

COMMENTS

Protecting Poly: Applying the Fourteenth Amendment to the Nonmonogamous

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I. INTRODUCTION

Polyamory is difficult to define.¹ There are some essential elements, like multiple partners and honesty, that everyone agrees upon.² Other things, like the number of partners, the type of relationships involved, and the level of identification with polyamory itself, differ from individual to individual, group to group, and region to region.³ Some define polyamory as an absence of or de-emphasis on jealousy, others as a philosophical identity as part of the larger sex radical movement.⁴ Many commentators see a political element in polyamory and its real or imagined rejection of identity politics.⁵ For purposes of this Comment, polyamory is defined philosophically as “self-knowledge, radical honesty, consent, self-possession, and privileging love and sex over other emotions and activities such as jealousy”⁶ and practically as

* © 2013 Elizabeth Cannon Leshner. J.D. candidate 2013, Tulane Law School; B.S. 2008, Smith College. I would like to thank my parents, Stephanie Cannon and Robert A. Leshner for their support and love; my brother Max and my sister Grace for being such wonderful friends; Professor Sarudzayi Matambanadzo for her support and help; and all of my friends, especially Kurt Amacker, who helped me with the writing process.

1. See Ann E. Tweedy, *Polyamory as a Sexual Orientation*, 79 U. CIN. L. REV. 1461, 1479-81 (2011).

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

3. Tweedy, *supra* note 1, at 1483-85.

4. See *id.* at 1481-87.

5. See Nathan Patrick Rambukkana, *Uncomfortable Bridges: The Bisexual Politics of Outing Polyamory*, 4 J. BISEXUALITY 141, 150-51 (2004).

6. Emens, *supra* note 2, at 283.

nonmonogamous sexual behavior and a desire for multiple romantic and emotional relationships, both for one's self and one's partners.⁷

However polyamory (or nonmonogamy more broadly) is defined, it is clear that a significant portion of the openly polyamorous face discrimination in the workplace, in housing, and in custody matters.⁸ Surveys done of self-identified polyamorous persons and polygamists show that discrimination is generally a matter of great concern when considering "coming out" as nonmonogamous.⁹ Take for example the common prohibitions on unrelated and unmarried persons sharing a house, even if there is a sexual relationship between them,¹⁰ or the case of Alice Divilbiss, whose child was removed by the court because Alice lived with two men.¹¹ Meri Brown was terminated from her long-time job because of the criminal investigation into her polygamist family.¹²

The backlash against the nonmonogamous community is commonly thought of as a rejection of the sexist worldview, which underlain historical polygyny. There is also a fear of the psychological costs of abandoning monogamy or a generalized dislike of all taboos, such as homosexuality.¹³ Nevertheless, at first glance, the vitriol against poly and other forms of honest nonmonogamy like plural marriage seems irrational. After all, nonmonogamous sexual interest is practically ubiquitous.¹⁴ Divorce with remarriage is considered by sociologists to be serial monogamy, but it clearly functions as polygamy over the sexual lifetime of the individual.¹⁵ Additionally, adultery is rampant in the United States.¹⁶ Elizabeth Emens postulates that it is precisely the commonality of nonmonogamous experience that makes the polyamory view troubling to the general populace; it becomes necessary to erect a firm wall of rejection against the possibility of transgressing the majoritarian impulse to monogamy.¹⁷

7. *Id.* at 284.

8. *Id.* at 362; *see, e.g.*, Plaintiff's Complaint at 31, *Brown v. Herbert*, 850 F. Supp. 2d 1240 (D. Utah 2012).

9. *See* Elisabeth Sheff, *Polyamorous Women, Sexual Subjectivity and Power*, 34 J. CONTEMP. ETHNOGRAPHY 251, 277-78 (2005).

10. *See, e.g.*, NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE* 3-5 (2008).

11. Emens, *supra* note 2, at 310-12 (citing *In re A.M.*, No. K1719 (Juv. Ct., Memphis & Shelby County, Tenn., Apr. 16, 1999)).

12. Plaintiff's Complaint, *supra* note 8, at 176.

13. Emens, *supra* note 2, at 283.

14. *See id.* at 298-99.

15. *Id.* at 297-98.

16. *See id.* at 299.

17. *Id.* at 283-84.

The ways in which the law actively prefers monogamy are too numerous to digest fully in this Comment. It is sufficient to say that monogamy and marriage go hand in hand and the de facto benefits given to married couples are not extended to the nonmonogamous. The default assumptions of family law presume monogamy and leave the polyamorous to resort to private contract to resolve these issues. Additionally, the legal supports given to the cultural ideal of monogamy and jealousy itself are broad, extending as far as the underpinnings of adequate provocation in homicide¹⁸ and the lingering (although unenforced) criminalization of adultery.¹⁹

The paths forward for polyamory to protect itself from discrimination appear to be twofold. One path confronts the prohibitions against plural marriage (a term typically used in the context of religious polygyny, but also applicable here). Although no court cases are currently being seriously litigated in the United States with the aim of legalizing plural marriage, the Kody Brown case in Utah has begun challenging the criminalization of religious polygyny.²⁰ Additionally, other countries are addressing ideas of customary nonmonogamy, such as South Africa.²¹ However, a strong case can be made that marriage itself will become less meaningful than it is today.²² Many other Western and industrialized nations do not base social benefits or legal status on marriage.²³ Furthermore, plural marriage in the religious or customary sense might not truly mesh with polyamory nor encompass its philosophical underpinnings such as self-possession,²⁴ although the polyamorous community might benefit in other meaningful ways from a move away from monogamous marriage as the normative standard.²⁵

18. See Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 346 (1996).

19. Emens, *supra* note 2, at 362 & n.436.

20. See Plaintiff's Complaint, *supra* note 8, at 29.

21. Eusebius McKaiser, *South Africa: Polygamy Debate Reveals Nation's Schizophrenia*, ALLAFRICA (Mar. 17, 2008), <http://allafrica.com/stories/200803170605.html>.

