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Compulsory Sexuality

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COMPULSORY SEXUALITY

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Asexuality is an emerging identity category that challenges the common assumption that everyone is defined by some type of sexual attraction. Asexuals—those who report feeling no sexual attraction to others—constitute one percent of the population, according to one 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 the antidiscrimination law of one state and several localities, but legal scholarship has thus far neglected the subject.

This Article introduces asexuality to the legal literature 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.

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Thinking about asexuality also sheds light on our legal system. Ours is arguably a sexual law, predicated on the assumption that sex is important. This Article uses asexuality to develop a framework for identifying the ways that law privileges sexuality. Across various fields, these interactions include legal requirements of sexual activity, special carve-outs to shield sexuality from law, legal protections from others' sexuality, and legal protections for sexual identity. Applying this framework, the Article traces several ways that our sexual law burdens, and occasionally benefits, asexuals. This Article concludes by closely examining asexuality's prospects for broader inclusion into federal, state, and local antidiscrimination laws.

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 "[H]ey, what did you think of the salmon?"

"[M]eh, it's okay, I don't really like food[.]"

". . . [W]ait, you must mean you don't really like salmon . . . [W]hat do you mean you don't like food?"

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

"[U]hh, it's delicious[.]"

"[S]ee, it's just not that appealing to me[.]"[1]

1. Blueskies, Comment to *Some Blunt Questions, Asexual Q&A*, ASEXUAL VISIBILITY & EDUC. NETWORK (July 15, 2008, 4:49 AM), http://www.asexuality.org/en/topic/32908-

Asexuality is the middle child of the sexual orientation family, neglected until 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 been 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: one state and several localities across the country protect against discrimination on the basis of "asexuality."[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.[6] 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, and 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 our broader culture.

In contrast to homosexuality, asexuality has not been expressly punished by the law. For this reason, asexuality may appear to have little connection to

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some-blunt-questions (ellipses in original). One forum participant wrote: "That food analogy is perfect." Ankh Ascendant, Comment to *Some Blunt Questions, Asexual Q&A*, ASEXUAL VISIBILITY & EDUC. NETWORK (July 21, 2008, 9:46 PM), http://www.asexuality.org/en/topic/32908-some-blunt-questions/page-2. Another participant did not view the analogy as favorably, writing, "Well, gosh, if you stop eating you rather die, don't you? But yeah, I suppose I see what you're saying . . . ." Forensic, Comment to *Some Blunt Questions, Asexual Q&A*, ASEXUAL VISIBILITY & EDUC. NETWORK (July 15, 2008, 5:38 AM), http://www.asexuality.org/en/topic/32908-some-blunt-questions (ellipsis in original) (emoji omitted).

2. ASEXUAL VISIBILITY & EDUC. NETWORK, http://www.asexuality.org/home (last visited Jan. 29, 2014); *see also, e.g.*, ANTHONY F. BOGAERT, UNDERSTANDING ASEXUALITY 16 (2012).

3. *See, e.g.*, Lori A. Brotto et al., *Asexuality: A Mixed-Methods Approach*, 39 ARCHIVES SEXUAL BEHAV. 599, 599 (2010) ("There have been at least seven primetime television features on asexuality in the past year . . . .").

4. (A)SEXUAL (Arts Engine 2011).

5. *See infra* Part III.E.1.

6. The U.S. legal system is better described as "sexual law" than as a regime of "compulsory sexuality," as Part III reveals. The title of this Article, *Compulsory Sexuality*, refers to the pervasive cultural assumption—set into relief by the emergence of asexuality and popular responses to it—that everyone is defined by some kind of sexual attraction. *See, e.g.*, *infra* Part II.A.3. The Article's title draws inspiration from Adrienne Rich's classic essay: Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631 (1980).

law. On the contrary, this Article identifies a broad range of legal intersections with asexuality. Most surprising is that one state—New York—and several localities include asexuality within their antidiscrimination laws.[7] There is a plausible argument for such protections, bolstered by a recent finding that asexuals face bias similar to, or greater than, that faced by homosexuals and bisexuals.[8] Nonetheless, there is a common intuition that asexuality is a poor fit with existing antidiscrimination law.[9] This Article therefore identifies eight criteria that track the degrees of protection accorded to different identity categories and considers asexuality in light of these criteria. Asexuality currently meets very few of the criteria, though this could change over time.[10]

The Article has three parts. Part I explains asexuality's emergence as an identity category through conceptual, clinical, empirical, and identity-based discourses. 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 possible models for understanding it. Part III looks at our laws from the perspective of asexuality, outlining and applying a framework for analyzing asexuality's intersections with law. This Part concludes by identifying a plausible normative case for protecting asexuality under antidiscrimination law and by reflecting on what would need to happen for this protection to become widespread.

I. THE EMERGENCE OF ASEXUALITY

> The definition of asexuality is "someone who does not experience sexual attraction."
>
> —Asexual Visibility & Education Network (AVEN)[11]

Asexuality emerged as an analytic category only recently. Four discourses shape its emergence: one conceptual, one clinical, one empirical, and one identity based. These discourses intersect and inform each other, but distinguishing them helps to illuminate diverse perspectives on this phenomenon. This Part therefore introduces asexuality by telling the story of its development as a category of analysis through these four contexts.

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7. *See* N.Y. EXEC. LAW § 292(27) (McKinney 2013) ("The term 'sexual orientation' means heterosexuality, homosexuality, bisexuality or asexuality, whether actual or perceived."). For the story of New York's incorporation of "asexuality," as well as a list of the other U.S. localities that cover asexuality and information on a recent development in U.K. law, see Part III.E.1 below.

8. *See infra* Part III.E.2.a (discussing these results).

9. *See infra* text accompanying notes 250-68.

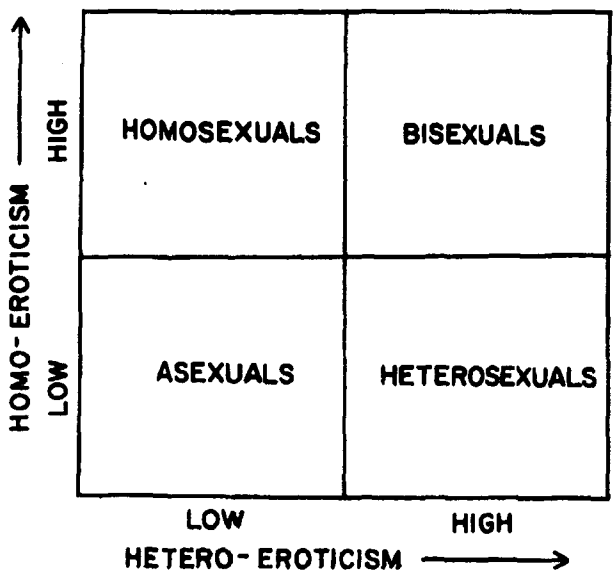
10. *See infra* Part III.E.3.

11. *General FAQ*, ASEXUAL VISIBILITY & EDUC. NETWORK, http://www.asexuality.org/home/general.html#ex1 (last visited Jan. 29, 2014).

A. *Conceptual: The Fourth Sexual Orientation*

The identification of asexuality as a concept is generally attributed to the psychologist Michael D. Storms, whose 1980 article posited asexuality as a fourth sexual orientation, alongside homosexuality, heterosexuality, and bisexuality.[12] Storms challenged the Kinsey scale, which located subjects somewhere on a spectrum from exclusive heterosexual orientation (zero) to exclusive homosexual orientation (six).[13] "On Kinsey's unidimensional scale," as Storms aptly explained it, "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."[14] By contrast, Storms proposed a two-dimensional model—portrayed in Figure 1—in which homoeroticism and heteroeroticism were separate axes, along which any person could have greater or lesser amounts of either, independent of the other.

FIGURE 1
Storms's 1980 Two-Dimensional Model[15]



12. Michael D. Storms, *Theories of Sexual Orientation*, 38 J. PERSONALITY & SOC. PSYCHOL. 783, 784-85 (1980).

13. *See* ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 639-41 (1948). On Kinsey's designation of "X" for those who did not make the scale, see *id.* at 658 fig.170.

14. Storms, *supra* note 12, at 785.

15. *Id.* at 784 fig.1.

Storms pointed out that his model overcame a problem that had hindered not only Kinsey's work, but also that of Masters and Johnson: the conflation of bisexuals and asexuals.[16]

Kinsey's work had revealed a substantial population of subjects—especially among unmarried females—who reported no desire for either men or women; however, Kinsey had largely ignored these subjects, labeling them "X."[17] (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.)[18] Storms's 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."[19] Storms concluded that "these data 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."[20] Although Storms's empirical project did not include asexuals, his theoretical model made a space for asexuals as those individuals who score low on both dimensions.[21] It is worth noting that, while Storms is often cited as initiating the study of asexuality, another scholar—Myra T. Johnson—had published an article more specifically about asexuality shortly before Storms published his. Johnson's article focused on asexuality in women, a point to which I return when discussing the gendered dimensions of asexuality in Part II.[22]

B. *Clinical: Hypoactive Sexual Desire Disorder*

Also in 1980, clinical psychology introduced its version of asexuality.[23] The third edition of the American Psychiatric Association's Diagnostic and

16. *Id.* at 790 (discussing WILLIAM H. MASTERS & VIRGINIA E. JOHNSON, HOMOSEXUALITY IN PERSPECTIVE (1979), and noting that when Masters and Johnson conducted their 1979 study of the sexual responses of homosexuals, heterosexuals, and ambisexuals (who had no preference about the gender of their sexual partners), their definition of the latter group included both bisexuals and asexuals).

17. *See, e.g.*, BOGAERT, *supra* note 2, at 17, 45 ("In the male sample, 1.5 percent were Xs. In his female sample, . . . 14-19 percent of unmarried women were Xs, whereas 1-3 percent of married women were Xs." (citations omitted)); ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE 472 (1953); ALFRED C. KINSEY ET AL., *supra* note 13, at 658 fig.170 (1948). On gender differences and asexuality, see Part II.B.2.b below.

18. *See, e.g.*, (A)SEXUAL, *supra* note 4 (including comments by Cynthia Graham of the Kinsey Institute).

19. Storms, *supra* note 12, at 790.

20. *Id.*

21. *See id.* at 788-89 (describing his empirical inquiry).

22. *See infra* notes 192-97 and accompanying text.

23. By calling Hypoactive Sexual Desire Disorder (HSDD) a "version of asexuality," I do not mean to suggest that the two have very much in common. On the contrary, they have

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.[24] In 1987, the revised DSM-III shifted to the terminology of "Hypoactive Sexual Desire Disorder" (HSDD), replacing the clinical assumption of "inhibition" with a term signaling variation from the norm, "hypoactive."[25] As presented in the DSM-IV—versions of which held strong for nearly two decades, from 1994 to 2013—the "essential feature" of HSDD is "a deficiency or absence of sexual fantasies and desire for sexual activity."[26] Notably, under the DSM-IV, the "disturbance must cause marked distress or interpersonal difficulty."[27]

HSDD is controversial in both feminist and asexual circles. Those who support the diagnosis make bold claims, such as this: "Hypoactive sexual desire disorder . . . 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%)."[28] 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.[29] One historian notes that "[i]n earlier eras a woman had to worry that her sexual feelings were inappropriate and abnormal," whereas "[i]n 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. . . . In popular wisdom,

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important differences, most notably the "distress" criterion for HSDD. *See infra* note 32 and accompanying text.

24. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 302.71, at 278-79 (3d ed. 1980) (defining it as "[p]ersistent and pervasive inhibition of sexual desire" and noting that "[i]n 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").

25. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 302.71, at 293 (3d ed., rev. 1987).

26. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 302.71, at 539 (4th ed., text rev. 2000). The DSM-IV was published in 1994, and the DSM-IV-TR in 2000. For a discussion of the DSM-V, which was published in May 2013, see notes 35-39 below and accompanying text.

27. AM. PSYCHIATRIC ASS'N, *supra* note 26, § 302.71, at 539.

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

29. 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' 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.'" (citation omitted)); *see also* ORGASM INC. (First Run Features 2009) (asserting, for example, that two sexologists, the Berman sisters, were paid up to $75,000 per day by pharmaceutical companies to promote diagnoses of sexual disorders on news programs around the country).

sexual pleasure has become something of a medical necessity."[30] 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."[31]

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.[32] Interestingly, researchers drawing this distinction have not emphasized that HSDD requires either "marked distress *or interpersonal difficulty*"[33] and therefore seems to leave room for diagnoses of HSDD even in the absence of distress in the asexual individual.[34] The changes in the DSM-V,[35] released in May 2013—which include the intriguing decision to create separate low-desire diagnoses for men and women[36]—take care of this, however, by changing the language to "clinically significant distress."[37] Most notably, after significant lobbying,[38] the DSM-V for the first time

30. Lillian Faderman, *Nineteenth-Century Boston Marriage as a Possible Lesson for Today*, *in* BOSTON MARRIAGES: ROMANTIC BUT ASEXUAL RELATIONSHIPS AMONG CONTEMPORARY LESBIANS 29, 36-37 (Esther D. Rothblum & Kathleen A. Brehony eds., 1993).

31. Annemarie Jutel, *Framing Disease: The Example of Female Hypoactive Sexual Desire Disorder*, 70 SOC. SCI. & MED. 1084, 1089 (2010).

32. *See* Brotto et al., *supra* note 3, at 599 (finding that sexual response was "not experienced as distressing" for self-identified asexuals); Lori A. Brotto & Morag A. Yule, *Physiological and Subjective Sexual Arousal in Self-Identified Asexual Women*, 40 ARCHIVES SEXUAL BEHAV. 699, 710 (2011) ("Although the significantly lower levels of partner-related sexual desire may suggest that asexuals fit the criteria for HSDD, the fact that they do not experience distress . . . means that they do not meet diagnostic criteria.").

33. AM. PSYCHIATRIC ASS'N, *supra* note 26, § 302.71, at 539 (emphasis added).

34. One researcher indicates without citation that "a sexual dysfunction is only diagnosed in modern medicine and psychology (e.g., in the *DSM*) if it has an effect on interpersonal relations *beyond* the specific sexual domain that is of issue." BOGAERT, *supra* note 2, at 110-11. I have been unable to substantiate this claim, and other sources are to the contrary. *See, e.g.*, HANDBOOK OF CLINICAL SEXUALITY FOR MENTAL HEALTH PROFESSIONALS 100-05 (Stephen B. Levine et al. eds., 2003) (discussing "interpersonal difficulty" in a way that assumes it covers a partner's distress).

35. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

36. Interestingly, the male version of low-desire disorder tracks the current HSDD diagnosis almost exactly while the DSM-V added a newly minted diagnosis for women called "Female Sexual Interest/Arousal Disorder." *Compare id.* § 302.71, at 440 (defining "Male Hypoactive Sexual Desire Disorder"), *with id.* § 302.72, at 433 (defining "Female Sexual Interest/Arousal Disorder"). Also notable is the removal of "sexual aversion disorder" from the proposed DSM-V "due to rare use and lack of supporting research." AM. PSYCHIATRIC ASS'N, HIGHLIGHTS OF CHANGES FROM DSM-IV-TR TO DSM-5, at 14 (2013), *available at* http://www.dsm5.org/Documents/changes%20from%20dsm-iv-tr%20to%20dsm-5.pdf.

37. *See* AM. PSYCHIATRIC ASS'N, *supra* note 35, § 302.72, at 433, § 302.71, at 440.

38. *See* E-mail from David Jay, Founder, The Asexual Visibility & Educ. Network, to author (Sept. 3, 2013) (on file with author) (confirming that he and others lobbied for this change); *see also* Shawn Landis, *Proposed Definition for HSDD in Males for the DSM-V*

specifically names self-identified asexuality as a nonclinical alternative to a diagnosis of a desire disorder.[39]

C. *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 1.05% of the subjects agreed with the statement, "I have never felt sexually attracted to anyone at all."[40] 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 asexual women than gay and bi women.[41] Later work by Bogaert and others has found different percentages of people reporting low or no attraction or desire—with some finding less than 1% and a few finding more than 1%—but this initial study by Bogaert retains its prominence as a large probability sample of people across a wide age span.[42]

Released, EXAMINER.COM (June 21, 2010), http://www.examiner.com/article/proposed-definition-for-hsdd-males-for-the-dsm-v-released (describing, inter alia, a seventy-five-page report submitted to the American Psychiatric Association by an Asexual Visibility and Education Network task force).

39. The statements to this effect are similar, but not identical, in the female and male versions of low-desire disorder; surprisingly, though, whereas in the female diagnosis this sentence appears in the "[d]iagnostic [f]eatures" section, in the male diagnosis the sentence appears under "[o]ther sexual dysfunctions." *See* AM. PSYCHIATRIC ASS'N, *supra* note 35, § 302.72, at 433-34 ("If a lifelong lack of sexual desire is better explained by one's self-identification as 'asexual,' then a diagnosis of female sexual interest/arousal disorder would not be made."); *id.* § 302.71, at 443 ("If the man's low desire is explained by self-identification as an asexual, then a diagnosis of male hypoactive sexual desire disorder is not made.").

40. Anthony F. Bogaert, *Asexuality: Prevalence and Associated Factors in a National Probability Sample*, 41 J. SEX RES. 279, 281-82 (2004).

41. *Id.* at 282.

42. *See* BOGAERT, *supra* note 2, at 44-49 (reviewing and critiquing the studies, including his own ten-year follow-up study, and concluding that "the original estimate of 1 percent may not be a bad one, all things considered, and it is possible that it may underestimate the true number of asexual people" (citation omitted)); *see also* Anthony F. Bogaert, *The Demography of Asexuality*, *in* INTERNATIONAL HANDBOOK ON THE DEMOGRAPHY OF SEXUALITY 275, 280-82 (Amanda K. Baumle ed., 2013) (reporting on his follow-up study, with different parameters such as a younger population, in which the rate of those reporting never having experienced sexual attraction was only 0.47%); Catherine R.H. Aicken et al., *Who Reports Absence of Sexual Attraction in Britain? Evidence from National Probability Surveys*, 4 PSYCHOL. & SEXUALITY 121, 124-25 (2013) (finding prevalence rates of 0.4% and 0.9% reporting never having experienced sexual attraction with British samples from 1990-1991 and 2000-2001, respectively); Dudley L. Poston, Jr. & Amanda K. Baumle, *Patterns of Asexuality in the United States*, 23 DEMOGRAPHIC RES. 509, 519 (2010) (reporting, on three oblique measures of "asexual" identity, attraction, and behavior, respectively, that 3.8% of female subjects and 3.9% of male subjects in their 2002 U.S. sample responded "not sure" to a question about sexual orientation; 0.8% of females and 0.7% of males responded "not

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."[43] Though fewer asexuals than sexuals had current or past long-term relationships, a significant minority of the asexuals (33%) were currently married or cohabiting, and more still were involved in past or current long-term relationships (44%).[44] Bogaert also found the following demographic features of his asexual sample: asexuals were more likely to be female, older, of lower socioeconomic status, nonwhite, religious (in terms of attending religious services), less well-educated, shorter, and with a later age of menarche among the women.[45] (For men, age and race dropped out.)[46] Asexual people were also more likely to have adverse health issues, but this result was apparently linked to social class and education.[47]

The next significant study, by affiliates of the Kinsey Institute, targeted self-identified asexuals, and did not replicate several of Bogaert's key demographic findings.[48] 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.[49] The latter finding may be due to their younger subject pool;[50] self-identified asexuals are, on average, rather young.[51] This study also found no significant difference in the sex/gender of the asexual population,[52] though subsequent studies have been more consistent with Bogaert's finding of more female

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sure" to a question about sexual attraction; and nearly 5% of females and 6% of males reported "that they have never had sex in their lifetimes"). *But see* Aicken et al., *supra*, at 122-23 (critiquing Poston & Baumle, *supra*).

43. Bogaert, *supra* note 40, at 282.

44. *Id.* The study collected no data on arousal or masturbation.

45. *Id.* Menarche is the start of menstruation—the "first period."

46. *Id.* at 283.

47. *Id.* at 282-83.

48. Nicole Prause & Cynthia A. Graham, *Asexuality: Classification and Characterization*, 36 ARCHIVES SEXUAL BEHAV. 341, 352-53 (2007). The authors unfortunately did not report any findings on race.

49. *Id.* at 352.

50. The authors specifically emphasize the relative youth of the non-asexual subjects, observing that the study's "[n]on-asexuals were younger and perhaps less likely to be partnered as a result of insufficient time to locate a suitable partner rather than as a result of their non-asexual identity." *Id.* at 352-53. Overall, however, the subject pool was rather young—with a mean age of 21.5 for non-asexuals and 25.5 for asexuals—with a gap of four years between them. *Id.* at 348.

51. One recent poll of the self-identified asexual community found that 81% of respondents were age 25 or younger. TRISTAN "SIGGY" MILLER, ANALYSIS OF THE 2011 ASEXUAL AWARENESS WEEK COMMUNITY CENSUS (2011), *available at* http://www.asexualawarenessweek.com/census/SiggyAnalysis-AAWCensus.pdf.

52. Prause & Graham, *supra* note 48, at 352.

asexuals, as I discuss later.[53] Interestingly, the Kinsey affiliates found that self-identified asexuals were more likely than sexuals to report both benefits and drawbacks of asexuality—though the latter finding is less surprising in light of the fact that a majority of the "drawbacks" suggested to subjects concerned difficult interactions with the (sexual) world.[54] 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.[55]

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

Asexuality as an identity group emerged through Internet-based communities.[56] The most prominent of these is AVEN, the Asexuality Visibility and Education Network, which was founded by David Jay in 2001.[57] AVEN's membership has grown exponentially in the past decade—from 134 members in 2002, to 26,780 members in 2011,[58] to over 70,000 members in 2013.[59] 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

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53. *See infra* Part II.B.2.b.

54. Prause & Graham, *supra* note 48, at 352.

55. *See* Brotto et al., *supra* note 3, at 613 (finding, "contrary to [their] predictions, a disproportionately high number of atheists in [their] sample"); *see also id.* ("On the web site . . . there was an informal poll and there seemed to be a quite a lot of atheist people."). This difference between Bogaert's and Brotto et al.'s findings on religiosity may reflect their different subject pools and ways of measuring asexuality, as Bogaert asked a national probability sample about their (lack of) attraction while Brotto et al. studied a sample of self-identified asexuals.

56. *See, e.g.*, Kristin S. Scherrer, *Coming to an Asexual Identity: Negotiating Identity, Negotiating Desire*, 11 SEXUALITIES 621, 622 (2008) ("Asexuality, a relatively recent emergent sexual identity, has been developed with the aid of internet technologies which have allowed for the formation of community by otherwise geographically isolated individuals.").

