. “I realized I was asexual about the same time I realized I was short, when I was about 15,” said one female asexual, who is 5-foot-1; “I realized I was short when everyone grew taller than me, and I realized I didn’t have sexual feelings when everyone else started expressing and experimenting with theirs.”¹⁰⁰

Asexuality as an identity need not involve distress, as discussed earlier,¹⁰¹ but some degree of friction seems to characterize asexuals’ interactions with a sexual culture. As one person put it, in response to questions about what it is like to live in a sexual world:

⁹⁷ No longer blogging, *Asexuality 101*, <http://cfgreyace.wordpress.com/ace101/>.

⁹⁸ See David Jay, *Touch*, <http://asexualunderground.blogspot.com/2011/11/touch.html> (Nov. 16, 2011).

⁹⁹ Riki Ann Wilchins, *What Does It Cost To Tell the Truth?*, READ MY LIPS.

¹⁰⁰ Mary Duenwald, *For Them, Just Saying No Is Easy*, N.Y. TIMES, June 9, 2005, <http://www.nytimes.com/2005/06/09/fashion/thursdaystyles/09asexual.html?adxnnl=1&adxnnlx=1324063380-V7silNHn1J/2hpYcInVtEw>.

¹⁰¹ See *supra* Section I.C.

It gets frustrating trying to explain to some people that I just don't have an interest in sex. Some get downright nasty about it, and I constantly have to deal with comments like, "You must have had bad experiences," "You just haven't met the right person yet," or "Your partner must be bad in bed." One guy was absolutely convinced I just hadn't been with a guy with a large enough...er... endowment. I finally just turned and walked away from that one because my message was not sinking in and he wouldn't leave me alone about it.¹⁰²

Many asexuals lament the constant barrage of diagnoses they receive whenever they disclose their asexuality. Indeed, listing the pathologizing attributions made to asexuals seems a mainstay of asexual community formation.

An asexual who goes by the name of Swankivy made a name for herself with what she calls the "Asexuality Top Ten." This list of the "top ten most common misconceptions" about asexuals nicely captures the most common interpellations, at least of a female asexual¹⁰³:

- 10) "You hate men."
 - 9) "You can't get a man."
 - 8) "You have a hormone problem."
 - 7) "You're overly involved in your busy life."
 - 6) "You just never had me in your bed."
 - 5) "You are afraid of getting into a relationship."
 - 4) "You were sexually abused as a child."
 - 3) "You are a lesbian."
 - 2) "You just haven't met the right guy."
 - 1) "You just got out of a bad relationship." . . .
- Honorable mentions [include] "You must be religious."¹⁰⁴

Each item links to a set of responses to the particular accusation. The list has multiple purposes: Swankivy explicitly aims to educate "sexuals" who do not understand asexuality, but also to "help others in similar situations understand that asexuality isn't an illness and they are not alone."¹⁰⁵ In this way, the list serves a community and identity building function among asexuals, through humor and indignation about a common set of interactions with the surrounding sexual world.

¹⁰² PrairieGhost, July 16, 2008, <http://www.asexuality.org/en/index.php?/topic/32908-some-blunt-questions/>.

¹⁰³ A parallel game of "asexuality bingo" was made by a male asexual who goes by jmerry: <http://swankivy.com/LJ/bingo.jpg>.

¹⁰⁴ Swankivy, Asexuality Top Ten, <http://swankivy.com/writing/essays/philosophy/asexual.html> (last visited Feb. 6, 2012). Cf. Section I.B (noting the conflicting data on whether asexuals are more or less likely to be religious).

¹⁰⁵ *Id.*

The type of comments on Swankivy's list plague many asexuals.¹⁰⁶ For example, in the recent documentary *(A)sexual*, David Jay confronts a series of questions and challenges at the asexual community's first time participating in an LGBT Pride March.¹⁰⁷ These responses include simple disbelief from one person, "But you do *eventually*? . . . Not ever ever?"; a guy who asks for Jay's number and whose friends remark, as Jay walks away, "He's a Christian"; and finally, one person who says with real feeling, "I pity you."¹⁰⁸ Appearing as a talking head in the film, sex columnist Dan Savage describes asexuals' marching in the Pride parade as "hilarious";¹⁰⁹ he observes, "I know from giving advice that there a lot of people who are deeply conflicted about their sexuality . . . and it'd be easier to say I'm not sexual."¹¹⁰

Disbelief is the usual way to describe the response to asexuality, but the demand for explanation may be a more apt characterization of the typical response. Many people may be perfectly prepared to *believe* that asexuals exist; openness to the diversity of human experience may eliminate surprise at any new identity claim that emerges. But, implicitly or explicitly, they may nonetheless want more of an explanation for asexuality than they would expect for other identities.¹¹¹

4) *The Problem of Diversity.*

These kinds of comments are a source of great frustration to self-identified asexuals, but they also raise a real issue. There are many reasons that someone might identify as asexual. Some people surely do identify as asexual on the way to some other identity, or because they are struggling with their sexuality due to negative experiences or repressive influences.¹¹² As one asexual put it in an interview:

"I think there are some people who identify themselves as asexual who have a fear of sex, who may have had something traumatic in their past that's put them off. I'm not denying that they may make up a proportion of the asexual

¹⁰⁶ See, e.g., Olly Bootle, *No Sex Please: An Asexual Life*, THE INDEP., Mar. 17, 2009.

¹⁰⁷ (A)SEXUAL, *supra* note XX.

¹⁰⁸ (A)SEXUAL (Dir. Angela Tucker, 2011).

¹⁰⁹ For the full quotation, see *infra* text accompanying note XX.

¹¹⁰ (A)SEXUAL (Dir. Angela Tucker, 2011).

¹¹¹ I thank Justine di Giovanni for this distinction.

¹¹² Interestingly, the research on the link between diminished desire and childhood sexual abuse is largely inconclusive or, at best, mixed. See, e.g., Tamra Burns Loeb et al., *Child Sexual Abuse: Associations with Sexual Functioning of Adolescents & Adults*, 13 ANN. REV. SEX RES. 307, 318-19 (2002). Some work finds a significant relationship, e.g., David B. Sarwer & Joseph A Durlak, *Childhood Sexual Abuse as a Predictor of Adult Female Sexual Dysfunction: A Study of Couples Seeking Sex Therapy*, 20 CHILD ABUSE & NEGLECT 963, 969 (1996), while other work finds none, e.g., Karen E. Luftey et al., *An Examination of the Association of Abuse (Physical, Sexual, or Emotional) and Female Sexual Dysfunction: Results from the Boston Area Community Health Survey*, 90 FERTILITY & STERILITY 957, 962 (2008).

population, but I do think there [are] many who are also physiologically different, wired not to be attracted to other people.”¹¹³

Acknowledging the many paths to asexuality, as this asexual does, is relatively unusual. The conflicted types are a challenge for the asexual community, since they seem to confirm the assumptions that the sexual world typically has about asexuals. Note that it is hard even to call these assumptions “stereotypes” since that term suggests a category that people use to organize the world; asexual is not a widely recognized category yet, so many outsiders’ responses to an asexual are the reaction to a first encounter, rather than a developed stereotype about the group.¹¹⁴

Thus, AVEN explicitly embraces a diverse community, as noted earlier, and the website tries to embrace most comers, but the site also tries to draw some lines.¹¹⁵ Consider this question and answer on the site’s “Frequently Asked Questions” page:

QU: I find people attractive and I get horny, but I dislike sex and would never do it. Am I asexual?

ANS: If you’re turned on by other people then you don’t fit the definition. Asexuality is about lack of attraction to other people, not about lack of activity. Asexuals do not get horny toward other people, they would feel completely satisfied if they never shared a single sexual experience for the rest of their lives. . . .¹¹⁶

Ultimately, acknowledging diversity while drawing boundaries is a challenge for asexuals, as it is for many identity groups. The fact that some people fit the common assumptions about asexuality does not, of course, invalidate the identity of others. But the diversity covered by the label asexual presents particular difficulties because, for many asexuals, explaining themselves in response to widespread disbelief is a defining issue.

5) Responding to the Skepticism.

How might asexuals answer the disbelief? Do any responses cause skeptical sexuals to open up to the idea of asexuality as a plausible human variation? A few possibilities follow.

Quantity Contrasts. We tend to believe that some people are more sexual than others—even that some people might be hypersexual—so why not less sexual or not at all sexual? Perhaps people vary widely on the quantity axis in both directions.

¹¹³ Olly Bootle, *No Sex Please: An Asexual Life*, THE INDEP., Mar. 17, 2009, <http://www.independent.co.uk/life-style/health-and-families/features/no-sex-please-an-asexual-life-1646347.html#>.

¹¹⁴ See *infra* Section IV.C.3 (discussing implications of this).

¹¹⁵ AVEN FAQ, <http://www.asexuality.org/home/general.html#def1> (last visited Jan. 13, 2012).

¹¹⁶ AVEN FAQ, <http://www.asexuality.org/home/general.html#def1> (last visited Jan. 13, 2012).

Other Hobby Horses. People have varying affinities for different activities and foods. Perhaps it helps to think of sex as a kind of hobby or taste that appeals to some and not to others. Analogies in this vein come up a lot in asexual web fora.¹¹⁷ For instance, one asexual writes, “Personally, it doesn’t puzzle me why sexuals want/enjoy sex—it’s just not for me. Similarly I can appreciate why people play golf or go fishing, but they’re not for me either.”¹¹⁸ (Curiously, golf seems to come up more often than other activities, which may say more about the reputation of golf than that of asexuals.¹¹⁹) More generally, people may make claims of the universal appeal of their favorite things,¹²⁰ but it’s interesting to think about the question: Is there really anything else, other than sex, that we are so inclined to believe that everyone wants?¹²¹

Hypothetical Universes. Imagine living in a world where everyone was obsessed with some form of physical interaction that you find decidedly unappealing or baffling. For some it might be peeing on each other or, more remotely,¹²² reaching inside each other’s noses.¹²³

Attraction Lacunae. People who are not bisexual (“monosexuals”¹²⁴) presumably have a way to relate to asexuality, since they are not attracted to half the population.¹²⁵ Combining this fact with the hypothetical universes approach, we could ask gays and straights to imagine that the whole world was made up only of the sex they don’t desire.¹²⁶ Even those who aren’t pure monosexuals can find a similar way in: Surely everyone can think of at least one person to whom he or she is not sexually attracted. What if the world were filled with people like that? As one sexual person put it, in dialogue with asexuals, “I have to say, and I’m sure it must be equally puzzling to you what it’s like to need sex, but it’s difficult for me to imagine never wanting to have sex

¹¹⁷ See, e.g., Aven q&a, response to blueskies from PraireGhost (July 16, 2008), <http://www.asexuality.org/en/index.php?topic/32908-some-blunt-questions/>.

¹¹⁸ Aven q&a, response to blueskies from Roger Mellie (July 21, 2008), <http://www.asexuality.org/en/index.php?topic/32908-some-blunt-questions/>.

¹¹⁹ See *id.*; *supra* note XX (quoting PraireGhost); Bootle, *supra* note XX. Cf George Carlin, “Golf,” from *Jammin’ in New York* (1992), http://en.wikiquote.org/wiki/George_Carlin.

¹²⁰ Cf., e.g., AVEN q&a, response to blueskies from AVENCakes (July 15, 2008), <http://www.asexuality.org/en/index.php?topic/32908-some-blunt-questions/>.

¹²¹ I thank Martie Kutscher for this angle on the hobbies point.

¹²² The noses example is arguably more remote because urination is already known as a desirable sexual activity for some people in the current universe. See, e.g., Entry for “Golden Shower,” Urban Dictionary, <http://www.urbandictionary.com/define.php?term=golden%20shower> (last visited Feb. 19, 2012) (“The act of urinating on another person, usually for sexual gratification, or as a way of humiliation.”).

¹²³ Cf. McBuh, *Define Sex Please*, AVEN q&a, <http://www.asexuality.org/en/index.php?topic/22445-define-sex-please/> (responding to someone’s definition of sex as ‘So I’d have to say something like “putting any protruding part of one person’s anatomy into any orifice of another person’s anatomy”’ with the line: “Make sure the nose you pick is your own!” (quoting Gray, *Define Sex Please*, *supra*)).

¹²⁴ See, e.g., Yoshino, *Bisexual Erasure*, *supra* note XX.

¹²⁵ Of course, definitions of bisexuality vary, and by many accounts, monosexuals often have some amount of attraction to their nondominant sex. But a pure monosexual would not.

¹²⁶ I thank Kimberly Walters for this way of formulating the point.

ever. I guess the closest I can imagine, is imagining someone I really wouldn't want to have sex with and then imagining that everyone is that person."¹²⁷

Happy Communities. The previous four answers focus on convincing the sexual outsider that asexuals actually exist. Even if successful, these approaches may leave the outsider with a no-less pathological, pitying, or at least unhappy view of asexuality. Thus, the approach taken by David Jay tends instead to focus on the potential for intimacy and happiness in nonsexual relationships and, especially, among asexuals.¹²⁸

Historical Analogies. Many of the comments made to asexuals are reminiscent of what gay men and lesbians used to hear when they came out. More on this in the next Section.

B. Intersections: Comparing Identity Categories

Asexuality has a set of intriguing intersections with other identity categories. These relationships between identities open up questions about how to think about asexuality and also how to think about these other categories. This Section compares asexuality with the categories of sexuality, gender, and disability.

1) Sexuality.

a) Homosexuality. Gay identity discourse provides key language and models for asexuality, as it has done for other sexual identities. Aces speak of "coming out" about their asexuality, and about the significance of finding other people like them and forming communities.¹²⁹ Psychologists explicitly draw on models of identity development for homosexuality to examine the formation of asexual identity.¹³⁰ Whether asexual identity is a "queer" identity is another topic for debate within asexual circles.¹³¹

Moreover, as noted above, many of the common responses to asexuality sound familiar: They sound like comments made to gay people not too long ago (or still in some places). For instance, recall these five items from Swankivy's top-ten list, as comments made to a woman:

- 11) "You hate men."
- 9) "You can't get a man."
- 6) "You just never had me in your bed."
- 4) "You were sexually abused as a child."

¹²⁷ Asexual Q&A Forum, Post by blueskies, Asexual Visibility and Education Network, Jul. 15 & 21, 2008, at http://www.asexuality.org/en/index.php?/topic/32908-some-blunt-questions/page__st__30.

¹²⁸ See David Jay, Jun. 12, 2012 (personal communication).

¹²⁹ See *supra* notes XX.

¹³⁰ See, e.g., Brotto et al., *supra* note XX, at 615 (discussing V. Cass, *Homosexual Identity Formation: A Theoretical Model*, 4 J. HOMOSEXUALITY 219 (1979)).

¹³¹ See, e.g., AVEN FAQs, <http://www.asexuality.org/home/general.html#def1>.

2) “You just haven’t met the right guy.”¹³²

As one reporter writing about asexuality put it, “[I]sn’t that how people thought about homosexuality 100 years ago, that they could pinpoint the reason as to why it existed?”¹³³ Of course one striking difference between the responses to homosexuality and asexuality is the violence of the state’s reaction, a topic to which we’ll return in Part IV.

b) Bisexuality. In some ways, though, a closer analogy than homosexuality is bisexuality. Many of the common assumptions about asexuals—for instance, that they just haven’t come out as gay yet, that they are in denial, or that they just haven’t met the right person yet—echo those made about bisexuals. A prominent theme in scholarly writing about bisexuality has been its erasure.¹³⁴ Kenji Yoshino has argued that both gays and straights have an interest in erasing bisexuality, because of their shared interests in “the stability of sexual orientation categories,” “the primacy of sex as a diacritical axis,” and “the preservation of monogamy.”¹³⁵ According to Yoshino, monosexuals (i.e., those who aren’t bisexual) believe that bisexuals threaten or undermine these interests in some way and, thus, the monos tacitly agree to pretend that bisexuality doesn’t exist. He supports this argument by, *inter alia*, pointing to the vast disparity between the lesser presence of bisexuality in the mainstream media (compared to homosexuality) and the greater percentage of bisexuals in the population (compared to homosexuals).¹³⁶

Relatedly, we might compare the number of people who exhibit asexual orientation with the percentage of people who identify as asexual.¹³⁷ Think here of Bogaert’s 1% of people who say “I have never felt sexually attracted to anyone at all”¹³⁸—compared with the small number of people who identify as asexual, which hasn’t been studied but is suggested anecdotally by how few people have heard of asexuality much less met someone who so identifies.¹³⁹ This is all the more striking in light of a comparison between the number of people with asexual feelings and the number with gay and bisexual feelings. In Bogaert’s study, the percentage of people who reported no attractions ever was very similar to the percentage of those with same-sex attractions, whether homosexual or bisexual.¹⁴⁰

There is another link between asexuality and bisexuality: Though the data are far from definitive, early studies seem to suggest that a disproportionate number of asexuals

¹³² Swankivy, *supra* note XX.

¹³³ Bootle, *supra* note XX.

¹³⁴ See, e.g., Colker; Mezey. This theme is most prominently emphasized by Kenji Yoshino’s *The Epistemic Contract of Bisexual Erasure*, STAN. L. REV.

¹³⁵ Yoshino, *Bisexual Erasure*, *supra* note XX.

¹³⁶ Yoshino, *Bisexual Erasure*, *supra* note XX, at 364-88. Whether erasure is still the cultural location of bisexuals has recently been contested by Liz Glazer, but that is outside the scope of our discussion here. Elizabeth Glazer, *Sexual Reorientation*, GEORGETOWN L.J. (2012).

¹³⁷ This is not the same thing as what Yoshino did, which of course warrants further discussion—both his methodical approach and this informal one.

¹³⁸ See *supra* Section I.B.

¹³⁹ See also *supra* note XX (citing the size of AVEN).

¹⁴⁰ See Bogaert, *supra* note XX.

identify as bisexual—or biromantic—in their romantic attractions.¹⁴¹ “Bi-asexual” is the term that asexuals use for the combined identities (rather than for people who are sometimes asexual and sometimes not, who are instead labeled “gray-As”). Some asexuals link bisexuality to asexuality, observing that it would make sense if more asexuals were bisexuals “since sexual attraction is not a factor,”¹⁴² or as one subject who so identified put it, “The things I find attractive, I find attractive in both sexes.”¹⁴³ One researcher observes, “For [some] participants, an asexual identity that conveys a lack of sexual attraction opens the door to not using gender as a screening mechanism for romantic partners.”¹⁴⁴ In other words, if you don’t care about having sex (as in sexuality), then who compels you would depend less on the person’s sex (as in sex/gender).¹⁴⁵ This perspective depends, however, on the assumption that bisexuality means not caring about sex/gender, but this is only one strand or view of bisexuality. Some bisexuals report very gendered desires—of whatever sorts—directed toward both men and women.¹⁴⁶

c) *Polyamory*. Asexuality might seem the opposite of polyamory, the term for multiparty sexual loving relationships (distinct from traditional polygamy).¹⁴⁷ Whereas polyamorists typically want more sex with more people than is usual, asexuals want less sex with fewer people than is usual. Interestingly, though, the two sexual forms have more overlap than expected.

Aces and polys can come together around a shared interest in relationship forms other than monogamous sexual pairbonds. The complicated networks of relationships asexuals may embrace is vividly portrayed in the film *(A)sexual*.¹⁴⁸ Midway through the film, asexual activist David Jay makes a presentation at a college about all the different relationship forms and connections we might want to have, if we were asexual, using a diagram of his life and many close connections to others, with different forms and degrees of closeness.¹⁴⁹ The diagram he draws is reminiscent of the graphical illustrations polyamorists may draw of their relationship forms, some of which have names, such as vee and triad.¹⁵⁰ The difference of course is that the polyamorists’ relationships are typically organized around sex—which relationships have it and which do not, and whether those relationships are sexually exclusive—whereas the asexuals’ relationships are less likely to privilege that component.