22. See generally Polikoff, *supra* note 10.

23. See *id.* at 110-22.

24. See Emens, *supra* note 2, at 283.

25. Take for example the case of Alice Divilbiss. Divilbiss had a child with one man who abandoned her and the child. Later, she entered a stable polyfidelous vee with her new husband and another man. The juvenile court judge who removed the child from the Divilbiss household repeatedly cited her status as a married woman as evidence that she had created an unfit living situation for her child. Emens, *supra* note 2, at 311 (citing *In re A.M.*, No. K1719, (Juv. Ct., Memphis & Shelby County, Tenn., Apr. 16, 1999)). It would be interesting to see if the judge would have used the same intolerance for an unmarried woman with two partners. See also *Michael H. v. Gerald D.*, 491 U.S. 110, 115-18 (1989) (emphasizing the primary importance of marriage in custody decisions).

The second option currently under debate is whether polyamory should be considered a sexual orientation,²⁶ thereby receiving the limited protections for sexual orientation under the rational basis standard,²⁷ as well as other local statutes covering sexual orientation discrimination for housing and employment.²⁸ The use of the Equal Protection Clause of the Fourteenth Amendment to protect sexual minorities, namely the LGBT community, has achieved somewhat limited success in recent years.²⁹ However, the use of equal protection law has become less predictable in the years since Justice Scalia joined the court.³⁰ Before *Romer v. Evans*, rational basis was regarded as a dead end for recovery under the Equal Protection Clause; after *Romer*, rational basis was a possible path forward,³¹ provided that the law in question is motivated by “animus” toward the group in question.³²

The third option, and the central focus of this Comment, is applying substantive due process to the nonmonogamous legal framework. Both polyamory and religious polygamy present a range of issues for substantive due process, such as freedom of intimate association, freedom of religion, and the right to privacy. Applying the idea of a right to intimate association³³ provides new arguments to use in the legal struggles of the nonmonogamous.

II. THE CURRENT STATE OF PLURAL MARRIAGE

This Comment will begin by analyzing the debate on plural marriage and its connection to polyamorous legal rights by looking at both domestic and international cases. However, it must be noted at the outset that most cases of recognized or contested plural marriage occur in religious communities with ideologies vastly different from what is commonly espoused in polyamorous circles. Common elements between polyamory and plural marriage (as an example) do exist, however. Polyamory and plural marriage, as defined within their respective communities, each involve free and honest choice to enter into

26. See Tweedy, *supra* note 1, at 1461-62.

27. See *Romer v. Evans*, 517 U.S. 620, 632 (1996) (using rational basis to strike down a law prohibiting gays and lesbians from receiving antidiscrimination protections).

28. See, e.g., CAL. CIV. CODE § 51 (West) (2012).

29. See, e.g., *Romer*, 517 U.S. 620.

30. Samuel A. Marcossou, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 665-68 (2001).

31. See *id.*

32. See *Romer*, 517 U.S. at 632.

33. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 627 (1980).

a nonmonogamous arrangement as well as a firm belief in the moral properness of nonmonogamous relationships.³⁴ Obviously, differences exist as well, notably the religious motivation of plural marriage and ideological differences between the two groups on the issues of women's rights and place within society and the family. I believe the usefulness of looking at plural marriage is in addressing the moral strictures implicit in antipolygamy laws, as well as the possibilities for marriage work-arounds found in other countries.

In the United States, Utah is the paradigmatic example of antipolygamy law.³⁵ The Utah Constitution expressly prohibits "polygamous or plural marriages" even while guaranteeing freedom of religion and toleration.³⁶ Given the centrality of plural marriage to fundamentalist Latter-day Saints' practice, it is a truly contradictory statement in the purist sense.³⁷ The only ways around the issue are to preclude fundamentalist Latter-day Saints from the status of religion—in fact, this was the strategy for the court in multiple polygamist cases in the first half of the twentieth century³⁸—or to rely on a belief-versus-practice distinction.³⁹ This contradiction in the Utah Constitution has not faced a serious challenge.

In addition to the antipolygamy constitution of Utah, other antipolygamous statutes are currently found in state law, notably title 76, chapter 7, section 101 of the Utah Code, which criminalizes polygamy even when it is only practiced in the home, without applications for

34. Emens, *supra* note 2, at 300-09.

35. See Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691, 701-06 (2001).

36. "Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited." UTAH CONST. art. III. This was a precondition of Utah's admission to statehood. See Sealing, *supra* note 35, at 716-17 (discussing the effect of the Edwards Act on Utah's statehood bid).