57. Mark Carrigan, *There's More to Life than Sex? Difference and Commonality Within the Asexual Community*, 14 SEXUALITIES 462, 462, 466, 477 n.1 (2011) (listing websites); ASEXUAL VISIBILITY & EDUC. NETWORK, http://www.asexuality.org (last visited Jan. 29, 2014). In addition to AVEN, these sites include, for example, APOSITIVE.ORG, http://apositive.org (last visited Jan. 4, 2014); ASEXUALITY, http://asexuality.livejournal.com (last visited Jan. 29, 2014); ASEXUAL EXPLORATIONS, http://www.asexualexplorations.net (last visited Jan. 29, 2014); ASEXUAL SEXOLOGIST, http://asexualsexologist.wordpress.com (last visited Jan. 29, 2014); and AVENWIKI, http://www.asexuality.org/wiki/index.php? (last modified Jan. 29, 2014). *See also* Ty, *Asexual Communities—A Pilot Study*, http://edu.surveygizmo.com/s3/470476/cae8ae8af2a4 (last visited Jan. 29, 2014); KAGU143, *A Survey for A-positive's Members, Announcements*, APOSITIVE.ORG (Mar. 30, 2011, 12:08 PM), http://apositive.org/viewtopic.php?f=6&t=505&start=0&hilit=Ty+Hayes#p5022 (announcing Ty Hayes's study).

58. (A)SEXUAL, *supra* note 4.

59. *See* The Asexual Visibility & Educ. Network, Employment Discrimination Against the Asexual Community: A Growing Trend 2 (Jan. 26, 2013) (unpublished manuscript) (on file with author) [hereinafter AVEN Memo].

marches.[60] AVEN is now only one of many websites dedicated to asexuality and asexuals.[61] The reasons for this growth at this particular moment in time are not clear, but what is clear is that substantial numbers of people now identify and organize themselves under the rubric of asexuality.[62]

Many asexuals—sometimes "aces" for short[63]—describe their discovery of AVEN as a revelation. Finding a community of asexuals was a watershed moment—a sign that they are not alone.[64] In some ways this is like gay people talking about finding gay bars, pornography, or people, and realizing there are others like them.[65] But there are unique reasons an online 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."[66] 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 discourses, and which is the most relevant to legal regulation, as Part III will address.

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60. Carrigan, *supra* note 57, at 462; *see* Brotto et al., *supra* note 3, at 601; (A)SEXUAL, *supra* note 4 (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").

61. *See supra* note 57 (listing examples).

62. AVEN reports that registration rates for its website average forty per day and that this burgeoning community is quite young, with 73% of respondents age 23 and younger. *See* AVEN Memo, *supra* note 59, at 2. For speculation as to why asexuality has emerged as a concept and an identity at this particular moment, see text accompanying notes 252-61 below.

63. Shawn Landis, *Why Are Asexuals Aces?*, ASEXUAL NEWS (Aug. 9, 2011, 1:14 PM), http://asexualnews.com/index.php/asexuality-101/410-asexualaces (observing that asexuals use "ace" because it is a convenient shorthand form of "asexual").

64. *See, e.g.*, Brotto et al., *supra* note 3, 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.").

65. *See, e.g.*, Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47 STAN. L. REV. 661, 681-82 (1995) ("Many gay men remember feeling as if they were 'the only one.' . . . For [this and other] reasons, a gay adolescent male's encounter with gay pornography is often a shattering discovery: 'shattering' in a positive sense.").

66. (A)SEXUAL, *supra* note 4 (interviewing Swankivy).

II. MAPPING ASEXUAL IDENTITY

If you're not having sex, what's there to talk about?

—Star Jones, speaking to David Jay, on *The View*[67]

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.[68] The previous Part introduced asexuality by discussing four contexts for 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 Part III.

A. *Defining Asexuality as an Identity: Elements and Distinctions*

This Subpart defines asexuality by identifying its important elements as well as the key distinctions that structure its internal diversity. Note that asexuals have defined everyone else as *sexuals*. In this way, the previously unmarked (and naturalized) category now has a name, little known though it is thus far.

1. *Principal elements*

The precise contours of asexual identity are not easy to establish. Those who identify as asexuals question the boundaries of the category, and a common theme is the "diversity of experience within the community."[69] But contemporary asexuality 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.'"[70] Attraction is often distinguished from arousal (or desire); as one researcher put it, "If

67. Rosie Swash, *Among the Asexuals*, OBSERVER (Feb. 25, 2012), http://www.theguardian.com/lifeandstyle/2012/feb/26/among-the-asexuals/print ("Appearing on *The View*, . . . [David] Jay attempted to explain to mainstream America what asexuality was. 'What's the problem? Why do you need to organise?' barked Joy Behar, an actress and comedian who looks like Bette Midler and makes Joan Rivers seem demure. 'If you're not having sex, what's there to talk about?' said her co-panellist Star Jones, in an 'Am I right, ladies?' tone of voice.").

68. *See infra* Part III.E.

69. *General FAQ*, *supra* note 11; *see* Carrigan, *supra* note 57, at 467; *infra* Part II.A.4.

70. *General FAQ*, *supra* note 11.

sexual desire or arousal were present, asexuals argued that they were not 'directed' at anyone."[71] How little attraction is enough to qualify for asexuality is ambiguous. 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 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."[72]

AVEN's information pages are quick to assure readers that "there is no hierarchy of asexuality."[73] But the need to broadcast this claim betrays the anxieties of authenticity that haunt this community.[74] A new member's question about whether most asexuals are "virgins" prompts 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."[75] 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" or, in the terminology preferred by some, an "accommodation."[76]

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71. Brotto et al., *supra* note 3, at 609. For a discussion of the distinctions between attraction, arousal, and desire, inter alia, see BOGAERT, *supra* note 2, at 11-26.

72. *General FAQ*, *supra* note 11.

73. *Id.*

74. *Cf.* RANDALL KENNEDY, SELLOUT: THE POLITICS OF RACIAL BETRAYAL 3 (2008) ("The specter of the 'sellout' haunts the African-American imagination."); J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2327 (1997) (discussing "status anxiety").

75. Thylacine, Comment to *Some Blunt Questions, Asexual Q&A*, ASEXUAL VISIBILITY & EDUC. NETWORK (July 16, 2008, 11:57 PM), http://www.asexuality.org/en/index.php?/topic/32908-some-blunt-questions.

76. For another example of the compromise position, see AVENCakes, Comment to *Some Blunt Questions, Asexual Q&A*, ASEXUAL VISIBILITY & EDUC. NETWORK (July 15, 2008, 9:22 AM), http://www.asexuality.org/en/topic/32908-some-blunt-questions ("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."). On some asexuals' rejection of the term "compromise" to describe situations where asexuals agree to sexual activity, see Ace, *There Is No Such Thing as Sexual "Compromise" in Mixed Romantic Relationships*, THINKING ASEXUAL (Feb. 26, 2012, 8:24 AM), http://thethinkingasexual.wordpress.com/2012/02/26/there-is-no-such-thing-as-sexual-compromise-in-mixed-romantic-relationships ("The appropriate words to use when describing sex or lack thereof in mixed romantic relationships are: *accommodate*, *concede*, *sacrifice*, and *agree*.").

b. *Lack of choice*

Second, self-identified asexuals understand asexuality to involve no choice about this lack of attraction.[77] "Celibacy is a choice to abstain from sexual activity. Asexuality is not a choice," an AVEN pamphlet reports, "but rather a sexual orientation."[78] The contrast with celibacy is frequently drawn.[79] 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."[80] An important idea among asexuals is that they are not resisting their desires. Unlike many people who choose celibacy—whether for personal, 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).[81] Thus, for asexuals, it is a choice whether to *do* sex, but it is not a choice whether to *want* sex.[82]

Choice is therefore a key axis in the discourse on asexuality. However, the "not a choice" discourse here operates somewhat differently than in the discourse about homosexuality.[83] In the context of homosexuality, gays (sometimes) want to say that gayness isn't a choice, because anti-gay moralism thinks

77. *See, e.g.*, Dominique Mosbergen, *Asexual Disorder? The Search for Asexual Identity Is Part Recognition, Part Redefinition*, HUFFINGTON POST (June 18, 2013, 9:31 AM EDT), http://www.huffingtonpost.com/2013/06/18/asexual-disorder_n_3361472.html?1371562287 ("Why am I asexual? I was born this way.").

78. ASEXUAL VISIBILITY & EDUC. NETWORK, ASEXUALITY: NOT EVERYONE IS INTERESTED IN SEX 2, *available at* http://www.asexuality.org/docs/AVEN%20300dpi%20pamphlets.pdf.

79. *See, e.g.*, *id.*; (A)SEXUAL, *supra* note 4; *Natalie Cassidy's Real Britain: Asexuality* (BBC Three television broadcast Mar. 5, 2009).

80. Scherrer, *supra* note 56, at 631 (internal quotation marks omitted) (quoting a study participant).

81. *See infra* notes 213-15; *see also* Robin West, *Sex, Law, and Consent*, *in* THE ETHICS OF CONSENT: THEORY AND PRACTICE 221, 238 (Franklin G. Miller & Alan Wertheimer eds., 2010) ("Women and men both might consent to undesired sex on occasion—even on many occasions—for benign or harmless reasons. A woman might, on occasion, rather watch television, read, or sleep but agree to sex she doesn't particularly desire, because she loves her partner, because she's accustomed to trade-offs of this sort that benefit both, because she doesn't feel it as a burden, because she knows that her lack of desire may give way to desire, and so on. But that some undesired sex is harmless hardly means that it all is.").

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

83. 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* 4 (Benjamin N. Cardozo Sch. of Law, Jacob Burns Inst. for Advanced Legal Studies, Working Paper No. 223, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1104538.

that the "choice" of gayness is immoral.[84] 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 supermoral 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.[85] 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 hypermorality rather than against charges of immorality.

2. *Key distinctions*

Three distinctions also help to illuminate the category of asexuality: sex with self versus sex with others, romantic versus aromantic, and sex-averse versus sex-indifferent.

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.[86] One recent study found that the rates of masturbation among asexuals were not much different than the rates in the non-asexual population,[87] although other research has found substantially low-

84. I use "gays" here as shorthand for gay men and lesbians. This analysis applies to some bisexuals as well.

85. An AVEN "Q&A" 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. Blueskies, *supra* note 1 (posting the initial question); Ankh Ascendant, *supra* note 1 (replying negatively); Forensic, *supra* note 1 (replying negatively); *see also infra* Part II.B.1.c (discussing linkages with polyamory).

86. *See, e.g.*, Scherrer, *supra* note 56, at 628.

87. Brotto et al., *supra* note 3, at 607 (finding that 80% of asexual men and 70% of asexual women reported that they had masturbated, and observing that these "masturbation frequencies were comparable to those reported in a recent British national probability study of sexual individuals"); *see also* BOGAERT, *supra* note 2, at 58 (observing that the percentages obtained by Brotto et al. were "only somewhat lower than the percentage of people who reported masturbating in a national sample of the United States population"). The data on this point are hard to interpret across the studies, however.

er rates of masturbation among asexuals.[88] Whatever the precise numbers, it is clear that some, though not all,[89] self-identified asexuals masturbate.[90]

Various writers have observed, however, that asexuals often talk about masturbation in ways that are highly clinical or mechanical, using metaphors like "clean[ing] out the plumbing."[91] "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";[92] or "I have no sexual urges or sexual needs. Some asexual people feel physical 'urges' and some don't. I don't."[93] On the one hand, one might ask how robust this tonal distinction between sexuals and asexuals is; in other words, how erotic is the language that *sexual* people use to describe masturbation?[94] On the other hand, some descriptions of masturbation by asexuals would be more surprising among sexuals; for instance, one AVEN member writes, "Yes, I masturbate . . . but my mind is blank when I do so. No hot guys or girls or anything in there . . . ."[95]

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88. *See, e.g.*, BOGAERT, *supra* note 2, at 58-59 (discussing his own finding that "42 percent of asexual people had masturbated in the last month" and explaining why even this figure might be artificially high).

89. It was not always obvious that contemporary asexual identity would evolve in the direction of including those who masturbate. AVEN's capacious understanding of asexuality rose in popularity amidst critiques of an alternative group—the "Official Asexuality Society," later renamed the "Official Nonlibidoism Society"—formed on the premise that "only people who did not masturbate could be asexual." Andrew Hinderliter, *How Is Asexuality Different from Hypoactive Sexual Desire Disorder?*, 4 PSYCHOL. & SEXUALITY 167, 171-72 (2013). According to Hinderliter, this group "became defunct in late 2006." *Id.* at 172.

90. *See, e.g.*, BOGAERT, *supra* note 2, at 59.

91. BOGAERT, *supra* note 2, at 59 (citing Brotto et al., *supra* note 3, at 611) (internal quotation marks omitted). In addition, some asexuals report that "they think of nothing when they masturbate" or they think of "non-human images," and, by one account, "a handful indicated that certain fetishes, like BDSM, come to mind." Dominique Mosbergen, *Asexual Relationships, Masturbation and Romance in the Ace Community*, HUFFINGTON POST (Aug. 21, 2013, 10:50 AM EDT), http://www.huffingtonpost.com/2013/06/19/asexual-relationships_n_3362206.html.

92. Blueskies, *supra* note 1 (posting the initial question); Forensic, *supra* note 1 (replying).

93. Thylacine, *supra* note 75.

94. One might think here of popular representations of people masturbating for instrumental reasons, such as to fall asleep. *See, e.g.*, *Seinfeld: The Contest* (NBC television broadcast Nov. 18, 1992); *see also* BOGAERT, *supra* note 2, at 60 ("[A]s mentioned, some sexual people may masturbate, at times, for this reason: merely to release tension and pelvic congestion, and less for the intense sexual pleasure of it.").

95. Kt8, Comment to *Some Blunt Questions*, *Asexual Q&A*, ASEXUAL VISIBILITY & EDUC. NETWORK (July 24, 2008, 7:15 AM), http://www.asexuality.org/en/topic/32908-some-blunt-questions/page-2 (ellipses in original).

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;[96] some do not.[97] (Some also have sexual relationships, but cast in the language of compromise or accommodation rather than desire, as noted earlier.)[98] Romantic asexuals often identify themselves by the sex/gender of those they (romantically) desire—gay, straight, bisexual, or pansexual—and in the language of "romantic orientation"—as in a "heteroromantic orientation."[99] The axis of romantic versus aromantic is an important one among self-identified asexuals.

This axis of identity raises the question of what distinguishes romance from sex, on the one hand, or from friendship, on the other. As to what counts as sex, one scholar thinks that asexuals have an unusually narrow idea of sex.[100] There is something to this. A broad definition of sex would presumably include masturbation, which asexuals generally do not consider sex, and which many engage in, as discussed above.[101] 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 it seems 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.[102] Other asexuals take a broader definition, however.[103]

On the other hand, what distinguishes romance from friendship? One asexual answered this question with another question: "What is the difference

96. *See, e.g.*, BOGAERT, *supra* note 40, at 282; CJ DeLuzio Chasin, *Theoretical Issues in the Study of Asexuality*, 40 ARCHIVES SEXUAL BEHAV. 713, 716 (2011); Scherrer, *supra* note 56, at 633-34; *General FAQ*, *supra* note 11.

97. *See, e.g.*, Dame du Lac, Comment to *Some Blunt Questions*, *Asexual Q&A*, ASEXUAL VISIBILITY & EDUC. NETWORK (July 15, 2008, 11:36 PM), 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.").

98. *See supra* text accompanying notes 75-76, 81-82.

99. *See, e.g.*, Mosbergen, *supra* note 91. "Pansexual" refers to attraction to others regardless of gender. *See, e.g.*, *Pansexuality*, AVENWIKI, http://www.asexuality.org/wiki/index.php?title=Pansexuality (last modified Nov. 10, 2010).

100. *See* Scherrer, *supra* note 56, at 629.

101. *See supra* Part II.A.2.a.

102. Cacchioni, *supra* note 29, at 304. Within mainstream culture, think of the uses of the terms "lost their virginity" or "had sex."

103. *See, e.g.*, P.V.P., Comment to *Define Sex Please?*, *Asexual Q&A*, ASEXUAL VISIBILITY & EDUC. NETWORK (Mar. 13, 2007, 3:36 AM), http://www.asexuality.org/en/index.php?/topic/22445-define-sex-please.

between a romantic sexual partner and a friend with benefits?"[104] 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, etc.—many asexuals enjoy physical, non-sexual closeness whether they are romantic or aromantic. And no, sex is not necessary for romance.[105]

As this passage suggests, the question of the difference between friendship and romance 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 powerful short essay arguing that we need a more robust vocabulary for distinguishing types of nonsexual touch.[106]

c. *Distinguishing aversion and indifference*

Asexuality is a capacious category, encompassing many varieties, as indicated by the foregoing. A further distinction, which will prove important to the discussion of law in the next Part, concerns an asexual individual's attitude to sex, whether averse or indifferent.

Some self-identified asexuals report feeling highly averse to—"repulsed" by—the idea of sex. As one site puts it, "Repulsed is a term used by some asexual individuals to indicate that they find sex disgusting or revolting, as in, 'I'm a repulsed asexual' or simply 'I'm repulsed.'"[107] Repulsion can be a reaction only to "the idea of engaging in sex" or instead to "sex in general."[108] In an example of the latter, one asexual writes, "I'm repulsed by it, so much so that I feel physically sick when I see a couple kissing."[109]

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104. *Asexuality 101*, CFGREYACE.WORDPRESS.COM, http://cfgreyace.wordpress.com/ace101 (last visited Sept. 15, 2013) (on file with author).

105. *Id.*

106. *See* David Jay, *Touch*, LOVE FROM ASEXUAL UNDERGROUND (Nov. 16, 2011, 9:13 AM), http://asexualunderground.blogspot.com/2011/11/touch.html.

107. *Repulsed*, AVENWIKI, http://www.asexuality.org/wiki/index.php?title=Repulsed (last modified June 6, 2013).

108. *Id.*

109. Shadiya, Comment to *When It Comes to Sex—Are You Repulsed or Indifferent??, For Sexual Partners, Friends and Allies*, ASEXUAL VISIBILITY & EDUC. NETWORK (Feb. 25, 2008, 4:08 AM), http://www.asexuality.org/en/topic/29262-when-it-comes-to-sex-are-you-repulsed-or-indifferent/page-2. For an example of the former type of sex aversion, see note 235 below.

As with gay men and lesbians—some of whom are indifferent to, rather than repulsed by, straight sex[110]—many asexuals are indifferent to sex. The following quotations are representative: "I'm not disgusted at the thought of sex, I just don't have any desire to engage in it myself. Just like I have no desire to engage in mountain climbing or bungee jumping. I'm not disgusted at the thought of those activities though."[111] Or, "I'm pretty familiar with sex and kinks, it'd take some hard work to gross me out, and I could (and did) have sex . . . but it just doesn't do anything for me, and I don't experience sexual attraction in the first place anyway. I guess sex is just like cars in my book . . . ."[112] Like aversion, indifference can refer either to having sex oneself or to the idea of sex more generally.[113]

Some have suggested this distinction should be understood as a spectrum, rather than as a binary.[114] Expanding the analysis further, one researcher proposes four categories of asexual attitudes to sex, rather than two, to cleave apart the options and to recognize their breadth: *sex-positive* ("endors[ing] sex [for others], . . . without experiencing sexual desire or seeking to engage in it"), *sex-neutral* (being "simply uninterested in sex"), *sex-averse* (feeling that "the idea of [personally having] sex, let alone the actual practice of it" is, at best, "mildly uncomfortable" or, at worst, "disgusting and deeply distressing"), and *anti-sex* (evincing a more "generalized response to sex," even for others to engage in, as

110. *Compare, e.g.*, Dennis Milam Bensie, *A Gay Man's Sex with Women*, GOOD MEN PROJECT (June 24, 2013), http://goodmenproject.com/marriage-2/a-gay-mans-sex-with-women ("Jessica often asked me to go down on her. I just ignored her request: I'm sure the look on my face gave her my answer. She offered to shower right before we had sex to make sure it was clean. No deal. I couldn't even look at her vagina, let alone stick my whole face down there."), *with, e.g.*, Flymetothemoon, Comment to *Lesbians—Sex with Men?, Coming Out Advice*, EMPTY CLOSETS (Feb. 19, 2013, 11:12 PM), http://emptyclosets.com/forum/coming-out-advice/58013-lesbians-sex-men.html ("I consider myself a lesbian, but I have had sex with men before. I never really enjoyed sex as much with a man as I have with a woman, though, and I think for me that's the difference.").

111. Apollonian, Comment to *When It Comes to Sex—Are You Repulsed or Indifferent??, For Sexual Partners, Friends and Allies*, ASEXUAL VISIBILITY & EDUC. NETWORK (Feb. 2, 2008, 6:35 AM), http://www.asexuality.org/en/topic/29262-when-it-comes-to-sex-are-you-repulsed-or-indifferent.

112. Atalante, Comment to *When It Comes to Sex—Are You Repulsed or Indifferent??, For Sexual Partners, Friends and Allies*, ASEXUAL VISIBILITY & EDUC. NETWORK (Feb. 2, 2008, 11:05 AM), http://www.asexuality.org/en/topic/29262-when-it-comes-to-sex-are-you-repulsed-or-indifferent (ellipses in original).

113. *Indifferent*, AVENWIKI, http://www.asexuality.org/wiki/index.php?title=Indifferent (last modified Oct. 28, 2010).

114. *See, e.g.*, Shockwave, Comment to *When It Comes to Sex—Are You Repulsed or Indifferent??, For Sexual Partners, Friends and Allies*, ASEXUAL VISIBILITY & EDUC. NETWORK (Mar. 4, 2008, 1:40 AM), http://www.asexuality.org/en/topic/29262-when-it-comes-to-sex-are-you-repulsed-or-indifferent/page-2 ("Why is it that every time someone starts a new thread on this topic they only include those two options? Life is not binary, people!").

"deeply problematic").[115] These distinctions are helpful analytically; however, the trend within the self-identified asexual community is more toward indifference or neutrality than aversion or negativity.[116]

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[117]

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 Subpart 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 five foot one; "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."[118]

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115. Carrigan, *supra* note 57, at 469-70. Carrigan also acknowledges a range or spectrum within the categories. *Id.*

116. An online survey conducted on AVEN found 142 participants identifying as "indifferent" and 87 as "repulsed." Frustr8ed, *When It Comes to Sex—Are You Repulsed or Indifferent??*, *For Sexual Partners, Friends and Allies*, ASEXUAL VISIBILITY & EDUC. NETWORK, http://www.asexuality.org/en/topic/29262-when-it-comes-to-sex-are-you-repulsed-or-indifferent (last updated Nov. 11, 2011).