The intersection between asexuals and polyamorists reflects a broader synergy: according to David Jay, people who identify as highly sex-positive, after overcoming their initial skepticism about asexuality, often end up the strongest allies and supporters

¹⁴¹ See, e.g., Scherrer, *supra* note XX.

¹⁴² Scherrer, *supra* note XX (quoting Nora, a twenty-year old white woman).

¹⁴³ Scherrer, *supra* note XX, at 11 (quoting Mona, a thirty-year-old white woman).

¹⁴⁴ Scherrer, *supra* note XX, at 11.

¹⁴⁵ See JANET HALLEY, *SPLIT DECISIONS* (on the distinction between sex1 and sex2).

¹⁴⁶ See Emens, *Intimate Discrimination* (discussing these conflicting views).

¹⁴⁷ See, e.g., Emens, *Monogamy’s Law*; Martha Ertman.

¹⁴⁸ *(A)SEXUAL* (Dir. Angela Tucker, 2011).

¹⁴⁹ *Id.*

¹⁵⁰ See Emens, *Monogamy’s Law*, *supra* note XX.

of asexuals.¹⁵¹ This might seem surprising, until one considers the common interests at stake. In addition to their experimentation with atypical relationship models noted above, many asexuals share with polyamorists and other sex-positive thinkers a deep commitment to freedom of individual variation from the dominant expectations of our sexual culture. These affinities can be seen vividly in two moments in the documentary *(A)sexual*: In one, David Jay rollerblades through the San Francisco Pride Parade shouting to bystanders, “I love that you love sex!”¹⁵² In another, a polyamorist comments about Jay, “We want the freedom to say yes as much as possible, and he wants the freedom to say no as much as possible. It’s pretty much the same thing.”¹⁵³

d) No Sexual Orientation. Asexuality bears some resemblance to a variety of sexual orientations (and models¹⁵⁴), but one could also view it as challenging the whole idea of sexual orientation.¹⁵⁵ We will consider this view at the end of this Part.

2) Gender.

a) No gender. Some work suggests that asexuals may be more likely to resist gender identity labels. In a striking oversight in one of the larger empirical studies to date, the study made gender self-identification as “male” or “female” a threshold question for inclusion in the study.¹⁵⁶ The authors found that a surprising number of people (27 out of 214) declined to answer the question and were therefore dropped from the study.¹⁵⁷ The authors speculate that respondents may have “deliberately left this item blank because they did not label themselves exclusively as male or female (i.e., agendered, gender queer, homoaesthete asexual, pan-asexual gender-free, gender-fluid girl born with an outie) or perhaps they identified equally as male and female.”¹⁵⁸

There are several reasons asexuality could be correlated with a refusal to identify with the male/female sex binary. First, and most obviously, asexuality may lead to gender nonconformity. Asexuals may have less use for the labels of male and female, and may therefore feel hemmed in by them, or framed as a sexual being through them. As one scholar put it, somewhat tendentiously, “it is possible that sexual attractiveness standards govern gender presentations and behaviors, and that without the desire to attract a sexual partner, asexual people may have more freedom to explore their own

¹⁵¹ See Film Screening of *(A)sexual* and Discussion with David Jay and Angela Tucker, Columbia Law School (April 10, 2012); David Jay, personal communication (June 12, 2012).

¹⁵² See *(A)SEXUAL*; Cerankowski & Milks, *supra* note XX, at 662.

¹⁵³ See *(A)SEXUAL*, *supra* note XX.

¹⁵⁴ Whether polyamory is a sexual orientation is a contested question. See, e.g., Emens, *supra* note XX; Tweedy, *supra* note XX.

¹⁵⁵ *(A)SEXUAL* (Dir. Angela Tucker, 2011) (quoting one AVEN Pride marcher, saying, “We’re almost like we don’t have [a sexuality]. I always felt like I don’t have a sexuality.”).

¹⁵⁶ Lori A. Brotto et al, *Asexuality: A Mixed-Methods Approach*, 39 ARCH. SEX. BEHAV. 599 (2010). This was in spite of the fact that some other questions, such as about “sexual orientation,” were free response. Brotto et al., *supra* note XX, at 615.

¹⁵⁷ Brotto et al., *supra* note XX, at 601.

¹⁵⁸ Brotto et al., *supra* note XX, at 615.

genders.”¹⁵⁹ This passage seems to assume a pre-cultural multiplicity of gender identities, such that the genders asexuals claim are “their own.” One wouldn’t need to make such a contentious claim in order to surmise that, in the absence of sexual attractions, people might be interested in exploring a wider range of gendered and genderless identities. This view would be consistent with classic work in gender theory that identifies the categories of male and female as deeply bound up with their uses in heterosexuality.¹⁶⁰

Second, gender nonconformity may lead to, or otherwise influence, self-identification as asexual. One scholar claims that “there exist (historical) pressures on transsexual people to be ‘asexual’ pre-transition in order to access medical services, with the implicit expectation that the treatment will lead to their becoming (hetero/sexual) people.”¹⁶¹ In addition, in a world organized around sexual orientation defined by whether one desires males or females, trans and intersex people may be treated by many as less sexual beings, and this could backform into some degree of asexuality. This is harder to tell as a happy story than the first. But the assumption that this is an unhappy outcome seems to assume asexuality as an unhappy outcome and therefore bears critique through the lens offered in the section on disability below.¹⁶² Finally, and relatedly, being intersex or trans might well matter less for finding partners in an asexual community, notwithstanding the sex- and gender-specific romantic attractions expressed by some asexuals.

b) Very gendered. On the other hand, we might conclude that asexuality is a highly gendered phenomenon.¹⁶³ Some, though not all, studies suggest that more women than men are asexual.¹⁶⁴ The study by the Kinsey affiliates did not find a significant gender difference between asexuals and nonsexuals.¹⁶⁵ But the original Bogaert study found that, while 1% of people in general were asexual, further analysis revealed more gay and bi men than asexual men, and more asexual women than gay and bi women, as noted earlier.¹⁶⁶ Brotto and Scherrer both had more female asexual subjects.¹⁶⁷ And an AVEN study conducted in 2007 found that approximately 65% of subjects identified as female, 31% identified as male, and 4% opted for intersex or trans.¹⁶⁸

¹⁵⁹ CJ DeLuzio Chasin, *Theoretical Issues in the Study of Asexuality*, 40 ARCH. SEXUAL BEHAV. 713, 716 (2011).

¹⁶⁰ See, e.g., Butler; Sedgwick.

¹⁶¹ Chasin, *supra* note XX, at 716.

¹⁶² See *infra* notes XX.

¹⁶³ I present these two possibilities as in tension, but the tension may be resolved if it turns out that a relatively large subset of asexuals refuse a gender identity, but that of those who do, women are in the majority.

¹⁶⁴ See *supra* Section I.B.

¹⁶⁵ See Prause & Graham, *supra* note XX.

¹⁶⁶ Bogaert (2004), *supra* note XX, at 282.

¹⁶⁷ See Brotto et al., *supra* note XX, at 615.

¹⁶⁸ Biological Sex Poll (July 2007), <http://www.asexuality.org/en/index.php?/topic/24599-biological-sex-poll-july-2007/> (reporting more specifically, in a study of 1370 members, that 1.24% chose intersex, 0.80% chose M to F transsexual, and 2.19% chose F to M transsexual). Surprisingly, Brotto reports slightly different numbers from this study, although the site says the topic is closed. See Brotto et al., *supra* note XX, at 615. The import of the results is the same, in any case.

Participants on the AVEN website ponder why more women so identify.¹⁶⁹ One theory is that more women than men feel comfortable identifying as asexual.¹⁷⁰ Indeed, some posts seem keen to supply cultural explanations such as this—as opposed to concluding that more women lack sexual attraction—but I’ve not seen any empirical work exploring this question. Scholarly theories include, for example, that women are generally more receptive than proceptive in their desires, so an understanding of sexual identity organized around attraction is less of a fit for them.¹⁷¹

Of course, the gender divide among asexuals overlaps with a broader cultural presumption that men want more sex than women do.¹⁷² The stereotype of women’s lower level of desire—“Not tonight, honey, I have a headache”—was captured vividly in the classic scene from *Annie Hall*, where the couple Alvy and Annie are seeing their therapists at the same time on a split screen:

Alvy Singer’s Therapist:	How often do you sleep together?
Annie Hall’s Therapist:	Do you have sex often?
Alvy Singer [lamenting]:	Hardly ever. Maybe three times a week.
Annie Hall [annoyed]:	Constantly. I’d say three times a week. ¹⁷³

The male and female partners report the same amount of sex, but with a completely different affective sense of its frequency.¹⁷⁴ The idea that male and female sexual desires—or the lack thereof—differ substantially is effectively endorsed by the proposed DSM-V, which creates separate diagnostic categories for low desire in women as opposed to in men, as we saw in Part I.¹⁷⁵

If more women than men are asexual, what would that mean for how we view asexuality as a cultural phenomenon? Historically, such a difference might help to account for asexuality’s relatively recent emergence as an identity category receiving (even limited) recognition. Perhaps no one took note of asexuality until men did it—that

¹⁶⁹ Aven q&a, <http://www.asexuality.org/en/index.php?topic/32908-some-blunt-questions/>.

¹⁷⁰ Aven q&a, <http://www.asexuality.org/en/index.php?topic/32908-some-blunt-questions/> (July 15, 2008) (responding to the question “Is there any data on whether more men or more women are asexual?” by saying, “Not to my knowledge. I think women are reportedly higher in number, but men are expected by society to be sex fiends, so men may not feel comfortable admitting that they are asexual . . .”) (quoting Throne Eins responding to blueskies).

¹⁷¹ See Brotto et al.; see also Ela Przybylo, *Producing Facts: Empirical Asexuality and the Scientific Study of Sex*, FEMINISM & PSYCHOLOGY, Apr. 2012, at 13 (critiquing this hypothesis).

¹⁷² See, e.g., J.G. Beck, *Hypoactive Sexual Desire Disorder: An Overview*, 63 J. CONSULTING & CLINICAL PSYCHOL. 919 (1995); Roy F. Baumeister, et al., *Is There a Gender Difference in Strength of Sex Drive? Theoretical Views, Conceptual Distinctions, and a Review of Relevant Evidence*, 5 PERSONALITY & SOC. PSYCH. REV. 242, 243 (2001) (reviewing the literature and finding no consensus about whether men or women have the stronger sex drive).

¹⁷³ ANNIE HALL (MGM 1977); see also <http://www.imdb.com/title/tt0075686/quotes> (quoting the scene).

¹⁷⁴ *Id.* There is a lot at stake in the question of who derives greater pleasure from sex—which is not the same thing, of course, as who wants sex more or who wants more sex—and contestation over this point can be seen as far back as the Ovidian tale of Tiresias’s blinding.

¹⁷⁵ See *supra* note XX.

is, until men claimed it as an identity.¹⁷⁶ In the same vein, as noted earlier, the Storms article tends to be cited as the first scholarly work on the subject, although the Myra Johnson article preceded it.¹⁷⁷ Prescriptively, one scholar has asked whether asexuality might have benefits for girls: “What kinds of resistance do people face related to their asexuality and what kinds of protection might their asexuality afford them (e.g., do asexual/potential-asexual adolescent girls, like adolescent lesbians, show a smaller developmental drop in self-esteem than heterosexual girls)?”¹⁷⁸

3) Disability.

a) *Disability as Asexuality.* Various writing about disability laments the desexualization of disabled people.¹⁷⁹ The prism of asexuality has recently brought an important critique to bear on this disability scholarship, by pointing out its tendency to cast asexuality in highly negative terms.¹⁸⁰ Eunjung Kim has written the most thorough study of the subject thus far, drawing on provocative and powerful writing by several disabled people who affirmatively claim their asexuality.¹⁸¹

b) *Asexuality as Disability.* A lack of interest in sex can also be caused by any number of physical conditions and illnesses, which the AVEN website acknowledges and urges people to explore if their sexual desire has recently dropped.¹⁸² There are also some interesting potential intersections between asexuality and autism spectrum disorders.¹⁸³ More work is needed in this area, both to assess and understand the connections and to examine the attitudinal implications for both aces and aspies.¹⁸⁴

In a kind of mirror image of the “disability as asexuality” discussion just above, the writing about asexuality often casts disability in a negative light. As noted earlier, the clinical diagnosis most closely associated with asexuality—Hypoactive Sexual Desire Disorder (HSDD)—is highly controversial and has been much criticized for pathologizing female patterns of desire that don’t satisfy male partners.¹⁸⁵ Asexuals tend to be keen to distinguish themselves from this clinical diagnosis of mental disability.

¹⁷⁶ See, e.g., Bootle, *supra* note XX (“It’s so unusual—especially for a man—to have a complete lack of interest in sex . . .”).

¹⁷⁷ See *supra* note XX.

¹⁷⁸ Chasin, *supra* note XX, at 722-23.

¹⁷⁹ See, e.g., Tom Shakespeare, *Disability, Identity and Difference*, in EXPLORING THE DIVIDE: ILLNESS AND DISABILITY 94, 109 (Colin Barnes & Geof Mercer eds., 1996); Emens, *Intimate Discrimination*, HARV. L. REV. (2009); Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?*, 20 N.Y.U. REV. L. & SOC. CHANGE 517 (1993-94).

¹⁸⁰ See, e.g., Scherrer, *supra* note XX, at 623.

¹⁸¹ Eunjung Kim, *Asexuality in Disability Narratives*, 14 SEXUALITIES 479 (2011).

¹⁸² See, e.g., Aven q&a, <http://www.asexuality.org/home/general.html#def1> (“If you experience a sudden decline in sexual interest or attraction, it may be linked to side effects of certain medications or illness. It is advisable to discuss sudden changes with your doctor.”).

¹⁸³ See, e.g., Brotto, *supra* note XX.

¹⁸⁴ Aspies is short term embraced by some people with Asperger’s.

¹⁸⁵ See *supra* Section I.C.

C. Models: Minority, Spectrum, Novelty, or Umbrella Category

Asexuality might be understood on any one of several existing models of sexual orientation, or it might lead us to some entirely different models for thinking about sexual identity. This Section briefly sketches several such possibilities, to conclude our examination of asexuality as an emerging identity category. Parts III and IV will then turn to the law's relation to asexuality.

1) *Minoritizing.*

Some of the discourse in this area suggests that there is a distinct minority of individuals characterized by their lack of sexual attraction to others.¹⁸⁶ Asexuals often say or imply that they have always been this way, that they were hard-wired asexual.¹⁸⁷ This “nature talk” is reminiscent of gays who want to find the gay gene,¹⁸⁸ and of other sexual minorities who piggyback on this narrative of essential identity.¹⁸⁹ Researchers in this area report on the eagerness of asexuals to participate in research studies;¹⁹⁰ study participants presumably surmise that research validation will help to make asexuality “a thing” that the rest of the culture believes in.¹⁹¹

2) *Spectrum.*

Perhaps it is more plausible to think of asexuality on a spectrum of desire, from little or none, at one end, to very much, at the other. Some of the identity discourse surrounding asexuality takes this tack, as Chasin observes:

This language of asexuality entails certain ideological assumptions upon which the discourse is founded, namely that human (sexual) variation is continuous and not discrete. People are not merely sexual or asexual, but instead there is a continuum along which people may fall. Extremely intense sexuality exists at one end, and extremely intense asexuality at the other, and there is a range of *gray-asexuality* approaching the asexual end. In framing ideas this way, asexual community discourse asserts that sexual people and asexual people are not

¹⁸⁶ On “minoritizing” discourses, see Eve Sedgwick, *supra* note XX, at 85 (defines a “minoritizing” view of homosexuality as the view that “there is a distinct population of persons who ‘really are’ gay”).

¹⁸⁷ See, e.g., *supra* note XX (on “wired” this way). This is not to say that the two are the same; Ed Stein has done a nice job teasing apart “born that way” arguments from “not a choice” arguments. See Stein, *supra* note XX.

¹⁸⁸ On “nature talk” across categories, and the quest for the gay gene in particular, see Emens, *Against Nature*, NOMOS (forthcoming 2012).

¹⁸⁹ Cf. Emens, *Monogamy’s Law*, *supra* note XX (discussing minoritizing).

¹⁹⁰ See, e.g., Brotto et al., *supra* note XX.

¹⁹¹ On becoming “a thing,” see Liz Glazer, invoking Tina Fey. See Glazer, *Sexual Reorientation*, *supra* note XX, at 38 (citing the draft posted on SSRN).

different kinds of people. Instead, they differ only in the degree to which they possess a certain characteristic (i.e., sexuality).¹⁹²

Chasin acknowledges, however, that the category of asexual has “social reality, with a very real impact on people” and thus the category “may be useful both for purposes of political solidarity and for coming to understand people’s lived realities.”¹⁹³ In short, a minority identity may be important or useful to many asexuals, but the discrete demarcation may well be artificial.

3) Universalizing.

“There is a big secret about sex: most people don’t like it.”
— Leo Bersani, *Is the Rectum a Grave?*¹⁹⁴

It is a short leap from understanding asexuality on a spectrum to understanding it on a “universalizing” model. The sexuality theorist Eve Sedgwick articulated the universalizing model of identity in the context of homosexuality in this way: By contrast to a minoritizing view, a “universalizing” view of homosexuality holds “that apparently heterosexual persons and object choices are strongly marked by same-sex influences and desires, and vice versa for apparently homosexual ones”¹⁹⁵ A universalizing conception of the identity posits that the minority category is substantially important in the lives of many people, even those who do not identify with the sexual minority.

Is there universal asexuality? Bersani would tell us that “most people don’t like” sex—that that is the truth we’re all hiding from. For many of us, this claim is simply implausible. But a much milder version of a universalizing account might have something to it. Various work suggests that many people go through more or less sexual phases of their lives, and even their days.¹⁹⁶ Moreover, it seems plausible to think that most everyone has some way to relate to the experience of asexuality. That is to say, everyone—or, to be safe, let us say nearly everyone—has at some point felt a lack of sexual attraction. And nearly everyone has probably felt the lack of sexual attraction at a moment when they (or someone else) wished they had felt it. Their lack of desire might have hurt someone else’s feelings; or damaged or ended a valued relationship; or made them unable to partner with the friend with whom they were highly compatible. Unwilling to face their lack of attraction, they might have engaged in what Thea

¹⁹² Chasin, *supra* note XX, at 717.

¹⁹³ Chasin, *supra* note XX, at 718.

¹⁹⁴ Leo Bersani, *Is the Rectum a Grave?*

¹⁹⁵ SEDGWICK, *supra* note XX, at 85.

¹⁹⁶ For example, some work suggests that sexual desire varies over the life cycle, for example, declining with age and with parenting, though the trajectories are not all linear and more research is needed. See, e.g., Abi Taylor & Margot A. Gosney, *Sexuality in Older Age: Essential Considerations for Healthcare Professionals*, 40 AGE & AGEING 538, 538 (2011); Osmo Kontula & Elina Haavio-Mannila, *The Impact of Aging on Human Sexual Activity and Sexual Desire*, 46 J. SEX RES. 46, 54 (2009); Vaughn Call et al., *The Incidence and Frequency of Marital Sex in a National Sample*, 57 J. MARRIAGE & FAM. 639, 647 (1995); see also Suzanne Kim.

Cacchioni calls “the labor of love”—or, more tendentiously, “sex work”—to try to bolster their desire.¹⁹⁷

In this context, a universalizing model might lead us to ask whether the common disbelief or skepticism in response to asexuality could be defensive. Elsewhere I have argued that a “paradox of prevalence”—akin to what I’m describing here for asexuality—contributes to the negative reactions to polyamory.¹⁹⁸ There, I used the phrase to refer to the way that mainstream culture seemed to resist (typically through laughter or disgust) the very idea of polyamory—not so much because mainstream people really felt so far away from polyamory, but more because they felt so close to it. That is, monogamy is plagued by such failures already that people are anxious that they (or their partners) might be or become polyamorists. Could something similar be true for asexuality? Possibly. Perhaps some of the laughter (“hilarious,” says Dan Savage¹⁹⁹) and aggressive erasure (I know better than you: you’re really gay! Or really just repressed! etc.²⁰⁰), that arises in response to the topic of asexuality is partly, or at least sometimes, motivated by people’s anxieties about their own moments of past, present, or future diminished desire, or a partner’s, or both.