37. 20 JOSEPH SMITH, JOURNAL OF DISCOURSES 28 (1878) ("Some people have supposed that the doctrine of plural marriage was a sort of superfluity, or non-essential to the salvation or exaltation of mankind. In other words, some of the Saints have said, and believe, that a man with one wife, sealed to him by the authority of the Priesthood for time and eternity, will receive an exaltation as great and glorious, if he is faithful, as he possibly could with more than one. I want here to enter my solemn protest against this idea, for I know it is false.")

38. See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1878); *Murphy v. Ramsey*, 114 U.S. 15 (1885); *Davis v. Beason*, 133 U.S. 333 (1890); *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890).

39. See *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877-78 (1990).

multiple marriage licenses.⁴⁰ In *Potter v. Murray City*, a police officer was dismissed from his job for participating in a plural marriage.⁴¹ He attempted to challenge the applicable Utah laws on First and Fourteenth Amendment grounds, as well as the Utah constitutional provisions on equal footing grounds.⁴² Under the 1972 *Wisconsin v. Yoder* ruling on religious freedom, there must be “a state interest of sufficient magnitude to override the interest claiming protection” to a law that impinges on a legitimate religious belief.⁴³ Unfortunately for Potter, the Court in *Yoder* also expressly listed the existing antipolygamy precedent of its time, *Reynolds v. United States*,⁴⁴ as an instance of legitimate government interference with religious practice.⁴⁵ Potter’s privacy claim was dismissed in four sentences by the court.⁴⁶

Currently, section 76-7-101 of the Utah Code is being challenged by Kody Brown’s family, because threats to prosecute them for polygamy have led to the family fleeing Utah.⁴⁷ The Browns only hold one marriage license within the family, between Kody Brown and his first wife, Meri.⁴⁸ However, the Utah law still prohibits living as if one were legally married to more than one person, even if this behavior is private.⁴⁹

Brown v. Herbert attacks the Utah statute on many grounds, including due process, equal protection, free exercise of religion, free speech,⁵⁰ freedom of association, and establishment of religion.⁵¹ As recently as 2006, the private enforcement aspect of Utah law was challenged in *State v. Holm*.⁵² However, *Holm* was pursued in Utah state court and involved an underaged participant.⁵³ *Brown* is a federal case and involves no underaged wives and represents a notably more mainstream complainant.⁵⁴ (The religious denomination of the Brown

40. “A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person.” UTAH CODE ANN. § 76-7-101 (West 2012).

41. *Potter v. Murray City*, 760 F.2d 1065, 1067 (10th Cir. 1985).

42. *Id.* at 1067-68.

43. *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

44. *Reynolds v. United States*, 98 U.S. 145 (1878).

45. *Yoder*, 406 U.S. at 220.

46. *Potter*, 760 F.2d at 1070-71.

47. Plaintiff’s Complaint, *supra* note 8, at 9, 13.

48. *Id.* at 7.

49. *See State v. Holm*, 137 P.3d 726, 733-34 (Utah 2006).

50. The free speech claim is due to the Browns’ participation in the TLC series *Sister Wives*, for which they received much attention, leading to the threats of prosecution. Plaintiff’s Complaint, *supra* note 8, at 22.

51. *Id.* at 17.

52. *Holm*, 137 P.3d at 742-45.

53. *Id.* at 730-31.

54. *Brown v. Herbert*, 850 F. Supp. 2d 1240 (D. Utah 2012).

family is the Apostolic United Brethren, which differs from many groups which practice polygamy in that they accept the original Latter-Day Saints church,⁵⁵ do not promote arranged or underaged marriages⁵⁶ and many of the wives work outside the home.⁵⁷

Of the many arguments put forward in the Brown's Civil Rights Complaint, one of the strongest rests on the (comparatively) new decision in *Lawrence v. Texas*, which overturned a state law that prohibited private sodomy.⁵⁸ In *Lawrence*, there were no minors involved, no coercion, no "public conduct," no "formal recognition," and it involved "sexual practices common to a homosexual lifestyle."⁵⁹ With the exception of the homosexual aspect of *Lawrence*, the same elements apply to the Brown case and the case of many other polygamists living in the United States.⁶⁰ The intrusion into the private lives of consenting adults and the regulation of both their emotional and sexual practices was found to be unconstitutional in *Lawrence* because "[f]reedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."⁶¹ The Court found that the state cannot restrict a relationship without some injury to justify the intrusion.⁶² It is possible to argue that plural marriage damages the institution of marriage as "injury to a person or abuse of an institution the law protects."⁶³ However, the private conduct at issue here does not seem to be substantively different from unmarried persons living together without a belief that they are celestially married. Because unmarried cohabitation is not an abuse to the institution of marriage, it is difficult to see how unmarried cohabitation with celestial marriage is more meaningfully damaging.

For both nonreligious polyamory and religious polygamy, these due process arguments would be applicable if they are accepted by a court in the context of the *Brown* case.⁶⁴ But whether that would extend to

55. *The Primer: A Guidebook for Law Enforcement and Human Services Agencies Who Offer Assistance to Fundamentalist Mormon Families*, THE FAMILY SUPPORT CENTER 11, http://attorneygeneral.utah.gov/cmsdocuments/The_Primer.pdf (last updated Jan. 2011) [hereinafter *The Primer*].

56. *Id.* at 12.

57. See Plaintiff's Complaint, *supra* note 8, at 176-77.

58. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

59. *Id.* at 578.

60. See, e.g., Plaintiff's Complaint, *supra* note 8, at 113-17.

61. *Lawrence*, 539 U.S. at 562.