117. RIKI ANNE WILCHINS, *What Does It Cost to Tell the Truth?*, *in* READ MY LIPS: SEXUAL SUBVERSION AND THE END OF GENDER 33, 33-35 (1997) (describing, inter alia, social interactions around her process of transitioning from male to female).

118. 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 (internal quotation marks omitted).

Asexuality as an identity need not involve distress, as discussed earlier,[119] but some degree of friction seems to characterize asexuals' interactions with a sexual culture. Many asexuals lament the constant barrage of diagnoses they receive whenever they disclose their asexuality.[120] Most prominently, Swankivy, who was mentioned earlier, made a name for herself with what she calls the "Asexuality Top Ten."[121] This list of the "top ten most common misconceptions" about asexuals nicely captures the typical interpellations, at least of a female asexual[122]:

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."[123]

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."[124] In this way, the list serves a community- and identity-building function among asexuals, through

119. *See supra* Part I.B.

120. *See, e.g.*, PrairieGhost, Comment to *Some Blunt Questions, Asexual Q&A*, ASEXUAL VISIBILITY & EDUC. NETWORK (July 16, 2008, 8:03 PM), http://www.asexuality.org/en/index.php?/topic/32908-some-blunt-questions.

121. Swankivy, *Asexuality Top Ten*, SWANKIVY.COM, http://swankivy.com/writing/essays/philosophy/asexual.html (last visited Jan. 29, 2014) [hereinafter Swankivy, *Asexuality Top Ten*]; *see also* Swankivy, *Asexuality: An Introduction*, YOUTUBE (June 2, 2008), http://www.youtube.com/watch?v=RBzGJIjAy4Y [hereinafter Swankivy, *Asexuality: An Introduction*] ("In my next videos, I'm going to itemize a top-ten list that I came up with a long time ago of things people suggest are *really* the reason for my lack of interest in sex besides asexuality.").

122. A parallel game of "asexuality bingo" was made by a male asexual who goes by jmerry. Jmerry, ASEXUALITY BINGO (last visited Jan. 29, 2014), http://swankivy.com/LJ/bingo.jpg.

123. Swankivy, *Asexuality Top Ten*, *supra* note 121 (capitalization altered); *cf. supra* Part I.C (noting the conflicting data on whether asexuals are more or less likely to be religious).

124. Swankivy, *Asexuality Top Ten*, *supra* note 121.

humor and indignation about a common set of interactions with the surrounding sexual world.

Comments like those on Swankivy's list plague many asexuals.[125] 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.[126] These responses include simple disbelief from one person, "But you do *eventually*? . . . never 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 your poor soul."[127] Appearing as a talking head in the film, sex columnist Dan Savage describes asexuals' marching in the pride parade as "hilarious";[128] he observes,

> I know from giving people advice about their sex lives for eighteen years that there's a lot of people that are deeply conflicted about their desires and really conflicted about their sexual orientations and for a lot of these people it'd be easier to just not have a sexual orientation . . . and to say that "I'm just asexual."[129]

Disbelief is the usual way to describe the response to asexuality,[130] 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.[131]

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

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125. *See, e.g.*, Olly Bootle, *No Sex Please: An Asexual Life*, INDEPENDENT (Mar. 17, 2009), http://www.independent.co.uk/life-style/health-and-families/features/no-sex-please-an-asexual-life-1646347.html ("I get told I'm repressed, that I'm psychologically damaged, that it's something to do with my history, that I've been abused. I've had people make out there's something wrong with me, as if it's a physical or psychological ailment." (internal quotation mark omitted)).

126. (A)SEXUAL, *supra* note 4.

127. *Id.*

128. For the full quotation, see text accompanying note 250 below.

129. (A)SEXUAL, *supra* note 4.

130. *See, e.g.*, BOGAERT, *supra* note 2, at 41 ("In short, some people's reaction [to my research findings] has been one of disbelief, questioning that as many as 1 percent or more of human beings could be asexual. Frankly, I think that some people would question that *anyone* could be truly asexual, even if I had reported the rate at .00001 percent." (citation omitted)).

131. I thank Justine di Giovanni for this distinction.

might identify as asexual.[132] Some asexuals claim their asexuality is "hard-wired."[133] Others surely identify as asexual on their way to some other identity, or because they are struggling with their sexuality due to negative experiences or repressive influences.[134] 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 population, but I do think there's many who are also physiologically different, wired not to be attracted to other people.[135]

Acknowledging the prospect of multiple paths to asexuality, as this individual does, is relatively unusual in asexual community forums. The conflicted types are a particular 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.[136]

Thus, while AVEN explicitly embraces a diverse community, as noted earlier, the website also tries to draw some lines.[137] For instance, the site's "Frequently Asked Questions" page explains, "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."[138] Although many identity groups struggle

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132. *See* BOGAERT, *supra* note 2, at 64 (observing that "asexuality is a diverse phenomenon"); *see also supra* note 69 (citing sources on the diversity within asexuality).

133. The search for empirical evidence of a biological basis for asexuality is underway. Building on Bogaert's 2004 finding that a lack of sexual attraction had biological correlates such as shorter stature and later menarche, Yule, Brotto, and Gorzalka conducted an online study of self-identified asexuals and non-asexuals and found that the asexuals were significantly more likely to be non-right-handed and evinced different patterns and numbers of older siblings. *See* Morag A. Yule et al., *Biological Markers of Asexuality: Handedness, Birth Order, and Finger Length Ratios in Self-Identified Asexual Men and Women*, 43 ARCHIVES SEXUAL BEHAV. 299, 306-07 (2014).

134. The research on the link between child sexual abuse and diminished desire (which is not the same thing as asexuality but has some overlap) is not conclusive, *see, e.g.*, Tamra Burns Loeb et al., *Child Sexual Abuse: Associations with the Sexual Functioning of Adolescents & Adults*, 13 ANN. REV. SEX RES. 307, 316 (2002) ("Researchers examining the association of [child sexual abuse] with women's sexual functioning describe conflicting findings."), but some work finds a significant relationship, *see, 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). For a discussion relatively sympathetic to the search for causes of asexuality, see BOGAERT, *supra* note 2, 147-160.

135. Bootle, *supra* note 125 (internal quotation marks omitted).

136. *See infra* Part III.E.3 (discussing implications of this).

137. *See General FAQ*, *supra* note 11.

138. *Id.*

with their boundaries, 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 one respond to the disbelief in asexuality? Possible responses set into relief the assumptions of our sexual world, as the following examples illustrate.

Other Hobby Horses. The epigraph that began this Article compared asexuality to a lack of interest in food, but perhaps the better analogy is indifference to a *particular* food.[139] We generally recognize that individuals have different affinities for various activities and foods. Perhaps it helps, then, to think of sex as a kind of hobby or taste that appeals to some and not to others. 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."[140] Is there really anything else, other than sex, that we are so inclined to believe that everyone wants?[141]

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139. *See supra* note 1 and accompanying text. As one comment to the passage quoted in the epigraph observed, you literally need food to live, but you don't need sex to live. Forensic, *supra* note 1.

140. Roger Mellie, Comment to *Some Blunt Questions, Asexual Q&A*, ASEXUAL VISIBILITY & EDUC. NETWORK (July 21, 2008, 8:58 PM), http://www.asexuality.org/en/index.php?/topic/32908-some-blunt-questions/page-2. Curiously, golf seems to come up more often than other activities, which may say more about the reputation of golf than about asexuals. *See* BOGAERT, *supra* note 2, at 49; Bootle, *supra* note 125; *Q & Ace: An Introduction to Asexuality*, ASEXUALITY ARCHIVE (Jan. 23, 2012), http://www.asexualityarchive.com/q-ace-an-introduction-to-asexuality ("That's a bit like claiming that I'm not interested in golf because I'm no good at it. No, I'm not interested in golf because it's *golf* and it's not interesting."); *see also George Carlin*, WIKIQUOTE, http://en.wikiquote.org/wiki/George_Carlin (last modified Dec. 22, 2013) (calling golf "[a] boring game for boring people").

141. I thank Martie Kutscher for this angle on the hobbies point. One explanation offered for the skepticism about asexuality is the bias known in social psychology as the false consensus effect—that is, people's "tendency to believe that everyone must be just like [them]." *See* BOGAERT, *supra* note 2, at 51 (citing Lee Ross et al., *The "False Consensus Effect": An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 279 (1977)). But to the extent that asexuality inspires vocal disbelief, this point from social psychology only seems to sharpen the divide between asexuality and everything else: namely, how often do golfers actually *believe* that everyone else loves golf? That said, there is one food analogy that holds some promise: chocolate. *Cf., e.g.*, Madison Moore, *Yes, There Are People Who Don't Like Chocolate*, THOUGHT CATALOG (Aug. 19, 2013), http://thoughtcatalog.com/2013/yes-there-are-people-who-dont-like-chocolate.

Hypothetical Universes. Imagine living in a world where everyone was obsessed with some form of physical interaction that you find decidedly unappealing or baffling—reaching inside each other's noses, for example.[142]

Attraction Lacunae. People who are not bisexual ("monosexuals"[143]) presumably have a way to relate to asexuality, since they are not attracted to half the population.[144] 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 didn't desire.[145] Even those who aren't pure monosexuals can find a similar way to relate: 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?

Happy Communities. The previous three answers focus on convincing the sexual outsider that asexuals actually exist. Even if successful, these approaches may leave the outsider with a no less pathologizing, pitying, or at least unhappy view of asexuality. Thus, the approach taken by David Jay tends to focus instead on the potential for intimacy and happiness in nonsexual relationships and, especially, among asexuals.[146]

Historical Analogies. Many of the comments made to asexuals are reminiscent of what gay men and lesbians used to hear when they came out.[147] This brings us to the next Subpart.

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 Subpart examines the interplay between asexuality and the categories of sexuality, gender, and disability.

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142. *See* McBuh, Comment to *Define Sex Please?*, *Asexual Q&A*, ASEXUAL VISIBILITY & EDUC. NETWORK (Mar. 14, 2007, 6:22 AM), http://www.asexuality.org/en/index.php?/topic/22445-define-sex-please (responding to someone's definition of sex as the placement of any appendage into another's orifice with the line: "Make sure the nose you pick is your own!").

143. *See, e.g.*, See Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 358 n.9 (2000).

144. 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.

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

146. *See* Interview with David Jay, Founder, The Asexual Visibility & Educ. Network, in N.Y.C., N.Y. (June 12, 2012).

147. *See infra* Part II.B.1.a.

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.[148] Psychologists explicitly draw on models of identity development for homosexuality to examine the formation of asexual identity.[149] Whether asexual identity is a "queer" identity is another topic for debate within asexual circles.[150]

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 Swankivy's "Asexuality Top Ten."[151] Or 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?"[152] 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 III.

b. *Bisexuality*

In some ways, though, a closer analogy than homosexuality is bisexuality. From one perspective, bisexuality is the opposite of asexuality, in the sense that a bisexual could potentially be attracted to anyone, and an asexual is sexually attracted to no one. From another perspective, though, both bisexuality and asexuality lie outside the cultural norm of "monosexuality" (desiring one sex). 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.[153] Kenji Yoshino

148. *See supra* notes 64-66 and accompanying text.

149. *See, e.g.*, Brotto et al., *supra* note 3, at 616 (discussing V. Cass, *Homosexual Identity Formation: A Theoretical Model*, 4 J. HOMOSEXUALITY 219 (1979)).

150. *See, e.g.*, *General FAQ*, *supra* note 11.

151. Swankivy, *Asexuality Top Ten*, *supra* note 121.

152. Bootle, *supra* note 125.

153. *See, e.g.*, Naomi Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts*, 10 BERKELEY WOMEN'S L.J. 98, 99 (1995) ("'[*B*]*isexual practices*' are absorbed into both heterosexual and homosexual *identities*, and . . . those identities either hide or disfigure bisexuality as an alternative identity."); *see also* Ruth Colker, *A Bisexual Jurisprudence*, 3 LAW & SEXUALITY 127, 127 (1993) ("A bisexual jurisprudence? Until I decided to write this essay, there was no such thing as a bisexual jurisprudence."). This theme is most prominently emphasized by Yoshino, *supra* note

has argued that both gays and straights (that is, monosexuals) 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."[154] To help support the argument that monosexuals erase bisexuality, Yoshino points 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).[155]

Relatedly, we might compare the number of people who exhibit asexual feelings with the percentage of people who identify as asexual.[156] Think here of Bogaert's one percent—the people who say "I have never felt sexually attracted to anyone at all"[157]—compared with the small number of people who identify as asexual—which hasn't been studied on a large scale but is suggested anecdotally by how few people have heard of asexuality much less met someone who so identifies.[158] This is all the more striking since the percentage of people in Bogaert's original study who reported feeling no attractions was very similar to the percentage of those with same-sex attractions.[159]

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 identify as bisexual—or, rather, biromantic—in their romantic attractions.[160] "Bi-asexual" and "biromantic asexual" are terms for the combined identities (as distinguished from people who are sometimes asexual and sometimes not, who are instead labeled "gray-A"[161]). Some asexuals observe that it would make sense if romantic asexuals were often "bi" "[s]ince sexual attraction is not a factor,"[162] or as one subject who so identified put it, "[t]he things I find attractive, I find attractive in both sexes."[163] Note that this perspective seems to depend on the assumption that bisexuality means not car-

143. *But see* Elizabeth M. Glazer, *Sexual Reorientation*, 100 GEO. L.J. 997, 1000 (2012) (arguing that bisexuality is now "hypervisible" in both law and culture).

154. Yoshino, *supra* note 143, at 399, 410.

155. *Id.* at 364-88.

156. Note this informal comparison is only very roughly analogous to Yoshino's detailed and methodical analysis.

157. *See* Bogaert, *supra* note 40, at 281-82.

158. *See also* AVEN Memo, *supra* note 59, at 2 (citing the size of AVEN).

159. *See* Bogaert, *supra* note 40, at 284.

160. *See, e.g.*, Scherrer, *supra* note 56, at 635.

161. *See, e.g.*, *Lexicon*, AVENWIKI, http://www.asexuality.org/wiki/index.php?title=Lexicon (last modified Oct. 25, 2013). A related term is "demisexual," used for those who feel "sexual attraction only to people with whom they are in an [sic] close relationship, often a romantic one." *Id.*

162. Scherrer, *supra* note 56, at 635 (quoting Nora, a twenty-year-old white woman).

163. *Id.* (internal quotation mark omitted) (quoting Mona, a thirty-year-old white woman).

ing about sex/gender; however, some bisexuals report feeling decidedly gendered desires for men and for women.[164]

c. *Polyamory*

Polyamory—the term for multiparty sexual, loving relationships (distinct from traditional polygamy)[165]—might also seem to be the opposite of asexuality. Whereas polyamorists (polys) typically want more sex with more people than is usual, asexuals want less sex with fewer people than is usual. Interestingly, though, the two identities overlap at some points.

According to David Jay, sexual people who identify as highly sex-positive, after overcoming their initial skepticism about asexuality, often end up the strongest allies and supporters of asexuals.[166] This might seem surprising, until one considers the common interests at stake. For starters, aces and polys have a shared interest in relationship forms other than monogamous sexual pair-bonds. These may include complicated networks of relationships, some of which have specific names in the poly community, such as "vee" and "triad."[167] Moreover, many asexuals share with polyamorists and other sex-positive thinkers a deep commitment to freedom of individual variation from the dominant expectations of asexual 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!"[168] 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."[169] Saying "yes" and saying "no" to sex are far from the same thing. (Consider the role of consent in each context, for starters.) The differences make it all the more striking, then, that some polys could see the two identities as aligned.

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164. *See* Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1355 (2009) (discussing competing versions of bisexuality as either (1) indifferent to gender or (2) sensitive to gender, as in a person who desires both masculine men and feminine women or both feminine men and feminine women, for instance).

165. *See, e.g.*, Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 282-83 (2004).

166. Interview with David Jay, *supra* note 146. On the meaning of "sex positivity," see, for example, Margo Kaplan, *Sex Positive Law*, 89 N.Y.U. L. REV. (forthcoming 2014) (manuscript at 7) ("A sex-positive framework values sexual autonomy and all forms of consensual sexual activities as a source of pleasure and fulfillment."), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2308955.

167. *See* Emens, *supra* note 165, at 309.

168. *See* (A)SEXUAL, *supra* note 4; *see also* Karli June Cerankowski & Megan Milks, *New Orientations: Asexuality and Its Implications for Theory and Practice*, 39 FEMINIST STUD. 650, 662 (2010). On sex-positive asexuals, as compared to neutral, indifferent, or repulsed asexuals, see text accompanying note 115 above.

169. *See* (A)SEXUAL, *supra* note 4.

d. *No sexual orientation*

Asexuality bears some resemblance to a variety of sexual orientations (and models[170]), but one could also view it as challenging the whole idea of sexual orientation.[171] We will consider this view in the discussion of models for understanding asexuality at the end of this Part.[172]

2. *Gender*

a. *No gender*

Some work suggests that asexuals may be more likely to resist gender identity labels. One of the larger empirical studies to date made gender self-identification as "male" or "female" a threshold question for inclusion in the study, and a surprising number of people (27 out of 214) declined to answer the question and were therefore excluded from the analysis.[173] Tacitly acknowledging their oversight, 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."[174]

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 noncomformity. As one scholar put it, "[i]t 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 genders."[175] This passage seems to assume a precultural 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

170. Whether polyamory is a sexual orientation is a contested question. *See, e.g.*, Emens, *supra* note 165, at 340-54 (contrasting universalizing and minoritizing accounts of polyamory); Ann E. Tweedy, *Polyamory as a Sexual Orientation*, 79 U. CIN. L. REV. 1461, 1462 (2011) (examining whether polyamory can properly be considered an "orientation").

171. (A)SEXUAL, *supra* note 4 ("We're almost like we don't have [a sexuality]. I always felt like I don't have a sexuality.").

172. *See infra* Part II.C.4.

173. *See* Brotto et al., *supra* note 3, at 601.

174. *Id.* at 615.

175. Chasin, *supra* note 96, at 716.

categories of male and female as deeply bound up with their uses in heterosexuality.[176]

Second, gender noncomformity 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."[177] 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 back form into some degree of asexuality.[178] Finally, and relatedly, being trans or intersex 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*

Alternatively, we might conclude that asexuality is a highly gendered phenomenon.[179] Some, though not all, studies suggest that more women than men are asexual.[180] The study by the Kinsey affiliates did not find a significant gender difference between asexuals and sexuals.[181] But the original Bogaert study found that, while 1% of people in general were asexual, further analysis revealed more gay and bisexual men than asexual men, and more asexual women than gay and bisexual women, as noted earlier.[182] Brotto and Scherrer both had more female asexual subjects in their studies.[183] And an AVEN study conducted in 2007 found that approximately 65% of subjects identified as female, 31% identified as male, and 4% opted for "intersexed" or "transsexual."[184]

176. *See, e.g.*, JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 8-9 (1999).

177. Chasin, *supra* note 96, at 716.

178. On intersex, see *What Is Intersex?*, INTERSEX SOC'Y N. AM., http://www.isna.org/faq/what_is_intersex (last visited Jan. 29, 2014) ("'Intersex' is a general term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn't seem to fit the typical definitions of female or male . . . [and] is a socially constructed category that reflects real biological variation.").

179. 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 do not embrace a binary gender identity, but that among those who do, women are in the majority.

180. *See supra* Part I.C.

181. *See* Prause & Graham, *supra* note 48, at 349.

182. Bogaert, *supra* note 40, at 282. Bogaert's follow-up study found a significant sex difference only in the weighted analyses but not in the original data. *See* Bogaert, *supra* note 42, at 280.

183. *See* Brotto et al., *supra* note 3, at 615; Scherrer, *supra* note 56, at 625.

184. Lunamoth, *Biological Sex Poll (July 2007), Census Forum*, ASEXUAL VISIBILITY & EDUC. NETWORK, http://www.asexuality.org/en/index.php?/topic/24599-biological-sex-poll-july-2007 (last updated Oct. 8, 2011) (reporting more specifically, in a study of 1370 mem-

Participants on the AVEN website ponder why more women so identify.[185] One theory is that more women than men feel comfortable identifying as asexual.[186] Indeed, some posts seem keen to supply cultural explanations such as this—as opposed to concluding that more women actually lack sexual attraction—but I have 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.[187]

Of course, the gender divide among asexuals overlaps with a broader cultural presumption that men want more sex than women do.[188] 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.[189]

The male and female partners report the same amount of sex, but with a completely different affective sense of its frequency.[190] The idea that male and

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bers, that 1.24% chose "Intersexed," 0.80% chose "Transsexual (M to F)," and 2.19% chose "Transsexual (F to M)"). Surprisingly, Brotto et al. report slightly different numbers for this study, *see* Brotto et al., *supra* note 3, at 615, although the site says the topic is closed, *see* Lunamoth, *supra*. The upshot of the results is the same, in any case.

185. Blueskies, *supra* note 1.

186. Throne Eins, Comment to *Define Sex Please?*, *Asexual Q&A*, ASEXUAL VISIBILITY & EDUC. NETWORK (July 15, 2008, 9:44 PM), http://www.asexuality.org/en/index.php?/topic/32908-some-blunt-questions ("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.").

187. *See* Brotto et al., *supra* note 3, at 615. *But see* Ela Przybylo, *Producing Facts: Empirical Asexuality and the Scientific Study of Sex*, 23 FEMINISM & PSYCHOL. 224, 236-39 (2013) (critiquing this hypothesis).

188. *See, e.g.*, J. Gayle Beck, *Hypoactive Sexual Desire Disorder: An Overview*, 63 J. CONSULTING & CLINICAL PSYCHOL. 919, 920 (1995); Terri D. Fisher et al., *Sex on the Brain?: An Examination of Frequency of Sexual Cognitions as a Function of Gender, Erotophilia, and Social Desirability*, 49 J. SEX RES. 69, 69 (2012) ("According to stereotype and the popular media, men think about sex much more than do women."). *But see* 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. PSYCHOL. REV. 242, 243 (2001) (reviewing the literature and finding no consensus about whether men or women have the stronger sex drive).

189. ANNIE HALL (MGM 1977); *Annie Hall (1977): Quotes*, IMDB, http://www.imdb.com/title/tt0075686/quotes (last visited Jan. 29, 2013) (quoting the scene).