Could a paradox of prevalence characterize the responses to both asexuality and polyamory? Perhaps so. If our quantity of desire—whether too much or too little—is an underappreciated feature of sexual selves, then anxieties surrounding it might be driving us to alienate those who have gone too far, and too openly, in either direction.²⁰¹ This brings us to the possibility of novel axes, beginning with quantity.

4) *Something New.*

Perhaps the newly claimed identity of asexuality invites us to imagine some new ways to think about sexuality, identity, or our selves.²⁰²

a) *Quantity Axis.* The most obvious axis that asexuality forces us to examine more closely, as I have just been discussing, is the axis of quantity. How much sex does a particular person want, compared to another, or compared to the norm? Recall, from the discussion of Storms’ work in Part II, that the early sexual orientation studies were so oblivious to quantity as an axis of desire that they unwittingly managed to conflate bisexuality and asexuality.²⁰³

¹⁹⁷ See Thea Cacchioni, *Heterosexuality and ‘the Labour of Love’: A Contribution to Recent Debates on Female Sexual Dysfunction*, 10 *SEXUALITIES* 299 (2007).

¹⁹⁸ Emens, *Monogamy’s Law*, *supra* note XX.

¹⁹⁹ See *infra* text accompanying note XX.

²⁰⁰ See *supra* Section III.A.

²⁰¹ This might help explain why avowedly sex positive people tend to be the strongest allies for asexuals, as discussed earlier, see *supra* text accompanying notes XX: They may be least likely to feel anxious about being mistaken for asexual.

²⁰² Cf. Chasin, *supra* note XX, at 718 (suggesting that asexuality may spawn “radical new ideas”).

²⁰³ See *supra* text accompanying notes XX.

This does not mean, however, that talking about quantity of desire is new: We talk about quantity in relation to some times in life (“horny teenagers”²⁰⁴) or times of the month (“I’ve been noticing I become horny during my period”²⁰⁵). The word “horny” comes up regularly in quantity examples, but more often to describe a mood or moment than a character.²⁰⁶ But we also classify people along this axis, either for high quantity (such as “horndog”²⁰⁷ or “sex addict”²⁰⁸) or low quantity (such as “frigid”²⁰⁹ or “cold fish”²¹⁰). Our quantity terms also imply the gendered dimensions of this axis discussed earlier.²¹¹

What is arguably new is that asexuality, as an identity category, pushes us to consider this quantity axis as potentially significant to our identities—that is, as a meaningful part of “sexual orientation.”²¹²

b) Autoerotic Axis. Asexuals may masturbate at rates not far from the rates of the general population, according to the (admittedly imperfect) data gathered thus far.²¹³ But the idea of an identity category organized around the lack of sexual attraction for others, even in the presence of sexual activity with oneself, presses the question of what counts as “sex,” how important masturbation is to everyone else, and what meanings it may have. Again, Sedgwick anticipated a version of this: “Some people’s sexual orientation is strongly marked by autoerotic pleasures and histories—sometimes more so than by any aspect of alloerotic object choice. For others the autoerotic possibility seems secondary or fragile, if it exists at all.”²¹⁴ Had she had asexuality in mind, she might have said that the autoerotic can mark a person’s orientation “more so”—or to the exclusion of—“any

²⁰⁴ See, e.g., Urban Dictionary, <http://www.urbandictionary.com/define.php?term=a%2Fs%2F1> (setting up “horny teenager” as a type in a scenario).

²⁰⁵ See, e.g., Sex Q&A, *Does Menstruation Affect My Sex Drive?*, COSMOPOLITAN, <http://www.cosmopolitan.com/sex-love/advice/menstruation-affect-sex-drive>.

²⁰⁶ See, e.g., Urban Dictionary, <http://www.urbandictionary.com/define.php?term=horny+> (defining “horny” as “turned on immensely”).

²⁰⁷ See, e.g., Urban Dictionary, <http://www.urbandictionary.com/define.php?term=horny+> (defining “horndog” as “a really, really horny guy...or girl”) (all caps omitted).

²⁰⁸ See, e.g., Frances Cohen Praver, *What Drives a Sex Addict?*, <http://www.psychologytoday.com/blog/love-doc/200910/what-drives-sex-addict> (Oct. 7, 2009).

²⁰⁹ See, e.g., Urban Dictionary, <http://www.urbandictionary.com/define.php?term=frigid>, Mar. 4, 2005 (defining “frigid,” as, *inter alia*, “A term usually used to describe females who have no desire for sex; Persistently averse to sexual intercourse.”).

²¹⁰ See, e.g., Urban Dictionary, <http://www.urbandictionary.com/define.php?term=cold+fish> (“A sex partner who is either not receptive, or not providing any emotional or physical feedback during copulation.”).

²¹¹ See *supra* notes XX.

²¹² Eve Sedgwick foreshadowed this moment in 1990 when she puzzled over our preoccupation with the sex/gender of those we desire as the defining axis of sexual orientation, declaring instead, “People are different from each other.” EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 25-26 (1990). She offered an illustrative list of possible alternative classifications of sexuality, including “Some people spend a lot of time thinking about sex, others little”; and “Some people like to have a lot of sex, others little or none.” *Id.* at 25. Interestingly, the presence or absence of sexual desire for others seems to inform a disproportionate share of the alternatives Sedgwick identifies. See, e.g., *supra* text accompanying note XX (quoting 2 examples in the text, about wanting a lot or a little, and fantasizing a lot or a little).

²¹³ See *supra* notes XX.

²¹⁴ SEDGWICK, *supra* note XX, at 25.

aspect of alloerotic object choice.” Asexual discussions of masturbation also highlight the variability in how *sexual* (or not) masturbation feels to different people or at different moments to the same person.²¹⁵

c) *Narcissism Axis*. Some asexuals talk about not being put off by the idea of sex unless they are personally involved.²¹⁶ This leads to an axis we could affectionately name after Narcissus, who, at one end of this spectrum, so wanted only his own image that he melted into it.²¹⁷ Here we might ask: How much does an individual’s desire depend upon her presence (or absence) in the sex (or sexual fantasy) that she is having? This overlaps with the autoerotic axis, in that one place on this spectrum could be someone who likes only sex with himself and to the exclusion of anyone else. But the idea here centers on the erotic impact of one’s own presence in the sexual activity (in reality or fantasy). For instance, men turned on by lesbian sex could differ sharply on this axis; one man could like the fantasy of watching lesbians have sex for his benefit or as a prelude to his entering the scene, whereas another could prefer to imagine lesbians having sex oblivious to him. A likely example of the latter type is the popularity of gay male porn among lesbians.²¹⁸

d) *Romantic-Attraction Axis*. Thinking about asexuality might lead us to recognize more pointedly the degree of *romantic* attraction, as distinct from *sexual* attraction, as an axis of identity in the sexual population as well. Some work has gestured in this direction already, observing that people may have romantic attractions toward one sex and sexual attractions to the other.²¹⁹ But asexuality pushes us to consider people who may have one and lack the other, in ways previously overlooked. Romantic asexuals have romantic attractions but not sexual ones. “Might researchers discover,” as one scholar writing about asexuality suggests, “a population of aromantic sexual people hitherto misunderstood?”²²⁰

e) *Orientation-Object Axis*. Romantic asexuals would probably do well to be romantically attracted to other (romantic) asexuals, which highlights the significance of what we might call the orientation-object axis of a person’s sexuality. By this I mean, the sexual orientation of those to whom one is attracted. For homosexuals and heterosexuals, as for asexuals, it is quite useful to desire those of their own orientation type. For

²¹⁵ Cf. *see supra* text accompanying notes XX (discussing Brotto’s account of asexuals’ descriptions of masturbation in clinical or mechanical terms).

²¹⁶ Carrigan, *supra* note XX, at 470 (quoting one avowedly sex-averse asexual who observed, “I believe I differ from many other repulsed (as opposed to indifferent) asexuals in that it is purely the idea of myself having sex that I find disgusting. The idea of others doing it does not bother me in the slightest, apart from finding depictions of female sexuality a little uncomfortable as it reminds me of myself . . .”).

²¹⁷ See, e.g., OVID, *METAMORPHOSES*.

²¹⁸ See, e.g., Jacob Bernstein, *An Indie Hit’s Sex Message*, <http://www.thedailybeast.com/articles/2010/07/18/the-lesbians-who-love-male-gay-porn.html> (July 18, 2010).

²¹⁹ See Diamond, *What Does Sexual Orientation Orient?: A Bio-Behavioral Model Distinguishing Romantic Love and Sexual Desire*, 110 *PSYCHOL. REV.* 173 (2003).

²²⁰ Chasin, *supra* note XX.

bisexuals, however, it matters less.²²¹ In informal settings, certain types along this axis of identity have been given names—such as “girlfag”²²² and “guydyke”²²³—but I have not encountered any naming of this *axis* of sexuality.

5) *An Umbrella Category of Orientation.*

Finally, asexuality could be an umbrella category of orientation—asexual orientation—alongside sexual orientation.²²⁴ Typically, asexuals instead claim asexuality as a type of sexual orientation just like gayness.²²⁵ Importantly, though, as discussed earlier, many (romantic) asexuals also claim an orientation based on the sex of those they romantically desire, such as gay, straight, or bi.²²⁶ In this light, one scholar has proposed that—rather than viewing asexuality as a particular sexual orientation—we instead see “asexual” as an umbrella or “meta-category.” On this view, asexual functions as a rubric “just like *sexual*, encompassing the same kind of smaller categories.”²²⁷

Of all the models, the meta-category of asexuality arguably poses the most substantial challenge to the pervasive cultural assumption that our sexual selves importantly define us.²²⁸ An asexual umbrella category pushes us to imagine a mirror on our sexual world, replicating each of society’s components, but without sexual attraction defining any of them.

This perspective brings us to the next Part’s examination of our sexual law.

²²¹ Yoshino’s work on bisexual erasure points to some reasons why bisexuals might find less acceptance among monosexuals, however.

²²² Clare, Girlfags FAQ, www.girlfags.com/faq.html (defining “girlfag” as “[a] woman who is very attracted to gay/bi men”).

²²³ *Id.* (defining “guydyke” as “[a] man who is very attracted to lesbian/bi women.”).

²²⁴ This would make asexuality more like the absence of a sexual orientation, as discussed earlier. *See supra* notes XX.

²²⁵ Swankivy, for instance, would certainly resist the characterization of asexuality as a challenge to the idea of sexual orientation. She writes: “I’d like to state here and now that I think my sexual orientation is an unrecognized fourth categorization, along with heterosexual, homosexual, and bisexual. It isn’t an ‘undecided’ or a ‘none of the above’; it is actually a legitimate fourth choice—it is not ‘no sexual orientation,’ but rather a ‘sexual orientation of “no.”’” Swankivy, *supra* note XX. Cf. Storms, *supra* (Figure 2).

²²⁶ *See supra* note XX.

²²⁷ Chasin, *supra* note XX.

²²⁸ *See, e.g.,* Foucault, *History of Sexuality*. Relatedly, Sedgwick wrote, “Sexuality makes up a large share of the self-perceived identity of some people, a small share of others’.” SEDGWICK, *supra* note XX, at 25.

III. OUR SEXUAL LAW

“It is hard to unthink what you know.”

—Catherine A. MacKinnon²²⁹

The rise of asexual identity, discussed in the previous Parts, underscores how powerful a grip sex and sexuality have on our current world. Sex is so important that even those who are not interested in doing it with other people feel a need to organize and express their identity in terms of that lack of interest in sex. The demand that we identify and confess our sexual selves is so powerful that it extends even to those whose deepest sexual secret is that they’re “just not that into [it].”²³⁰ Asexual self-elaboration therefore offers a fascinating lens through which to view our legal system’s relationship to sex. This Part considers what can be learned by looking at our laws through the metaphor of asexual eyes.

Asexuals are often seen as lying beyond the law. For instance, one recent critical work observes that, “[p]ossibly as a result of its *lack* of behaviour and desire, [asexuality] does not draw attention to itself, and has not historically been perceived as morally or legally wrong.”²³¹ On one level this is true. Asexuality has not been subjected to the kinds of coercive restrictions that homosexuals have faced in this country, such as explicit immigration restrictions and criminal prohibitions, as the next Part will address.²³²

On the other hand, the idea that asexuality lies outside of law betrays a rather narrow conception of law. This view assumes that law consists merely of prohibitions, and fails to recognize the range of subtler regulatory functions of law. Many of these operate to the detriment of asexuals, while a few may accrue to their benefit, as the examples presented in this Part show.

²²⁹ Catharine A. MacKinnon, *Sexual Harassment: Its First Decade in Court* (1986), reprinting from FEMINISM UNMODIFIED (1987).

²³⁰ Cf. SEX AND THE CITY (coining the now iconic phrase “he’s just not that into you”). On the demand for sexual confession, see FOUCAULT, THE HISTORY OF SEXUALITY, VOL. 1; SEDGWICK, EPISTEMOLOGY.

²³¹ Annemarie Jutel, *Framing Diseases: The Example of Female Hypoactive Sexual Desire Disorder*, 70 SOC. SCI. & MED. 1084, 1086 (2010); see also Bogaert, *supra* note XX, at 284 (2004) (“Neither of course has it been illegal or perceived as morally wrong to have such inclinations.”); Kristin S. Scherrer, *Coming to an Asexual Identity: Negotiating Identity, Negotiating Desire*, 11 SEXUALITIES 621, at *12 (2008) (“Asexuality, on the hand [in contrast to lgbtq identities], has been largely unnoticed by legal institutions, perhaps in part because of its *lack* of behavior and desire. In some ways, because asexuality is defined as a *lack* of behavior and desire, asexuality has escaped attention, which is a clear departure from the experiences of other marginalized identities.”).

²³² See *infra* Section IV.C.

A. Marriage Law: Exclusions and Omissions

1) Sexual Requirements.

As a general rule, marriages are valid even without sexual consummation.²³³ But in several ways, legal marriage effectively requires consummation for its fullest ratification. For instance, in some states, nonconsummation of a marriage is a ground for voiding the marriage.²³⁴ Failure to consummate renders it voidable, however, not void; the exception that proves this rule is South Carolina, where nonconsummation can render a marriage void, but cohabitation suffices to prove consummation.²³⁵ In addition, consummation of a marriage seals the marriage off from some attempts to void it.²³⁶ And while fraud is not generally grounds for voiding a marriage, fraudulent intent “not to consummate the marriage or not to have intercourse likely to produce progeny” can be.²³⁷ Also striking is the fact that many states make impotence a ground for annulment,²³⁸ whereas infertility is not an independent ground for annulment in any state (unless misrepresented or concealed), suggesting that sex *per se* matters more to marriage than reproduction.²³⁹ In the immigration context, failure to consummate, by itself, does not render a marriage a “sham marriage.”²⁴⁰ But under immigration law, “proxy marriages”—in which the spouses are not both physically present for the marriage ceremony—are not recognized unless they are subsequently consummated.²⁴¹ In various ways, then, marriage law effectively requires sexual activity.

²³³ See, e.g., *Berdikas v. Berdikas*, 178 A.2d 468, 470 (Del. Super. Ct. 1962) (“An examination of the Digests bring to light many cases in which the Courts have, in instances of ceremonial marriages, held that consummation of such a marriage is not a necessary element to make such marriages valid.”); *In re Marriage of Burnside*, 777 S.W.2d 660, 663 (Mo. Ct. App. 1989) (“A ceremonial marriage is valid notwithstanding that it is not consummated by coition.”).

²³⁴ See, e.g., Ohio R.C. § 3105.31; see also *Darling v. Darling*, 335 N.E.2d 708, 710 (Ohio Ct. App. 1975) (“A nonconsummated marriage is not void ab initio, but merely voidable.” (citations omitted)). This may require a finding of fault by the defendant. *Lang v. Reetz-Lang*, 488 N.E.2d 929, 931 (1985).

²³⁵ See *Blair v. Blair*, 147 S.W.3d 882 (Mo. App. 2004).

²³⁶ Max Rheinstein, MARRIAGE STABILITY, DIVORCE AND LAW 95 (1972).

²³⁷ See, e.g., David B. Perlmutter, J.D., *Incapacity for sexual intercourse as ground for annulment*, 52 A.L.R.3d 589 §§ 3[b] & 4 (1973) (last revised July 14, 2012); *Manbeck v. Manbeck*, 489 A.2d 748 (1985).

²³⁸ See, e.g., James Lockhart, J.D., *Cause of Action to Annul Marriage*, 29 CAUSES OF ACTION 431 (1992) (last updated July 2012). Relatedly, courts have tended to consider the ability to sexually consummate the marriage, but not the (in)ability to procreate, as relevant to whether transsexuals could legally marry. See, e.g., *M.T. v. J.T.*, 355 A.2d 204, 211 (App. Div. 1976).

²³⁹ *Matter of Peterson*, 12 I. & N. Dec. 663 (BIA 1968) (“Where a marriage has been duly solemnized in accordance with the laws of the place where it is performed, the marriage comes into existence at that moment regardless of whether it is followed by sexual intercourse.”); *Whetstone v. Immigration & Naturalization Serv.*, 561 F.2d 1303 (9th Cir. 1977).

²⁴⁰ See 8 U.S.C. § 1101(a)(35).

2) *Marriage's Disparate Impact.*

Marriage confers numerous benefits and responsibilities, some of them unique to marriage and some merely obtained efficiently through marriage.²⁴² Fewer asexuals marry than sexuals, most studies suggest.²⁴³ For instance, Bogaert found that approximately twice as many sexuals as asexuals were married.²⁴⁴ If true, then marriage law has a disparate impact on asexuals. That said, asexuals can marry and do marry, particularly those who identify as romantic asexuals. Asexuals may increasingly choose to marry (perhaps especially each other²⁴⁵) if they continue to self-identify and grow as a movement. The link between marriage and being a sexual person therefore should not be overstated here, but some disparate impact is hard to ignore.

3) *Looking Beyond Conjugal.*

Aces may also be prime candidates for the movement to abandon marriage as a legal institution or to replace it with any number of alternatives organized around a principle other than conjugality.²⁴⁶ The many alternatives that scholars and activists have examined include privileging dyadic caregiver relationships,²⁴⁷ recognizing friendships or other close familial and non-familial relationships,²⁴⁸ moving to a contractarian regime,²⁴⁹ or replacing marriage with a similar domestic partnership or civil union regime.²⁵⁰ Important recent work shows how our law's privileging of sex in the context of intimate relationships "devalues both sexual relationships that lack an intimate component and intimate relationships that lack a sexual component."²⁵¹ These debates over marriage and its alternatives, which I have considered at length elsewhere, therefore have an important, if not a unique, relation to asexuality.²⁵²

²⁴² See, e.g., *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003) (listing benefits and responsibilities).

²⁴³ See *supra* Section II.A.

²⁴⁴ See Bogaert (2004), *supra* note XX.

²⁴⁵ Cf. *infra* Section II.C.4.e (discussing the advantages to asexuals, like homosexuals, of desiring one's own kind on the orientation-object axis).

²⁴⁶ Cf. *Beyond Conjugal*; Laura A. Rosenbury & Jennifer E. Rothman, *Beyond Intimacy* 2 (Sept. 8, 2008) (unpublished manuscript, on file with the Harvard Law School Library).

²⁴⁷ MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) (arguing for vertical parent-child dyads to replace horizontal intimate dyads as the privileged state relationship, and replacing marriage with contractual arrangements).

²⁴⁸ See, e.g., Ethan J. Leib, *Friendship and the Law*, 54 U.C.L.A. L. REV. 631 (2007); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007).

²⁴⁹ See, e.g., Emens, *Regulatory Fictions* (discussing contractarian alternatives, *inter alia*); *but cf.* Carol Sanger, *A Case for Civil Marriage*, 27 Cardozo L. Rev. 1311 (2006) (expressing skepticism about the ability of a contract law regime to adequately replace marriage law).