62. *Id.* at 567.

63. *Id.*

64. If the Browns win their challenge on due process grounds, it would apply equally to polyamorous persons living together in Utah, unlike if the suit was affirmed on free exercise of religion grounds. Additionally, this victory might be emblematic of the due process and

granting full rights to engage in polygamy, including legal recognition of more than one marriage, is unlikely. Instead, the right to engage in private nonmonogamous activity would be more useful to form an argument that any future government discrimination in custody decisions or employment of a polygamous⁶⁵ or polyamorous person⁶⁶ is a violation of his or her fundamental liberty, analogous to the right to be free from government intrusion on private intimate conduct in *Lawrence*. These due process implications will be discussed further in Part IV.

It is clear that it is possible for some Western nations to function with at least partial recognition of plural marriages, because both the United Kingdom and Australia acknowledge plural marriages legally officiated in other countries for purposes of welfare benefits.⁶⁷ Many opponents have argued that allowing for polygamy would create an unduly complex and unadministrable system for family law decisions.⁶⁸ Many problems could arise from a more substantive extension of plural marriage recognition, such as the issues of who should make medical decisions, who should receive inheritance, and who should handle the disposition of the body after death. There have been proposals to overcome this issue, such as allowing for a democratic decision to be made among the wives and a hierarchy that gives preference to the first wife in a given group in decision making or to break a tie vote.⁶⁹ These proposals have found no receptive ear in the United States, and there appears to be no mechanism to compel states to recognize plural marriage of a religious or secular variety. While due process or equal protection might protect polygamists or polyamorous persons from discrimination toward their private lives, it might be impossible to receive government acknowledgement of these unions.

fundamental liberty rights of polyamorous persons and relationships to be treated equally by the government if the court finds that the Browns do have such a right to intimate association.

65. See, e.g., *Potter v. Murray City*, 760 F.2d 1065 (10th Cir. 1985).

66. See, e.g., *Emens*, *supra* note 2, at 311 (citing Transcript, *In re A.M.*, No. K1719 (Juv. Ct., Memphis & Shelby County, Tenn. Apr. 16, 1999)).

67. Talal Malik, *UK Legally Recognizes Multiple Islamic Wives*, ARABIANBUSINESS.COM (Feb. 4, 2008, 5:07 PM), <http://www.arabianbusiness.com/uk-legally-recognises-multiple-islamic-wives-121789.html>; Natalie O'Brien, *Probing Polygamy*, AUSTRALIAN (June 26, 2008, 12:00 AM), <http://www.theaustralian.com.au/news/probing-polygamy/story-e6frg8go-1111116736076>. The legal principle that allows for this loophole is *lex loci celebrationis*. It has been acknowledged at least once in the United States as well, in *In re Dalip Singh Bir's Estate*, 188 P.2d 499, 501-02 (Cal. Ct. App. 1948).

68. See *Sealing*, *supra* note 35, at 753-56 (2001).

69. See *id.* at 755.

III. POLYAMORY AS A SEXUAL ORIENTATION

This argument will have limited applicability to persons involved in religious or customary nonmonogamy, like celestial marriage⁷⁰ or marriage in South Africa.⁷¹ Instead, it focuses exclusively on those who identify as polyamorous and/or those who pursue relationships in accordance with the definition of polyamory. It must be acknowledged that many men and women living in polygamous relationships actively prefer the lifestyle.⁷² However, the majority of this praise for polygamy comes from the engendering of female friendships, cooperative child-rearing arrangements, and mutual responsibilities, not from sexual desires or emotional fulfillment.⁷³ Instead, to include polyamory as a sexual orientation, we must look to the definition of polyamory and the definition of sexual orientation and see if the essential elements of sexual preference overlap.

Ann Tweedy's article discussed the possibility of viewing polyamory as a sexual orientation.⁷⁴ The issue could be seen to depend largely on the definition of sexual orientation: is it a changeable, socially constructed process by which certain parties are favored, or is it an immutable truth, a congenital quality?⁷⁵ In some ways, this larger debate is fundamentally flawed.⁷⁶ As was demonstrated in *Lawrence*, the Court is capable of looking to the sexual acts common to a particular group without coming to a decision as to the immutability of the designation.⁷⁷ Additionally, the way that a category is experienced by an individual will not necessarily differ whether the category is a social idea or an immutable trait; the individual and society itself will view the individual by that logic, whether positively or negatively.⁷⁸

What is unique about polyamory and those persons who identify as polyamorous? First, polyamorists do not among themselves agree on the

70. Defined as plural marriage engaged in by persons motivated by Joseph Smith's foundational revelations to the Mormon Church. *The Primer*, *supra* note 54, at 24.

71. Polygamy is legally recognized in South Africa. Jacob Zuma, the current president of South Africa, has three acknowledged wives. *Hundreds Arrive in Village for Zuma's Fifth Wedding*, ABC NEWS (Jan. 5, 2010, 6:40 AM), <http://www.abc.net.au/news/2010-01-04/hundreds-arrive-in-village-for-zumas-fifth-wedding/1198086>.

72. *See, e.g.*, Emens, *supra* note 2, at 314-17.

73. *Id.*

74. Tweedy, *supra* note 1, at 1461-62.

75. *See id.* at 1463-73.

76. *See* Marcossion, *supra* note 30, at 659-72 (noting that many immutable qualities are not subject to heightened scrutiny while many mutable qualities, such as religion, are).