190. 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 Ovidean tale of Tiresias's blinding.

female sexual desires—or at least a lack thereof—differ substantially is implicitly endorsed by the proposed DSM-V, which creates separate diagnostic categories for low desire in women as opposed to in men, as noted in Part I.[191]

If more women than men are asexual, what does 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 is, until men claimed it as an identity.[192] As noted earlier, Michael Storms's article tends to be cited as the first scholarly work on asexuality, although Myra Johnson's article, *Asexual and Autoerotic Women*, preceded it.[193] The fact that Johnson was a woman writing about women may have rendered her work on asexuality relatively unremarkable to many—though the content of her argument certainly warrants remark.

Johnson offers an account of the ways that female asexuality has been denigrated—as "'ascetic,' 'neurotic,' 'unliberated,' or 'politically conscious'"[194]—and concludes that the "sexual preferences [of female asexuals] are explained away in the rhetoric of whatever sexual ideology seems currently to be in vogue."[195] Ultimately, Johnson is critical of political pressures on female sexuality *and* female asexuality:

> A consensus which 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 "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.[196]

Evincing a related concern for the sexual pressures placed on girls, one scholar has asked whether asexuality might be a boon for some: "[w]hat 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)?"[197]

OVID, 1 METAMORPHOSES 147-49 (G.P. Goold ed., Frank Justus Miller trans., 3d rev. ed. 1984) (c. 8 C.E.).

191. *See supra* notes 35-37 and accompanying text.

192. This may help explain David Jay's relative fame and role in bringing asexuality into the limelight. *See, e.g.*, Bootle, *supra* note 125 ("It's so unusual—especially for a man—to have a complete lack of interest in sex . . . .").

193. *See supra* text accompanying note 22.

194. Myra T. Johnson, *Asexual and Autoerotic Women: Two Invisible Groups*, *in* THE SEXUALLY OPPRESSED 96, 104 (Harvey L. & Jean S. Grochos eds., 1977).

195. *Id.* at 104.

196. *Id.*; *cf.* Faderman, *supra* note 30.

197. Chasin, *supra* note 96, at 722-23.

3. *Disability*

a. *Disability as asexuality*

Various writing about disability laments the desexualization of disabled people.[198] 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.[199] 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.[200]

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, urging people to explore this possibility if their sexual desire has recently dropped.[201] There are also some interesting potential intersections between asexuality and autism spectrum disorders (ASDs).[202] More work is needed in this area, both to

198. *See, e.g.*, TOM SHAKESPEARE, KATH GILLESPIE-SELLS & DOMINIC DAVIES, THE SEXUAL POLITICS OF DISABILITY: UNTOLD DESIRES 9-12 (1996); Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?*, 20 N.Y.U. REV. L. & SOC. CHANGE 517, 537 (1993-1994); Tom Shakespeare, *Disability, Identity and Difference*, *in* EXPLORING THE DIVIDE: ILLNESS AND DISABILITY 94, 109 (Colin Barnes & Geof Mercer eds., 1996); *see also* Emens, *supra* note 164, at 1325.

199. *See, e.g.*, Scherrer, *supra* note 56, at 623.

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

201. *See, e.g.*, *General FAQ*, *supra* note 11 ("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." (italics omitted)).

202. The extant research has focused largely on ASDs, finding higher levels of asexuality (and sometimes homosexuality or bisexuality) among people with ASDs. *See, e.g.*, Laura Gilmour et al., *Sexuality in a Community Based Sample of Adults with Autism Spectrum Disorder*, 6 RES. AUTISM SPECTRUM DISORDERS 313, 317 (2011). Extensive conversations on AVEN and informal surveys suggest higher levels of Asperger's Syndrome among self-identified asexuals. *See, e.g.*, Morpohovariant, Comment to *Asexuality & Asperger's, Welcome Lounge*, ASEXUAL VISIBILITY & EDUC. NETWORK (Feb. 2, 2012, 4:00 PM), http://www.asexuality.org/en/topic/70498-asexuality-and-aspergers. This is far from a definitive conclusion, however. As one comment put it:

> While a noticeable number of AVEN members have Asperger's, this is not necessarily a link between the two. Firstly there would need to be research into the incidences of Asperger's in other sexualities to compare them to and secondly it has been said that people with Asperger's are more likely to realise they are asexual because of the logical thought and lack of social connections that are innate to the syndrome.

ASEXUALITY VISIBILITY & EDUC. NETWORK, ASEXUALITY: THE BUMPER BOOK OF FREQUENTLY ASKED QUESTIONS 5 (2013), *available at* http://asexualawarenessweek.com/docs/PRIDE-bumper-faqs.pdf.

assess and understand any connections and to examine the attitudinal implications for both aces and aspies[203] (and others with ASDs).

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—has been highly controversial and much criticized for pathologizing female patterns of desire that don't satisfy male partners.[204] Asexuals tend to be keen to distinguish their identity from this clinical diagnosis of mental disability.

C. *Models: Minoritizing, Universalizing, Novel, or Umbrella Category*

Asexuality might be understood using any one of several existing models of sexual orientation, or it might lead to entirely different models for thinking about sexuality. This Subpart briefly sketches several such possibilities, before Part III turns 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.[205] Storms's model posited asexuality as a fourth sexual orientation, akin to heterosexuality, homosexuality, and bisexuality.[206] Asexuals often say or imply that they have always been this way, that they were hardwired asexual.[207] This "nature talk" is reminiscent of gays who want to find the gay gene,[208] and of other sexual minorities who piggyback on this narrative of essential identity.[209] Researchers in this area report on the eagerness of asexuals to participate in

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203. Aspies is a shorthand term embraced by some people with Asperger's Syndrome, which is the type of ASD most commonly associated with asexual identity. *See supra* note 202.

204. *See supra* Part I.B.

205. On "minoritizing" discourses, see EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 85 (1990) (defining a "minoritizing" view of homosexuality as the view that "there is a distinct population of persons who 'really are' gay").

206. *See supra* notes 12-16 and accompanying text.

207. *See, e.g.*, Bootle, *supra* note 125 and accompanying text (quoting one asexual on being "wired" this way); *see also supra* note 133 and accompanying text (discussing research on biological bases and claims of hardwired asexuality). This is not to say that the "born that way" arguments are the same as the "not a choice" arguments, as Ed Stein demonstrates. *See* Stein, *supra* note 83, at 10-14.

208. On "nature talk" across categories, and the quest for the gay gene in particular, see generally Elizabeth F. Emens, *Against Nature*, *in* NOMOS LII: EVOLUTION AND MORALITY 293 (James E. Fleming & Stanford Levinson eds., 2012).

209. *Cf.* Emens, *supra* note 165, at 352-54 (discussing minoritizing in the context of polyamory).

research studies;[210] study participants presumably surmise that research validation will help to make asexuality "a thing" that the rest of the culture believes in.[211]

2. *Universalizing*

> There is a big secret about sex: most people don't like it.
>
> — Leo Bersani[212]

By contrast to a minoritizing conception of an identity, a universalizing conception of an identity posits that the category is substantially important in the lives of many people, even those who do not identify with the sexual minority.[213] 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 people, a strong form of this claim is simply implausible. But a much milder version of a universalizing account might have something to it. Some work suggests that many people go through more or less sexual phases of their lives, and even of their days.[214] Moreover, it seems plausible to think that everyone—or, to be safe, let us say nearly everyone—has at some point felt a lack of sexual attraction. And sometimes that lack of attraction has had painful consequences: it might have hurt someone else's feelings, damaged or ended a valued relationship, or made a person unable to partner with a highly compatible friend. Struggling against this unwanted lack of attraction, individuals might have engaged in what Thea Cacchioni calls "the labour of love"—or, more tendentiously, "sex work"—to try to bolster their attraction to another.[215]

In this context, a universalizing model might lead us to ask whether the common disbelief or skepticism in response to asexuality could be defensive. I have argued elsewhere that a "paradox of prevalence" contributes to the nega-

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210. *See, e.g.*, Brotto et al., *supra* note 3, at 599.

211. *Cf.* Glazer, *supra* note 153, at 1006 n.38 (invoking Tina Fey's *30 Rock* character Liz Lemon on becoming "a thing").

212. Leo Bersani, *Is the Rectum a Grave?*, OCTOBER, Winter 1987, at 197, 197.

213. In the words of Eve Sedgwick, who coined the term in writing about homosexuality, a "universalizing" view of homosexuality contrasts with a "minoritizing" view that some subset of people really are gay, and holds "that apparently heterosexual persons and object choices are strongly marked by same-sex influences and desires, and vice versa for apparently homosexual ones." SEDGWICK, *supra* note 205, at 85.

214. For example, some works suggest 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.*, Vaughn Call et al., *The Incidence and Frequency of Marital Sex in a National Sample*, 57 J. MARRIAGE & FAM. 639, 646-47, 649-50 (1995); Osmo Kontula & Elina Haavio-Mannila, *The Impact of Aging on Human Sexual Activity and Sexual Desire*, 46 J. SEX RES. 46, 54 (2009); Abi Taylor & Margot A. Gosney, *Sexuality in Older Age: Essential Considerations for Healthcare Professionals*, 40 AGE & AGEING 538, 538-39 (2011); *see also* Suzanne A. Kim, *The Neutered Parent*, 24 YALE J.L. & FEMINISM 1, 49 (2012).

215. *See* Cacchioni, *supra* note 29, at 301-02.

tive reactions to polyamory.[216] Mainstream culture seems to resist—typically through laughter or disgust—the very idea of polyamory, not so much because mainstream people really feel so far away from polyamory but because they feel so close to it. That is, monogamy is already so plagued by its failures that people who aspire to monogamy 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 Savage[217]) and aggressive erasure (I know better than you: You're really gay! Or really just repressed![218]) 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 lack of attraction, or a partner's, or both.

Could a paradox of prevalence really characterize the responses to *both* asexuality and polyamory? Perhaps so. If our quantity of attraction—whether too much or too little—is an underappreciated feature of our (sexual or asexual) selves, then anxieties surrounding it might be driving us to alienate those who have gone too far, or too openly, in either direction.[219] This brings us to the possibility of novel axes, beginning with quantity.

3. *Something new*

The newly claimed identity of asexuality invites us to imagine some new ways to think about sexuality, identity, and ourselves.[220]

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 that the early sexual orientation studies were so oblivious to quantity as an axis of sexuality that they unwittingly managed to conflate bisexuality and asexuality.[221] This does not mean, however, that talking about quantity of desire or attraction is new: we talk about quantity in relation to times in life ("[h]orny teenager"[222]) or times of the month ("I've been noticing that I become horny

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216. Emens, *supra* note 165, at 349.

217. *See* (A)SEXUAL, *supra* note 4.

218. *See supra* Part II.B.1.b.

219. This might help explain why avowedly sex-positive people tend to be the strongest allies for asexuals; they may be the least likely to feel anxious about being mistaken for asexual. *See supra* notes 166-71 and accompanying text.

220. *Cf.* Chasin, *supra* note 96, at 723 (suggesting that asexuality may spawn radical new ideas).

221. *See supra* notes 12-16 and accompanying text.

222. *See, e.g.*, PurEvil, *a/s/l*, URBAN DICTIONARY (Apr. 24, 2006), http://www.urbandictionary.com/define.php?term=a%2Fs%2Fl.

during my period"[223]). The word "horny" comes up regularly in quantity examples, but more often to describe a mood or moment than a character.[224] But we also classify people along this axis either for high quantity (such as "horndog"[225] or "sex addict"[226]) or low quantity (such as "frigid"[227] or "cold fish"[228]). Our quantity terms also imply the gendered dimensions of this axis discussed earlier.[229]

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."[230] Various work suggests that many aces embrace this idea that everyone is on a spectrum of attraction levels—from low to high quantity of sexual attraction—even while they recognize that the discrete identity category of "asexual" may usefully serve personal and political purposes.[231]

b. *Autoerotic axis*

Self-identified asexuals apparently masturbate at rates not far from the rates of the general population, or at least in significant numbers, according to the (admittedly imperfect) data gathered thus far.[232] 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

223. *See, e.g.*, *Does Menstruation Affect My Sex Drive?*, COSMOPOLITAN, http://www.cosmopolitan.com/sex-love/advice/menstruation-affect-sex-drive (last visited Jan. 29, 2013).

224. *See, e.g.*, Nympho, *Horny*, URBAN DICTIONARY (Aug. 25, 2003), http://www.urbandictionary.com/define.php?term=horny (defining "horny" as "[t]urned on immensely").

225. *See, e.g.*, Ze_kimster, *Horndog*, URBAN DICTIONARY (Jan. 15, 2005), http://www.urbandictionary.com/define.php?term=horndog (defining "horndog" as "a REALLY, REALLY horny guy . . . or girl" (ellipsis in original)).

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

227. *See, e.g.*, Anonymous, *Frigid*, URBAN DICTIONARY (Mar. 4, 2005), http://www.urbandictionary.com/define.php?term=frigid.

228. *See, e.g.*, David Chen, *Cold Fish*, URBAN DICTIONARY (Dec. 14, 2003), http://www.urbandictionary.com/define.php?term=cold+fish.

229. *See supra* Part II.B.2.b.

230. 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, "[p]eople are different from each other." SEDGWICK, *supra* note 205, at 22 (italics omitted). She offered an illustrative list of possible alternative classifications of sexuality, including some that reflect a quantity perspective: "[s]ome people spend a lot of time thinking about sex, others little" and "[s]ome people like to have a lot of sex, others little or none." *Id.* at 25.

231. Chasin, *supra* note 96, at 718.

232. *See supra* note 87.

masturbation may have.[233] 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.[234]

c. *Narcissism axis*

Some asexuals talk about not being put off by the idea of sex unless they are personally involved, as noted earlier.[235] 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.[236] 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, but the idea here centers on the erotic impact of one's own presence in the sexual activity (in reality or fantasy).[237] 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.

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233. Eve Sedgwick anticipated a version of this: "Some people's sexual orientation is intensely 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." SEDGWICK, *supra* note 205, at 25-26. A related clinical diagnosis is "automonosexualism," or a sexual attraction to oneself. *See* Przybylo, *supra* note 187, at 233. Had Sedgwick had asexuality identity in mind, she might have said that the autoerotic can mark a person's orientation "more so"—*or to the exclusion of*—"any aspect of alloerotic object choice." SEDGWICK, *supra* note 205, at 25-26.

234. *See supra* text accompanying notes 91-95 (discussing Brotto's account of asexuals' descriptions of masturbation in clinical or mechanical terms).

235. Carrigan, *supra* note 57, at 470. Carrigan quotes 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.

Id. For more discussion of sex-aversion and sex-indifference—whether toward sex in general or just sex involving oneself—see Part II.A.2.c above.

236. *See, e.g.*, 1 OVID, *supra* note 190, at 149-61.

237. *Cf.* BOGAERT, *supra* note 2, at 63 ("[W]hen [masturbation] fantasies do occur in asexual people in a consistent or systematic way, they are often, although not always, still of a 'disconnected' sort. That is, these people often view themselves as not being part of the sexual acts they are fantasizing about or viewing . . . ."). Bogaert has characterized the "'disconnect' between an individual's sense of self and a sexual object/target"—which he describes as "consistent with a lack of subjective sexual attraction for others"—as a "paraphilia" that he names "autochorissexualism." Anthony F. Bogaert, *Asexuality and Autochorissexualism (Identity-less Sexuality)*, 41 ARCHIVES SEXUAL BEHAV. 1513, 1513 (2012). In contrast to Bogaert's medicalizing of the position associated with asexuality, my suggestion here is that everyone with sexual fantasies or behavior would fall somewhere along the narcissism axis, with masturbating asexuals on the low end, and those who imagine themselves as a part of every sexual fantasy or activity on the high end.

A likely example of the latter type of disposition is the popularity of gay male pornography among lesbians.[238]

d. *Romantic-attraction axis*

Thinking about asexuality sets into relief the matter 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, for example, that people may have romantic attractions toward one sex and sexual attractions to the other.[239] 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?"[240]

e. *Orientation-object axis*

Romantic asexuals might do well to be romantically attracted to other romantic asexuals,[241] 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 bisexuals, however, it matters less.[242] In informal settings, certain types along this axis of identity have been given names—such as "girlfag"[243] and "guydyke"[244]—but I have not encountered any naming of this axis of sexuality.

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238. *See, e.g.*, Jacob Bernstein, *An Indie Hit's Sex Message*, DAILY BEAST (July 18, 2010, 6:38 PM EDT), http://www.thedailybeast.com/articles/2010/07/18/the-lesbians-who-love-male-gay-porn.html. *But cf.* Kristina Gupta, *Picturing Space for Lesbian Nonsexualities: Rethinking Sex-Normative Commitments Through* The Kids Are All Right *(2010)*, 17 J. LESBIAN STUD. 103, 107 (2013) (arguing that the film "creates a space for nonsexuality within the category lesbian").

239. *See* Lisa M. Diamond, *What Does Sexual Orientation Orient? A Biobehavioral Model Distinguishing Romantic Love and Sexual Desire*, 110 PSYCHOL. REV. 173 (2003).

240. Chasin, *supra* note 96, at 722.

241. This is of course speculation. One scholar rightly suggests that an interesting avenue for further research is "relational dynamics between asexual and non-asexual partners. For example, do 'sexually congruent' couples (i.e., both identify as asexual) experience greater levels of intimacy and relationship satisfaction than 'sexually incongruent' couples?" C.J. Bishop, *A Mystery Wrapped in an Enigma—Asexuality: A Virtual Discussion*, 4 PSYCHOL. & SEXUALITY 195, 205 (2013) (italics omitted) (quoting Todd G. Morrison).

242. Yoshino's work on bisexual erasure points to some reasons why bisexuals might find less acceptance among monosexuals, however. *See supra* Part II.B.1.b.

243. Clare, *GirlFags FAQ*, GIRLFAGS, https://web.archive.org/web/20111126035847/http://www.girlfags.com/faq.html (defining "girlfag" as "[a] woman who is very attracted to gay/bi men").

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

4. *An umbrella category of orientation*

Finally, asexuality could be an umbrella category of orientation—asexual orientation—alongside sexual orientation.[245] Typically, asexuals instead claim asexuality as a type of sexual orientation just like gayness.[246] 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.[247] 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," such as romantic and aromantic, and gay, straight, or bi.[248]

Of all the models, the meta-category version of asexuality arguably poses the most substantial challenge to the pervasive cultural assumption that our sexual selves importantly define us.[249] 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.

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245. This would make asexuality more like the absence of a sexual orientation, as noted earlier. *See supra* text accompanying notes 170-71.

246. Swankivy, for instance, has resisted the characterization of asexuality as a challenge to the idea of sexual orientation. *See* Swankivy, *Asexuality and Pansexuality: Petition!*, YOUTUBE (July 11, 2009), http://www.youtube.com/watch?v=jRkaPYe9fLw ("I am an asexual. . . . Some people would say, 'Does that mean you have no sexual orientation?' It really means more the other way. It means you kind of have a sexual orientation of 'no.'"); Swankivy, *Asexuality: An Introduction*, supra note 121 ("I want to make information available about lack of sexual attraction being not a sickness or a psychosis in itself but rather a legitimate sexual orientation."); *cf.* Storms, *supra* note 12, at 784 fig.1.

247. *See supra* note 99 and accompanying text.

248. Chasin, *supra* note 96, at 721.

249. *See, e.g.*, 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 9-13 (Robert Hurley trans., Random House, Inc. 1978); *see also* MICHEL FOUCAULT, *The End of the Monarchy of Sex*, *in* FOUCAULT LIVE: COLLECTED INTERVIEWS, 1961-1984, at 214, 214 (Sylvère Lotringer ed., Lysa Hochroth & John Johnston trans., 1996) [hereinafter FOUCAULT, *The End of the Monarchy of Sex*] ("How is it that sexuality has been considered the privileged place where our deepest 'truth' is read and expressed? . . . [S]ince Christianity, Western civilization has not stopped saying, 'To know who you are, know what your sexuality is about.'"). 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 205, at 25.

III. ASEXUAL LAW AND OUR SEXUAL 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 Savage[250]

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]."[251]

Why is this the moment for the emergence of an identity organized around a lack of attraction? It is interesting to speculate. Incidental factors presumably played some role, as others have surmised: most notably, the charisma (and possibly the maleness[252]) of David Jay, the emergence of the Internet as a forum for social connection,[253] and the media attention surrounding Bogaert's one percent finding.[254] More broadly, perhaps the prohibitions on sexual expression have dropped away to such an extent that no one could escape the demand to speak some kind of sexual truth; perhaps the cultural pressure for sexual identification had to grow strong enough for a countervailing identity to form.[255] When gays were expected to be in the closet,[256] or women were

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250. (A)SEXUAL, *supra* note 4.

251. *Cf. Sex and the City: Pick-a-Little, Talk-a-Little* (HBO television broadcast July 13, 2003) (coining the now-iconic phrase: "he's just not that into you"). On the demand for sexual confession, see 1 FOUCAULT, *supra* note 249, at 11-13; and SEDGWICK, *supra* note 205, at 85.

252. *See supra* text accompanying notes 192-93.

253. *See, e.g.*, Dominique Mosbergen, *What Is Asexuality? A Community's Coming of Age*, HUFFINGTON POST (Aug. 21, 2013, 10:46 AM EDT), http://www.huffingtonpost.com/2013/06/17/what-is-asexuality_n_3360424.html?1371476978 ("We know that asexual people have been looking for each other for a long time, but it wasn't until the Internet that we found each other." (quoting David Jay)).

254. *See* BOGAERT, *supra* note 2, at 38.

255. On the demand to speak one's sexual truth, see sources cited note 249 above. Interestingly, Foucault anticipated an emerging discourse contrary or oblique to this demand, though presumably not in the form of asexual identity. FOUCAULT, *The End of the Monarchy of Sex*, *supra* note 249, at 218 ("A movement is taking shape today which seems to me to be reversing the trend of 'always more sex,' of 'always more truth in sex,' . . . : it's a matter, I don't say of rediscovering, but rather of fabricating other forms of pleasure, of relationships, coexistences, attachments, loves, intensities. I have the impression of hearing today an 'anti-sex' grumbling (I'm not a prophet, at most a diagnostician), as if a thorough effort were being made to shake this great 'sexography' which makes us decipher sex as the universal secret.").

256. *See supra* note 149 and accompanying text.

expected to have sex out of duty only,[257] then a lack of sexual attraction would have blurred with many other conventional postures. But once women are expected to be sexual beings,[258] and gays are expected to come out,[259] then few closets remain.[260] In this context, the one who does not share the sexual dispositions of her neighbors—like the atheist or agnostic in a profoundly religious community[261]—may feel impelled to speak her truth and to convene allies to seek recognition for their mutual experience of alienation from pervasive assumptions.