²⁵⁰ See, e.g., BEYOND CONJUGALITY; Mary Lyndon Shanley, *Afterword*, in *Just Marriage* 109 (Joshua Cohen & Deborah Chasman eds., 2004).

²⁵¹ Laura A. Rosenbury & Jennifer E. Rothman, *Sex in and out of Intimacy*, 59 EMORY L.J. 809, 811 (2010).

²⁵² See Elizabeth F. Emens, *Regulatory Fictions: On Marriage and Counter-marriage*, 99 CAL. L. REV. (2011); Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004).

B. Sexual Privacy: The Architecture of Our Lives

1) *Nudity Restrictions: What Our Clothing Hides.*

Our world is arranged in multifarious ways around the assumption of (hetero)sexual desire. Consider clothing. It particularly covers parts deemed relevant to sexual feelings and activity. This is most obvious with bathing suits, which cover genitals and female, but not male, nipples. In cold weather climates, the sexual architecture of our clothing is less obvious, but we still have special undergarments for the special sexual parts. What, we might ask at this juncture, would clothing designed by aces look like?²⁵³

The social expectations for our clothing are inscribed in our laws. Most, if not all, U.S. jurisdictions have a statute prohibiting public lewdness or indecency,²⁵⁴ which consists of intentionally exposing one's "private parts" to public view.²⁵⁵ What are private parts? In addition to male and female genitalia, private parts include, in most jurisdictions, female but not male breasts.²⁵⁶ As set forth in New York law, "For purposes of this section, the private or intimate parts of a female person shall include that portion of the breast which is below the top of the areola."²⁵⁷ Because female breasts are an "erogenous zone," baring them in public is a violation of the criminal law.²⁵⁸ There is a common exception to this criminal prohibition, though: breastfeeding. About half the states exempt breastfeeding in public from the criminal lewdness law.²⁵⁹ This permissiveness about public breastfeeding does not, however, translate into the same freedom in workplaces, which is a source of current controversy.²⁶⁰ But in the public square, there is often an exception to nudity restrictions for that use of the breast that is not considered to be sexual. (This is in spite of various writing documenting some women's experience of breastfeeding as erotic.²⁶¹) The breast, like the genitals, is generally assumed to be sexual—and thus indecent if exposed—except for a partial maternal carve-out.

²⁵³ I thank Kimberly Walters for this question.

²⁵⁴ 95 A.L.R.5th 229, at *10 (Originally published in 2002).

²⁵⁵ 6A McQuillin Mun. Corp. § 24:112 (3rd ed.).

²⁵⁶ 67 A.L.R.5th 431 (Originally published in 1999).

²⁵⁷ N.Y. Penal Law § 245.01 (McKinney).

²⁵⁸ 67 A.L.R.5th 431, at *6 (Originally published in 1999).

²⁵⁹ Emily F. Suski, *In One Place, But Not Another: When the Law Encourages Breastfeeding in Public While Simultaneously Discouraging it at Work*, 12 UCLA WOMEN'S L.J. 109 (Fall/Winter 2001).

²⁶⁰ See, e.g., *Burgbacher v. Rocky Mt. Academy of Evergreen*, ACLU Case No. 2011-04, <http://aclu-co.org/case/burgbacher-v-rocky-mountain-academy-of-evergreen>; see also Suski, *supra* note XX, at *115-*117.

²⁶¹ See, e.g., Iris Marion Young, *Breasted Experience: The Look and the Feeling*, in ON FEMALE BODY EXPERIENCE 75, 87 (2005); Rosenbury & Rothman, *supra* note XX, at 855.

2) *Sexual Confinement: Female and Male or Sexual and Asexual Spheres?*

Much of our physical architecture is divided up by sex—male and female—on an implicit presumption of sexual desire between the two. We can see this across numerous contexts: bathrooms, locker rooms, dressing rooms, camp cabins, and prisons, for example. Most of us encounter sex-segregated spaces every day. Problems with this structural feature of our lives have been observed and examined elsewhere: it burdens trans and other people who do not identify as male or female; it assumes that desire travels across sex; it stereotypes the sexes right down to the emblems typically used to represent men and women on bathroom doors.²⁶² An asexual perspective also shows up the extent to which this segregation organizes us around (our presumptive) sexual desire.

These structures of sex(ual) segregation look particularly curious in light of one unusual variation on them: the special unit for gay inmates in the LA County Jail.²⁶³ Russell Robinson recently published a compelling account of the jail's practices for selecting who is gay enough to qualify for the jail.²⁶⁴ What does this special jail look like through the lens of asexuality? Not particularly appealing, in its current incarnation. Though the special unit aims to protect gay inmates from predators, it also sets up a space organized around the sexuality of the inhabitants, whose (gay) orientation is (superficially at least) towards each other (as men). The unit recognizes the possibility of sexual activity, distributing condoms.²⁶⁵ An asexual might also like sexual-orientation-based segregation, but organized around the umbrella categories of sexual and asexual. Then again, any other inmate concerned about sexual victimization might also prefer to be in the asexual prison, leading to the selection problems allegedly faced by the LA County Jail.²⁶⁶ Moreover, separating the jail into sexual and asexual units presumes that sexual people know, when they're entering prison, whether they're going to want to have sex there.²⁶⁷ Answers are elusive here, but thinking about this scenario raises a host of interesting questions—about the potential for affinities among asexuals, about predatory affinities for asexuals, and about platonic (self-protective) affinities for asexuals. This last topic brings us to our final sexual law context.

²⁶² See, e.g., Mary Anne Case, *Why Not Abolish the Laws of Urinary Segregation?*, <http://www.law.uchicago.edu/files/files/tperae.pdf>; see also Mary Anne Case, *All the World's the Men's Room*, 74 U. CHI. L. REV. 1655 (2007); Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U.L. REV. 133 (2010).

²⁶³ K6G is also for trans inmates, but much of the emphasis among the selecting deputies, and therefore in Robinson's work, appears to be on gay inmates; this is my focus here as well.

²⁶⁴ Russell Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309 (2011).

²⁶⁵ The jail only distributes one condom per week per inmate, however. For a discussion of some possible implications of this, see Elizabeth F. Emens, *Inside Out*, 2 CALIF. L. REV. CIRCUIT 95 (2011).

²⁶⁶ Of course people have sex—in prison and elsewhere—for many reasons other than desire. Being housed in an asexual jail would be no guarantee against sexual predation.

²⁶⁷ On situation-specific homosexuality, see Robinson, *supra* note XX.

3) Asexy Nurses: Sexual Carve Out or Asexual Employment Opportunity?

“So the World Government was making a two-pronged attack on overpopulation. One pronging was the encouragement of ethical suicide, which consisted of going to the nearest Suicide Parlor and asking a Hostess to kill you painlessly while you lay on a Barcalounger. The other pronging was compulsory ethical birth control. . . . [E]thical birth-control pills, the only legal form of birth control, made people numb from the waist down. . . . All Hostesses were virgins. They also had to hold advanced degrees in psychology and nursing. They also had to be plump and rosy, and at least six feet tall. . . . The truth was, of course, that sex was the last thing that any Hostess ever had in mind.”

—Kurt Vonnegut, *Welcome to the Monkey House*²⁶⁸

Sexual privacy also creates a special carve-out to employment discrimination law. In general, Title VII does not defer to customer preferences that contravene its prohibition on “discrimination against any individual . . . because of such individual’s . . . sex,”²⁶⁹ such as airlines that want to hire only female flight attendants because customers prefer it.²⁷⁰ Nonetheless, the “privacy” interests of customers have been invoked to uphold sex-based discrimination in contexts such as “labor and delivery rooms, mental hospitals, youth centers, washrooms, and nursing homes.”²⁷¹ For example, the privacy of laboring mothers has been cited to justify hospitals’ refusals to hire any qualified male nurses in labor and delivery rooms.²⁷² Trenchant critiques have been offered of this doctrine and its structure.²⁷³ Among them is the point just discussed, about the heterosexual presumption of privacy law.²⁷⁴

This privacy exception seems inadequate for anyone actually wishing to avoid a sexual gaze (and not just a male-on-female gaze, which is clearly an axis here as well²⁷⁵). Someone of the same sex could also emit a desiring gaze. But through the lens of asexuality, we see not only the heterosexual presumption of this legal exception, but also the sexual presumption. Within the logic of this privacy doctrine, perhaps the best defense of the sex-based exclusion is that someone needs to do this job, and since most

²⁶⁸ Kurt Vonnegut, *Welcome to the Monkey House*, in *WELCOME TO THE MONKEY HOUSE* 28, 28-31 (Dell, 1973).

²⁶⁹ 42 U.S.C. § 2000e-2(a).

²⁷⁰ See, e.g., *Wilson v. Southwest Airlines*, 517 F. Supp. 292 (N.D. Tex. 1981); *Diaz v. Pan American World Airways, Inc.*

²⁷¹ Amy Kapczynski, Note, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1259 (2003) (citations omitted).

²⁷² Kapczynski, *supra* note XX, at 1259 (citing *EEOC v. Mercy Health Ctr.*, 29 Fair Empl. Prac. Cas. (BNA) 159 (W.D. Okla. 1982); *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191 (E.D. Ark. 1981), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982)).

²⁷³ Though only her student Note, Kapczynski’s article is particularly incisive.

²⁷⁴ Kapczynski, *supra* note XX, at 1287.

²⁷⁵ See Kapczynski, *supra* note XX.

people (think they) are straight, excluding the opposite sex has the better chance of excluding the desiring gaze.²⁷⁶

An asexual patient wishing not to be exposed to desiring eyes would, in principle, prefer an asexual nurse to a sexual nurse of either sex.²⁷⁷ For that matter, though, so might many other people. The Vonnegut story quoted in the epigraph sets up asexual nurses as inherently, underneath it all, waiting to be violated, and the real patients, underneath it all, as dying to violate them. But it might well be that many people would prefer, more than any restrictions based on sex (as in male versus female), the opportunity to request asexual nurses—or “asexy” nurses, in the slang of the asexual community—and, for that matter, asexy doctors, asexy airport security, asexy police officers, and so on.²⁷⁸ Perhaps an employment niche has emerged that could favor asexual candidates.

C. Sex at Work: Harassment Law and Sex Work

1) *Express Disavowal: Sexual Harassment Law.*

Broadly speaking, asexuals appear to be beneficiaries of sexual harassment law. In a relatively short period of time, the law in this area has irreversibly changed our understanding of a set of workplace interactions. Sexual interactions once commonplace have now become inconceivable to many people.²⁷⁹ This is one area where—for better or worse, depending on whom one asks—law has undoubtedly had an impact on culture.²⁸⁰ In the context of sexual harassment, as with many other things, “It is hard to unthink what you know.”²⁸¹

For people who don’t feel sexual attraction, the introduction of laws that deter some subset of sexual behavior or expressions of sexual desire in the workplace would appear to be a welcome change. Vicki Schultz and others have decried the “sanitized workplace” resulting from sexual harassment law.²⁸² But to those who feel little or no sexual attraction, a sanitized workplace might well look pretty good.²⁸³

²⁷⁶ There are of course all kinds of problems with this argument, starting with the fact that it is only male nurses, not male doctors, who are excluded from delivery rooms.

²⁷⁷ As we know, asexuals are not necessarily indifferent to sex/gender, so this is not certain. And gender as well as sexuality is clearly at play in this privacy exception.

²⁷⁸ Moreover, asexual job candidates could offer a way around the demand for women or men in these roles and therefore avoid a legal tangle with the high bar for sex-specific hiring, the bona fide occupational qualification analysis. See *infra* Section C.

²⁷⁹ *Id.*

²⁸⁰ See, e.g., DIRECTIONS IN SEXUAL HARASSMENT LAW (Catharine A. MacKinnon & Reva B. Siegel eds., 2003).

²⁸¹ Catharine A. MacKinnon, *Sexual Harassment: Its First Decade in Court* (1986), reprinting from FEMINISM UNMODIFIED (1987).

²⁸² Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003); see also Janet Halley, *Sexuality Harassment*; Katherine Franke; Rosenbury & Rothman, *supra* note XX, at 865.

²⁸³ Asexuals often complain about the deluge of sexual themes and content throughout our culture. See, e.g., Throne Eins, July 15, 2008, <http://www.asexuality.org/en/index.php?/topic/32908-some-blunt->

Asexuality has even been mentioned by the Supreme Court in a case in this area. Paradoxically, this explicit mention is an example of how asexuals are written out of law. In *Oncale v. Sundowner Offshore Services, Inc.*, which held that same-sex harassment could be “because of sex” and thus actionable, Scalia tells us that “the prohibition of harassment on the basis of sex requires *neither asexuality nor androgyny* in the workplace; it forbids only behavior so objectively offensive as to alter the conditions of the victim’s employment.”²⁸⁴ Of course Scalia doesn’t mean the identity asexual, as discussed in this article, but his use of the word here points us to something interesting about an asexual lens on sexual harassment law. Scalia’s lines reflect the pervasive sense that the law in this area is a trade-off, where we endure extensive limitations on sexual expression in the workplace in the interest of protecting vulnerable parties from unwelcome sexual content. The asexuality perspective highlights, from a different angle than the sex-as-danger feminists do,²⁸⁵ how the framing of this debate *assumes* that sexual expression and interaction are a social and individual good. Courts’ particular emphasis on punishing *sexual* content has been criticized by Schultz,²⁸⁶ at least in part because courts’ “desire dominance paradigm” leads employers to strip the workplace—where we spend so much of our lives—of a vital part of our being.²⁸⁷

Scalia’s line from *Oncale* about asexuality illuminates controversial aspects of sexual harassment law: namely, the unwelcomeness requirement and the objective prong of the hostile work environment analysis. On the first, scholars have criticized the requirement that a plaintiff prove that the alleged harassment was *unwelcome*, as if some harassment is *welcome*.²⁸⁸ A challenge for these scholars is addressing the assumed fact that some sexual attention is desired by everyone in some context; in this light, critics ask, how should a supposed harasser, or a judge after the fact, know which attention is not desired?²⁸⁹ Asexuality belies that assumption of universal sexual interest. On the second, much writing has critiqued the reasonable person standard in this and other contexts. Sexual harassment law confronts the particular problem of deciding whose perspective is used to determine whether conduct is “objectively offensive.”²⁹⁰ Here,

questions/ (“I get annoyed when I watch movies or tv shows or read books and there’s pointless sex crammed in there because it’s not ‘normal’ for people, even fictional ones, to not engage in sexual practices.”).

²⁸⁴ See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998) (emphasis added).

²⁸⁵ On the so-called sex wars between feminists who emphasize sex as pleasure and those who emphasize sex as danger, see, for example, CAROLE S. VANCE, *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* (1993); Katherine M. Franke, *Theorizing Yes*, 101 COLUM. L. REV. 181 (2001).

²⁸⁶ Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998) (contrasting courts’ troubling emphasis on sexual desire with the frequently overlooked problem of gender-based harassment that undermines workplace competence).

²⁸⁷ Schultz would prefer that courts target harassment that undermines an employee’s workplace competence on the basis of gender, rather than focusing on whether an alleged harasser expressed desire. *Id.*

²⁸⁸ See, e.g., Grace S. Ho, *Not Quite Rights: How the Unwelcomeness Element in Sexual Harassment Law Undermines Title VII’s Transformative Potential*, 20 YALE J.L. & FEMINISM 131, 139, 157 (2008). I thank Bridget Crawford for flagging the unwelcomeness issue.

²⁸⁹ Cf., e.g., *Miller v. Bank*, 418 F. Supp. 233, 236 (N.D. Cal. 1976), rev’d, 600 F.2d 211 (9th Cir. 1979).

²⁹⁰ *Oncale*, 523 U.S. 75 (1998).

some courts and scholars have argued that we should have something closer to a “reasonable woman” standard for sexual harassment law, to counteract the implicit (and historic) “reasonable man” standard that courts may otherwise employ.²⁹¹ Whatever the merits of these arguments, what Scalia’s remark in *Oncale* indicates is that we have a reasonable *sexual* person standard. The whole structure of the tradeoffs we imagine sexual harassment law to attempt to balance (successfully or not) assumes some reasonable level of sexual interaction, which is greater than zero. This is understandable, as most people apparently are sexual, but the perspective of asexuality casts a new light on these debates.

2) *The Sex Work Debates: Through an Asexual Lens.*

The preceding discussion presumes that asexuals have more interest in avoiding sexual attention than do sexuals. It might well be, on the contrary, that for some asexuals, other people’s sexual desires are a matter of indifference, something to be ignored or tolerated rather than avoided. (This possibility comes into focus if we ask the question of who is most bothered by sexually provocative clothing in the workplace: typically someone who finds it arousing and therefore distracting.) Some asexuals report being annoyed or aggravated by sexual content, but others just consider it meaningless noise.²⁹² The possibility of people who truly don’t care about sex could call into question some commonplace assumptions, not only in sexual harassment law, but in other domains, like sex work.

On the one hand, some people might be more troubled by sex work performed by people who never desire sex. On the other hand, if the sex worker has no desire to experience sex on different, non-commodified terms, other people might find it easier to see sex as simply a job, without anything inherently degrading about it.²⁹³ The latter view would be consistent with work by Martha Nussbaum and others who argue that sex is not inherently more demeaning than many other kinds of physically intense or tiring work, such as plucking chickens.²⁹⁴

Relatedly, one might think here of the literature suggesting that lesbians are disproportionately represented in erotic dancing and other forms of sex work for male consumers.²⁹⁵ Some researchers, such as the one quoted here, argue that lesbians are better candidates for this work because of how they feel about it:

²⁹¹ See, e.g., *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995) (“Whether the workplace is objectively hostile must be determined from the perspective of a reasonable person with the same fundamental characteristics.”).

²⁹² See *supra* Part II.

²⁹³ On the commodification debates, see, for example, Martha Ertman & Joan C. Williams, *Rethinking Commodification* (2005).

²⁹⁴ See Martha C. Nussbaum, “*Whether from Reason or Prejudice*”: *Taking Money for Bodily Services*, 27 J. LEGAL STUD. 698 (1998).

²⁹⁵ The popular claims to this effect are legion, but hard data are hard to come by. On the popular side, Truman Capote famously remarked, “It’s a well-known fact that *most* prostitutes are Lesbians—at least 80 percent of them, in any case. And so are a great many of the models and showgirls in New York; just off

I discovered that many lesbians and bisexual women choose to work in the sex industry because they are not attracted to men. Lesbian informants shared that they felt dancing was easier for them than it would be for a heterosexual woman because they can sustain a clearer boundary between the work of feigning desire for men and the more “authentic” desire they feel for women.²⁹⁶

These lines point toward an argument that might apply even more robustly to asexuals than to lesbians²⁹⁷: That is, sex work need not look as troubling if it has no overlap with something one considers meaningful. None of this is an argument for encouraging asexuals to enter sex work, nor do I mean to suggest that many asexuals would find this an appealing job. Nor does this resolve the many complicated issues—including concerns about exploitation, consent, safety and public health—surrounding the criminalization or regulation of sex work.²⁹⁸ Instead, the point is only that the sex work debates look rather different when considered in light of the fact that there are some people who, contrary to the assumptions of our sexual world, simply do not see sex as anything special.

IV. ASEXUAL LAW

“It’s funny to think about. You know, you’ve got the gays marching for the right to be cocksucking homosexuals, and then you have the asexuals marching for the right to—not do anything. Which is hilarious. Look, you didn’t need to march for that right. You just need to stay home, and not do anything.”

— Dan Savage²⁹⁹

These lines from Dan Savage imply that asexuals don’t need anything from the law. His words, though comic, prompt a series of more sober questions: For starters, was Savage right? Do asexuals need nothing from law? Or does taking asexuality

the top of my head.” TRUMAN CAPOTE, *TRUMAN CAPOTE: CONVERSATIONS* 142 (1987). On the research side, the better data seem to come from Australia, which legalized sex work in 1992. See Roberta Perkins, *Female Prostitution*, in *SEX WORK AND SEX WORKERS IN AUSTRALIA*, 143, 155 (Roberta Perkins ed., 1994).