77. *Lawrence v. Texas*, 539 U.S. 558, 567-70 (2003).

78. *See* Marcossion, *supra* note 30, at 707.

level of identification with the label itself.⁷⁹ Some claim that polyamory is a quality that individuals may have, while others claim that a relationship is polyamorous, not a person.⁸⁰ To speak of a sexual attraction that is unique to polyamory is also problematic, because the unique *sexual* element of polyamory is merely to engage in sexual acts with multiple persons, rather than any particular sexually driven prerequisite activity or a particular gender or sex or attribute of partner.⁸¹ Polyamory can apply to any heterosexual, homosexual, or queer person with their polyamorous feelings sitting beside these attractions but not forming them.⁸²

There are two emotions described in conjunction with polyamory that seem central to the polyamorous identity, whether the practitioner views herself as innately polyamorous or a chosen polyamorist: jealousy (or the lack thereof)⁸³ and compersion.⁸⁴ The absence of jealousy is regarded by a large part of the polyamorous community as the personal quality they felt “hardwired” with from an early age.⁸⁵ Others experience jealousy but elect to place less meaning on it than is placed in monogamous relationships generally.⁸⁶ Jealousy is not seen as the fault of the nonjealous party but a natural reaction to insecurity or the embedded monogamous cultural imperative.⁸⁷ Compersion is an emotional idea defined by polyamorous communities as happiness at a partner’s success in other relationships, whether sexual or romantic or both.⁸⁸ It is not universal in all polyamorous relationships, particularly those struggling with jealousy.⁸⁹ But compersion is generally regarded as a goal in polyamorous relationships.⁹⁰ These relational qualities are the foundations of polyamorous relationships as they encompass both the action of having more than one relationship and the philosophical elements of honesty, self-possession, and knowledge.

79. Tweedy, *supra* note 1, at 1483.

80. See *FAQs*, MNPOLY, <http://www.mnpoly.org/FAQs> (last visited Sept. 12, 2012).

81. See Emens, *supra* note 2, at 283.

82. See *id.*

83. Tweedy, *supra* note 1, at 1483.

84. ANITA WAGNER, CULTIVATING THE SPIRIT OF COMPERSION IN POLYAMOROUS RELATIONSHIPS 1 (2010), <http://www.practicalpolyamory.com/images/COMPERSION.pdf>. Compersion is generally defined as the inverse of jealousy, as a sense of joy in one’s other partner’s romantic relationships. *Id.*

85. Tweedy, *supra* note 1, at 1483.

86. See DOSSIE EASTON & JANET W. HARDY, THE ETHICAL SLUT 108-130 (2d ed. 2009).

87. See *id.*

88. WAGNER, *supra* note 84, at 1.

89. See *id.* at 3-4.

90. Emens, *supra* note 2, at 330.

There are a few problems with viewing polyamory (and nonmonogamy more generally) as a sexual orientation. The first is the incredible ubiquity of nonmonogamous sexual attraction. If sexual orientation is defined by certain innate characteristics related to sexual preferences, whether it is mutable, immutable, socially constructed, or essential, sexual desire for multiple people at a given time would place polyamorists among the majority of the world population.⁹¹ If sexual orientation is a sexual preference that is completely innate, polyamory cannot be carved out from the majority as a particular group; polyamorists would merely be a faction of a larger majority who acted on their nonmonogamous impulses in a particularly open and honest (process oriented) way.⁹² After all, it can hardly be said that there is a shortage of nonmonogamous sexual exchanges occurring, given the prevalence of adultery in the United States.⁹³ If sexual orientation is defined as a response to some prevailing categorization of sex, analogous to the creation of the heterosexual default and homosexual other, what is the category of sexual activity or attraction that does not sweep polyamory in with everyone else? Nonmonogamous sexual desire and sexual activity are not unique to the polyamorist community.⁹⁴ And to claim that all those persons committing adultery or serial monogamy are closeted polyamorists would completely abrogate the fundamental elements of polyamory such as radical honesty, self-possession, and self-knowledge.

Instead, the argument must be that sexual orientation encompasses not only sexual attractions, practices, and desires, but also relationship orientations. This argument comes perilously close to declaring a feeling, such as compersion or jealousy, a sexual orientation. It would seem the question of whether polyamory is a sexual identity misses a large part of the essential quality of polyamory: polyamorists need not sleep with anyone outside a monogamous relationship to be polyamorous.⁹⁵ After all, only one element of polyamory involves nonmonogamous sexual interactions.⁹⁶ The other three involve emotional

91. *See id.* at 299-300.

92. That is to say, if nonmonogamous sexual behavior is a sexual preference or sexual orientation, polyamory is merely a subdivision within that preference—like the portion of heterosexual relationships who prefer to split the check at dinner compared to the heterosexual population at large.

93. *See* Emens, *supra* note 2, at 299-300.