However precisely it happened, asexual identity has emerged as a striking challenge to a prominent religion of contemporary U.S. society—sexuality. Asexual self-elaboration therefore offers a fascinating lens through which to view our legal system's relationship to sex.

The lines from Dan Savage in the epigraph, though comic, contain a serious claim: Savage implies that asexuals don't need anything from the law. And his perspective is not unusual; asexuals are often seen as beyond the law.[262] Is Savage right?

Savage assumes a particular understanding of legal advocacy: rights claims predicated on a history of legal prohibitions. This model does not map neatly onto asexuals, who have not been subjected to the kinds of legal strictures applied to homosexuals.[263] The problem here is not the lack of fit between asexuality and the law, however, but the narrowness of Savage's conception of law. This view fails to recognize the range of subtler regulatory functions of law, some of which operate to the detriment of asexuals, while a few may accrue to their benefit, as this Part will show.

What kinds of legal projects might asexuals want to pursue? Most prominently, some self-identified asexuals have begun to lobby for inclusion in federal antidiscrimination law, through the proposed Employment Non-

257. *See supra* note 31 and accompanying text.

258. *See supra* notes 29-30 and accompanying text.

259. *See, e.g.*, Brian McNaught, Op-Ed., *Why Gays Should Come Out at Work*, CNN (June 29, 2011, 6:12 AM EDT), http://www.cnn.com/2011/OPINION/06/28/mcnaught.gays.workplace/index.html; Dave Urbanski, *Popular NFL Quarterback: Gay Players Should Come Out 'Now'*, BLAZE (Aug. 14, 2013, 11:32 AM), http://www.theblaze.com/stories/2013/08/14/popular-nfl-quarterback-gay-players-should-come-out-now.

260. Arguably polyamory is still one, *see, e.g.*, Emens, *supra* note 165, at 283, and certainly so is the (very differently situated) pedophilia, *see, e.g.*, Balkin, *supra* note 74, at 2364-65.

261. *Cf., e.g.*, GAVIN HYMAN, A SHORT HISTORY OF ATHEISM, at xv (2010) ("[The] origin, definition and plausibility [of atheism] are inseparable from the 'modern' world-view out of which it arose, and the 'modern' form of religion against which it reacts and defines itself.").

262. *See, e.g.*, Jutel, *supra* note 31, at 1086 ("Possibly 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."); *see also* Bogaert, *supra* note 40, at 284; Scherrer, *supra* note 56, at 637.

263. *Cf. infra* note 467 and accompanying text.

Discrimination Act, which aims to prohibit employment discrimination on the basis of sexual orientation.[264] This Part will consider this effort in more detail, as the most developed legal endeavor of the asexuality movement thus far and the one with extant legal precedents.[265] But antidiscrimination law is only one of many possible legal routes that advocacy and thinking about asexuality might travel.

Our legal system assumes sexuality in a range of ways. This Part sets out a framework for identifying and analyzing types of interactions between law and asexuality. The aim here is twofold. First, this framework should serve as a toolkit for advocates and thinkers about asexuality, as they consider what areas of law, if any, they might want to try to change. Second, the framework shows how asexuality can operate as a diagnostic tool or heuristic for identifying the ways that law's interactions with sexuality affect the broader society.[266] Namely, asexuality invites us to see the implicit sexual baselines in our sexual law that affect not only those people whose experience is in some significant sense asexual,[267] whether or not they *identify* as asexual,[268] but that also help to constitute everyone else's sexuality in ways they are unlikely to see.

This next Subpart provides the analytic toolkit of interactions between asexuality and the law, and the rest of this Part applies the tools.

A. *Asexuality's Interactions with Law: An Analytic Framework*

This Article began by characterizing asexuality as the middle child of the sexual orientation family. In one sense, this is true: asexuality has been overlooked until recently, overshadowed by its more prominent siblings—heterosexuality, homosexuality, and bisexuality—which have drawn more explicit praise or blame than their less active peer. In another sense, though, the analogy to birth order is inapt. The inattention to asexuality has arguably been a more genuine form of benign neglect than middle children stereotypically com-

264. *See* AVEN Memo, *supra* note 59.

265. *See, e.g.*, N.Y. EXEC. LAW § 292(27) (McKinney 2013) ("The term 'sexual orientation' means heterosexuality, homosexuality, bisexuality or asexuality, whether actual or perceived."); *see also infra* note 351 (listing several U.S. localities that protect asexuality under antidiscrimination ordinances and citing a U.K. government statement that asexuality is covered under hate crimes law).

266. *Cf.* LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 11 (2002) (discussing race as a lens through which to identify broader societal problems); MARTHA MINOW, *Sources of Difference*, *in* MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 49, 49-78 (1990) (discussing the problem of unarticulated baselines).

267. This is a paraphrase of Eve Sedgwick; for discussion, see Part II.C.1 above.

268. On models for thinking about asexuality beyond the current identity category, see Part II.C above.

plain of,[269] or than other outsider groups typically experience. Consider disability, which courts and commentators often associate with benign neglect in the form of inaccessible buildings, homes, and communities.[270] As various commentators have pointed out, it is hard to view as entirely benign the structural exclusion of people with disabilities in a society that has warehoused, sterilized, and in various ways attempted to avoid the creation and the participation of members of the group.[271] Asexuality, however, seems to have been genuinely overlooked or unrecognized, if not simply illegible, until very recently.

With regard to homosexuality, Justice Kennedy asserted in *United States v. Windsor*[272] that the idea of "equal dignity" through marriage for same-sex couples was a new "concept" of late, leading some people to "a new perspective, a new insight."[273] Whatever the merits of this claim about same-sex *marriage* as a conceptual breakthrough, the idea of people desiring their own sex is far from a revelation in a society that has passed laws outlawing homosexual activity and that has engaged in explicit exclusion, punishment, and attempted conversion of homosexuals.[274]

Asexuality, by contrast, is more plausibly a new concept for many people. In a culture that assumes that sexuality is the deep secret of everyone's identity, the idea of asexuality can seem like a genuine revelation.[275] Asexuality therefore offers the possibility of revealing unarticulated assumptions embedded in our law and culture.[276] This Article thus far has attempted to expose some of

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269. *See, e.g.*, *Middle Children DO Get Neglected, Admit Parents*, DAILY MAIL (Apr. 7, 2009, 6:50 PM EST), http://www.dailymail.co.uk/news/article-1168394/Middle-children-DO-neglected-admit-parents.html.

270. *See, e.g.*, Alexander v. Choate, 469 U.S. 287, 295 (1985) ("Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.").

271. *See, e.g.*, Harlan Hahn, *Disputing the Doctrine of Benign Neglect: A Challenge to the Disparate Treatment of Americans with Disabilities*, *in* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 269, 269-74 (Leslie Pickering Francis & Anita Silvers eds., 2000); *Introduction to Part C*, *in* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS, *supra*, at 163, 165.

272. 133 S. Ct. 2675 (2013).

273. *Id.* at 2689 ("It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. . . . For others, however, came the beginnings of a new perspective, a new insight."); *see also id.* at 2693 ("equal dignity"); *id.* at 2682 ("the concept of same-sex marriage"). On the problems and the potential in *Windsor*'s "equal dignity," see Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J.L. & GENDER 2 (forthcoming 2014).

274. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 1 (1999) (discussing the history of legal persecution and exclusion of homosexuals); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 786 (2002) (discussing legal and cultural demands that homosexuals convert).

275. *Cf.* sources cited *supra* note 249.

276. *See supra* note 266.

these assumptions.[277] This Part aims to push those insights further and to develop a framework for analyzing asexuality's interplay with law.

This Part puts forward a typology of four types of legal interactions with asexuality:

(1) legal requirements of sexual activity;

(2) legal exceptions to shield sexuality from commodification;

(3) legal protections from others' sexuality; and

(4) legal protections for sexual identity.

Note that by beginning this typology with sexual requirements, I am passing over what is arguably the harshest form of legal regulation of sexuality: legal punishment of particular sexualities or of sex acts important to particular individuals.[278] As the focus here is asexuality, however, and asexuals have not faced this kind of legal burden,[279] I do not include this category.

Nothing in this analysis presumes the effect of these legal structures on asexuality, nor presumes that any legal change (or what sort of legal change) would be desirable from an asexual perspective. The purpose here, as noted earlier, is to offer tools for advocates and thinkers focused on asexuality and to provide a framework for a broader set of readers to use asexuality to recognize unstated legal assumptions that help to constitute sexuality more generally. Each of these categories warrants an inquiry encompassing questions such as the following: In a society such as ours, with a small number of people self-identified as asexual, what is the impact on asexuals of this legal interplay with sexuality? In addition, what is the impact on people whose experience, right now or across time, is largely asexual, but who are not identified as such? Moreover, what is the effect of this legal structure on sexual people?[280] Finally, if most or all people *were* asexual, does it seem likely that the law would still work this way? The last question, though a speculative counterfactual, offers a mechanism for trying to root out the role of sexuality per se in the legal norm.

The rest of this Part considers each of the categories of legal interplay listed above with no pretense of addressing all the key questions, but instead with the aim of highlighting several key points about each. The most attention

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277. *See supra* Parts I-II.

278. The relationship between status and conduct is a complicated one, but niceties aside, homosexual sex and homosexual identity are closely connected; or as Janet Halley aptly put it,

> Of course it is rational to say that homosexuals—real homosexuals, professed homosexuals, or people designated by others as homosexuals for good conventional reasons—are more likely to engage in homosexual sodomy than everyone else. (To my mind that is one of the great things about homosexuals, but I acknowledge that many people disagree with my moral position on this point.)

Janet E. Halley, Romer *v.* Hardwick, 68 U. COLO. L. REV. 429, 438 (1997).

279. *See supra* note 262.

280. These distinctions between sexuals and asexuals may be, to some extent, artificial, *see supra* Part II.C, but the third question aims to get at the overlap.

is devoted to the final category, antidiscrimination law, because of its current political prominence.

B. *Legal Requirements of Sexual Activity*

The most striking aspect of a legal regime, from the perspective of asexuality, would be any legal requirements of sexual activity. As noted earlier, some (typically romantic) asexuals do have sex, but as part of the give-and-take of a relationship, not because of sexual attraction.[281] Therefore to have any legal benefits depend on sexual activity could be a substantial burden on many asexuals as well as anyone else who is not having sex, whether by inclination or decision.

1. *Marriage law*

Legal marriage confers numerous benefits and responsibilities, some of them unique to marriage and some merely obtained efficiently through marriage.[282] As a general rule, marriages are valid even without sexual consummation.[283] 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.[284] 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.[285] Also notable is the fact that many states make impotence a ground for annulment,[286] whereas infertility is not an independent ground for annulment in any state

281. *See supra* notes 81-82 and accompanying text.

282. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 954-57 (Mass. 2003) (listing benefits and responsibilities).

283. *See, e.g.*, Berdikas v. Berdikas, 178 A.2d 468, 470 (Del. Super. Ct. 1962) ("An examination of the Digests bring[s] 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."); Burnside v. Burnside (*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.").

284. *See, e.g.*, OHIO REV. CODE ANN. § 3105.31(F) (LexisNexis 2013); *see also* Hassan v. Hassan, No. FA010632261, 2001 WL 1329840, at *4 (Conn. Super. Ct. Oct. 9, 2001) ("Applying these principles, we hold that the purported marriage, deficient for want of due solemnization, was voidable rather than void, insofar as the latter term may imply an absolute nullity." (quoting Hames v. Hames, 316 A.2d 379, 385 (Conn. 1972)) (internal quotation mark omitted)); Darling v. Darling, 335 N.E.2d 708, 710 (Ohio Ct. App. 1975) ("A nonconsummated marriage is not void *ab initio*, but merely voidable."). This may require a finding of fault by the defendant. *See* Lang v. Reetz-Lang, 488 N.E.2d 929, 931 (Ohio Ct. App. 1985).

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

286. *See, e.g.*, Manbeck v. Manbeck, 489 A.2d 748, 751 (Pa. Super. Ct. 1985); David B. Perlmutter, Annotation, *Incapacity for Sexual Intercourse as Ground for Annulment*, 52 A.L.R.3d 589 (1973).

(unless misrepresented or concealed), perhaps suggesting that sex per se matters more to marriage than reproduction.[287] In the immigration context, failure to consummate, by itself, does not render a marriage a "sham marriage."[288] 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.[289] In several ways, then, marriage law effectively requires sexual activity.[290]

How does this aspect of marriage law affect asexuals? On one level, the kind of sexual requirements attached to marriage in this country probably have little direct effect on asexuals who are open about their asexuality. Failure to consummate renders a marriage voidable, not void, so the other party would have to want to void the marriage for this provision to be activated.[291] If an asexual were open about her asexuality prior to marriage, then the other party should have little reason to complain. On the other hand, we know that, when marriages break down, former spouses can invoke the law in ways they would not have expected before marriage, out of spite or a desire to save money. Thus, this provision for voiding the marriage for lack of consummation creates a vulnerability for asexuals (or rather, for those asexuals who don't have sex, which is not all asexuals[292]).

On the other hand, a provision for voiding a marriage for lack of consummation might seem useful protection for *sexuals*—who might reasonably expect sexual consummation in a marriage in this sexual culture—against asexuals who are not open about their asexuality. But if the idea is to force information about sexual intentions, then the law should narrowly target the disclosure point: sexual consummation should be treated like infertility in some states—not a ground of annulment unless misrepresented or concealed.[293]

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287. *See, e.g.*, James Lockhart, *Cause of Action to Annul Marriage*, *in* 29 CAUSES OF ACTION (SECOND) 431, § 12 (West 2013). (Relatedly, courts have tended to focus on the ability to sexually consummate the marriage—rather than the ability or inability to procreate—as relevant to whether transsexuals could legally marry. *See, e.g.*, M.T. v. J.T., 355 A.2d 204, 209, 211 (N.J. Super. Ct. App. Div. 1976).) Note that an alternative interpretation might be that courts focus on impotence rather than infertility because a person is more likely to know about his impotence than his infertility before marriage, so there is more reason to have expected disclosure of the former.

288. *See* Whetstone v. INS, 561 F.2d 1303, 1307-09 (9th Cir. 1977); *In re* Peterson, 12 I. & N. Dec. 663, 665 (B.I.A. 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.").

289. 8 U.S.C. § 1101(a)(35) (2012).

290. Note also that historically, rape law could be understood to embrace a de facto requirement to submit to unwanted sex in marriage, since the law did not recognize rape as a crime within marriage. *See, e.g.*, Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2174 (1996).

291. *See supra* note 284.

292. *See supra* notes 81-82 and accompanying text.

293. *See supra* notes 286-87 and accompanying text.

2. *Looking beyond conjugality in marriage and its alternatives*

Marriage law formally recognizes and attaches legal significance to a deeply significant social institution. Even if marriage law does not technically require sex—and even if the law were changed so that lack of consummation did not render a marriage voidable without misrepresentation in any jurisdiction, as discussed above[294]—the legal significance of a social institution deeply linked with conjugality surely affects asexuals. Fewer asexuals marry than sexuals, studies suggest; for instance, Bogaert found that approximately twice as many sexuals as asexuals were married.[295] If true, then marriage law has a disparate impact on asexuals.

That said, asexuals can marry and do marry, particularly romantic asexuals. Asexuals may increasingly choose to marry (perhaps especially each other[296]) if they continue to self-identify and to 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.

Aces may therefore be prime candidates to support the movement to abandon marriage as a legal institution or to replace it with any number of alternatives explicitly organized around a principle other than conjugality.[297] The many alternatives that scholars and activists have examined include privileging dyadic caregiver relationships,[298] recognizing friendships or other close familial and nonfamilial relationships,[299] moving to a contractarian regime,[300] or replacing marriage with a similar domestic partnership or civil union regime.[301] Important recent work shows how law's privileging of sex in the context of intimate relationships "devalues both sexual relationships that lack an intimate

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294. *See supra* Part III.B.1.

295. *See* Bogaert, *supra* note 40.

296. *Cf. supra* Part II.C.3.e (considering the possible advantages to asexuals, like homosexuals, of desiring one's own kind on the orientation-object axis).

297. *See* sources cited *infra* note 301.

298. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 8, 229 (1995) (arguing for vertical parent-child dyads to replace horizontal intimate dyads as the privileged state relationship and for replacing marriage with contractual arrangements).

299. *See, e.g.*, Ethan J. Leib, *Friendship and the Law*, 54 UCLA L. REV. 631, 684-705 (2007); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 202-42 (2007).

300. *See, e.g.*, Elizabeth F. Emens, *Regulatory Fictions: On Marriage and Countermarriage*, 99 CALIF. L. REV. 235, 257-69 (2011) (discussing, inter alia, contractarian alternatives). *But cf.* Carol Sanger, *A Case for Civil Marriage*, 27 CARDOZO L. REV. 1311, 1312 (2006) (expressing skepticism about the ability of a contract law regime to adequately replace marriage law).

301. *See, e.g.*, LAW COMM'N OF CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS 117-18 (2001), *available at* http://www.samesexmarriage.ca/docs/beyond_conjugality.pdf; Mary Lyndon Shanley, *Afterword* to JUST MARRIAGE 109, 112 (Joshua Cohen & Deborah Chasman eds., 2004).

component and intimate relationships that lack a sexual component."[302] These debates over marriage and its alternatives, which I have examined at length elsewhere, consider the interests of a wide range of people, including polyamorists, singles, committed friends, extended family networks, and many others.[303] Asexuals have a significant, though not unique, stake in these debates.

Finally, thinking about asexuality in relation to legal requirements of sexual activity underscores an important point about domestic partnership regimes. As Mary Anne Case has aptly observed, domestic partnership regimes often impose stricter requirements on participants than do traditional marriage regimes.[304] Marriage has strict conditions for entry (most notably, the requirement of one man and one woman in most jurisdictions), but once inside the institution, spouses are typically given substantial freedom to structure their relationship as they choose. By contrast, domestic partnership regimes often impose requirements such as cohabitation, shared finances, and monogamy.[305] Some even appear to require sexual consummation.[306] An off-the-rack legal status can be a simple and cost-effective way to secure a relationship,[307] and because domestic partnership regimes evade the cultural meanings of marriage, they may be particularly appealing for romantic (or otherwise partnering) asexuals. Protecting the interests of partnering asexuals is therefore another reason to organize alternatives to marriage around principles other than conjugality.

C. *Legal Exceptions to Shield Sexuality*

In select domains, rather being required by law, sex is specially protected from incorporation into law. Parties are prohibited in various ways from creating contracts about sex, thereby setting sex apart as relatively non-commodifiable.[308] This Subpart uses the perspective of asexuality to analyze

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302. Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 811 (2010).

303. *See* Emens, *supra* note 165, at 279-80; Emens, *supra* note 300.

304. Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1772-74 (2005).

305. *Id.*

306. *See, e.g.*, *Fla. School: "Non-Platonic" Relations for Benefits* (NPR radio broadcast Jan. 23, 2006) (transcript available at http://www.npr.org/templates/transcript/transcript.php?storyId=5168852); *see also* CAL. FAM. CODE § 297(a) (West 2013) (implying conjugality by describing a domestic partnership as "two adults who have chosen to share one another's lives in an *intimate* and committed relationship of mutual caring" (emphasis added)); Case, *supra* note 304, at 1773 n.66 (contrasting California's marriage and domestic partnership definitions).

307. *See, e.g.*, Sanger, *supra* note 300, at 1316-17.

308. On the commodification debates, see the essays collected in RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE (Martha M. Ertman & Joan C. Williams eds., 2005).

two types of legal exceptions for sex: sex work and *Marvin* agreements. In both domains, the reasons for excluding sex from legal agreements are many, including general associations of nonmarital sex with vice. But the debates in these areas also partake of a privileging of sex as particularly warranting protection from the taint of legal and financial exchange.

1. *The sex work debates*

One might assume that asexuals have more interest in avoiding sexual attention than do sexuals. As noted earlier, though, for sex-indifferent asexuals, other people's sexual desires are a matter of little importance, something to be ignored or tolerated rather than avoided. (Relatedly, one might ask who is most bothered by sexually provocative clothing in the workplace: possibly someone who finds it arousing and therefore distracting.) Some asexuals do report being annoyed or aggravated by sexual content—averse to it, in the language employed earlier—but others just consider it meaningless noise.[309] The possibility of people who truly don't care about sex could call into question some commonplace assumptions, for instance, about sex work, which has been the subject of extensive debate.

On the one hand, some policymakers might be more troubled by the idea of sex work performed by people who never feel sexually attracted to others. On the other hand, if the sex worker has no desire to have sex with others on different, noncommodified terms—if she is a sex-indifferent asexual—some policymakers might find it easier to see sex as simply a job for her, without anything inherently degrading about it. 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.[310]

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.[311] One researcher concluded that lesbians are better suited to this work 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

309. *See supra* Part II.A.2.c.

310. *See* Martha C. Nussbaum, *"Whether from Reason or Prejudice": Taking Money for Bodily Services*, 27 J. LEGAL STUD. 693, 700-02 (1998).

311. 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." TRUMAN CAPOTE, *Playboy Interview*, *in* TRUMAN CAPOTE: CONVERSATIONS 110, 142 (M. Thomas Inge ed., 1987). On the research side, see, for example, BERNADETTE BARTON, STRIPPED: INSIDE THE LIVES OF EXOTIC DANCERS 169 n.11 (2006) ("My research suggests that the greatest proportion of dancers are bisexual, with an unusually high percentage of lesbians, or women who identify as bisexual in lesbian relationships, compared to the general population.").

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."[312] These lines point toward an argument that might apply even more robustly to asexuals than to lesbians: that is, sex work need not look as troubling if it has no overlap with something the worker considers especially meaningful. None of this is an argument for encouraging sex-indifferent asexuals to enter sex work, nor do I mean to suggest that many asexuals would find this an appealing job. Moreover, this discussion does not resolve the many complicated issues—including concerns about exploitation, consent, safety, and public health—surrounding the criminalization or regulation of sex work.[313] 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.

2. Marvin *and nonmarital agreements*

Parties can create explicit or implicit nonmarital cohabitation agreements encompassing many aspects of their relationships.[314] Through a doctrine associated with the case of *Marvin v. Marvin*, these agreements are generally enforceable so long as sexual activity is not part of the consideration for the agreement.[315] One might think this is just a sensible restraint on what kinds of activities individuals can require of each other, but recall that contractual remedies are generally compensatory, not specific, and specific performance is not

312. Bernadette Barton, *Queer Desire in the Sex Industry*, SEXUALITY & CULTURE, Fall 2001, at 3, 16; *see also Sex Work and Prostitution: Female*, GLBTQ, http://www.glbtq.com/social-sciences/sex_work_female.html (last visited Jan. 29, 2014) ("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.").