²⁹⁶ Bernadette Barton, *Queer Desire in the Sex Industry*, *SEX. & CULTURE*, Fall 2001, at 3, 16; BERNADETTE BARTON, *STRIPPED: INSIDE THE LIVES OF EXOTIC DANCERS*, 169 (2006); see also *Sex Work and Prostitution: Female*, GLBTQ, http://www.glbtq.com/social-sciences/sex_work_female.html (last visited July 14, 2012) (“Lesbians, whose sexuality does not depend upon men, are often better able to separate their private sexual lives from their work in the sex industry, protecting them from some of the psychological damage that straight prostitutes experience.”)

²⁹⁷ The reference to bisexuality makes little sense and, through the elision of bisexuality and lesbianism, the author effectively erases bisexuality. Cf. Yoshino, *Bisexual Erasure*, *supra* note XX.

²⁹⁸ See, e.g., Noah D. Zatz, *Sex Work/Sex Act: Law, Labor, and Desire in Constructions of Prostitution*, 22 *SIGNS* 277 (1997).

²⁹⁹ (A)SEXUAL (Dir. Angela Tucker, 2011).

seriously mean incorporating asexuality into law? What would it even mean to make law *asexual*?

Asexual law, as it were, might be understood in either of two ways. First, asexual law could mean carving out a particular space in law for asexuals, by creating special protections or exceptions. Second, it could mean making our sexual law less sexual for everyone. We might refer to these, respectively, as “static” versus “dynamic” approaches to accommodating asexuality, drawing on a conceptual distinction from disability law.³⁰⁰

The two different approaches would lead to different types of proposals.³⁰¹ For instance, in the marriage law context discussed earlier,³⁰² a static approach could involve complementing marriage with alternative structures that include non-sexual relationships. An example would be Vermont’s “reciprocal beneficiaries” status, which gives some marriage-like benefits to pairs of friends or non-sexual relatives, without altering civil marriage for eligible partners.³⁰³ A dynamic approach, by contrast, would tend toward a more ambitious goal like eliminating civil marriage altogether, in favor of a legal regime that does not symbolically or materially support conjugal relationships at all.³⁰⁴ These different approaches to expanding traditional marriage intersect with lively debates in family law, which have been explored at greater length elsewhere, as noted earlier.³⁰⁵

We can see the novel implications of these competing approaches to asexual law through examples from antidiscrimination law. Here, a static approach could mean protecting asexuals through employment discrimination law, for instance, whereas a dynamic approach might mean eliminating, as much as possible, sexual content from our workplaces and other shared spaces.³⁰⁶ The question then becomes, is either form of legal change desirable?

Important work from sex-positive feminism urges us to be wary of interventions that unduly suppress sexual expression, both because sexuality is a source of pleasure for many people and because its suppression can particularly burden marginal individuals.³⁰⁷

³⁰⁰ See Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 894 (2008) (“The static model of accommodation understands accommodation as a special thing done for one or a few individuals, for a subset of the population, to make it possible for those different individuals to participate in, for example, the workplace. In contrast, the dynamic model of accommodation understands accommodation as a process of interrogating the existing baseline, by focusing on part of the population that was neglected in the creation of that baseline, to make changes to that baseline that may affect everyone.”).

³⁰¹ Of course, there is overlap and interplay between the static and dynamic approaches; they are not mutually exclusive, but as a matter of intention, they usefully distinguish different kinds of proposals.

³⁰² See *supra* Part III.

³⁰³

³⁰⁴ This could involve, for instance, a domestic partnership regime, or a functional approach to families or households, that disregards sexual activity, *see, e.g.*, Beyond Conjugal; or leaving horizontal relationships to private contract, *see, e.g.*, Fineman, *supra* note XX.

³⁰⁵ See *supra* Section III.A.

³⁰⁶ Cf. Case, *supra* note XX; *supra* text accompanying notes XX and XX (discussing this argument). As noted earlier, however, eliminating sexual content is a result that many asexuals would not favor. See *infra; supra*.

³⁰⁷ See, *e.g.*, Halley, *Sexuality Harassment*, *supra* note XX; Franke, *Theorizing Yes*, *supra* note XX; Vicki Schultz, *The Sanitized Workplace*, *supra* note XX; Vance, *supra* note XX.

In addition, it is not clear that desexualizing the workplace would be an appealing agenda to many asexuals.³⁰⁸ Some asexuals may be less, not more, bothered by sexual content than sexuals, since it does not excite them.³⁰⁹ Moreover, as noted earlier, many asexuals are vocal supporters of other people's sexual expression and make common cause with polyamorists and other sex-positive groups, on the basis that we should all be free to pursue our sexual or asexual affinities, even if they do not fit dominant cultural expectations.³¹⁰ For these and other reasons, this article does not pursue the more ambitious, dynamic approach to accommodating asexuality, which would attempt to make our laws less sexual in general. The focus of this Part is instead on the merits and the practical potential for the more modest intervention of laws protecting asexuals from workplace discrimination.

Is antidiscrimination law protection for asexuals a good idea? One jurisdiction has explicitly included asexuality within its antidiscrimination law: New York's Sexual Orientation Non-Discrimination Law defines "sexual orientation" to encompass asexuality. This Part begins by telling the story of that legislative innovation, before considering the question of whether other states or the federal government should follow suit.

Sexuals often assume that asexuals face no discrimination, as the epigraph from Dan Savage dramatically suggests.³¹¹ Because asexuals have faced no punitive legal regime comparable to that of homosexuals, the assumption is that asexuals should not need help from the law; after all, Savage says, they simply want to "not do anything."³¹² Interestingly, however, recent research on discriminatory bias suggests that heterosexuals show similar levels and types of bias against asexuals, and sometimes even more bias, than against gays and bisexuals.³¹³ As this Part discusses, these data combine with other considerations to lead to the conclusion that a plausible argument can be made for antidiscrimination protection for asexuality. But even if a normative case can be made, there is a widespread intuition that asexuality just doesn't fit with existing antidiscrimination law.³¹⁴ This Part concludes by unpacking this intuition, with the aim of illuminating both asexuality and the field of antidiscrimination law. Legal protections against discrimination track whether a category meets a combination of eight criteria, I argue, few of which are currently met by asexuals, though that could change with time.³¹⁵

³⁰⁸ Though it would be for some. *See, e.g., Was I Fired Because of My Asexuality?*, *supra* note XX.

³⁰⁹ *See supra* Section III.C (discussing sexually provocative clothing).

³¹⁰ *See supra* notes XX.

³¹¹ *See supra* text accompanying note XX.

³¹² *Id.*

³¹³ *See infra* Section IV.A.

³¹⁴ *See infra* Section IV.C.

³¹⁵ *See infra* Section IV.C.4.

A. Asexuals Enter Law: New York's Unique Antidiscrimination Law

One jurisdiction has explicitly recognized asexuality in its law. New York's Sexual Orientation Non-Discrimination Act (SONDA) defines "sexual orientation" as "heterosexuality, homosexuality, bisexuality or asexuality, whether actual or perceived."³¹⁶ New York is the first, and so far the only, jurisdiction in the world to protect asexuality.³¹⁷ The story behind this aspect of SONDA has not been written. Indeed, several of the key players in the legislation whom I consulted told me that I was the first person who had ever asked about asexuality's presence in the law.³¹⁸

Asexuality was introduced not in response to any asexual organizing or any individual asexual. The legislative history is silent on the meaning of asexuality in the law,³¹⁹ but according to individuals who were involved in the passage of the legislation,³²⁰ the category of "asexual" was introduced into the SONDA bill, along with "heterosexual," to broaden the perceived scope of the bill beyond gays.³²¹ The original version of the SONDA bill protected "sexual preference."³²² According to former Assemblyman Steve Sanders, who was the bill's sponsor, some assembly members contacted him to say that the term was problematic because it implied that sexuality was a choice.³²³ In the same period, several people involved in the work on SONDA told me, opponents were casting the law as "special rights" legislation for gays³²⁴ and claiming it would "permit all kinds of sordid homosexual activity."³²⁵

In the late 1980s,³²⁶ in response to these arguments, the bill's proponents rewrote the language to cover "sexual orientation" and included in its definition "heterosexuality"

³¹⁶ "The term 'sexual orientation' means heterosexuality, homosexuality, bisexuality or asexuality, whether actual or perceived." NY Sexual Orientation Non-Discrimination Act (SONDA), N.Y. Exec. Law § 292 (McKinney 2011).

³¹⁷ Vermont's Human Rights Commission has also issued a pamphlet defining "sexual orientation" to include asexuality, but the legislature has not acted to codify this change. See http://hrc.vermont.gov/sites/hrc/files/pdfs/harassment%20docs/gender_sex_sexual_orientation_definitions.pdf ("Sexual Orientation (a protected category in Vermont) [:] Gay, Lesbian, Bisexual, Heterosexual, Asexual [:] Sexual orientation is who you are emotionally and sexually attracted to: opposite sex, same sex, both sexes, or neither."). Some sources suggest that Australia offers protection for asexual, but further investigation reveals that asexuality appeared only in draft legislation.

³¹⁸ See, e.g., Telephone conversation with Ross Levi (Feb. 3, 2012) (notes on file with author); Telephone conversation with Steve Sanders (Feb. 10, 2012) (notes on file with author).

³¹⁹ See NY Sexual Orientation Non-Discrimination Act (SONDA), http://www.ag.ny.gov/bureaus/civil_rights/sonda_brochure.html.

³²⁰ I am very grateful to Suzanne Goldberg for helping me contact those involved in drafting and passing the legislation.

³²¹ Telephone conversation with Steve Sanders (Feb. 10, 2012) (notes on file with author); Telephone conversation with Ross Levi (Feb. 3, 2012) (notes on file with author).

³²² Sanders, *supra* note XX.

³²³ Sanders, *supra* note XX.

³²⁴ Levi, *supra* note XX; Sanders, *supra* note XX.

³²⁵ Email from Dick Dadey (Feb. 8, 2012) (copy of file with author).

³²⁶ Email from Libby Post (Feb. 16, 2012) (copy of file with author) ("When the non-discrimination bill was first introduced in 1985 it was sexual preference. By the time I got directly involved with hate crime legislation is 1989 it was sexual orientation.").

as well as “asexuality.”³²⁷ The purpose was to say that “this isn’t a law to protect gay people” because it protects everyone,³²⁸ and this is “not about sex but orientation.”³²⁹ There wasn’t a “specific purpose” to protect asexuals; rather, the proponents were “just going through the categories of what [we] considered to be sexual,” “trying to include more and a lot of categories of how people express themselves sexually, or don’t express sexuality.”³³⁰ “There wasn’t any particular case,” Sanders remembers. “It was just a category; we decided it was a category.”³³¹

“I’d like to tell you that we were visionary,” Assemblyman Sanders remarked when I brought up the subsequent development of an asexual rights movement.³³² But Sanders declined to claim such a vision. And others were adamant that the language was not about asexuals: “Please don’t let this feed some ‘asexuals were there from the start’ story line. If it was true—yes—but in all my dealings with every part of our movement no one has ever identified her/himself as an asexual.”³³³ It is clear, then, that asexuality was included in SONDA for rhetorical and political purposes related to gay rights, and not because of any salient asexual person or activism.

That said, Assemblyman Sanders remarked that he never considered it “controversial” that some people are asexual.³³⁴ Sanders may also have been the one to have thought of including asexuality in the law.³³⁵ His recognition of asexuality as a category of sexual orientation is therefore notable. Even if the aim of including asexuals wasn’t to address any particular individual or movement, the possibility of protecting real people whose identity is asexual wasn’t outside the contemplation of at least one of the key players in the legislation. This is interesting in light of so many people’s skepticism at the very idea of asexuality, as discussed earlier.³³⁶

No cases have been published or, according to those I consulted, even filed under SONDA on the basis of asexuality.³³⁷ The next Section considers what asexuality-based claims might look like, as part of addressing whether our laws should permit them.

³²⁷ Sanders, *supra* note XX.

³²⁸ Dadey, *supra* note XX (“It wasn’t [the idea of] anyone within our movement, but rather straight legislative allies who were trying to combat the opposition’s statements that this was about protecting behavior and not orientation and trying to be ‘inclusive’, of whom, I don’t know.”).

³²⁹ Dadey, *supra* note XX.

³³⁰ Sanders, *supra* note XX.

³³¹ Sanders, *supra* note XX.

³³² Sanders, *supra* note XX.

³³³ Email from Matt Foreman (Feb. 8, 2012) (copy of file with author). Foreman also remarked, at the outset of the inquiry, “I do know it wasn’t because of asexual activists storming the gates!” *Id.*

³³⁴ Sanders, *supra* note XX.

³³⁵ Sanders, *supra* note XX (responding to the question of who actually had the idea to include “asexuality” by saying, “I don’t know. It might have been me. . .”).

³³⁶ See *supra* Part II.

³³⁷ This is consistent with what everyone I consulted indicated as well as my own investigations. E.g., Foreman, *supra* note XX (“It never came up in a serious way during my tenure.”).

B. The Stakes of Recognition: Should Asexuality Be Protected?

New York law's formal incorporation of asexuality raises the question of whether other states or federal law should follow its lead. Twenty-one states and the District of Columbia offer antidiscrimination protection on the basis of sexual orientation,³³⁸ with nearly all defining it to include heterosexuality, homosexuality, and bisexuality.³³⁹ And while federal law does not cover sexual orientation, the versions of the proposed Employment Non-Discrimination Act (ENDA) currently in the House and Senate define the protected "sexual orientation" to mean only "homosexuality, heterosexuality, or bisexuality."³⁴⁰ Should ENDA and laws in other jurisdictions embrace asexuality within their ambit? This Section considers that question.

1) Discrimination Against Asexuals.

A common response, when people encounter the idea of asexuality, is to suppose that it does not inspire discrimination. Why, one might ask, would anyone discriminate against an asexual? Asexuals don't pose any sexual risk; they aren't (a)sexual predators, forcing others to participate in their deviant practices. Indeed, they don't, as a group, represent any physical practices at all, and thus they seem unlikely to trigger disgust.³⁴¹ They don't violate religious prohibitions, at least not in the way that homosexuals or

³³⁸ CAL. GOV'T CODE § 12926(r) (WEST 2012); COLO. REV. STAT. ANN. § 24-34-301(7) (WEST 2012); CONN. GEN. STAT. ANN. § 46a-81a (WEST 2012); DEL. CODE ANN. TIT. 19, § 710(18) (WEST 2012); D.C. CODE § 2-1401.02(28) (2012); HAW. REV. STAT. § 378-1 (2012); 775 ILL. COMP. STAT. ANN. § 5/1-103(O-1) (WEST 2012); IOWA CODE ANN. § 216.2(14) (WEST 2012); ME. REV. STAT. TIT. 5, § 4553(9-C) (2012); MD. CODE ANN., STATE GOV'T § 20-101(f) (WEST 2012); MASS. GEN. LAWS ANN. CH. 151B, § 3 (WEST 2012); MINN. STAT. ANN. § 363A.03(SUBD. 44) (WEST 2012); NEV. REV. STAT. ANN. § 281.370(3)(c) (WEST 2011); N.H. REV. STAT. ANN. § 354-A:2(XIV-c) (WEST 2012); N.J. STAT. ANN. § 10:5-5(hh) (WEST 2012); N.M. STAT. ANN. § 28-1-2(P)-(Q) (WEST 2012); N.Y. EXEC. LAW § 292(27) (McKINNEY 2012); OR. REV. STAT. ANN. § 174.100(6) (WEST 2012); R.I. GEN. LAWS ANN. § 28-5-6 (WEST 2012); VT. STAT. ANN. TIT. 1, § 143 (WEST 2012); WASH. REV. CODE ANN. § 49.60.040(26) (WEST 2012); WIS. STAT. ANN. § 111.32(13m) (WEST 2012); *see also* National Gay and Lesbian Task Force, *State Nondiscrimination Laws in the U.S.* (Last updated Jan. 20, 2012), available at http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_1_12_color.pdf (last visited July 24, 2012).

³³⁹ The only exceptions are that Minnesota does not define sexual orientation using subcategories, Minn. Stat. Ann. § 363A.03(Subd. 44) (West) (2012), and New York also includes asexuality, N.Y. Exec. Law § 292(27) (McKinney) (2012), as discussed above. In addition, sixteen states and DC also prohibit discrimination on the basis of gender identity or expression, with some including it in the definition of sexual orientation. National Gay and Lesbian Task Force, *State Nondiscrimination Laws in the U.S.* (Last updated Jan. 20, 2012), available at http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_1_12_color.pdf (last visited July 24, 2012).

³⁴⁰ H.R. 1397, <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1397ih/pdf/BILLS-112hr1397ih.pdf>; S.811, <http://www.gpo.gov/fdsys/pkg/BILLS-112s811is/pdf/BILLS-112s811is.pdf>. ENDA has passed neither the House nor the Senate.

³⁴¹ For an argument that disgust is a primary factor in negative responses to homosexuality to this day, see MARTHA C. NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW* (2010).

bisexuals do.³⁴² They don't have any obvious job-related impairment or perceived need for costly accommodations.³⁴³ The fact that no cases have been filed based on asexuality under New York's SONDA seems consistent with this view that asexuality doesn't provoke discrimination.

Interestingly, though, some very recent data suggest that asexuals are disliked and disdained in many of the same ways that homosexuals and bisexuals are, and often to an even greater degree.³⁴⁴ A 2012 study of heterosexual subjects found that, "Attitudes toward homosexuals, bisexuals, and asexuals were more negative than attitudes toward heterosexuals, revealing a sexual minority bias. Within sexual minorities, homosexuals were evaluated most positively, followed by bisexuals, with asexuals being evaluated most negatively of all groups."³⁴⁵ In addition, subjects viewed asexuals as less human than homosexuals and bisexuals.³⁴⁶ Finally, student subjects reported being less willing to hire, or rent to, asexuals than to homosexuals (or heterosexuals).³⁴⁷ These data run contrary to the expectation that asexuals would not face discrimination. Why, then, would there be no cases yet under New York's SONDA? A likely explanation is that very few asexuals are "out" (i.e., open about their asexuality) at work.³⁴⁸ Indeed, the one other, smaller study of discrimination against asexuals suggested that, while asexuals had had few experiences of discrimination at work, the paucity of their discrimination experiences neatly tracked how few of them were out to coworkers or supervisors.³⁴⁹

³⁴² They may come into conflict with religious prescription, however. See *infra* text accompanying note 353.

³⁴³ I highlight *perceived* cost here, because there are reasons to think that the perceived cost of disability accommodations often exceeds the actual cost. See, e.g., Emens, *Integrating Accommodation*, *supra* note XX.

³⁴⁴ Cara C. MacInnis & Gordon Hodson, *Intergroup Bias Toward "Group X": Evidence of Prejudice, Dehumanization, Avoidance, and Discrimination Against Asexuals*, GROUP PROCESSES & INTERGROUP RELATIONS, Apr. 24, 2012, at 1, <http://gpi.sagepub.com/content/early/2012/04/20/1368430212442419>.

³⁴⁵ MacInnis & Hodson, *supra* note XX, at 7 (reporting on a university sample) (emphasis removed); see also *id.* at 11 (reporting similar results from the community sample).

³⁴⁶ MacInnis & Hodson, *supra* note XX, at 7-8 (reporting on the student sample); see also *id.* at 12-13 (reporting on the community sample). Interestingly, whereas the student subjects largely viewed all three minority groups as less human than heterosexuals, the community subjects did not view homosexuals or bisexuals as significantly less human than heterosexuals, but instead saw asexuals alone as less human than members of the other three groups. *Id.* at 12-13.