94. *See id.*

95. Consider the ongoing question of whether a person is polyamorous or the relationship is polyamorous.

96. Emens, *supra* note 2, at 283-84.

attachments and the hope for one's partners to have rewarding sexual and emotional relationships with others.⁹⁷ This broad emotional difference marks polyamory as unique. An interesting comparison can be made here between the taboo associated with swinging⁹⁸ and polyamory. While both practices are frowned upon generally and can lead to bias,⁹⁹ swinging is more commonly regarded as a suburban activity, conducted in private and between the two parties in the relationship.¹⁰⁰ In contrast, the emotional dangers of polyamory are cited as a more pressing fear.¹⁰¹

I would argue that it is strictly the emotional construct of monogamy, rather than the sexual fidelity, that is the deviation from which polyamory is derived. Whether or not this allows polyamory to sit within the concept of sexual orientation or creates a new distinction of emotional orientation is unclear. It is clear that sexual orientation has been used in some contexts to apply to gender identity or perceived orientation, although this has had limited usefulness.¹⁰² Whether this expansion of sexual orientation to encompass a more emotional predilection or relationship type like polyamory would be accepted by courts is one question; whether it is in the best interest of polyamorous persons is another question entirely.

After all, the protections given to sexual orientation are hardly meaningful. For purposes of equal protection, a law that discriminates against a group based on sexual orientation must pass a rational basis test with an added scrutiny of explaining that the law was not created based on some "animus" toward the group.¹⁰³ Essentially, this standard, which is stated as rational basis but is something more than the traditional

97. *Id.*

98. Swinging is commonly defined as casual and/or anonymous sex engaged in by preexisting couples with others—usually established couples. *See Compare and Contrast: Polygamy vs. Swinging*, SEROLYNNE, <http://www.serolynne.com/polyvsswing.html> (last visited Sept. 12, 2012).

99. *See, e.g., Ex-wife of GOP Senate Candidate Alleged Sex Club Forays*, CNN (June 22, 2004), http://articles.cnn.com/2004-06-22/politics/ryan.divorce_1_club-allegations-documents-jack-ryan?_s=PM:ALLPOLITICS (demonstrating that public knowledge of a swinging lifestyle is detrimental to public opinion).

100. *Compare and Contrast: Polygamy vs. Swinging*, *supra* note 98; *see also* Curtis Bergstrand & Jennifer Blevins Williams, *Today's Alternative Marriage Styles: The Case of Swingers*, ELECTRONIC J. HUMAN SEXUALITY (Oct. 10, 2000), <http://www.ejhs.org/volume3/swing/body.htm> (finding that swingers are disproportionately middle class, white, and conservative).

101. *See* Sunny Strasburg, *Polyamory: Label or Process?*, REALITY SANDWICH (Feb. 6, 2008, 3:57 PM), http://www.realitysandwich.com/polyamory_label_or_process; *Polyamory: The Practice of Jealousy Management*, XEROMAG (Oct. 10, 2011), <http://www.xeromag.com/fvpolymorefrigerator.html>.

102. Tweedy, *supra* note 1, at 1463-65.

103. *See Romer v. Evans*, 517 U.S. 620, 632 (1996).

standard, appears to prevent those laws from using a bald pretext as a cover to pass the rational basis test and discriminate. The text of *Romer* itself states that the law must be “inexplicable by anything but animus”—a tenuous connection to legitimate government interest is fine; an unwise law is fine.¹⁰⁴ The law in question in *Romer* was unique for uniformly prohibiting a class of people from the right to a specific protection without explanation.¹⁰⁵

In the case of polyamory, it seems clear that many regulations of family law that have an impact on nonmonogamous relationships would have at least a tenuous connection to legitimate government ends. The Equal Protection Clause allows for the regulation of many aspects of private life, such as adult incest.¹⁰⁶ Given the common reaction against polygamy on the grounds that it would unacceptably complicate matters of family law and government benefits, it is easy to see how a law that disfavors a polyamorous person might easily clear the rational basis standard. Because most governmental actions that discriminate against polyamorous persons fall under housing regulations that limit unmarried persons from living together or custody decisions made by judges claiming to be in the best interest of the child, the cause of the discrimination is hardly an open faced bias in the law, but is found in its inability to recognize polyamorous relationships as valid and safe. This is hardly the sort of animus-only legislation best addressed by equal protection.

Additionally, I would argue that there is a clear drawback in arguing for polyamory to be considered a sexual orientation for equal protection purposes or to use the limited state statutes in existence, which protect against discrimination on the basis of sexual orientation.¹⁰⁷ Polyamory and polygamy are possibly less accepted in the United States than homosexuality. In Justice Scalia’s dissent to *Romer*, he lists polygamy alongside murder as reprehensible conduct that deserves the approbation of legislators.¹⁰⁸ Scalia clearly believes that the gains made by the LGBT community are unacceptable and to demonstrate this distaste, he compares homosexual discrimination to prohibitions against polygamy.¹⁰⁹ There exists a danger in pressing the case that polyamory is a sexual orientation. In the words of one polygamist, the gains made under that

104. *Id.*

105. *See id.* at 632-33.

106. *See, e.g.*, LA. REV. STAT. ANN. § 14:78 (2012).

107. *See, e.g.*, CAL. CIVIL CODE ANN. § 51 (Deering 2012).

108. *Romer*, 517 U.S. at 644 (Scalia, J., dissenting).