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

314. *See, e.g.*, Estate of Shapiro v. United States, 634 F.3d 1055, 1059 (9th Cir. 2011); *In re* Estate of Roccamonte, 808 A.2d 838, 840-41 (N.J. 2002), *superseded by statute on other grounds*, Act of Jan. 18, 2010, ch. 311, 2009 N.J. Laws 2322, *as recognized in* Botis v. Estate of Kudrick, 22 A.3d 975, 979 (N.J. Super. Ct. App. Div. 2011); Elizabeth Hodges, Comment, *Will You "Contractually" Marry Me?*, 23 J. AM. ACAD. MATRIMONIAL LAW. 385, 391 (2010) ("The recent trend has been for courts to enforce these cohabitation agreements under contract law principles, especially when the parties have an express written agreement.").

315. 557 P.2d 106, 110 (Cal. 1976) ("The courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services."); *see also, e.g.*, Milian v. De Leon, 226 Cal. Rptr. 831, 835 (Ct. App. 1986) ("[T]he only limitation upon the right of unmarried persons to contract with respect to their property and financial arrangements is that the contract must not be illegal or against public policy. . . . [It cannot] rest[] upon the immoral and illicit consideration of meretricious sexual services." (quoting *Marvin*, 557 P.2d at 112) (internal quotation mark omitted)).

an available remedy for personal services contracts.[316] In other words, no U.S. court would order someone to have sex to perform her obligations under a contract. But failure to perform under a contract could lead to damages, so if contracts for sex were enforceable, then damages could be awarded for failure to have sex. This may sound disturbing to sexual ears, but consider it from the perspective of asexuality.

As just discussed, for sex-indifferent asexuals, sex is not particularly different from other kinds of physical contact, other than that other people feel so strongly about it. If sex is not anything special, an asexual of this stripe might ask, why should sex be treated so differently from most everything else in law? The law of contracts, in principle at least, prides itself on not looking inside the "black box" of consideration—leaving it to parties to place their own valuations on particular deals.[317] Sex is one notable exception to that general principle.

While this sex exceptionalism in contract law might seem foreign to some asexuals, would eliminating it have any practical significance? This legal carve-out for sex might matter for asexuals in at least two ways. First, some self-identified asexuals might want to make legally binding agreements with romantic (or possibly aromantic) partners that state precisely what contributions each partner will make to the relationship. These might explicitly include or exclude sexual activity.[318] In a legal system that refuses to enforce contracts including sex, these partners could not expect enforcement of a term containing promises of sex in exchange for something else—but neither could they be entirely certain that a term *excluding* sex (for instance, a promise that neither partner ever request sex) would be enforced.

Second, and more generally, treating sex as special under law may do more than *reflect* the assumptions of a sexual society; rather, special legal treatment for sex may *reinforce* the specialness of sex as a cultural matter. This is an empirical question, and one that would be very hard to test. But hypothetically speaking, it seems not implausible that creating special carve-outs for sex contributes to the special meaning that sexuals place on sex, which in turn leaves asexuals, self-identified or not, on the outside.

D. *Legal Protections from Others' Sexual Expression*

Several areas of law protect some individuals from other individuals' sexual emanations. For instance, sexual assault law assigns harsher penalties to

316. *See* RESTATEMENT (SECOND) OF CONTRACTS ch. 16, intro. note (1981) ("The traditional goal of the law of contract remedies has not been compulsion of the promisor to perform his promise but compensation of the promisee for the loss resulting from breach."); *id.* § 367 ("A promise to render personal service will not be specifically enforced.").

317. *See id.* § 79 cmt. c.

318. *Cf. supra* note 81 and accompanying text.

unwanted touching and other interaction than non-sexual versions of those same interactions would trigger.[319] Obscenity law shields people from others' sexual expression and body parts.[320] This Subpart focuses on two types of legal protection against sexuality: the way the law shapes our physical environment around sexual assumptions and the way sexual harassment law has reduced sexual content in the workplace.

1. *Sexuality as legal architecture*

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 in many places: 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 (as in male and female), and it stereotypes the sexes down to the emblems typically used to represent men and women on bathroom doors.[321] 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 L.A. County Jail.[322] Russell Robinson recently published a compelling account of the jail's practices for selecting who is gay enough to qualify for the special unit.[323] What does this special jail look like through the lens of asexuality? Not particularly appealing, in its current incarnation. Though the special unit is designed to protect gay inmates from predators, it is also a space organized

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319. *See, e.g.*, David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 433-34 (2000) (describing the "traditional view that rape is a uniquely devastating type of assault" and observing that "penalties for rape and related offenses are greater than for assault").

320. *See, e.g.*, Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 393 (1963) ("Obscenity—sexual or scatological—is forbidden, in large part, not because it incites but because it offends. A state forbids obscenity—and nudity, 'indecent exposure,' graffiti—as it forbids public fornication and public excretion, because it is offensive to others. The state seeks to suppress or abate these noxious emanations on grounds akin to traditional notions of 'nuisance.'").

321. *See, e.g.*, Mary Anne Case, *Why Not Abolish the Laws of Urinary Segregation?*, *in* TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 211, 218-19 (Harvey Molotch & Laura Norén eds., 2010); *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, 133 (2010).

322. The unit is also for trans inmates, but much of the emphasis among the selecting deputies, and therefore in prominent writing about the unit, appears to be on gay inmates; this is my focus here as well. *See infra* note 323.

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

around the sexuality of the inhabitants, whose (gay) orientation is (superficially at least) toward each other (as men). 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 L.A. County Jail.[324] 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.[325] 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 final point about affinities for asexuals, among those wishing to avoid a sexually desiring gaze, highlights a way that the culture of sexual privacy could favor asexuals.[326] In a world with growing awareness of homosexuality, people may become increasingly dissatisfied with the illusion that the desiring gaze is evaded through institutional segregation based on sex (as in male versus female). Some people might instead prefer the opportunity to request asexual prison guards—"ace" guards, in a fitting use of the slang term[327]—and, for that matter, ace airport security, ace police officers, ace doctors, ace nurses, and so on.[328] Perhaps an employment niche is emerging that could favor asexual candidates.

2. *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. This

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324. *See id.* at 1323-24. 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.

325. On situation-specific homosexuality, see *id.* at 1360 & n.220.

326. It may also be worth noting that prison more generally might impose lesser burdens on asexuals in one very narrow way: for people who do not feel sexual attraction, confinement does not deprive asexuals of sexual activities that they desire. I thank Lior Strahilevitz for this point.

327. *See supra* note 63.

328. 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, which has a limited sexual privacy exception. *See, e.g.*, Amy Kapczynski, Note, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1259 (2003). *But cf.* Emily Gold Waldman, *The Case of the Male OB-GYN: A Proposal for Expansion of the Privacy BFOQ in the Healthcare Context*, 6 U. PA. J. LAB. & EMP. L. 357, 382-88 (arguing that the sexual privacy exception should be expanded).

is one area where—for better or worse, depending on whom one asks[329]—law has undoubtedly had an impact on culture.[330] In the context of sexual harassment, as with many other things, "[i]t is hard to unthink what you know."[331]

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.[332] But to those who feel little or no sexual attraction, a sanitized workplace might well look pretty good.[333]

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, Justice Scalia tells us that "[t]he 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."[334] Of course Justice Scalia doesn't mean the identity asexual, as discussed in this Article; instead, his disavowal of asexuality reflects the pervasive sense that the law in this area is a tradeoff, 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—very differently than the sex-as-danger feminists[335]—how the framing of this debate *assumes* that sexual expression and interaction are a so-

329. *See infra* notes 330-32 (citing works offering competing normative perspectives on sexual harassment law).

330. *See, e.g.*, Reva B. Siegel, *Introduction* to DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 27 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

331. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 105 (1987).

332. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2063-64 (2003); *see also* Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 770 (1997); Janet Halley, *Sexuality Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 330, at 182, 192, 198; Rosenbury & Rothman, *supra* note 302, at 865.

333. Asexuals often complain about the deluge of sexual themes and content throughout our culture. *See, e.g.*, Throne Eins, Comment to *Some Blunt Questions, Asexual Q&A*, ASEXUAL VISIBILITY & EDUC. NETWORK (July 15, 2008, 9:44 PM), http://www.asexuality.org/en/index.php?/topic/32908-some-blunt-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."). This is only one of several available attitudes to take toward sexual content, however. *See supra* Part II.A.2.c.

334. 523 U.S. 75, 81 (1998) (emphasis added).

335. On the so-called sex wars between feminists who emphasize sex as pleasure and those who emphasize sex as danger, see, for example, Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 182-83 (2001); and Carole S. Vance, *Pleasure and Danger: Toward a Politics of Sexuality*, *in* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 1, 3 (Carole S. Vance ed., 1984).

cial and individual good. Courts' particular emphasis on punishing *sexual* content has been criticized by Schultz, at least in part because the "desire-dominance paradigm" leads employers to strip the workplace—where we spend so much of our lives—of a vital part of our being.[336]

Justice 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*.[337] 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?[338] 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."[339] Here, 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.[340] Whatever the merits of these arguments, what Justice 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 forces us to ask if it is desirable and from whose perspective.

Do legal protections against others' sexual expression benefit asexuals? At first glance, they appear to, since asexuals—self-identified or not—presumably

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336. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1686-87 (1998). Schultz would prefer that courts emphasize harassment that undermines an employee's workplace competence on the basis of gender, rather than focusing on whether an alleged harasser expressed desire. *Id.* at 1689.

337. *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 highlighting the unwelcomeness point.

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

339. *Oncale*, 523 U.S. at 81.

340. *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."); Penny L. Cigoy, *Harmless Amusement or Sexual Harassment?: The Reasonableness of the Reasonable Woman Standard*, 20 PEPP. L. REV. 1071, 1110 (1993) ("The [reasonable woman] standard, . . . unlike the reasonable person standard, unequivocally communicates that the particular victim is the main focus, whether male or female.").

have little direct interest in that sexual content. On further reflection, however, some asexual interests come into focus. Recall that asexuals have diverse attitudes to sex, including not only sex-aversion and sex-neutrality but sex-positivity.[341] Sex-positive asexuals may have an interest in the availability of nonnormative sexual literature, film, and conversation, for the reasons discussed earlier about the alignment of the interests of asexuals with polyamorists and other sex-positive folks.[342] Moreover, discussion of *asexuality* may sound to some uninformed sexuals like unconventional "sex talk," giving asexuals of many stripes a direct interest in fewer strictures on expression conventionally viewed as obscene.[343] In addition, asexuals might have an interest in doctrinal transparency. The areas of law dedicated to protecting some people from others' sexuality tend not to eradicate sexual content, but to attempt to strike a balance, as the sexual harassment discussion above exemplifies; that balance is likely to assume a reasonable *sexual* person as the baseline.[344] While asexuals may not want greater legal strictures on sexual content, for the reasons just discussed, they might well want a more explicit acknowledgement of the sexual assumptions embedded in these doctrines.[345] Explicit attention to those sexual assumptions would facilitate a more honest examination of their effects on many individuals, not only asexuals.

E. *Legal Protections for Sexual Identity*

Antidiscrimination law was probably what Dan Savage had in mind when he called the idea of asexuals marching for rights "hilarious."[346] It is also the legal arena with the most action around asexuality thus far, as asexuality is already a protected category under the laws of one state and several municipalities, and some asexual activists recently submitted a memo to select LGBT groups arguing for the inclusion of asexuality in the proposed Employment Non-Discrimination Act.[347] For all these reasons, the prospect of antidiscrimination protection for asexuality warrants a more involved discussion. This Subpart therefore considers how asexuality made it into New York law, the merits and stakes of including asexuality in antidiscrimination law, and the prospects for further movement in this direction.

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341. *See supra* notes 114-15 and accompanying text.

342. *See supra* Part II.B.1.c.

343. *Cf., e.g.*, Sherman, *supra* note 65, at 681-83; DJ DJ, *Asexy Politics: Asexuality and the Law*, LOVE FROM ASEXUAL UNDERGROUND (Feb. 17, 2012), http://asexualunderground.blogspot.com/2012/02/asexy-politics-asexuality-and-law.html.

344. *See supra* Part III.C.1.

345. *Cf., e.g.*, MINOW, *supra* note 266, at 74-78.

346. *See supra* note 250 and accompanying text. Historically, for homosexuals, he could have been thinking of the repeal of sodomy laws, but that had already happened by the time of the quotation. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

347. *See* AVEN Memo, *supra* note 59.

1. *Asexuals enter state law: New York's Sexual Orientation Non-Discrimination Act*

New York's Sexual Orientation Non-Discrimination Act (SONDA) defines "sexual orientation" as "heterosexuality, homosexuality, bisexuality or asexuality, whether actual or perceived."[348] New York is the first, and so far the only, state to protect asexuality.[349] 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.[350] Several U.S. localities have also passed antidiscrimination laws that cover asexuality.[351] Most of these are in New York, starting with

348. Sexual Orientation Non-Discrimination Act, ch. 2, § 3, 2002 N.Y. Laws 46, 46 (codified at N.Y. EXEC. LAW § 292(27) (McKinney 2013)).

349. Vermont's Human Rights Commission has issued a pamphlet defining "sexual orientation" to include asexuality, but the legislature has not acted to codify this change. *See* TRACY TSUGAWA, VT. HUMAN RIGHTS COMM'N, GENDER IDENTITY 1 (2010), *available at* http://hrc.vermont.gov/sites/hrc/files/pdfs/harassment%20docs/gender%20sex%20sexual%20orientation%20definitions.doc (proposing a definition of "[s]exual [o]rientation (a protected category in Vermont)" that includes "[a]sexual[s]" and is defined as "who you are emotionally and sexually attracted to: opposite sex, same sex, both sexes, or neither"). On the draft legislation from Australia that included asexuality, but never passed in that form, see note 362 below.

350. *See, e.g.*, Telephone Interview with Ross Levi, Exec. Dir., Empire State Pride Agenda (Feb. 3, 2012); Telephone Interview with Steve Sanders, Former N.Y. Assemblymember (Feb. 10, 2012).

351. The U.S. localities with asexuality protections are, in order of passage, the following seven cities and one county: Albany, N.Y. (1992); Albany County, N.Y. (1996); Rochester, N.Y. (2001); Hamburg, N.Y. (2005); Binghamton, N.Y. (2008); Madison, Wis. (2010); Hyattsville, Md. (2013); and San Antonio, Tex. (2013). *See* Ed McMullen, *County Legislature Approves Gay-Rights Bill by 24-13 Vote*, ALTAMONT ENTERPRISE (N.Y.), Mar. 14, 1996, at 6 (reporting passage of the 1996 Albany County law and noting that the 1992 Albany city ordinance "define[d] sexual orientation as 'actual or perceived heterosexuality, homosexuality, asexuality, or bisexuality'"); ROCHESTER, N.Y., MUN. CODE § 63-2 (2013); PROCEEDINGS OF THE COUNCIL OF THE CITY OF ROCHESTER 2001, at 114, 116 (2001), *available at* http://www.cityofrochester.gov/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=8589941914 (noting Act was "amended in its entirety 3-14-2005"); HAMBURG, N.Y., GEN. CODE § 109-2 (2013) (showing initial adoption date of Dec. 15, 2008, and amendments to definitions section on Feb. 2, 2009, and Mar. 17, 2010); BINGHAMTON, N.Y., CODE OF ORDINANCES § 45-3 (2013); MADISON, WIS., CODE OF ORDINANCES §§ 39.02(1), 39.03(2)(ii) (2013) (establishing an affirmative action program to "increase the number and representation of affected and/or underrepresented groups" in city employment and contracting, which covers "sexual orientation," defined as "the sexual or loving attraction to another person or the complete absence thereof to any other person" which "can span a non-static continuum from same-sex attraction at one end to opposite-sex attraction to an absolute lack of attraction to any gender"); Hyattsville, Md., Ordinance 2013-04 (Nov. 13, 2013); SAN ANTONIO, TEX., CODE ORDINANCES §§ 2-550 to -551 (2013); Manny Fernandez, *San Antonio Passes Far-Reaching Antidiscrimination Measure*, N.Y. TIMES (Sept. 5, 2013), http://www.nytimes.com/2013/09/06/us/san-antonio-passes-far-reaching-antidiscrimination-measure.html.

Interestingly, the first instance of legal protection for asexuality appears to be a 1988 regulation implementing Governor Mario Cuomo's Executive Order 28.1, which banned discrimination on the basis of sexual orientation in state organizations without defining sexual

Albany, which enacted a law covering asexuality in 1992, ten years before the state-level SONDA went into effect; more recently, though, several local laws including asexuality were passed in other parts of the country, and U.K. hate crimes law was interpreted to cover asexuality.[352] The story of how asexuality made these and other legal inroads is complicated and intriguing, but limitations of space preclude a detailed account here. [353]As context for the normative discussion that follows, however, this Subpart briefly explains how asexuality became part of New York's SONDA, still the only state antidiscrimination statute to protect this emerging identity category.

Asexuality was introduced not in response to asexual organizing or activism. The legislative history of SONDA is silent on the meaning of asexuality in the law, as are current explanatory materials,[354] but according to individuals who were involved in the passage of the legislation,[355] the category of "asexual" was introduced into SONDA, along with "heterosexual," to broaden the perceived scope of the bill beyond gays and also, by delineating the covered groups, to defend it against slippery slope arguments.[356] The previous version of the SONDA bill protected "sexual preference."[357] According to former Assemblymember Steve Sanders, who was the bill's sponsor, some

orientation. *See* 10 N.Y. Reg. 96 (Mar. 2, 1988) (defining "sexual orientation" to include "asexuality"); 9 N.Y. COMP. CODES R. & REGS. tit. 9, § 4.28 (1983) (prohibiting state agencies from discriminating on the basis of "sexual orientation," left undefined). For more detail about this regulation and related history, see Gray & Emens, *infra* note 353. Beyond U.S. borders, the U.K. government's recent "Hate Crime Action Plan" interprets the 2008 Criminal Justice and Immigration Act to include "asexuals" among the sexual orientation groups protected. U.K HOME OFFICE, CHALLENGE IT, REPORT IT, STOP IT: THE GOVERNMENT'S PLAN FOR DEALING WITH HATE CRIME 4 (2012), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97850/easy-read-hate-crime-action-plan.pdf; *see also* Criminal Justice and Immigration Act, 2008, c. 4, § 74 (U.K.).

352. *See supra* note 351 (giving a chronology of local laws). On the passage of SONDA in December 2002, see Shaila K. Dewan, *Pataki Signs Law Protecting Rights of Gays*, N.Y. TIMES (Dec. 18, 2002), http://www.nytimes.com/2002/12/18/nyregion/pataki-signs-law-protecting-rights-of-gays.html.

353. *See* Timothy H. Gray & Elizabeth F. Emens, A Timeline of Asexuality's Emergence in New York Law and Beyond (Jan. 26, 2014) (unpublished manuscript) (on file with author). Timothy Gray engaged in heroic sleuthing efforts to help reconstruct this history.

354. *See* Eric T. Schneiderman, *The Sexual Orientation Non-Discrimination Act ("SONDA")*, N.Y. STATE ATT'Y GEN., http://www.ag.ny.gov/civil-rights/sonda-brochure (last visited Jan. 29, 2014).

355. I am very grateful to Suzanne Goldberg for helping me contact those involved in drafting and passing the legislation, and also to everyone who was generous enough to take the time to convey to me their memories of this process.

356. Telephone Interview with Ross Levi, *supra* note 350; Telephone Interview with Steve Sanders, *supra* note 350.

357. Telephone Interview with Steve Sanders, *supra* note 350. According to this source, the language was "affectional or sexual preference," defined as "having or manifesting an emotional or physical attachment to another consenting person or persons of either gender; or having or manifesting a preference for such attachment." *Write Your Legislators*, EMPTY CLOSET, Apr. 1983, at 1, 1 (reproducing text of bills).

assemblymembers contacted him to say that the term was problematic because it implied that sexuality was a choice.[358] In the same period, several people involved in the work on SONDA told me, opponents were casting the law as "special rights" legislation for gays[359] and trying to "derail" the debates about gay rights protections with slippery slope arguments about "paraphilias."[360]

In the late 1980s,[361] in response to these arguments,[362] SONDA's proponents rewrote the language to cover "sexual orientation" and included in its definition "heterosexuality" as well as "asexuality."[363] The purpose was to convey that SONDA wasn't a law to protect gay people because it protected everyone[364] and was not about sex but orientation.[365] There wasn't a "specific pur-

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358. *Id.*

359. Telephone Interview with Ross Levi, *supra* note 350; Telphone Interview with Steve Sanders, *supra* note 350.

360. E-mail from Susan Russell, Former Assistant Counsel, Joint Legislative Bill Drafting Comm'n, to author (Jan. 26, 2014) (on file with author) ("I do believe that asexuality was ultimately put in to foreclose the debate Re paraphilias that had no connection to what we were trying to do and always derailed discussion. And also to cover the gamut of sexualities that should legitimately be included."); *see also* Telephone Interview with Steve Sanders, Former N.Y. Assemblymember (Jan. 24, 2014) (making similar comments about the potential of a delineated definition of "sexual orientation," including asexuality, to distinguish sexual orientation from "bestiality" or sex with a minor, and to give "context" for sexual orientation rather than "just letting people use their imagination").

361. E-mail from Libby Post, President & CEO, Commc'n Servs., to author (Feb. 16, 2012) (on 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 [sic] 1989 it was sexual orientation.").

362. In contrast to the account offered here, one person who looked into this issue suggested that the idea might have come somehow from an Australian sexuality discrimination bill from 1996, which included asexuality. *See* Posting of Hexa Quark, hexaquark@yahoo.ca, to history-of-asexuality@googlegroups.com (Nov. 21, 2011) (on file with author). The draft legislation is available, *see* Sexuality and Gender Identity Discrimination Bill 2003 (Cth) pt 1 s 5 (Austl.), but it apparently died in 2008, *see Sexuality and Gender Identity Discrimination Bill 2003 [2004]*, PARLIAMENT AUSTL., http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s404 (last visited Jan. 29, 2014) (noting bill "[l]apsed at end of Parliament" in 2008). A new version of the bill, which does not include asexuality, passed in 2013. *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) (Austl.); *see* AUSTL. HUMAN RIGHTS COMM'N, SEXUAL ORIENTATION, GENDER IDENTITY & INTERSEX STATUS DISCRIMINATION INFORMATION SHEET 1-2 (2013) ("From 1 August 2013 it will be unlawful under federal law to discriminate against a person on the grounds of their sexual orientation, gender identity, [or] intersex status. . . . Sexual orientation means a person's sexual orientation towards: a) persons of the same sex or b) persons of a different sex or c) persons of the same sex and persons of a different sex."), *available at* https://www.humanrights.gov.au/sites/default/files/Information%20sheet%20on%20new%20protections%20in%20the%20Sex%20Discrimination%20Act%20-%20FINAL.pdf.