³⁴⁷ On this metric, among student subjects, bisexuals fared worse than either homosexuals or asexuals (or, of course, heterosexuals). MacInnis & Hodson, *supra* note XX, at 7. Among the community-based subjects, asexuals fared the worst, but the differences among the minority groups were not significant; the only significant finding was that heterosexuals were less willing to hire, or rent to, any sexual minorities than to other heterosexuals. *Id.* at 12-13. Interestingly, religious fundamentalism, in conjunction with other factors, correlated with bias against asexuals, as it does with bias against homosexuals and bisexuals. MacInnis & Hodson, *supra* note XX, at 7. Negative attitudes to all three groups also increased with higher levels of social-dominance orientation and right-wing orientation, based on scales created to measure these orientations, which generally correlated with bias against outgroups. *Id.*

³⁴⁸ Some of the reason for this may be that asexuals are, on average, so young as to have had few work experiences thus far. See AVEN Memo, *supra* note XX; *supra* note 36.

³⁴⁹ In that small study of self-reported experiences, asexuals largely replied "not applicable" to questions about their experiences of anti-asexual discrimination in a range of contexts, such as the workplace. But the results are misleading, since the study also indicated that the subjects were generally not "out" (open about their asexuality) in those contexts, which presumably explains why they found a question about discrimination not applicable to them. Stephanie B. Gazzola & Melanie A. Morrison, *Asexuality: An*

Moreover, without expecting discriminatory impulses to be rational,³⁵⁰ we can conceive of partial answers to the assumption that asexuality wouldn't inspire discrimination. For instance, homosexuals are not only threatening to those they proposition sexually, but also to those who might fear exposure for their own similar tendencies; hence the term "homophobia," which captures a fear of the other in the self. Likewise, asexuality could be threatening to those who fear it in themselves, as discussed earlier in relation to the universalizing model of asexuality.³⁵¹ The fact that many asexuals have sex with themselves, but not with others, could seem a disgusting sexual "lifestyle" to some.³⁵² On the religious front, asexuals' inclinations seem in tension with injunctions like "Be fruitful and multiply," leading to anecdotal reports of asexuals being judged harshly by some strongly religious people.³⁵³ And if asexuals are viewed as less human than other groups, as the recent data suggest,³⁵⁴ then this could affect employers' expectations of performance or desire to interact with asexuals on the job. These kinds of fraught interactions are consistent with the reports by asexuals, discussed in Part II, of feeling repeatedly hurt and frustrated by the expectations of the sexual world, particularly when sexuals doubt the truth or legitimacy of asexuals' identity.

2) *The Desire for Recognition.*

The law is a powerful tool for validating the identity claims of marginal groups.³⁵⁵ In this way, the potential benefits of legal recognition for self-identified asexuals (and those inclined to so identify) are not difficult to see. For a group that struggles to be believed as ingenuous rather than self-deceiving—that wants outsiders to stop assigning

Emergent Sexual Orientation, in *SEXUAL MINORITY RESEARCH IN THE NEW MILLENNIUM* 21, 31-32 (Todd G. Morrison et al., eds., 2012) (reporting on a study of 39 asexual subjects). For example, 92.1% answered "not applicable" to "treated unfairly by co-workers" (the remaining 2.6% said "1-2 times," and 5.3% said "never"), and 100% answered "not applicable" to "treated unfairly by employers or supervisors." *Id.* at 31-32. The authors surmise that N/A means either that "the participant does not have contact with the individual(s) in question (e.g., teachers) or that they believe the item is not applicable to their asexual identity in general." *Id.* at 35. This is a puzzling conclusion, since their own findings suggest that, for example, only 13.6 percent of the subjects were out to "work peers," *id.* at 33, which is 3 subjects—the same number of subjects who supplied any answer other than N/A to the treated unfairly by coworkers question. This supports the conclusion that so many "N/As" reflect the fact that they were not out at work, and perhaps also that they had not otherwise heard work peers make comments about asexuals, which would be unsurprising, since most people apparently haven't heard of asexuality.

³⁵⁰ Cf., e.g., MacInnis & Hodson, *supra* note XX, at 15-16 (noting the frequent irrationality of discrimination).

³⁵¹ Cf. *supra* Section II.C.3 (discussing the possibility of a paradox of prevalence driving negative responses to asexuality).

³⁵² One might think here of Scalia's apparently troubled response to the idea that laws against "masturbation" might fall, in the wake of *Lawrence v. Texas*. See, e.g., Mary Anne Case, *Of This and That in Lawrence*, SUP. CT. REV. (discussing this).

³⁵³ See *supra* Section II.B.

³⁵⁴ See *supra* notes XX (discussing MacInnis & Hodson, *supra* note XX).

³⁵⁵ See, e.g., Nancy Fraser.

reasons for their asexuality “other than asexuality”³⁵⁶—legal classification could usefully rebut the demand for explanations by helping to substantiate asexuality as a minority identity.³⁵⁷ Moreover, the imprimatur of law could help support asexuals’ efforts to reduce the stigma of asexuality by making it seem more legitimate. Finally, increasing legal recognition could generate publicity for asexuality and thus begin to crystallize the identity in the public imagination.

Legal recognition of asexuality would also have implications for people who are not asexual. If asexuality lies on a spectrum,³⁵⁸ then the people with the most to gain from recognition of asexuality are those who feel less than fully identified with the sexual end of the spectrum. These potential gains have three dimensions: publicity, legitimation, and innovation. First, public recognition of asexuality could help draw attention to human variations in the quantity axis of sexual desire, creating publicity for the issue of diminished desire and helping people to recognize it in their own lives.³⁵⁹ Second, legal recognition could help to take some of the stigma and shame out of the experience of having less desire than the cultural norm, both because the law’s imprimatur can seem to confer approval, as noted above, and because broader legal recognition may inspire more asexuals to come out publicly, whether to support these laws or to bring suit.³⁶⁰ Those in the middle of the spectrum may feel more comfortable acknowledging their own fluctuating or diminishing desire, if some group of people claims asexuality with pride.³⁶¹ Finally, more public attention to asexuality might help to generate attention and public support for innovations in relationship forms, such as Boston marriages or other forms of committed friendships, whether or not their participants are asexual per se.³⁶²

It is worth noting that recognition can also come with costs for group members and others. Legal as well as cultural recognition can ossify the group identity, leading to rigid and inflexible boundaries around the group.³⁶³ Relatedly, legal recognition can lead to litigation disputes about who is in and who is out, bolstering particularly narrow

³⁵⁶ Swankivy, Asexuality Top Ten, <http://swankivy.com/writing/essays/philosophy/asexual.html> (last visited Feb. 6, 2012).

³⁵⁷ See *supra* Section II.C (discussing a minoritizing model of asexuality and its potential strategic advantages). More generally, on the desire to stop answering questions about one’s identity, drawing on examples from the disability context, see Emens, *Shape Stops Story*, NARRATIVE.

³⁵⁸ See *supra* Section II.C.

³⁵⁹ See *supra* Section II.D.4 (discussing a quantity axis of sexuality).

³⁶⁰ See *supra* notes XX.

³⁶¹ As noted earlier, the asexuality movement recognizes degrees of asexuality through terms like “gray-A” and “demisexual.” See *supra* notes XX.

³⁶² On the problem of the law’s devaluing of intimate non-sexual relationships, see *supra* Section III.A.C. On Boston marriages, in particular, see the thoughtful and varied contributions to *BOSTON MARRIAGES: ROMANTIC BUT ASEXUAL RELATIONSHIPS AMONG CONTEMPORARY LESBIANS* (Esther D. Rothblum & Kathleen A. Brehony eds., 1993). On committed friendships, see, for example, David L. Chambers, *For the Best of Friends and for Lovers of All Sorts*, 76 Notre Dame L. Rev. 1347 (2001); Ethan Lieb.

³⁶³ A minoritizing conception of asexuality, to use Eve Sedgwick’s term, could force people to choose to identify as asexual or not, rather than having more flexibility to explore the complexities or fluctuations in their identity. Cf. Faderman, *supra* note XX (discussing the historical shift around the recognition of lesbian sexual relationships, which left less room even for nonsexual relationships between women, since they fell under new suspicion of lesbianism).

definitions of group identity.³⁶⁴ This is the double-edged sword of recognition for the group: Just as a group may hope that the positive connotations of legal recognition will bleed into improving cultural status, the group should also worry that rigid definitions and policing of the boundaries of the category can bleed over to confine the social identity. In addition, increasing recognition and even approval of asexuality might give some sexual people an excuse to hide from, or otherwise not explore, their own or their partner's sexuality.³⁶⁵ Although minority recognition can be empowering for some, backlash effects can also bolster stigma or pathological diagnoses and thus increase anxiety about any overlap with the stigmatized identity.³⁶⁶ Finally, growing legal and cultural recognition means a greater opportunity for stereotypes to develop about the group. When few people know about asexuals, theories and misconceptions about them are likely to be fewer and weaker; with growing recognition, groups potentially face more rigid appraisals from outsiders.

3) Legal Implications: Will There Be Any Cases?

In light of the absence of asexuality-based cases brought under New York antidiscrimination law,³⁶⁷ we might reasonably wonder if there are any plausible cases of asexuality-based discrimination. Would asexuals bring employment discrimination cases, or is this debate purely about the politics of recognition?³⁶⁸

We can imagine four types of discrimination against asexuals. The first is animus based. For instance, an employer might not like an asexual because asexuality seems “weird.” Here, asexuality might be like a person's being a vegetarian or a Wiccan; it's sufficiently outside the mainstream that some people will be uncomfortable with its otherness.³⁶⁹ Any number of justifications might be given for this, for instance, that the problem is not asexuality per se but an asexual's decision to talk about it.³⁷⁰ Thus, an

³⁶⁴ See, for example, the vast literature on the struggles over the definition of disability.

³⁶⁵ See *supra* note XX (discussing the possibility that some people claim asexuality in response to sexual abuse, but noting also that the data in this area are mixed). In terms of partners' sexuality, various work emphasizes the ways that female sexuality is more often misunderstood or unappreciated by (often male) partners; one might therefore worry that the availability of an attribution of asexuality to one partner could fall more harshly on women. Cf. *Intimate Discrimination*.

³⁶⁶ These effects may fall more harshly on those who share features of the minority identity but do not have the solace and support of affiliation with the minority community.

³⁶⁷ See *supra* note XX.

³⁶⁸ On the politics of recognition, see Nancy Fraser.

³⁶⁹ Cf. Zachary Kramer, *Of Meat and Manhood*.

³⁷⁰ One might say that we generally don't protect most kinds of weirdness, such as vegetarianism, but only those forms of weirdness that fall on certain axes of identity. In this way, though, asexuality can still be compared to Wiccanism, which is protected as a religion, although an unusual one. Whether asexuality is better thought of as one of the four central sexual orientations—along with heterosexuality, homosexuality, and bisexuality, as Storms hypothesized (see Section I.A)—or whether it is best understood as an umbrella orientation, alongside *sexual* orientation—within which romantics can be oriented towards men, women, or both (see *supra* notes XX (discussing Chasin's point to this effect))—the data discussed earlier suggest that heterosexuals cast similar or more negative aspersions on asexuals than on homosexuals and bisexuals. See MacInnis & Hodson, *supra* note XX; see *supra* text accompanying notes XX.

animus-based claim seems plausible, particularly as more asexuals come out about their identity.

Second, an asexual employee might be harassed or fired for saying she's asexual or merely for behaving asexually. The prototypical version of this may look different for female and male asexuals. For females, the asexuality could be an affront or a challenge to a sexual supervisor (think here of male harassment—or worse—of lesbians for sexually rejecting them³⁷¹). One might imagine the interactions that inspired Swankiv's top 10 list—especially “You just never had me in your bed”—which suggest some number of men who see her professed asexuality as a prompt to assert their desire.³⁷² For males, the asexuality could be a failure of manliness that offends a masculine environment. One might think here of the facts of *Oncale*, where an apparently effeminate man was verbally and physically assaulted by other members of the all-male ship's crew,³⁷³ or more pointedly of *Goluszek v. Smith*, in which a male employee “with little or no sexual experience” who “blushes easily and is abnormally sensitive to comments pertaining to sex” was subjected to taunting vulgarities and physical abuse by male coworkers.³⁷⁴ (Both scenarios could of course occur to the reverse sex, though less stereotypically.) If the harassment met the standard of “sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,”³⁷⁵ then existing sexual harassment law would likely cover the asexual employee, but that is a fairly high bar in most jurisdictions. If, instead, an asexual employee were fired for declining to participate in sexual banter or pranks that were neither severe nor pervasive, then her only recourse (if any) would probably be antidiscrimination protection specific to asexuality.³⁷⁶

Third, with more public awareness of asexuality, stereotypes could develop that would shape job prospects. For instance, because there is apparently a small correlation between autism spectrum disorders and asexuality, asexuals might be stereotyped as having these impairments or being generally awkward in social interactions.³⁷⁷ Employers might also assume that asexuality means a lack of sexual experience, which

³⁷¹ See, e.g., Kavita B. Ramakrishnan, *Inconsistent Legal Treatment of Unwanted Sexual Advances: A Study of the Homosexual Advance Defense, Street Harassment, and Sexual Harassment in the Workplace*, 26 BERKELEY J. GENDER L. & JUST. 291, 320-21 (2011).

³⁷² See *supra* notes XX.

³⁷³ *Oncale v. Sundowner Offshore Svcs.*, 523 U.S. 75 (1998) (holding that same-sex harassment can be “because of sex” and thus sexual harassment, in a fact pattern involving aggressive hazing aboard an all-male ship).

³⁷⁴ *Goluszek v. Smith*, 697 F. Supp. 1452, 1452 (1988); *id.* at 1454 (reporting, inter alia, that “operators periodically asked Goluszek if he had gotten any ‘pussy’ or had oral sex, showed him pictures of nude women, told him they would get him ‘fucked,’ accused him of being gay or bisexual, and made other sex-related comments. The operators also poked him in the buttocks with a stick”).

³⁷⁵ *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 67 (1986).

³⁷⁶ This is a simplified version of the account given here. See *Was I Fired Because of My Asexuality?*, <http://thecupcakeace.wordpress.com/2011/08/10/was-i-fired-because-of-my-asexuality/>. In one case from the 1980s, a plaintiff in such a scenario received relief through contract law by arguing that the termination was against public policy, but the rationale has been criticized, and the result was superceded by statute. *Wagenseller v. Scottsdale Memorial Hospital*, 710 P.2d 1025 (Ariz. 1985); see also A.R.S. § 23-1501 et seq.; *Chaboya v. Am. Nat. Red Cross*, 72 F. Supp. 2d 1081, 1092 (D. Ariz. 1999).

³⁷⁷ On the links to Asperger's, see *supra* notes XX.

could be thought important to certain kinds of jobs, for instance, in therapeutic or mentoring contexts.³⁷⁸ Whether difficulty interacting or a lack of sexual experience is a legitimate basis for job discrimination would depend on the particular job requirements, but neither of these is necessarily linked to asexuality in any given individual. Thus, assuming them for a particular job applicant would likely be impermissible stereotyping under the structure of our employment discrimination laws if asexuality were protected. In theory, there could be jobs for which being “sexual” rather than “asexual” would itself be a bona fide occupational qualification (BFOQ), though it is hard to think of many (legal) ones of this sort.³⁷⁹ Notably, even sex work, in the forms and places where it’s legal, is not an obvious case for the BFOQ of experiencing sexual attraction, as the discussion at the end of Part III suggests.³⁸⁰

Finally, workplace policies that pay for spousal and family benefits could have a disparate impact on asexuals, as they do on single people more generally.³⁸¹ Again, this would be correlation, however, not a necessary connection, since many asexuals partner and have children.³⁸² Moreover, the impact would likely be much less for romantic than aromantic asexuals.³⁸³

4) A Case for Antidiscrimination Protections.

In light of the foregoing, there is an argument for protecting asexuality through employment discrimination law. Research indicates that asexuals face bias comparable to, or greater than, that faced by homosexuals and bisexuals.³⁸⁴ Moreover, the research suggests that the bias includes an impulse not to hire asexuals.³⁸⁵ These data are new, but if they hold up to scrutiny and are confirmed by further studies, this would support an argument for legal protection for asexuals. While no cases have yet been brought in New York, we can at least envision several grounds for discrimination claims based on asexuality, particularly if more asexuals begin to come out at work.³⁸⁶ Moreover,

³⁷⁸ See <http://www.asexuality.org/en/index.php?/topic/72206-asexual-discrimination/> (reporting that “Some people on the field of youth work are of the opinion that one cannot be a youth worker if one is asexual, because you need to have sexual experience in order to be able to work out sex-related issues with youngsters. I have been unjustly targeted by these people in a couple of occasions . . .”).

³⁷⁹ Various employers seek employees who have sex appeal, see, e.g., Kim Yuracko, *Playboy Bunnies*, *supra* note XX, but this field of jobs raises the interesting question of whether sexuals necessarily find asexuality *not* to be sexy. In opposition to this opposition we might think of the many contexts—including classical romantic pursuit of women—in which lack of interest or availability, or even a pure sexless quality, is thought to spur desire in the pursuer.

³⁸⁰ See *infra* Section III.C.1 (discussing the perspective asexuality offers on the sex work debates, and noting work on the prevalence of lesbians in the male-oriented sex-work industry).

³⁸¹ Cf. Mary Anne Case, *How High the Apple Pie?: A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI-KENT L. REV. 1753 (2001).

³⁸² See *supra* notes XX.

³⁸³ See *supra* Section II.B.

³⁸⁴ See *supra* Section IV.B.1.

³⁸⁵ *Id.*

³⁸⁶ See *supra* Section IV.B.3; see also AVEN Memorandum, *supra* note XX (discussing reasons to think that more asexuals will be entering the workforce and coming out as the population of very young asexuals gets older).

recognition of asexuality could have various cultural and emotional benefits for asexuals and for those who do not identify as asexual, as discussed above.³⁸⁷ Thus, under familiar principles, asexuals have a plausible basis for seeking legal protection.³⁸⁸

Recognizing asexuality in antidiscrimination law could have some costs. Most obviously, any new legal right can impose financial costs on the court system.³⁸⁹ In addition, rights against employers create potential costs for the employers—not only through any litigation that might ensue but also through human resources and training expenditures³⁹⁰—and employers are likely to pass these costs onto employees and customers.³⁹¹ More broadly, some proponents of antidiscrimination law may worry that adding new categories to existing protections will water down the impact of the law in this area. Some scholars have argued that we need antidiscrimination law to return to a more targeted focus on foundational or immutable categories, such as race, to consolidate scarce resources, bolster legitimacy, and encourage public confidence in the endeavor.³⁹² Including asexuality in the law would seem to move protection in the opposite direction, broadening rather than tightening its scope.

Moreover, it is interesting to note that asexuality, if it becomes better known, could inspire some favorable treatment—and thus in the long-term, legal recognition could possibly lead to prohibitions on such favorable “discrimination” as well.³⁹³ For example, an asexual employee might be expected to be more productive; he will not waste time thinking about sex when he should be working instead. A young asexual female may be relatively protected (rightly or wrongly) from the sex-based assumption that she’s likely to have children and leave the workforce intermittently or

³⁸⁷ See *supra* Section IV.B.2.

³⁸⁸ The two central principles in U.S. antidiscrimination law are antistatutory and antidifferentiation (or anticlassification). See, e.g., Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antistatutory?*, 58 U. MIAMI L. REV. 9 (2003). Under antidifferentiation, employer bias against certain groups should not influence decisions about individual employees. Under antistatutory, employers should not make decisions that contribute to the systematic subordination of certain groups. *Id.* These principles intersect in complicated ways, and for asexuals, the antistatutory argument would need to be oriented toward the future rather than the past, a break from its traditional purview. Cf. Jessica L. Roberts, *The Genetic Nondiscrimination Act as an Antidiscrimination Law*, 86 NOTRE DAME L. REV. 597, 630-34 (2011). But if the data on substantial discriminatory attitudes to asexuals are valid, then either theory could support protections, which would take slightly different forms, depending on the theory embraced.

³⁸⁹ See, e.g., STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (1999).