109. *Id.*

rubric will endanger “the case of . . . our gay and lesbian brothers and sisters.”¹¹⁰

IV. SUBSTANTIVE DUE PROCESS, THE RIGHT TO ASSOCIATION, AND POLYAMORY

A third possible option for addressing polyamory discrimination would be to advocate for substantive due process rights along the lines of that already proposed by Kenneth Karst.¹¹¹ The most obvious advantage of this would be to place polyamory along a larger continuum of liberty interests, such as privacy, autonomy, reproductive rights, gay rights, and the First Amendment rights of association and assembly.¹¹² Moving from an equal protection claim to a due process claim makes “usual judicial deference to the legislature . . . inappropriate,” because fundamental liberties are at stake.¹¹³ Additionally, allowing for a substantive due process right would create a work-around for the lack of clear group delineation found in other classifications, such as race or national origin. Although polyamory was not under consideration at the time of the Karst article, the philosophical and moral, as well as dispensational, underpinnings of polyamory align themselves well with the First Amendment, equal protection, and substantive due process rights discussed therein.¹¹⁴

Karst outlined the limits of the substantive due process right to freedom of intimate association in a *Yale Law Journal* article in 1980.¹¹⁵ While freedom of intimate association, unlike the right to privacy, was not and is not a uniformly accepted right by the Court, it has been cited and supported for many years in many contexts. The two basic applications of this freedom of intimate association fall under the categories of First Amendment associations and the right to live a family life free of unnecessary government influence.

In *U.S. Department of Agriculture v. Moreno*, the Court found that the food stamp program could not be organized in such a way as to deprive communes and other “hippie”-associated individuals from eligibility.¹¹⁶ The majority ruled on equal protection grounds that no

110. Hadar Aviram, *Make Love, Not Law: Perceptions of the Marriage Equality Struggle Among Polyamorous Activists*, 7 J. BISEXUALITY 261, 273 (2008).

111. See Karst, *supra* note 33, at 653-55.

112. See *generally* Griswold v. Connecticut, 381 U.S. 479 (1965); Lawrence v. Texas, 539 U.S. 558 (2003).

113. Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977).

114. See Karst, *supra* note 33, at 655-66.

115. *Id.*

116. U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534-35 (1973).

rational relationship existed to legitimate government interests and that the “bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”¹¹⁷ Justice Douglas’s concurrence rested instead on the “penumbra of the First Amendment”¹¹⁸ and “peripheral constitutional rights,” like those found in *Griswold v. Connecticut*.¹¹⁹ He found that the choice of one’s associates must be free from government interference.¹²⁰ One rationale, that of the majority, assumes that the group identity is being deliberately attacked, which cannot stand on rational basis grounds,¹²¹ while the other ignores the idea of group identity in favor of a broad right to organize one’s household life as one would wish.¹²²

In *Roberts v. U.S. Jaycees*, the Court held that a Minnesota law that would require a membership association to accept women as full members could be upheld on the grounds that the right to associate, both in an expressive way and in an intimate way, was not infinite and could be upheld to serve compelling state interests.¹²³ Two critical points arise from *Roberts*: first, family associations have a stronger value than membership associations,¹²⁴ and second: “The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”¹²⁵ The higher value of family associations is justified because families

by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.¹²⁶

117. *Id.* at 534.

118. *Id.* at 544 (Douglas, J., concurring).

119. *Id.* at 542.

120. *Id.* at 544-45.

121. *Id.* at 538 (majority opinion).

122. *Id.* at 542-45 (Douglas, J., concurring).

123. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628-29 (1984).

124. *See id.* at 619-20.

125. *Id.* at 623.

126. *Id.* at 619-20.

The Court looked to both the political and personal qualities of associations in *Roberts* and found that the more diffuse a group is, the less meaningfully they can call upon the freedom to intimate association, rather than a right to association based on more political or philosophical grounds.¹²⁷

In some ways, the argument that polyamory is a philosophical or political “sexual orientation” or a class of philosophically and sexually united individuals might seem far-fetched or disingenuous. However, if polyamory continues to be defined by not only multiple intimate relationships but also its emphasis on radical honesty, self-possession, and the equality of sexes and partners, it could be seen as a political or philosophical group protected from intentional discrimination in government benefits by *Moreno*.¹²⁸ After all, the politically disfavored group in *Moreno* is comprised of the ill-defined “hippies” of the 1960s and 1970s, already presumed to engage in “free love” within their communal groups. If anything, most polyamorous relationships will appear to be closer to a conventional understanding of a family when compared to hippie communes—generally limited in number,¹²⁹ composed of working tax-paying people and frequently homeowners with small children.¹³⁰

Additionally, the open performance of polyamory (the circumstance which is most likely to elicit discrimination) can be seen as an expressive performance of association as outlined in *Roberts*.¹³¹ It is implicit in many arguments for same-sex marriage equality that people have an important interest in being open and honest about their personal lives. Being an “out” gay man holds a myriad of positive psychological benefits and is a performative, public statement about the essential legitimacy of gay relationships. This performative quality of nonnormative relationships like polyamory would likewise operate as the sort of freedom that same-sex relationships seek.

A First Amendment argument, incorporated into a substantive due process right to intimate association according to Karst, succeeds in one

127. *Id.* at 620.

128. *See* U.S. Dep’t of Agric. v. *Moreno*, 413 U.S. 528, 534-35 (1973).

129. Some polyamorous persons claim that a limit of four to five persons in a relationship forms a sort of practical limit. Others place no limit on the number of sexual relationships they engage in, but limit their emotional and romantic partners. *See PolySaturation*, SEROLYNNE, <http://www.serolynne.com/polysaturation.htm> (last visited Sept. 12, 2012).