363. Telephone Interview with Steve Sanders, *supra* note 350.

364. E-mail from Dick Dadey, Exec. Dir., Citizens Union, to author (Feb. 8, 2012) (on file with author) ("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

pose" 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."[366] "There wasn't any particular case," Sanders remembers. "It was just a category; we decided it was a category."[367]

"I'd like to tell you that we were visionary," Former Assemblymember Sanders remarked when I brought up the subsequent development of an asexual rights movement.[368] But Sanders declined to claim such a vision. Rather, asexuality was included in SONDA for rhetorical and political purposes related to passing the law to enshrine gay rights. This account thus echoes popular accounts of the presence of "sex" in Title VII, except that asexuality was introduced by proponents to *save* SONDA, while sex was ostensibly introduced by opponents to *sink* Title VII.[369] That said, Former Assemblymember Sanders—who may have been the one to think of including asexuality in the law[370]—remarked to me that he never considered it "controversial" that some people are asexual.[371]

Though SONDA passed over ten years ago, in 2002,[372] no cases have been published or apparently even filed under SONDA on the basis of asexuality.[373]

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protecting behavior and not orientation and trying to be 'inclusive,' of whom, I don't know.").

365. *Id.*

366. Telephone Interview with Steve Sanders, *supra* note 350.

367. *Id.*

368. *Id.*

369. *See, e.g.*, Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1318 (2012). For a recent attempt by an opponent to include asexuality in a proposed local ordinance covering sexual orientation, however, see note 484 below.

370. Telephone Interview with Steve Sanders, *supra* note 350. When asked who actually had the idea to include "asexuality," Sanders responded by saying, "I don't know. It might have been me." *Id.*

371. *Id.* Sanders's remarks on this point are consistent with the views expressed by Richard Redlo, who drafted the original version of an Albany city ordinance, enacted in 1992, that covered "asexuality" as part of "sexual orientation." *See* Telephone Interview with Richard Redlo, Former N.Y. Assistant Att'y Gen. (Jan. 22, 2014); Greg B. Smith, *Homosexual Rights Debate Looms in Albany: Alderwoman Seeks to Amend Anti-Bias Laws*, ALBANY TIMES UNION (Mar. 9, 1987), http://albarchive.merlinone.net/mweb/wmsql.wm.request?oneimage&imageid=5408290 (naming Richard S. Redlo as the drafter). One person I spoke to emphasized, however, that the local movement did not include any self-identified asexuals, remarking: "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." E-mail from Matt Foreman, Former Exec. Dir., Empire State Pride Agenda, to author (Feb. 8, 2012) (on 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!" E-mail from Matt Foreman, Former Exec. Dir., Empire State Pride Agenda, to Suzanne Goldberg, Professor of Law, Columbia Law Sch. (Feb. 8, 2012) (on file with author).

372. *See supra* note 352.

The next Subpart considers what asexuality-based claims might look like and addresses whether our laws should permit such claims.

2. *Antidiscrimination protection: a normative assessment*

New York law's formal incorporation of asexuality—as well as the handful of local antidiscrimination laws that cover asexuality—raises the question of whether other jurisdictions should follow suit. Twenty-one states and the District of Columbia offer antidiscrimination protection on the basis of sexual orientation,[374] with nearly all defining it to include heterosexuality, homosexuality, and bisexuality.[375] And while federal law does not cover sexual orientation, the versions of the proposed Employment Non-Discrimination Act (ENDA) recently before the House and Senate define the protected "sexual orientation" to mean only "homosexuality, heterosexuality, or bisexuality."[376] Some asexuals have proposed including asexuality.[377] Should ENDA and laws in other jurisdictions embrace asexuality within their ambit? This Subpart considers that question from the perspective of asexuals, self-identified and otherwise, and sexuals.

a. *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

373. This is consistent with what everyone I consulted indicated, as well as with my own investigations and those of my excellent research assistants. *E.g.*, E-mail from Matt Foreman to Suzanne Goldberg, *supra* note 371 ("It never came up in a serious way during my tenure.").

374. *See* NAT'L GAY & LESBIAN TASK FORCE, STATE NONDISCRIMINATION LAWS IN THE U.S. (2013), *available at* http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_6_13_color.pdf.

375. The only exceptions are Minnesota, which does not define sexual orientation using subcategories, *see* MINN. STAT. § 363A.03(44) (2013), and New York, which also includes asexuality, *see* N.Y. EXEC. LAW § 292(27) (McKinney 2013), as discussed above. Seventeen states and the District of Columbia also prohibit discrimination on the basis of gender identity or expression, with some including it in their definition of sexual orientation. NAT'L GAY & LESBIAN TASK FORCE, *supra* note 374.

376. S. 811, 112th Cong. § 3(a)(9) (2011); H.R. 1397, 112th Cong. § 3(a)(9) (2011). ENDA was passed only by the Senate. *See* Ed O'Keefe, *Senate Votes to Ban Discrimination Against Gay and Transgender Workers*, WASH. POST. (Nov. 7, 2013), http://www.washingtonpost.com/politics/senate-set-to-approve-gay-rights-bill/2013/11/07/05717e4a-47c1-11e3-a196-3544a03c2351_story.html.

377. *See* AVEN Memo, *supra* note 59.

thus they seem unlikely to trigger disgust.[378] They don't violate religious prohibitions, at least not in the way that homosexuals or bisexuals do.[379] They don't have any obvious job-related impairment or perceived need for costly accommodations.[380] The fact that no cases have been filed based on asexuality under New York's SONDA seems consistent with the view that asexuality does not 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 even to a greater degree in some contexts.[381] A 2012 study of heterosexual subjects found, "[a]ttitudes 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."[382] In addition, subjects viewed asexuals as less human than homosexuals and bisexuals.[383] Finally, student subjects reported being less willing to hire, or rent to, asexuals than homosexuals (or heterosexuals).[384]

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? One explanation is that very few asexuals are "out" (i.e., open about their asexuality) at work, so they are unlikely to provoke discriminatory

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378. 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).

379. They may come into conflict with religious prescription, however. *See infra* note 391 and accompanying text.

380. 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.*, Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 868 (2008).

381. Cara C. MacInnis & Gordon Hodson, *Intergroup Bias Toward "Group X": Evidence of Prejudice, Dehumanization, Avoidance, and Discrimination Against Asexuals*, 6 GROUP PROCESSES & INTERGROUP REL. 725 (2012).

382. *Id.* at 731 (emphasis omitted) (footnote omitted) (reporting on a university sample); *see also id.* at 735-36 (reporting similar results from the community sample).

383. *Id.* at 731-32 (reporting on the student sample); *see also id.* at 735-36 (reporting on the community sample). Interestingly, whereas the student subjects largely viewed all three minority groups as less human than heterosexuals, the community subjects saw asexuals alone as less human than members of the other three groups. *Id.* at 731-32, 735-36. This view of asexuals as not quite human is something asexuals anecdotally report encountering. *See, e.g.*, Mosbergen, *supra* note 77 ("There was this really strong ethos that sex is a vital part of the human experience and without it, there's something wrong.").

384. On this metric, among student subjects, bisexuals fared worse than either homosexuals or asexuals (or, of course, heterosexuals). MacInnis & Hodson, *supra* note 381, at 732. 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 other heterosexuals. *Id.* at 736. Interestingly, religious fundamentalism, in conjunction with other factors, correlated with bias against asexuals, as it does with bias against homosexuals and bisexuals. *Id.* at 733.

responses.[385] 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.[386]

Moreover, without expecting discriminatory impulses to be rational,[387] 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.[388] The fact that many asexuals have sex with themselves, but not with others, could seem a disgusting sexual "lifestyle" to some.[389] Some asexuals also offer anecdotal accounts of harassment or assault in response to revealing their asexuality, with some reporting that "corrective rape" is a real threat for asexuals.[390] On the religious front, asexuals' inclina-

385. 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 59; *see also supra* note 51.

386. In that small study of self-reported experiences, asexuals largely replied "[n]ot [a]pplicable" to questions about their experiences of anti-asexual discrimination in a range of contexts, such as the workplace. Stephanie B. Gazzola & Melanie A. Morrison, *Asexuality: An 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 thirty-nine asexual subjects). 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. *Id.* at 33 tbl.2. The authors surmise that "[n]ot [a]pplicable" 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. Yet their own findings suggest that, for example, only 13.6% of the subjects were out to "[w]ork peers," *id.* at 33, which is three subjects—the same number of subjects who supplied any answer other than "[n]ot [a]pplicable" to a question addressing unfair treatment by coworkers. The "[n]ot [a]pplicable" responses may thus reflect the fact that the respondents were not out at work, and perhaps also that they had not otherwise heard work peers make comments about asexuals—unsurprising given that most people apparently haven't heard of asexuality. *See supra* note 66 and accompanying text.

387. *Cf., e.g.*, MacInnis & Hodson, *supra* note 381, at 739-40 (noting the frequent irrationality of discrimination).

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

389. Consider Justice 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 v. Texas, 2003 SUP. CT. REV. 75, 78 (discussing Justice Scalia's dissent).

390. *See* Dominique Mosbergen, *Battling Asexual Discrimination, Sexual Violence and "Corrective" Rape*, HUFFINGTON POST (Nov. 12, 2013, 3:38 AM EST), http://www.huffingtonpost.com/2013/06/20/asexual-discrimination_n_3380551.html?1371733068 (quoting Julie Decker, a.k.a. Swankivy, as saying that "[s]exual harassment and vio-

tions seem in tension with injunctions like "Be fruitful and multiply," leading to anecdotal reports of asexuals being judged harshly by some strongly religious people.[391] And if asexuals are viewed as less human than other groups, as the recent data suggest,[392] then, by definition, asexuals labor under a "stigma."[393] Stigma could affect employers' expectations of performance or desire to interact with asexuals on the job. Such 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. Outsiders' doubts reflect asexuals' position on the margins of a society that treats a person's sexuality as central to the truth of her identity.[394]

b. *The stakes of recognition*

The law is a powerful tool for validating the identity claims of marginal groups.[395] In this way, the potential benefits of legal recognition for self-identified asexuals (and those who might so identify in the future) 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 reasons for their asexual-

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lence, including so-called 'corrective' rape, is disturbingly common in the ace community" and noting that she "has received death threats and has been told by several online commentators that she just needs a 'good raping'"); *id.* (quoting, from a response to a blog post about the problem of corrective rape, an anonymous poster's writing, "[A]sexuality is not a thing. You are just ugly and no one wanted to date you, so you made up a thing to cuddle your lonely self as you cry into your pillow. Also, I hope you get raped. It has a dual benefit, you'll get laid finally AND put you into your place as well." (alteration in original) (internal quotation marks omitted)).

391. *See, e.g.*, Significantlysilent, Comment to *Christianity, the Bible, and Asexuality, Asexual Musings and Rantings*, ASEXUALITY VISIBILITY & EDUC. NETWORK (Apr. 3, 2012, 2:57 PM), http://www.asexuality.org/en/topic/72943-christianity-the-bible-and-asexuality ("[M]y mother believes that Asexuality does not exist because 'God did not create one to be that way' and 'it's not Godly.' My sister said the same thing, along with that it is not 'normal' or 'how God created us to be.'"); *see also* Shawn Landis, *Is Asexuality a Sin? Few Religions Have an Official Viewpoint*, EXAMINER.COM (Feb. 22, 2010), http://www.examiner.com/article/is-asexuality-a-sin-few-religions-have-an-official-viewpoint ("Even though few religions have an official position on asexuality, there are still people who will mistakenly identify it as a sin. The mistaken identification of asexuality as a sin comes from either mistaking an asexual for being gay, or assuming that go forth and multiply was one of the commands intended to apply to everyone indefinitely.").

392. *See supra* notes 381-83 and accompanying text.

393. *See* ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 5 (1963) ("By definition, of course, we believe the person with a stigma is not quite human."); *see also*, R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 817-19 (2004) (discussing the definition of stigma).

394. *See supra* note 249.

395. *See generally, e.g.*, Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a Post-Socialist Age*, NEW LEFT REV., July-Aug. 1995, at 68, 76-79, 87.

ity "besides asexuality"[396]—legal classification could usefully rebut the demand for explanations by helping to substantiate asexuality as a minority identity.[397] 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,[398] 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.[399] 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. Those in the middle of the spectrum may feel more comfortable acknowledging their own fluctuating or diminishing feelings of attraction, if some group of people claims asexuality with pride.[400] 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.[401]

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

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396. Swankivy, *Asexuality: An Introduction*, *supra* note 121.

397. *See supra* Part II.C.1 (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 Elizabeth F. Emens, *Shape Stops Story*, 15 NARRATIVE 124, 130 (2007).

398. *See supra* note 231 and accompanying text.

399. *See supra* Part II.C.3 (discussing a quantity axis of sexuality).

400. As noted earlier, the asexuality movement recognizes degrees of asexuality through terms like "gray-A" and "demisexual." *See supra* notes 160-64 and accompanying text.

401. On the problem of the law's devaluing of intimate non-sexual relationships, see Part III.B.2 above. For instance, on "Boston marriages"—a term historically used to describe two women cohabiting in a nonsexual relationship—see the thoughtful and varied contributions to BOSTON MARRIAGES: ROMANTIC BUT ASEXUAL RELATIONSHIPS AMONG CONTEMPORARY LESBIANS, *supra* note 30. On committed friendships, see, for example, David L. Chambers, *For the Best of Friends and for Lovers of All Sorts, a Status Other than Marriage*, 76 NOTRE DAME L. REV. 1347, 1348 (2001). *See also* Leib, *supra* note 299, at 705-06 ("[T]he law has no self-conscious, consistent, or well-considered approach to friendships and its role in regulating them. . . . There is something haphazard about the law's approach to friendship . . . .").

identity, leading to rigid and inflexible boundaries around the group.[402] Relatedly, legal recognition can lead to litigation disputes about who is in and who is out, bolstering particularly narrow definitions of group identity.[403] This is the double-edged sword of recognition: 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 partners', sexuality.[404] 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.[405] 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.

c. *Legal implications: will there be any cases?*

In light of the absence of asexuality-based cases brought under New York antidiscrimination law,[406] we might reasonably wonder if there are any plausible cases of asexuality-based discrimination. Would asexuals bring employment discrimination cases, for instance, or is this debate purely about the politics of recognition?[407]

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402. 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 30, at 36-37 (discussing the historical shift around the recognition of lesbian sexual relationships, which left less room for nonsexual relationships between women, since they fell under new suspicion of lesbianism).

403. As an example, there is a vast literature on the struggles over the definition of disability. *See, e.g.*, Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 YALE L.J. 992 (2008).

404. *See supra* note 134 (discussing the possibility that some people claim asexuality in response to sexual abuse, but noting also that the data in this area are not conclusive). 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 could fall more harshly on women. *Cf.* Emens, *supra* note 164, at 1357 ("As sex-positive feminism has highlighted, . . . the last thing women in particular need is another reason to suppress, critique, or feel bad about what turns them on.").

405. 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.

406. *See supra* note 373 and accompanying text.

407. On the politics of recognition, see generally Fraser, *supra* note 395.

We can imagine four types of workplace discrimination against asexuals. The most obvious 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 vegan or a Wiccan; it's sufficiently outside the mainstream that some people may be uncomfortable with its otherness.[408] 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.[409] Thus, an 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 perceived as an affront or a challenge to a sexual supervisor, akin to male harassment—or even violence—toward lesbians for sexually rejecting them.[410] 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,[411] 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.[412] (Both scenarios could of course occur to the reverse sex, though less stereotypically.) If the harass-

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408. *Cf.* Van Koten v. Family Health Mgmt., Inc., 134 F.3d 375, 1998 WL 54615 (7th Cir. Feb. 6, 1998) (unpublished table decision) (upholding summary judgment against a man who claimed that he was discriminated against because he was a Wiccan and whose vegetarian diet was a salient fact in the case); Zachary A. Kramer, *Of Meat and Manhood*, 89 WASH. U. L. REV. 287, 292 & n.28, 293 (2011) (discussing the case and related issues).

409. One might say that we generally don't protect most kinds of weirdness, such as veganism (which is of course deemed weird only in some communities), but we instead protect only those forms of weirdness that fall along certain axes of identity. In this way, though, asexuality can still be compared to Wicca, 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 supra* Part I.A—or whether it is best understood as an umbrella orientation, alongside *sexual* orientation, *see supra* note 248 and accompanying text (discussing Chasin's point to this effect)—asexuals may face prejudice similar to or greater than that against gays and bisexuals. *See* MacInnis & Hodson, *supra* note 381; *supra* notes 381-86 and accompanying text. In addition, on the analogy between asexuality and atheism, see note 487 below and accompanying text.

410. *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); *cf. supra* note 390 (citing sources on violence as a response to asexuality).

411. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 77 (1998) (holding that same-sex harassment can be "because of . . . sex" and thus finding sexual harassment in a fact pattern involving aggressive hazing aboard an all-male ship).

412. 697 F. Supp. 1452, 1453-54, 1456 (N.D. Ill. 1988) (internal quotation marks omitted) (dismissing Goluszek's sexual harassment claim on the grounds that he "was a male in a male-dominated environment"), *abrogated by Oncale*, 523 U.S. 75.

ment met the standard of "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment,"[413] then sexual harassment law would likely cover the asexual employee, whether or not asexuality is expressly covered, even though "severe or pervasive" is a fairly high bar in most jurisdictions.[414]

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.[415] Employers might also assume that asexuality means a lack of sexual experience, which could be thought important to certain kinds of jobs, for instance, in therapeutic or mentoring contexts.[416] 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.[417] Notably, even sex work, in

413. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (alteration in original) (internal quotation marks omitted).

414. *See, e.g.*, Baker v. Starwood Hotel & Resort Worldwide, Inc., No. Civ.A. 98-2076, 1999 WL 397405, at *3 & n.26 (E.D. La. June 15, 1999) (noting that "[c]ourts have set a high bar for what constitutes sufficiently severe and pervasive harassment for the purposes of a claim of a hostile work environment" and summarizing cases). For instance, it is hard to imagine that the account given in this post, Barnacle Strumpet, *Was I Fired Because of My Asexuality?*, ASEXUAL CUPCAKE (Aug. 10, 2011), http://thecupcakeace.wordpress.com/2011/08/10/was-i-fired-because-of-my-asexuality, would meet the standard. There is a limited contract-law precedent for a remedy granted to an individual fired for refusing to participate in sexual antics; in a 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. *See* Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025, 1035 (Ariz. 1985), *superseded by statute*, Employment Protection Act, ch. 140, 1996 Ariz. Sess. Laws 683, *as recognized in*, Chaboya v. Am. Nat'l Red Cross, 72 F. Supp. 2d 1081, 1092 (D. Ariz. 1999).

415. On the links to Asperger's Syndrome, see notes 202-03 above and accompanying text.

416. *See* Verp, Comment to *Asexual Discrimination?*, *Asexual Musings and Rantings*, ASEXUALITY VISIBILITY & EDUC. NETWORK (Mar. 17 2012, 12:10 AM), http://www.asexuality.org/en/index.php?/topic/72206-asexual-discrimination ("Some people [i]n 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.").

417. 42 U.S.C. § 2000e-2(e)(1) (2011). Various employers seek employees who have sex appeal, *see, e.g.*, Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147, 149-50 (2004), but these fields

the forms and places where it is legal, is not an obvious case for the BFOQ of experiencing sexual attraction, as the discussion earlier in this Part suggests.[418]

Finally, workplace policies that pay for spousal and family benefits could have a disparate impact on asexuals, for the reasons discussed earlier.[419]

d. *The case for antidiscrimination protections*

In light of the foregoing, there is an argument for protecting asexuality through antidiscrimination law. A recent study indicates that asexuals face bias comparable to, or greater than, that faced by homosexuals and bisexuals.[420] The bias involves viewing asexuals as not quite human, which is a classic feature of discrediting "stigma," as noted earlier.[421] In addition, this research suggests that the bias includes an impulse to make decisions on this basis, for example, not to hire or rent to asexuals.[422] This research is new and limited in scope, but if it holds up to scrutiny and is confirmed by further studies, it would help support an argument for legal protection for asexuals. More generally, asexuals are positioned on the margins of a society, and of a legal system, that privileges sexuality as specially important to human lives.[423]

While no discrimination cases have yet been brought on the basis of asexuality in New York, we can at least envision several grounds for such claims, particularly if more asexuals begin to come out.[424] Moreover, recognition of asexuality could have various cultural and emotional benefits for asexuals and for those who do not identify as asexual, as discussed above.[425] Thus, under familiar principles, asexuals have a plausible basis for seeking legal protection.[426]

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raise the interesting question of whether sexuals necessarily find asexuality *not* to be sexy. On the side of answering in the negative, 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.

418. *See supra* Part III.C.1 (discussing the perspective asexuality offers on the sex work debates, and noting sources asserting that lesbians are prevalent in the male-oriented sex-work industry).

419. *See supra* Part III.B.

420. *See* MacInnis & Hodson, *supra* note 381.

421. *See supra* note 393 and accompanying text.

422. *See supra* note 381 and accompanying text.

423. *See supra* Part III.A-D.

424. *See supra* Part III.E.2.c; *see also* AVEN Memo, *supra* note 59, at 2 (discussing reasons to think that more asexuals will be entering the workforce and coming out as the population of very young asexuals gets older).

425. *See supra* Part III.E.2.b.

426. The two central principles in U.S. antidiscrimination law are antisubordination and antidifferentiation (or anticlassification). *See, e.g.*, Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10-11 (2003). Under antidifferentiation, aspects of identity not relevant to job performance should not influence decisions about individual employees. Under

Recognizing asexuality in antidiscrimination law could have some costs. Most obviously, any new legal right can impose financial costs on the court system.[427] 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 expenditures[428]—and employers are likely to pass these costs on to employees and customers.[429] 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.[430] Including asexuality in the law would seem to move protection in the opposite direction, broadening rather than narrowing its scope.