³⁹⁰ Cf., e.g., Crosby Burns, *The Costly Business of Discrimination: The Economic Costs of Discrimination and the Financial Benefits of Gay and Transgender Equality in the Workplace*, CTR. FOR AM. PROGRESS, 15 (Mar. 2012).

³⁹¹ See, e.g., Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 651-56 (2001).

³⁹² See, e.g., RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* (2008).

³⁹³ This would require axis-based protection for sexuals and asexuals alike, which is even less likely to present itself in the near future. But it is possible that, under such a law, a sexual employee could bring a lawsuit that he was not hired because of his “sexuality,” if the company preferred an asexual employee based on lesser odds of sexual harassment lawsuits. Analyzing the merits would be complicated and interesting.

permanently.³⁹⁴ An asexual male might be reassuring to employers who have been burned by the high cost or negative publicity of settling or losing sexual harassment lawsuits—or who are merely eager to avoid them.³⁹⁵ (Indeed, the judge in one very early Title VII sexual harassment case predicted that, if and when such claims were deemed actionable, then “The only sure way an employer could avoid such charges would be to have employees who were asexual.”³⁹⁶) In addition, asexuals in general might be appealing employees and coworkers to those who prefer what Mary Anne Case has called “an incest taboo in the workplace.”³⁹⁷ Of course, these benefits of asexuality, like most of the burdens, largely depend on the asexual worker’s coming out. Furthermore, several intervening steps would need to occur before legal recognition could possibly constrain these benefits.

In light of the potential costs discussed above and the newness of the data on discrimination, reasonable minds could disagree on whether asexuality warrants protection. But we might at least say that, subject to further empirical findings, there is a plausible case for legal recognition of asexuality.

C. Applying Antidiscrimination Law to Asexuals: A Difficult Fit

In response to this normative argument for protection, many would object that asexuality seems a poor fit with existing antidiscrimination law. This intuition is reflected in the epigraph from Dan Savage at the start of this Part: To Savage, like many others, there is something funny about asexuals marching for rights.³⁹⁸ This Section attempts to understand that intuition. Specifically, it compares asexuality to several categories that are protected from discrimination, as well as two that are not, to develop an account of why asexuality seems a poor fit with the current law and what would need to change for the fit to improve. The focus of the analysis is statutory law, with examples taken largely from the employment context, though the discussion also refers to antidiscrimination principles within constitutional law.³⁹⁹ The approach offered here aims to shed light not only on asexuality, but on the broader landscape of antidiscrimination law.

1) *The Criteria that Characterize Protection: A Hybrid Approach*

There is no one principle or rationale that explains why certain categories are protected from antidiscrimination and others are not. Rather, because of the way

³⁹⁴ See, e.g., Joan C. Williams, *Want Gender Equality?: Die Childless at Thirty*, 27 WOMEN’S RTS. L. REP. 3 (2006).

³⁹⁵ See *supra* note XX (citing work).

³⁹⁶ *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163-64 (D. Ariz. 1975) (dismissing the plaintiffs’ claim), *vacated without opinion*, 562 F.2d 55 (9th Cir. 1977)).

³⁹⁷ Mary Anne Case, *A Few Words in Favor of Cultivating an Incest Taboo in the Workplace*, 33 VT. L. REV. 551 (2009).

³⁹⁸ See *supra* text accompanying note XX. I have heard many versions of this concern while presenting this project to various audiences.

³⁹⁹ Cf. Post at 8 (taking a similar approach).

antidiscrimination law has developed, protected categories are best described by a variety of criteria, which combine in what we might call a *hybrid approach* to legal protection. Figure 2 sets out the criteria. As we will see, race, the prototypical protected category, meets all eight of these criteria, while other categories meet some subset of these factors, largely tracking their varying degrees of legal protection. Asexuality, as we shall see, currently meets very few of these factors.

**Figure 2 — The Hybrid Approach:
Eight Criteria That Contribute to Antidiscrimination Protection**

Political

- 1) Identity characterized by a visible trait or distinct behavior
- 2) Beyond the individual's control or thought too deeply rooted to ask people to alter

Sociological

- 3) Identity associated with a salient social group
- 4) Associated with a widely known social movement

Psychological

- 5) Negative public attitudes toward the group
- 6) Limiting or demeaning stereotypes attached to the group

Legal

- 7) History of explicit or direct legal burdens
- 8) History of implicit or indirect legal burdens

I do not here present a theory of discrimination; rather, these criteria are descriptive, extracted from antidiscrimination case law, statutes, and scholarly analysis.⁴⁰⁰ Moreover, the criteria I describe here do not bind legal actors and may

⁴⁰⁰ Most obviously, some, but not all, of these criteria intersect with factors in the Court's suspect-class analysis. In the early 1970s, the Court set forth a series of factors that contribute to the determination of whether a particular classification is suspect (or quasi-suspect), thereby warranting a more searching analysis than rational-basis review under the Equal Protection Clause. Though formulations vary, the "traditional indicia of suspectness" include a "history of purposeful unequal treatment," relative "political powerlessness" of the group, and the "immutab[ility]" of the trait. *See, e.g.,* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (setting out the first three criteria); *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973) (plurality opinion) (presenting the first appearance of immutability). The Court's heightened scrutiny doctrine has been much criticized. *See, e.g.,* Suzanne Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004); Janet Halley, *Sexual Orientation and the Politics of Biology*, *supra* note XX, at 507; Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994); Kenji Yoshino, *Assimilationist Bias in Equal Protection*. But the hybrid approach I present here, unlike suspect-class analysis or the defenses of it on political process grounds, is not a normative theory of what factors should contribute to antidiscrimination protection. Rather, my analysis aims to describe the current landscape and to use it to explain why asexuality seems intuitively a poor fit with the law in this area.

change over time, as I discuss below.⁴⁰¹ This Section will briefly discuss each of the eight criteria in turn, before demonstrating their application to several classifications protected to various degrees.

a) Political Criteria. The criteria designated as *political* are, roughly speaking, immutability and visibility (or activity). Immutability is a well-known—and widely critiqued—element of suspect-class analysis.⁴⁰² The formulation offered here is what might be called the “new immutability,” which incorporates not only traits that *cannot* be changed, but also what society deems too *important* to ask anyone to change.⁴⁰³ This latter, normative idea of immutability has gained traction in recent sexual-orientation case law,⁴⁰⁴ but it arguably reflects the underlying logic of immutability doctrine more generally; as far back as John Hart Ely’s writing in 1980, commentators had begun to recognize that even traditional categories like sex can be changed.⁴⁰⁵ The other political criterion—“identity characterized by a visible trait or distinct behavior”—reflects the law’s tendency to recognize only what can be seen (the visible) or otherwise observed (through conduct). Kenji Yoshino has identified “visibility” as an important “presumption” of the Court’s suspect-class analysis, woven through the various prongs, and he is highly critical of the political-process arguments in favor of the visibility factor.⁴⁰⁶ My use of visibility is different. Visibility and activity together form the first criterion of the model because they capture the law’s tendency towards the verifiable. This can be seen in the literature on law and emotion, which identifies the ways that legal

Thus, some of the factors in the suspect-class inquiry are present in my hybrid approach—such as a version of immutability (#2) and the history of discrimination elements (#7 and #8)—but some are absent or countered by the analysis here—such as the political powerlessness element (contra #4).

⁴⁰¹ See *infra* Section IV.C.4.

⁴⁰² See, e.g., Sunstein, *Homosexuality and the Constitution*, *supra* note XX, at 9; Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 *YALE L.J.* 1063, 1073 (1980); Yoshino, *Assimilationist Bias in Equal Protection*; STEIN, *THE MISMEASURE OF DESIRE*, at 3 n.8.

⁴⁰³ See, e.g., *In re Marriage Cases*, 43 Cal.4th 757 (2008) (explaining, in a decision holding that sexual orientation is a suspect classification under the California Constitution, that while immutability “is not invariably required” under the California Constitution’s equal protection clause, sexual orientation is “so integral an aspect of a person’s identity [that] it is not appropriate to require a person to repudiate or change [it] to avoid discriminatory treatment”); Pederson; Golinski; see also Ann E. Tweedy, *Polyamory As A Sexual Orientation*, 79 U. CIN. L. REV. 1461, 1513 & n.229 (2011). Cf. Susan R. Schmeiser, *Changing the Immutable*, 41 CONN. L. REV. 1495, 1495 (2009) (using the term “new immutability” to distinguish a related conception of “status as subordination” rather than “status as essence”).

⁴⁰⁴ See *id.*

⁴⁰⁵ See ELY, *supra* note XX, at 150 (noting that “even gender is becoming an alterable condition”); see also Emens, *Against Nature*, *supra* note XX (discussing the ways that various identities, including race under some understandings, are subject to change, and citing examples of courts and commentators recognizing this).

⁴⁰⁶ 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 (1998). He locates visibility as part of the prong containing immutability where it’s described as an “obvious, immutable, or distinguishing characteristic,” *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (quoting *Lyng v. Castillo*, 477 U.S. 635, 638 (1986)), but also as pervading discussions of the other factors in some opinions. See Yoshino, *supra*, at 496 (citing cases). He argues that the political process argument for the visibility presumption is flawed because visibility (along with immutability) cuts both ways in terms of political influence. *Id.* at 492; 519-38.

actors are reluctant to recognize purely emotional events and harms.⁴⁰⁷ Relatedly, the new immutability forms the second criterion because courts are more comfortable with categories that seem to be natural (or at least unassailable), because it keeps their role in constructing identities out of the spotlight.⁴⁰⁸

b) Sociological Criteria. The sociological criteria account for the social reality that legal protection depends on group salience and activism.⁴⁰⁹ Contrary to suspect class analysis's ostensible demand for "political powerlessness," some degree of political power is generally required to obtain legal protection.⁴¹⁰ Thus, to understand who is protected by antidiscrimination law, we have to appreciate the importance of a significant social movement (criterion #4), which generally depends on a salient social group (criterion #3).⁴¹¹ The salient social group criterion also overlaps with some formulations of the prong of suspect-class analysis containing immutability: "obvious, immutable, or distinguishing characteristics that define them as a discrete group."⁴¹² But rather than the salient group being "discrete and insular"—which supports the normative case for "more searching judicial inquiry" in *Carolene Products* Footnote Four⁴¹³—in my approach the social group forms the crucial building block for a meaningful social movement. Moreover, the salience of the social group is important because it reflects the identity's prominence in the public imagination, combined with the features highlighted in the political criteria.⁴¹⁴

c) Psychological Criteria. The psychological criteria capture the importance of pervasive social prejudice to public support for antidiscrimination law. A group generally needs to be subjected to negative public attitudes (#5) or limiting or demeaning stereotypes (#6), or both, in order to obtain legal protection. The distinction between attitudes and stereotypes is foundational in social psychology.⁴¹⁵ Attitudes consist of feelings towards the group, whereas stereotypes consist of thoughts and beliefs.⁴¹⁶ Of

⁴⁰⁷ See, e.g., Erin Ryan, *The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation*, 10 HARV. NEGOT. L. REV. 231, 248-54 (2005); Russell Fraker, *Reformulating Outrage: A Critical Analysis of the Problematic Tort of IIED*, 61 VAND. L. REV. 983, 1000-01 (2008).

⁴⁰⁸ See, e.g., Suzanne B. Goldberg, *On Making Anti-Essentialist and Constructivist Arguments in Court*, 81 OR. L. REV. 629 (2002).

⁴⁰⁹ Elsewhere I discuss Robert Post's sociological account of antidiscrimination law. See *supra* notes XX. By sociological here I mean something broader than Post's theory, that is, the importance of social groups and social movements to garnering legal protection.

⁴¹⁰ See, e.g., Balkin, *supra* note XX, at 2340 ("[L]egal elites...usually respond to 'disadvantaged' groups only after a social movement has demanded a response. Ironically then, a status group must display some degree of political power—whether at the ballot box or in the streets—before it can be considered 'politically powerless' and hence deserving of legal protection.").

⁴¹¹ See, e.g., William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2064, 2064 & n.3 (2001); Russell D. Clark, III & Anne Maass, *The Effects of Majority Size on Minority Influence*, 20 EUR. J. SOC. PSYCH. 99, 100 (1990).

⁴¹² *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (quoting *Lyng v. Castillo*, 477 U.S. 635, 638 (1986)).

⁴¹³ *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n. 4 (1938).

⁴¹⁴ See *supra* text accompanying notes XX.

⁴¹⁵ See, e.g., Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 6 (1995).

⁴¹⁶ See, e.g., *id.*; Becca R. Levy & Mahzarin R. Banaji, *Implicit Ageism*, in AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 49, 51 (Todd D. Nelson ed., MIT Press 2002).

course the presence of negative attitudes and limiting stereotypes—whether conceptualized as bias, prejudice, stigma, or something else—is common to normative accounts of who should be protected by antidiscrimination law.⁴¹⁷ But as a descriptive matter, which is our focus here, the presence of such attitudes and stereotypes helps to persuade judges, legislators, and the public of the need for antidiscrimination protections.⁴¹⁸

d) Legal Criteria. Similarly, a history of discrimination is a classic element justifying special judicial solicitude,⁴¹⁹ but it also prompts legal actors and the public to the kind of sympathy that inspires legal intervention.⁴²⁰ Constitutional doctrine draws a sharp distinction between express or intentional legal burdens and indirect or unintended legal burdens,⁴²¹ despite extensive scholarly critique of this distinction.⁴²² As a descriptive matter, both a history of explicit or direct legal burdens (criterion #7) and of implicit or indirect legal burdens (criterion #8) can help lead a group to protection by antidiscrimination law, when we look not only to constitutional but to statutory protections.

2) Protected and Unprotected Categories.

The most robust categories of antidiscrimination protection meet all or nearly all of these criteria, through their most salient sub-groups, while partially protected groups meet fewer criteria, and others meet very few and garner little protection.⁴²³ This Section walks through several more familiar categories before applying the criteria to asexuality.

a) Robust Categories. Race meets all the criteria: African-Americans are a salient social group with a robust and high-profile civil rights movement.⁴²⁴ Race is typically visible, though of course scholars and other writers have effectively demonstrated that for some people it is much easier to hide (to “pass”) than is commonly

⁴¹⁷ See, e.g., Lenhardt, *supra* note XX (discussing “stigma”); *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n. 4 (1938) (discussing “prejudice”); ELY, *supra* note XX, at 153-57 (discussing “widespread hostility” and “stereotypes”).

⁴¹⁸ See, e.g., Robyn K. Mallett et al., *Seeing Through Their Eyes: When Majority Group Members Take Collective Action on Behalf of an Outgroup*, 11 GROUP PROCESSES & INTERGROUP RELATIONS 451, 456-57 (2008).

⁴¹⁹ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *supra* notes XX.

⁴²⁰ See, e.g., Sarah Cotterill & Jim Sidanius; cf. Mallett et al., *supra* note (citing sources).

⁴²¹ See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976); *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 375 (2000) (Kennedy, J., concurring); see also Ricci.

⁴²² See, e.g., Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 25 (2000).

⁴²³ It is interesting to note the slippage between the social group that meets the criteria—such as women or African-Americans—and the form the protection often takes—which is protection for the axis of identity, like sex or race, for everyone. This transformation, from the target group for protection to axis-based protection for everyone, is fascinating and has been the subject of important scholarly attention. See, e.g., Michael Kavey. Under the hybrid approach, this slippage between group and axis is worth noting as inconsistent across groups and not specifically predicted by the criteria.

⁴²⁴ See, e.g., CLAYBORNE CARSON, *THE EYES ON THE PRIZE* (1991); ROSENBERG, *THE HOLLOW HOPE*.

thought.⁴²⁵ And no matter how socially constructed race in general may be, the individual has little power to construct his race, which is a matter of social recognition.⁴²⁶ Extensive social science documents the negative attitudes, both explicit and implicit, directed toward African-Americans, as well as the negative stereotypes.⁴²⁷ And slavery and Jim Crow were obviously regimes of express legal restrictions, while their aftermath included many indirect legal burdens, such as literacy requirements for basic activities such as voting and facially neutral exclusion from major social programs.⁴²⁸

Sex meets nearly all the criteria. Women are a salient social group with a well-known civil rights movement, with historical targets ranging from suffrage to worker's rights to reproductive rights, among many others.⁴²⁹ A person's sex is typically visible biologically and socially.⁴³⁰ And sex is thought to be impossible or implausible to change, even though sex-based passing and trans and intersex identities complicate this fact for meaningful numbers of people, and even where recognized to be changeable, it would be anathema for the state to ask someone to change his sex.⁴³¹ Limiting stereotypes characterize widespread thinking about women, both explicitly and implicitly, as the implicit bias literature has shown.⁴³² And women have faced explicit legal restrictions on, for example, the right to vote, to run for office, to participate in professions of their choice, and to determine their own married names and make legal decisions independent of their husbands.⁴³³ In addition, women have faced implicit or indirect burdens in this country through, for instance, veterans preferences in employment, the structure of marriage law, and the lack of public childcare.⁴³⁴ The outlier criterion here is "negative public attitudes"; some would argue that negative attitudes about women pervade the public sphere, but others could reasonably contend that women are cherished, loved, and desired—particularly in their roles as mothers,

⁴²⁵ On passing, see, for example, John Howard Griffin, *Black Like Me* (1961); Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

⁴²⁶ See, e.g., ARIELA J. GROSS, *WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* (2008); IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1997). On debates over the social construction of race, see, for example, Emens, *Against Nature*. The reason I say "little power" is that some people are racially ambiguous enough that their self-presentation shapes the race ascribed to them.

⁴²⁷ See, e.g., Nosek et al., *supra* note XX.

⁴²⁸ See, e.g., IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE*; Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 Vand. L. Rev. 523, 537 (1973); Franke.

⁴²⁹ See, e.g., JANE F. GERHARD, *DESIRING REVOLUTION: SECOND-WAVE FEMINISM AND THE REWRITING OF AMERICAN SEXUAL THOUGHT, 1920 TO 1982* (2001).

⁴³⁰ Of course, how we define sex—and our certainty about its clarity—is a subject of extensive critique and deconstruction. See, e.g., Anne Fausto-Sterling, *supra* note XX.

⁴³¹ Yoshino, *Covering*, *supra* note XX (on sex-based passing). On the assumption of Immutable Nature for sex, see Emens, *Against Nature*, *supra* note XX.

⁴³² See, e.g., Greenawalt et al., *supra* note XX.

⁴³³ See, e.g., JOAN HOFF, *TOO LITTLE, TOO LATE: CHANGES IN THE LEGAL STATUS OF U.S. WOMEN* (2012).

⁴³⁴ See, e.g., *See, e.g.*, Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); Joan Hoff, *American Women and the Lingering Implications of Coverture*, 44 SOC. SCI. J., 41 (2007); JOAN WILLIAMS (discussing the second shift).

daughters, and lovers—and that attitudes to women are therefore largely positive.⁴³⁵ It is fair to say, then, that at least seven of the criteria are met for sex.

b) Mid-Level Categories of Protection. Age and disability both meet more than half of the criteria. Age is visible, in a broad sense, and beyond the individual's control.⁴³⁶ Social science research reveals strongly negative implicit and explicit attitudes to older people, as well as negative stereotypes about their abilities and prospects.⁴³⁷ Older people have also faced explicit legal restrictions, such as statutory retirement ages,⁴³⁸ and indirect burdens, such as workplace pay and promotion strategies favoring those recently hired for government employment.⁴³⁹ On the other hand, age does not lend itself to obvious social groupings, in the sense that everyone will pass through the various ages, luck permitting.⁴⁴⁰ And, perhaps relatedly, though there are age-based advocacy groups, there has not been a robust civil rights movement on the basis of age.⁴⁴¹ Thus, six of eight criteria are arguably met for age.