130. Matt C. Keener, A Phenomenology of Polyamorous Persons 42-50 (May 2004) (unpublished M.S. thesis, University of Utah), <http://user.xmission.com/~mkeener/thesis.pdf>; *see, e.g.,* Sheff, *supra* note 9, at 259-62.

131. *See Roberts*, 468 U.S. at 617-18.

way that an equal protection sexual orientation argument does not. Polyamory on the one hand, and religious, cultural, or customary polygamy on the other, both have strong roots in the rhetoric of choice, moral position, and religious or political affiliation found in First Amendment jurisprudence. The unresolved issue of whether polyamory is a choice, or an embedded identity, or a constructive identity, or immutable, or some combination thereof is diminished in importance. Polyamorous groups can instead be understood as groups brought together by a common ideology of relationships. The inquiry then turns to *Roberts*, and whether or not this group association falls closer to the designation of family than a broad membership association.

The second argument is precisely that polyamorous relationships fall within the fundamental liberty interests given to families and relationships.¹³² In *Village of Belle Terre v. Boraas*, the Court held that a municipality could decide to limit by zoning the number of unmarried persons living together for purposes of controlling property values and general community integrity.¹³³ The plaintiffs in this case were college roommates attempting to split the costs of housing in a college town.¹³⁴ The town ordinance prohibited more than two persons who did not constitute a family from living together.¹³⁵ It defined family as “persons related by blood, adoption, or marriage.”¹³⁶ The court found that it was within the legislative providence to prohibit more than two unmarried persons from living together even if three or four persons might constitute a family.¹³⁷

In contrast, the Court in *Moore v. City of East Cleveland* held that a city could not prohibit a grandmother from living with her son, his son, and her grandson from another child.¹³⁸ The Court found that East Cleveland had improperly defined family to include some relations and

132. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

133. *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 7-9 (1974).

134. *Id.* at 2-3.

135.

It has restricted land use to one-family dwellings excluding lodging houses, boarding houses, fraternity houses, or multiple-dwelling houses. The word “family” as used in the ordinance means, “[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.”

Id. at 2 (quoting BELLE TERRE, N.Y., MUNICIPAL CODE art. 1, § D-1.35a (1970)).

136. *Id.*

137. See *id.* at 8.

138. *Moore v. City of East Cleveland*, 431 U.S. 494, 498-99 (1977).

not others.¹³⁹ The Court declared that this was a much more meaningful intrusion into the family and that *Belle Terre* was therefore not the controlling law.¹⁴⁰ Instead, this intrusion was analyzed by looking to the fundamental liberties protected by the Due Process Clause.¹⁴¹ The Court also deliberately refused to restrict its analysis of the family in this case to a traditional nuclear family.¹⁴²

For polyamorous persons seeking to overturn housing laws that specifically discriminate against them or laws that govern the family in other ways such as in custody or best interest of the child cases, the question is whether *Belle Terre* or *Moore* is the controlling analysis. Is a polyamorous family in any form always a family, sometimes a family, or never a family? Will that depend on the presence of children who have an interest in living with their parents or merely on the ongoing sexual connections between the adult members of the relationship? For example, a state court has found that unrelated foster families fall within the protection of *Moore* by either distinguishing from the facts in *Belle Terre* or applying their own state constitutions to protect foster families.¹⁴³

Additionally, there are protections against discrimination toward unmarried couples generally,¹⁴⁴ which the Court in *Belle Terre* did not deal with directly because there was no sexual or romantic relationship between the roommates involved.¹⁴⁵ Both of these considerations militate toward an acceptance of polyamorous families as families to be protected from undue government interference, because marriage, adoption, or blood relationships do not apply. If the definition of family relationships given in *Roberts* is followed, many poly families will fit within it.¹⁴⁶ However, it is explicit in *Belle Terre* that the town can limit the number of unmarried persons above two who live together, even though they might be family.¹⁴⁷ Conversely, the Court in *Belle Terre* conditioned its approval of the ordinance on the assumption that no fundamental liberty was impinged upon,¹⁴⁸ which would seem to allow *Belle Terre* to be distinguished in the case of a polyamorous family with children.

139. *Id.*

140. *Id.*

141. *Id.* at 499.

142. *See id.* at 502.

143. *See Children's Home of Easton v. City of Easton*, 53 Pa. Commw. 216, 219-22 (Pa. Commw. Ct. 1980) (holding that a foster family is a functional equivalent of a natural family, unlike the students in *Belle Terre*).

144. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438 (1972).

145. *See Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 2-3 (1974).

146. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 619-20 (1984).

147. *Belle Terre*, 416 U.S. at 8.

148. *Id.* at 7.

V. CONCLUSION

The legal challenges of polyamory or polygamy come frequently in the form of indirect discrimination in the form of housing prohibitions, unfair custody decisions, or employment discrimination. In the case of active discrimination against private conduct, such as in Utah, there lies possible relief in the application of due process and *Lawrence*. It is still unlikely that any formal recognition could be given to polygamy or polyamory.

For more passive barriers, based on the presumptions of monogamy in federal and state laws or the dominant fear of nonmonogamous desires, equal protection and sexual orientation will not likely provide a basis to challenge these sorts of decisions. Sexual orientation is not a distinguishing characteristic of polyamorous persons and sexual orientation law provides limited protections. However, there is a possibility that due process can be applied, both through the First Amendment right to associate and within the liberty interests in family, to defend the right of polyamorous relationships to stay together, keep their children, or fight unfair termination.