Moreover, 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.[431] For example, an asexual employee might be expected to be more productive; he will not

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antisubordination, employers should not make decisions that contribute to the systematic subordination of certain groups. *Id.* at 9-10. These principles intersect in complicated ways, and for asexuals, the antisubordination argument would need to be oriented largely toward the future rather than the past, a break from its traditional purview. *Cf.* Jessica L. Roberts, *The Genetic Information Nondiscrimination Act as an Antidiscrimination Law*, 86 NOTRE DAME L. REV. 597, 630-34 (2011) (discussing the application of antisubordination principles to support a law anticipating future discrimination). But if the data on substantial discriminatory attitudes toward asexuals are valid, then either theory could support protection: in general terms, the one because employers should not make decisions based on this morally neutral criterion which is irrelevant to the job but important to identity (antidifferentiation), and the other because adverse employment actions on this basis could lead to systematic subordination of asexuals as a group (antisubordination).

427. *See, e.g.*, STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 45-46 (1999).

428. *Cf., e.g.*, CROSBY BURNS, CTR. FOR AM. PROGRESS, THE COSTLY BUSINESS OF DISCRIMINATION: THE ECONOMIC COSTS OF DISCRIMINATION AND THE FINANCIAL BENEFITS OF GAY AND TRANSGENDER EQUALITY IN THE WORKPLACE 1, 27 (2012), *available at* http://www.americanprogress.org/issues/2012/03/pdf/lgbt_biz_discrimination.pdf (discussing annual costs of $64 billion for workplace discrimination, including the costs of "workers who leave their jobs each year due to unfairness and discrimination" and workplace training).

429. *See, e.g.*, Christine Jolls, Commentary, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 686-88 (2001).

430. *See, e.g.*, RICHARD THOMPSON FORD, THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE 174-77 (2008).

431. 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. On the hypothetical prospects for favorable treatment of asexuality in hiring for some jobs, see text accompanying notes 326-28 above.

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 permanently.[432] 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.[433] (Indeed, the judge in one very early Title VII sexual harassment case predicted that, if and when such claims were deemed actionable, "[t]he only sure way an employer could avoid such charges would be to have employees who were asexual.")[434] 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"[435] or specifically for positions involving sexual privacy, as noted earlier.[436] 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 antidiscrimination protection for asexuality.

3. *Prospects for change*

This Subpart attempts to evaluate the prospects for asexuality entering antidiscrimination law by sketching a model of the factors associated with statutory legal protection. Table 1 lists these factors.

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432. *See, e.g.*, Joan C. Williams, *Keynote Address: Want Gender Equality? Die Childless at Thirty*, 27 WOMEN'S RTS. L. REP. 3, 3-4 (2006).

433. *Cf.* Burns, *supra* note 428, at 37.

434. 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).

435. Mary Anne Case, *A Few Words in Favor of Cultivating an Incest Taboo in the Workplace*, 33 VT. L. REV. 551, 552-53 (2009).

436. *See supra* Part III.D.1.

TABLE 1
A Descriptive Model:
Eight Criteria That Contribute to Antidiscrimination Protection

Individual

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

Political

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

Relational

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

This model is not a theory of discrimination. Rather, these criteria are descriptive, extracted from antidiscrimination case law, statutes, and scholarly analysis.[437] Moreover, the criteria I describe here do not bind legal actors and may change over time, as I discuss below.[438]

a. *The criteria: a brief exposition*

The criteria designated as *individual* are, roughly speaking, immutability and visibility (or activity). Immutability (criterion 1) is a well-known—and widely critiqued—element of suspect-class analysis.[439] The formulation offered here is what has been 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.[440] The other individual criterion—identity

437. Most obviously, some, but not all, of these criteria intersect with factors in the Court's suspect-classification analysis, but the approach I present here, unlike suspect-classification analysis or the defenses of it on political-process grounds, is a descriptive not a normative theory.

438. *See infra* Part III.E.3.b.

439. *See, e.g.*, Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 503 (1994); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 9 (1994); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1073 (1980).

440. *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384, 442 (Cal. 2008) (explaining that sexual orientation is "so integral an aspect of one's identity, [that] it is not appropriate to re-

characterized by a visible trait or distinct behavior (criterion 2)—reflects the law's tendency to recognize only what can be seen (the visible) or otherwise observed (through conduct).[441]

The *political* criteria account for the social reality that legal protection depends on group salience (criterion 3) and activism through a significant social movement (criterion 4). Contrary to suspect-class analysis's ostensible demand for political powerlessness, some degree of political power is generally required to obtain legal protection.[442]

The *relational* 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 (criterion 5), limiting or demeaning stereotypes (criterion 6), or both,[443] in order to persuade judges, legislators, and the public of the need for antidiscrimination protections.[444]

Similarly, as to the *legal* criteria, a history of discrimination is a classic element justifying special judicial solicitude,[445] and, as a descriptive matter, it may help legal actors and the public develop the kind of sympathy that inspires legal intervention.[446] Constitutional doctrine draws a sharp distinction between express or intentional legal burdens (criterion 7) and indirect or unintended legal burdens (criterion 8),[447] despite extensive scholarly critique of this distinction.[448] But both direct and indirect legal burdens can contribute to the public sympathy needed for statutory protection.[449]

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quire a person to repudiate or change [it] in order to avoid discriminatory treatment"); *see also* Tweedy, *supra* note 170, at 1513 & n.229; *cf.* Susan R. Schmeiser, *Changing the Immutable*, 41 CONN. L. REV. 1495, 1495, 1412-19 (2009) (discussing the "new immutability").

441. *Cf.* 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, 496-99 (1998) (locating visibility as part of the same prong containing immutability, but also as pervading discussions of the other factors in some opinions).

442. *See, e.g.*, Balkin, *supra* note 74, at 2340; William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2064 & n.3, 2065 (2002).

443. The distinction between attitudes (feelings) and stereotypes (thoughts and beliefs) is foundational in social psychology. *See, e.g.*, Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 6 (1995).

444. *Cf., 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 REL. 451, 452, 456-58 (2008) (discussing circumstances that trigger public action against discriminatory practices).

445. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

446. *Cf.* Mallett et al., *supra* note 444, at 457-58 (reporting the finding that "perspective taking" predicted collective action on behalf of outgroups).

447. *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring); Washington v. Davis, 426 U.S. 229, 239 (1976).

448. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319-27 (1987); Robert Post, *Prejudi-*

b. *The criteria applied to familiar categories*

The most robust categories of antidiscrimination protection (race and sex) meet all or nearly all of these criteria through their most salient subgroups, while partially protected groups (disability and age) meet fewer criteria, and others meet very few and garner little protection (personal appearance).[450] Space limitations preclude a systematic explanation of the criteria in this Article, but the rough contours of their application to traditional categories should be fairly obvious. A contrast between two less traditional categories of protection that have fared very differently in garnering protection—personal appearance as opposed to sexual orientation—dramatizes their significance, before the next Subpart applies the criteria to asexuality.

Personal appearance discrimination is a favorite topic in debates over the limits of antidiscrimination law.[451] Impressive data suggest that personal appearance leads to serious stratification of opportunities and outcomes—for instance, approximately a ten percent wage gap based on attractiveness.[452] The logic of our antidiscrimination laws would seem to dictate legal protection in this area, as various commentators have observed,[453] yet very few jurisdictions

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cial Appearances: The Logic of American Antidiscrimination Law, 88 CALIF. L. REV. 1, 39 (2000).

449. One might think here of the Americans with Disabilities Act, which was arguably passed in response to a combination of indirect and direct burdens. *See, e.g.*, *Garrett*, 531 U.S. at 377-80 (Breyer, J., dissenting); *see also id.* at 374-77 (Kennedy, J., concurring).

450. 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 thoughtful attention. *See, e.g.*, MK, *Questioning the Messaging: How Journalists & Equality Advocates (Unwittingly) Lend Credence to Anti-LGBT Talking Points*, LGBT YOUTH ALLIES (Jun 19, 2013, 5:55 PM), http://www.youthallies.com/questioning-messaging-anti-discrimination-laws. Under my approach, this slippage between group and axis is worth noting as inconsistent across groups and not specifically predicted by the criteria.

451. *See, e.g.*, FORD, *supra* note 430, at 159 (2008); DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG 2, 7 (2008); Post, *supra* note 448, at 2-8. My discussion in this Subpart of the Article was partially inspired by exchanges with George Rutherglen. *See also* George Rutherglen, *Concrete or Abstract Conceptions of Discrimination?* 24-28 (Univ. of Va. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 2012-58, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2148435.

452. *See, e.g.*, Daniel S. Hamermesh & Jeff E. Biddle, *Beauty and the Labor Market*, 84 AM. ECON. REV. 1174, 1186 (1994) (finding "a 7-9-percent penalty for being in the lowest 9 percent of looks among all workers, and a 5-percent premium for being in the top 33 percent"); Post, *supra* note 448, at 7 (quoting a source relying on the Hamermesh & Biddle study for the 10 percent figure). For a discussion of various data in this area, see DEBORAH L. RHODE, THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW 26-28 (2010).

453. *See, e.g.*, RHODE, *supra* note 452, at 20; Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2036 (1987); *see also* Post, *supra* note 448, at 2, 8 (discussing the argument that the logic of U.S. antidiscrimination law leads to "anti-lookism" protections).

offer such protection.[454] 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 Table 1 to this category. Personal appearance tracks no particular identity or social group, nor has there been a well-known social movement on this basis.[455] Though highly visible, personal appearance is frequently within an individual's control, or thought to be so.[456] 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 lose[457]), personal appearance is typically treated as quintessentially superficial.[458] The psychological literature documents some negative attitudes and stereotypes toward people deemed unattractive, particularly those considered overweight.[459] 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. The history of so-called "ugly laws" has been invoked by scholars as evidence of targeted legal burdens in this domain,[460] though the term "ugly laws" was coined by disability activists, who have been the main promoters of what little notoriety these municipal laws have received.[461] This leads to three—or at most, four, including the limited legal restrictions—out of eight criteria being met by 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.[462]

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454. Protections of various aspects of appearance, typically with limited remedies, can be found in one U.S. state, *see* MICH. COMP. LAWS § 37.2202(1)(a) (2013), and seven U.S. municipalities, *see* SANTA CRUZ, CAL., MUN. CODE § 9.83.020(13) (2013); S.F., CAL., ADMIN. CODE § 12A.1 (2013); D.C. CODE § 2-1401.01 (2013); URBANA, ILL., CODE OF ORDINANCES § 12-37 (2013); COUNTY OF HOWARD, MD., CODE OF ORDINANCES § 12.200 (2013); BINGHAMTON, N.Y., CODE OF ORDINANCES § 45-2 (2013); MADISON, WIS., CODE OF ORDINANCES § 39.03(1) (2013).

455. There is a small, and very interesting, fat rights movement, but it has not achieved a significant public presence. *See* NAT'L ASS'N ADVANCE FAT ACCEPTANCE, http://www.naafaonline.com (last visited Jan. 29, 2014); *see also* ANNA KIRKLAND, FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD 31-32 (2008).

456. On the extent to which weight is a mix of biology and choice, but is thought to be easy to control, see, for example, RHODE, *supra* note 452, at 42.

457. *See, e.g.*, *id.* at 119, 229 n.10 (discussing religion-based appearance discrimination cases).

458. 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. Post, *supra* note 448, at 2 (internal quotation mark omitted).

459. *See* RHODE, *supra* note 452, at 41-42.

460. *See, e.g.*, RHODE, *supra* note 452, at 117; Note, *supra* note 453, at 2035.

461. *See* SUSAN M. SCHWEIK, THE UGLY LAWS: DISABILITY IN PUBLIC 7-9 (2009) (explaining the coining of the term "ugly laws" and asserting that "[u]nsightly beggar ordinance" would be a "more accurate name historically" (internal quotation marks omitted)).

462. *See supra* note 454 and accompanying text.

Sexual orientation also lacks basic protections at the federal level,[463] 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,[464] which certainly have a high-profile social movement, involving prominent pride marches and multifarious organizations performing legal advocacy, education, and media policing.[465] Though the classic "invisible" minority,[466] gays meet the individual-trait-or-behavior criterion through the distinct behavior of same-sex sex, which characterizes the group and has been subject to widespread and notorious legal restrictions, in addition to restrictions specifically targeting homosexual status.[467] 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 his sexual orientation.[468] Extensive psychological research documents the negative attitudes toward homosexuality,[469] and stereotypes follow homosexuality, particularly for gay men.[470] 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.[471] Sexual orientation therefore meets seven criteria. Thus, by contrast to the outcome for personal appearance, this analysis would lead us to expect growing legal protections for sexual orienta-

463. *See supra* Part III.E.2.

464. And to a lesser degree, bisexuals, trans, and intersex people. *See* Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51, 51-52 (2006); Yoshino, *supra* note 143, at 353.

465. *See, e.g.*, *About GLAAD*, GLAAD, http://www.glaad.org/about (last visited Jan. 29, 2014); *About Us*, LAMBDA LEGAL, http://www.lambdalegal.org/about-us (last visited Jan. 29, 2014).

466. *But see* Robinson, *supra* note 323, at 1335 (arguing from existing work that there are visible differences between gays and straights).

467. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 190-94 (1986) (citing the legal restrictions and their history), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003); Yoshino, *supra* note 274, at 784-811 (cataloguing legal and cultural efforts to "convert" homosexuals).

468. *See, e.g.*, Yoshino, *supra* note 274, at 798-803 (documenting the decline of conversion demands placed on gay identity, importantly signaled by events such as the American Psychiatric Association's abandonment of psychiatric diagnoses of homosexuality).

469. *See, e.g.*, Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36, 54 (2007); *see also* Katherine B. Coffman et al., *The Size of the LGBT Population and the Magnitude of Anti-gay Sentiment Are Substantially Underestimated* 13, 15 (Nat'l Bureau of Econ. Research, Working Paper No. 19508, 2013), *available at* http://www.nber.org/papers/w19508 (suggesting that typical methods of studying anti-LGBT sentiment may underestimate its extent).

470. 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 323, at 1335-43.

471. Gay people can in principle get married, since the marriage restrictions are sex-based, not sexual-orientation based, but as many commentators have noted, this distinction is somewhat artificial in context.

tion. And indeed, ENDA has received substantial support,[472] twenty-one states and many more localities already have sexual orientation antidiscrimination protections,[473] and courts have been moving toward constitutional solicitude on this basis.[474]

c. *Applying the criteria to asexuality: difficulties of fit*

How does asexuality fare under this model? In the popular imagination, asexuality currently meets very few of the criteria. On the individual level, it is neither visible nor is it associated with any activity. Indeed, as the epigraph from Dan Savage (rather tendentiously) observes, asexuality is defined by "not do[ing] anything."[475] Whether it meets the other individual criterion—immutability—depends on whom you ask: self-identified asexuals would certainly claim that asexuality is not a choice,[476] but the broader culture endorses a medical and pharmacological approach that attempts to cure people with low desire.[477] As to the political criteria, asexuals have begun to connect with one another, but the community is not widespread or well known.[478] And while asexuals have begun to form a political presence—for example, by marching under the AVEN banner in LGBT pride marches—these developments are still in the early stages and have a limited public profile thus far.

With regard to the relational criteria, a very recent study finds striking degrees of bias against asexuals, including a greater unwillingness to hire or rent to asexuals than heterosexuals.[479] 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, this is not surprising as a group needs a certain notoriety for stereotypes to develop.

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,

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472. *See Employment Non-Discrimination Act*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/laws-and-legislation/federal-legislation/employment-non-discrimination-act (last updated Nov. 7, 2013).

473. *See supra* note 374 and accompanying text; *see also Local Employment Non-Discrimination Ordinances*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances (last updated Dec. 20, 2013).

474. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2693 (2013); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 996, 1003 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded on other grounds sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013); *In re* Marriage Cases, 183 P.3d 384, 441-42 (Cal. 2008); *see also* Lawrence v. Texas, 539 U.S. 558, 578-79 (2003); Romer v. Evans, 517 U.S. 620, 627, 631-34 (1996) (applying the de facto heightened form of "rational basis" scrutiny).

475. (A)SEXUAL, *supra* note 4.

476. *See supra* Part II.A.1.b.

477. *See supra* Part I.B.

478. *See supra* note 66 and accompanying text (discussing Swankivy's experience).

479. *See supra* notes 381-86 and accompanying text.

sex, age, and disability. By contrast, some indirect legal burdens are documented in this Part, most notably, limited consummation requirements for marriage and domestic partnership regimes.[480] In sum, as popularly understood, asexuality meets two (or possibly three, including immutability) of the criteria.

d. *The conditions for change*

This application of the model to asexuality need not mean that asexuality will remain unprotected outside of New York state and a handful of other jurisdictions. The model sets into relief what would need to occur for asexuality to garner widespread antidiscrimination protection across jurisdictions. Few of the criteria are fixed in time. Most obviously, the political and relational 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, then asexuality 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 and, on this analysis, would be far more likely to achieve protection.

Antidiscrimination protection for asexuals might come, in theory, through expansive judicial interpretation of existing sexual orientation protections, but this is unlikely given the definitional specifity of most of these laws.[482] More likely is the inclusion of asexuality within antidiscrimination laws that have not yet been enacted. Incorporating asexuality into ENDA would have the most significant impact, but short of that, the many remaining states and localities without sexual orientation antidiscrimination protection cover substantial territory. [483] In this vein, two municipalities passed ordinances in 2013 protecting asexuality as part of new laws covering "sexual orientation" more generally.[484]

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480. *See supra* Part III.B.

481. As noted earlier, the link with autism could form the basis for one stereotype about difficulty with human interaction. *See supra* notes 202-03.

482. Sexual orientation statutes nearly all define precisely which subcategories fall within them: namely, homosexuality, heterosexuality, and bisexuality (and, uniquely among states, asexuality in New York). *See supra* note 375 and accompanying text.

483. *See supra* note 473 and accompanying text.

484. The municipalities are Hyattsville, Md., and San Antonio, Tex. *See supra* note 351. In addition, "asexuality" was proposed for inclusion in one other city's ordinance protecting sexual orientation—a fairness law that passed in Frankfort, Ky., in August 2013—though the proposal to add asexuality was apparently made by an opponent and failed to garner support. Greg Kocher, *Frankfort Passes Fairness Ordinance with 3-2 Vote*, LEXINGTON HERALD-LEADER (Ky.) (Aug. 29, 2013), http://www.kentucky.com/2013/08/29/2793289/frankfort-passes-fairness-ordinance.html; *see also* Katie Brandenburg, *Group Eyes Fairness Ordinance*, PARK CITY DAILY NEWS (Ky.) (Dec. 22, 2013, 12:54 AM), http://www.bgdailynews.com/news/local/group-eyes-fairness-ordinance/article_f4d222ce-b5d1-59a1-91d1-96dd63e56f19.html ("[A critic] also had some issues with the way the ordi-

One might question whether asexuality appropriately fits under the legal rubric of "sexual orientation" at all. Of course, under one model, graphically depicted by Storms in Figure 1, asexuality is a fourth sexual orientation, a sibling to homosexuality, bisexuality, and heterosexuality.[485] But even on the umbrella model of asexuality—in which asexuality stands as a kind of parallel regime, even a challenge, to the whole idea of sexuality[486]—asexuality can be readily understood to fit under the rubric of legal antidiscrimination protection for sexual orientation. Here, asexuality may be analogized to atheism, which garners statutory protection from "religious" discrimination even as it stands in opposition to religious belief.[487]

Will asexuality be incorporated into antidiscrimination law in this country? There are some who see this watershed moment on the horizon, as the asexuality movement grows in size, reputation, and age.[488] As a normative matter, the Article has set out a plausible argument for this legal development, subject to further substantiation of the research in this area. As a predictive matter, the future is far from clear.[489] What is clear, however, is that asexuality has much to teach a sexual society about the assumptions and oversights embedded in both its culture and its laws.

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nance was written . . . . For example, asexual people aren't protected under Frankfort's ordinance, which indicates that it doesn't give equal protection to everyone.").

485. *See supra* Part II.C.1; *see also supra* Figure 1.

486. *See supra* Part II.C.4.

487. *See, e.g.*, Young v. Sw. Sav. & Loan Ass'n, 509 F.2d 140, 144-45 (5th Cir. 1975); EEOC Compl. Man. (BNA) § 628.51 (July 22, 2008). Religious discrimination claims under the Constitution involve unique protections and present more complicated questions for atheism than does Title VII, but the statutory analogy between atheism and asexuality, while imperfect, offers a neat parallel for purposes of seeing how standing outside a category could form the basis of protection under it. *Cf.* Kent Greenawalt, *Title VII and Religious Liberty*, 33 LOY. U. CHI. L.J. 1, 27 (2001) ("Whatever may be the status of atheism under the Free Exercise Clause, atheists can make claims under Title VII. Not only can an atheist suffer outright discrimination because of his religious belief that no God exists, an atheist may need accommodation.").

488. *See* AVEN Memo, *supra* note 59, at 3 (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); Miller, *supra* note 51, at 1.

489. Two new local ordinances in the United States in 2013, and an asexuality-inclusive legal interpretation in the United Kingdom in 2012, might be the beginnings of a broader trend, though it is too soon to tell. *See supra* note 351.

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 Being Bored*[490]

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 with more familiar categories of identity and with a sexual society. This 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. After telling the story of how New York became the first U.S. state to protect asexuality from discrimination, this Article offered a plausible case for why more jurisdictions should follow New York's lead. Finally, this Article used the intuition that asexuality is currently a poor fit with our antidiscrimination law to develop a framework for better understanding what categories are and are not protected, and offered suggestions for what would need to happen 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."[491] 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?

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490. ADAM PHILLIPS, *On Being Bored*, *in* ON KISSING, TICKLING, AND BEING BORED: PSYCHOANALYTIC ESSAYS ON THE UNEXAMINED LIFE 68, 69 (1994); *see also* FOUCAULT, *The End of the Monarchy of Sex*, *supra* note 249, at 219 ("Look at what is happening as far as children are concerned. Some say: children's life is their sex life. From the bottle to puberty, that's all it is. Behind the desire to learn to read or the taste for comic strips, there is still and will always be sexuality. Well, are you sure that this type of discourse is actually liberating? Are you sure that it doesn't lock children into a sort of sexual insularity? And what after all if they just couldn't care less? If the liberty of not being an adult consisted exactly in not being enslaved to the law of sexuality, to its principles, to its commonplace, would it be so boring after all?").

491. PHILLIPS, *supra* note 490, at 76.

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 say they 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. Examining our lives and laws through the lens of asexuality may lead all of us, sexual and asexual alike, somewhere we have not been before.