Though the category of disability is diverse, people with disabilities have emerged as a salient social group with a robust social movement, widely represented in the public imagination by highly visible disabilities, most notably those requiring wheelchairs.⁴⁴² An extensive body of research documents the explicit and implicit negative attitudes and stereotypes about people with disabilities.⁴⁴³ Moreover, people with certain disabilities have faced targeted legal burdens, expressly limiting their rights to education, voting, marriage, to name a few examples.⁴⁴⁴ Even more widespread are indirect burdens on disabled people, through, for instance, public environments designed “as though all bodies [and minds] were the same.”⁴⁴⁵ On the other hand, some of the criteria are not an easy fit. Many disabilities—probably a majority in fact—are invisible.⁴⁴⁶ And the

⁴³⁵ Cf. ELY, *supra* note XX, at 164 (“Instances of first-degree prejudice are obviously rare . . . The degree of contact between men and women could hardly be greater . . .”). Of course, close contact can involve its own forms of subordination. See, e.g., Emens, *Intimate Discrimination*, *supra* note XX.

⁴³⁶ For a complicating account of this assumption, however, see Emens, *Against Nature*, *supra* note XX.

⁴³⁷ Indeed, implicit attitudes to old age are so robust that they do not even improve among older subjects; as the age of subjects increases up through age seventy, explicit attitudes improve, but implicit attitudes remain just as negative. See

⁴³⁸ See, e.g., *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976).

⁴³⁹ See, e.g., *Smith v. City of Jackson*, 544 U.S. 288 (2005).

⁴⁴⁰ See, e.g., John Hart Ely.

⁴⁴¹ The AARP is a powerful lobbying group, and there has been a small but vocal internet-based youth liberation movement, but neither of these would likely be described as a social movement. See, e.g., Emens, *Aggravating Youth*.

⁴⁴² See, e.g., NOTHING ABOUT US WITHOUT US; JOE SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1993). The predominance of the wheelchair user as the symbol of disability rights has been decried by many scholars and activists. There are of course many invisible disabilities, and many people who do not associate with the disability movement, much as there are many women and African-Americans, who do not associate with the civil rights movements in those domains.

⁴⁴³ See, e.g., Greenwald et al., *supra* note XX.

⁴⁴⁴ Jacobus tenBroek, *The Right To Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841 (1966).

⁴⁴⁵ See, e.g., SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY 39 (1996); see also *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2000).

⁴⁴⁶ See, e.g., Asch, *supra* note XX.

immutability criterion is met for some disabilities, but not others. Moreover, disabilities are certainly not thought too deeply rooted to expect people to alter them; on the contrary, people with disabilities are generally expected to “race for the cure,” despite the explicit resistance to the ideology of cure by many.⁴⁴⁷ As with age, then, roughly six of eight are met for disability.

Thus, whereas sex and race easily meet all or nearly all eight criteria, age and disability face a bumpier road to meeting six of eight. This fits with the protections accorded these groups: While the former two have constitutional as well as statutory protection, the latter two have only federal statutory protection but do not garner heightened scrutiny under the federal constitution.⁴⁴⁸

c) Little or no protection. Personal appearance discrimination is a favorite topic in debates over the limits of antidiscrimination law.⁴⁴⁹ Impressive data suggest that personal appearance leads to serious stratification of opportunities and outcomes—for instance, a ten percent wage gap based on attractiveness.⁴⁵⁰ The logic of our antidiscrimination laws would seem to dictate legal protection in this area, as various commentators have observed,⁴⁵¹ yet very few jurisdictions offer such protections.⁴⁵² While the lack of legal protection on the basis of personal appearance may seem surprising, it is less so when we apply the eight criteria in Figure 2 to this category.

Personal appearance tracks no particular identity or social group, nor has there been a well-known social movement on this basis.⁴⁵³ Though highly visible, personal

⁴⁴⁷ See, e.g., SHAPIRO, *supra* note XX, at 14.

⁴⁴⁸ See, e.g., Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 Ind. L.J. 779, 793 (1987).

⁴⁴⁹ See, e.g., RICHARD THOMPSON FORD, THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE 159 (2008); Post, *supra* note XX, at 8; Rutherglen; Hellman. My discussion in this part of the article was partially inspired by my wish to respond to, and is therefore indebted to, George Rutherglen’s argument that the different trajectories of proposals to protect personal appearance versus sexual orientation can be meaningfully explained by their relative degrees of fit with the details of legal enforcement as it has developed in this area. George Rutherglen, *Concrete or Abstract Conceptions of Discrimination?*, at 24-28 (work in progress, May 2012).

⁴⁵⁰ Karen Dion et al., *What is Beautiful is Good*, 24 J. PERSONALITY & SOC. PSYCHOL. 285 (1972). For a discussion of the data in this area, see RHODE, *supra* note XX, at 26-28.

⁴⁵¹ See, e.g., DEBORAH L. RHODE, THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW (2011); Post, *supra* note XX; TRB, *The Tyranny of Beauty*, 197 NEW REPUBLIC, Oct. 12, 1987, at 4; Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2036 (1987).

⁴⁵² Protections of various aspects of appearance, typically with limited remedies, can be found in one U.S. state, MICH. COMP. LAWS ANN. § 37.2202(1)(a) (height and weight), and seven U.S. localities, Santa Cruz, Cal., Mun. Code §§ 9.83.01, 9.83.02(13) (1992) (“height, weight or physical characteristic”); San Francisco, Cal., Admin. Code § 12A.1 (2008) (height and weight); D.C. Code Ann. § 2-1401.01 (“personal appearance”); Urbana, Ill., Mun. Code § 12-37 (2007); Howard County, Md., Code Ordinances § 12.200 (2012) (“personal appearance”); BINGHAMTON, N.Y., CODE § 45-2 (2012) (“weight or height”); MADISON, WIS., CODE ORDINANCES § 39.03 (2012) (“physical appearance”). Outside the United States, Victoria, Australia, offers explicit protections, Equal Opportunity Act, 1995 (Vict. Austl.) §§ 4(1), 6(f), and some European laws have been interpreted to this end. See RHODE, *supra* note XX.

⁴⁵³ There is a small, and very interesting, fat rights movement, but it has not achieved a significant public presence. <http://www.naafaonline.com/dev2/>; ANNA KIRKLAND, FAT RIGHTS (2008).

appearance is frequently within an individual's control, or thought to be so.⁴⁵⁴ Moreover, there is little sense that appearance is too deeply rooted for people to be asked to change it. On the contrary, other than religion-based appearance claims (which themselves often lose⁴⁵⁵), personal appearance is typically treated as quintessentially superficial.⁴⁵⁶ The psychological literature documents some negative attitudes and stereotypes toward people deemed unattractive, particularly those considered overweight.⁴⁵⁷ But the realm of personal appearance has not been meaningfully shaped by legal burdens, whether direct or indirect, in the way that other categories have been.⁴⁵⁸ The history of so-called ugly laws has been invoked by scholars as evidence of targeted legal burdens in this domain,⁴⁵⁹ though the term "ugly laws" was coined by disability activists, who have been the main promoters of what little publicity these municipal laws have received.⁴⁶⁰ This leads to three—or at most, four, including the limited legal restrictions—out of eight criteria of the hybrid approach met by personal appearance. By contrast to the six to eight criteria met by race, sex, disability, and age, this is a meager showing for personal appearance, consistent with the absence of constitutional or federal statutory protection—and the lack of local protection in all but one state and seven localities—on this basis.

Sexual orientation also lacks basic protections at the federal level,⁴⁶¹ yet this category fares very differently than personal appearance on the eight criteria. Sexual orientation is associated with the salient identities of lesbians and gay men,⁴⁶² which certainly have a high-profile social movement, involving prominent Pride marches and multifarious organizations performing legal advocacy, education, and media policing.⁴⁶³ Though the classic "invisible" identity,⁴⁶⁴ gays meet the first criterion through the distinct behavior of same-sex sex, which characterizes the group and has been subject to

⁴⁵⁴ On the extent to which weight is a mix of biology and choice, but is thought to be easy to control, see, e.g., Theron; Rhode.

⁴⁵⁵ See, e.g., RHODE, *supra* note XX (discussing cases).

⁴⁵⁶ This is what makes the statements by Susan Sontag and Oscar Wilde to the contrary famous; by stating that "our manner of appearing is our manner of being," or that it is "shallow . . . not to judge by appearances," these provocateurs flout common wisdom. See, e.g., Post, *supra* note XX, at 2 (quoting).

⁴⁵⁷ See RHODE, *supra* note XX.

⁴⁵⁸ In addition to discussing the ugly laws, as the text notes, proponents of personal appearance antidiscrimination laws, perhaps reflecting the importance of this kind of legal history, search for it in various places: for instance, the dress codes that have shaped styles of dress, for instance, through sumptuary laws in eighteenth-century Europe or indecency laws in nineteenth-century United States. See RHODE, *supra* note XX. These laws interestingly show that law has been involved in the realm of appearance, but it is hard to describe them as burdens on people who fare badly along the axis of personal appearance.

⁴⁵⁹ See, e.g., RHODE, *supra* note XX; Note, *Facial Discrimination*, *supra* note XX, at 2035.

⁴⁶⁰ See SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* 7-9 (2009) (explaining the coining of the term "ugly laws" and explaining that "unsightly beggar ordinance" would be a "more accurate name historically").

⁴⁶¹ For more discussion of the complexities of the constitutional situation, see *infra* notes XX; for federal statutory and local law discussion, see *supra* notes XX.

⁴⁶² And to a lesser degree, bisexuals and trans and intersex people. See Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000); See Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51 (2006).

⁴⁶³ See, e.g., GLAAD; Lambda Legal Defense and Education;

⁴⁶⁴ But see Robinson, *Masculinity as Prison*, *supra* note XX (citing and critiquing work trying to document visible differences between gays and straights).

widespread and notorious legal restrictions, in addition to restrictions specifically targeting homosexual status.⁴⁶⁵ Whether sexual orientation *can* be changed, and what causes it, are subjects of some dispute, but a growing consensus reflects the view that no one *should be asked* to change their sexual orientation.⁴⁶⁶ Extensive psychological research documents the negative attitudes to homosexuality,⁴⁶⁷ and stereotypes follow homosexuality, particularly for gay men.⁴⁶⁸ On the other hand, it is less clear what kind of indirect legal burdens arise for this category, unless one wants to call marriage restrictions an indirect (rather than a direct) burden.⁴⁶⁹ Sexual orientation therefore meets seven criteria. This number is consistent with the most protected categories. Thus, by contrast to the outcome for personal appearance, this analysis would lead us to expect growing legal protections for sexual orientation. And indeed, ENDA has received substantial support,⁴⁷⁰ twenty-one states and many more localities already have sexual orientation antidiscrimination protections,⁴⁷¹ and courts have been moving towards constitutional solicitude on this basis already.⁴⁷²

3) Applying the Criteria to Asexuality.

How does asexuality fare under this hybrid model? Not very well. Asexuality currently meets very few of the criteria. It fails the first criterion more obviously than any category considered thus far: Asexuality is neither visible nor is it associated with any activity. Indeed, as the epigraph from Dan Savage (rather tendentiously) observes, asexuality is defined by doing “nothing.”⁴⁷³ The second criterion—immutability—depends on who you ask: Self-identified asexuals would certainly claim that asexuality is not a choice,⁴⁷⁴ but the broader culture endorses a medical and pharmacological culture that attempts to cure people with low desire.⁴⁷⁵ Thus, for purposes of public opinion, asexuality currently fails to meet the second criteria.

⁴⁶⁵ See, e.g., *Bowers v. Hardwick* (citing the legal restrictions and their history); Yoshino, *Covering*, 111 YALE L.J. 769 (2002) (cataloguing legal and cultural efforts to “convert” homosexuals); see also Yoshino, *Assimilationist Bias*, *supra* note XX (on invisibility).

⁴⁶⁶ See, e.g., Yoshino, *Covering* (documenting the history and decline of conversion demands placed on gay identity, with the decline importantly signaled by events such as the APA’s abandonment of psychiatric diagnoses of homosexuality).

⁴⁶⁷ See, e.g., Nosek et al., *supra* note XX.

⁴⁶⁸ For example, there are stereotypes of “gender inversion” for men and women, as well as predatory assumptions about gay men. See, e.g., Robinson, *supra* note XX, at 151-53.

⁴⁶⁹ Of course gay people can get married, since the marriage restrictions are sex-based, not sexual-orientation based, but as many commentators have noted, this distinction is somewhat artificial given the particular fit between marriage’s purpose and structure and the tendency of straights and gays to fit that structure.

⁴⁷⁰ See *supra* Section IV.B.

⁴⁷¹ See *supra* Section IV.B.

⁴⁷² See, e.g., *In re Marriage Cases*; *Perry v. Schwarzenegger*; see also *Romer v. Evans* (applying rational basis with teeth); *Lawrence v. Texas*; Yoshino, *The New Equal Protection*.

⁴⁷³ See *supra* text accompanying note XX (quoting Dan Savage as the epigraph to Part IV).

⁴⁷⁴ See *supra* Section II.A.

⁴⁷⁵ See *supra* Section I.C.

Asexuality also fails the sociological criteria. Though asexuals have begun to connect with one another, the group is not widespread or well known; if Swankivy has never accidentally met another asexual, then most non-asexuals have not knowingly met an asexual either.⁴⁷⁶ And while asexuality has begun to form itself into a political movement, marching under the AVEN banner in LGBT Pride marches, these developments are still in early stages and have a limited public profile thus far.

The outcome is split on the psychological criteria. As discussed earlier, one very recent study finds striking degrees of bias against asexuals, including an unwillingness to hire or rent to asexuals, and generally to a greater extent than for homosexuals and bisexuals.⁴⁷⁷ Assuming these findings are valid and will be replicated, we can say that asexuals face negative attitudes. There is little reason to think that asexuals face stereotypes at present, however, since a group needs a certain notoriety for stereotypes to develop. Moreover, since the attitudinal findings are little known and run contrary to the common assumption that asexuals wouldn't face discrimination, they cannot weigh heavily in favor of legal recognition. But we count the fifth criterion as minimally met nonetheless.

Finally, on the legal side, there is no history of direct legal burdens on asexuality, which stands in stark contrast to homosexuality, as well as to race, sex, age, disability. By contrast, some indirect legal burdens are documented in Part III, most notably, the consummation requirements for marriage.⁴⁷⁸

In sum, asexuality meets two (or possibly three, including immutability) of the criteria. This is lower than any of the protected groups considered, and even lower than for personal appearance. This helps to explain the common intuition that asexuality is a poor fit with our antidiscrimination law.

4) The Conditions for Change.

This application of the hybrid model to asexuality need not mean that asexuality will remain unprotected outside New York. At the level of individual jurisdictions, asexuality could gain legal recognition through legislative accident, as it did in the somewhat random way it entered New York law,⁴⁷⁹ or a particular judge could reach out

⁴⁷⁶ See *supra* text accompanying note XX.

⁴⁷⁷ See *supra* Section IV.B.1.

⁴⁷⁸ See *supra* Section III.A.

⁴⁷⁹ Recall that negotiators for New York's SONDA thought that adding asexuality (along with heterosexuality) would appease criticism of the bill as catering to special interests. See *supra* Section IV.A. Perhaps something similar could happen in other jurisdictions. But the difficulty for this prospect is that heterosexuality now satisfies that concern about special interests in extant and proposed sexual orientation legislation across the country, see *supra* text accompanying notes XX, without adding a concern about including groups some consider marginal or trivial.

to interpret existing sexual orientation protections to cover asexuality.⁴⁸⁰ But for asexuality to gain widespread protection, a greater shift would be necessary.

The hybrid model sets into relief what would need to occur for asexuality to garner antidiscrimination protection across jurisdictions. Most of the criteria are not fixed in time. Most obviously, the sociological and psychological landscape could change: asexuality could gradually or suddenly gain prominence as a salient group identity and a high-profile social movement, and broader public recognition could spur the creation and spread of limiting stereotypes.⁴⁸¹ Moreover, the normative form of immutability responds to changing attitudes. If the public begins to see asexuality as a fundamental part of a person's being—as the fourth sexual orientation, per Storms,⁴⁸² or as an umbrella category, akin to being a sexual person⁴⁸³—then it would meet the normative version of immutability. If all these changes occurred, then the identity would move from two or three criteria up to six criteria. This would locate asexuality on the threshold of mid-level protection, akin to disability and age, groups with some legislative protections at the state and the federal level. There are some who see this watershed moment on the horizon, as the asexuality movement grows in size, reputation, and age.⁴⁸⁴

CONCLUSION

“Is it not, indeed revealing, what the child’s boredom evokes in the adults? Heard as a demand, sometimes as an accusation of failure or disappointment, it is rarely agreed to, simply acknowledged. How often, in fact, the child’s boredom is met by that most perplexing form of disapproval, the adult’s wish to distract him—as though the adults have decided that the child’s life must be, or be seen to be, endlessly interesting.”

—Adam Phillips, *On Boredom*⁴⁸⁵

This article has offered the first study in the legal literature of the emerging phenomenon of asexuality, tracing the contours of this identity group and its intersections

⁴⁸⁰ As noted earlier, anti-discrimination protections targeting particular groups often expand to cover a broader range of individuals. The difficulty with anticipating this development for asexuality is that sexual orientation statutes nearly all specify precisely what subcategories fall within them: namely, homosexuality, heterosexuality, and bisexuality (and, uniquely in New York, asexuality). See *supra* text accompanying notes XX. So it would take serious judicial overreaching to add another category.

⁴⁸¹ As noted earlier, the link with autism could form the basis for one stereotype about difficulty with human interaction. See *supra* notes XX.

⁴⁸² See *supra* note XX and accompanying text.

⁴⁸³ See *supra* Section II.C.5.

⁴⁸⁴ See AVEN, *Employment Discrimination Against the Asexual Community: A Growing Trend*, presented to the National Center for Transgender Equality (Jan. 26, 2013) (unpublished manuscript on file with author) (arguing that “[o]ver the next decade, asexuality will receive a historically unprecedented level of visibility” as the traffic on the AVEN website, asexuality.org, continues to increase, as do media representations of and interest in asexuals, and as this relatively young movement is aging into a significant presence in the workforce) (citing sources); on youth, see *supra* note 36.

⁴⁸⁵ ADAM PHILLIPS, *On Boredom*, in ON KISSING, TICKLING, AND BEING BORED: PSYCHOANALYTIC ESSAYS ON THE UNEXAMINED LIFE 68, 69 (1994).

with more familiar categories of identity and with a sexual society. The article has proposed new models for thinking about both sexuality and asexuality, and used the perspective of asexuality to set into relief the sexual assumptions of our legal system. We have seen how New York became the first jurisdiction in the world to protect asexuality from discrimination and considered the question of whether other jurisdictions should follow New York's lead. Finally, the article used the intuition that asexuality is a poor fit with our antidiscrimination law to develop a framework for better understanding what categories are protected, and what would need to change for asexuality to gain protection.

In the incisive short essay quoted in the epigraph above, the British psychoanalyst Adam Phillips considers the subject of boredom in language that bears on our study of asexuality. In these lines, Phillips identifies a general reluctance by parents to accept that their child is, at any given moment, bored. Parents are more inclined to try to distract the child, to experience the child's boredom as a demand or a personal failure.

Phillips urges us to consider what might be discovered, or uncovered, if boredom were seen not as a threat but as an opening. He writes: "While the child's boredom is often recognized as an incapacity, it is usually denied as an opportunity."⁴⁸⁶ What new possibilities might boredom bring to the bored child, Phillips asks, if parents were to make room for his uninterest? Moreover, one might ask, what could the *parents* gain from opening their eyes to the child's lack of desire?

The subject of this article is of course adults, not children, and it is the absence of sexual attraction, rather than boredom. But it asks a parallel question to the one invited by Phillips on boredom: What might outsiders to asexuality stand to gain from becoming interested in the experience and perspective of those who are not interested in sex? Like Phillips, I suspect that something interesting lies in the seed of uninterest, in the position of those who do not share the assumptions of this sexual world. Looking at our lives and laws through the lens of asexuality, as best we can, may lead us somewhere we have not been before.

⁴⁸⁶ PHILLIPS, *supra* note XX, at 76.