

Beyond Polygamy

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ABSTRACT: Approximately four percent of American adults—the same percentage of people who identify as lesbian, gay, bisexual, or transgender (“LGBT”)—are currently in consensually non-monogamous relationships. Progressive municipalities have recently shown an interest in recognizing and extending legal rights to individuals in such relationships. In the past two years, the cities of Somerville and Cambridge, and the town of Arlington, Massachusetts, have enacted domestic partnership legislation that extends to more than two partners. Others are sure to follow.

This Article offers guidance regarding the form that legal regulation of plural relationships should take. To date, the few scholarly attempts to study the regulation of plural relationships have focused on polygamy: Marriage between more than two partners. This Article takes a different approach. Rather than adapting the framework of marriage to relationships involving multiple partners—a fruitless task given the incredible variation in plural relationship types—it decenters marriage by identifying how people in plural relationships configure their lives and analyzing how the law can respond to their needs. The Article makes three contributions. First, it reveals the diversity of plural relationship forms and explains their regulatory consequences. Second, it articulates a set of principles to guide the creation of plural relationship statuses at the state and local level. Third, it explores the potential of plural relationships to break marriage’s stranglehold on all forms of adult intimacy, promoting greater individual freedom and equal treatment of all relationship types.

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INTRODUCTION

In the summer of 2020, with the nation’s eyes fixed on COVID-19 and the Black Lives Matter protests, the City of Somerville quietly created a domestic partnership status open to people in group relationships.¹ By all

1. These relationships are sometimes referred to as “plural” because they involve a person’s relationship with more than one other partner. *See, e.g.*, RONALD C. DEN OTTER, IN DEFENSE OF PLURAL MARRIAGE 1 (2015); Sally F. Goldfarb, *Legal Recognition of Plural Unions: Is a Nonmarital Relationship Status the Answer to the Dilemma?*, 58 FAM. CT. REV. 157, 157 (2020). I will use the term “group relationships” to refer to relationships in which all partners consider themselves part of a single relationship involving more than two people. As I will discuss in Part I, some people are simultaneously involved in multiple distinct relationships, what some call “asymmetric relationships.” The term “plural” encompasses both forms, so I will use it accordingly.

accounts, the decision to create a legal status for relationships involving more than two people—a first in the United States²—emerged quickly and uncontroversially.³ The Somerville City Council had already planned to enact domestic partnership legislation as a means to expand access to health care and ensure hospital access for partners in the wake of the COVID-19 pandemic.⁴ Shortly before the June 25 meeting during which the legislation was passed, one councilmember reached out to the committee chair to ask, “Why is this two?,” referring to the contemplated number of partners.⁵ After coming up with “no good reason,” the committee chair revised the text of the ordinance to remove any references limiting partnerships to two individuals and the legislation passed unanimously shortly thereafter.⁶

It is important not to overstate the impact of the Somerville legislation. Cities lack the legal authority to change state law, meaning that they are inherently limited in the rights they can offer people in plural relationships. They cannot, for instance, change laws governing inheritance, marital property, or standing to sue for wrongful death. They cannot decriminalize conduct that their state has criminalized.⁷ They also lack the authority to confer any of the federal rights and obligations, like Social Security spousal benefits or coverage under the Family Medical Leave Act, that accompany marriage. Domestic partners in Somerville are entitled to a set of comparatively meager rights including hospital and jail visitation, health insurance coverage and bereavement leave for city employees, and limited antidiscrimination protections.⁸ Nonetheless, this official recognition is still significant. It amounts to a declaration by the city that plural relationships are valuable and worthy of respect.

2. See Ellen Barry, *A Massachusetts City Decides to Recognize Polyamorous Relationships*, N.Y. TIMES (July 1, 2020), <https://www.nytimes.com/2020/07/01/us/somerville-polyamorous-domestic-partnership.html> [https://perma.cc/V9VA-C2TA].

3. See Julia Taliesin, *Somerville Recognizes Polyamorous Domestic Partnerships*, WICKED LOC. (July 1, 2020, 10:41 AM), <https://www.wickedlocal.com/story/archive/2020/07/01/somerville-recognizes-polyamorous-domestic-partnerships/42962799> [https://perma.cc/LJJ6-T2EF].

4. See Adriana Loya, *This Massachusetts City Is Recognizing Polyamorous Relationships*, NBC BOS. (July 4, 2020, 8:08 AM), <https://www.nbcboston.com/news/local/this-massachusetts-city-is-recognizing-polyamorous-relationships/2153761> [https://perma.cc/G785-DVFG].

5. Taliesin, *supra* note 3 (internal quotation marks omitted).

6. See *id.* (internal quotation marks omitted); see also *City Council: Regular Meeting*, CITY OF SOMERVILLE (June 25, 2020, 7:00 PM), <http://somervillecityma.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=3160&MinutesID=2490&FileFormat=pdf&Format=Minutes&MediaFileFormat=mpg4> [https://perma.cc/67AU-F6NU].

7. Utah, for example, sweeps cohabiting relationships under its definition of bigamy. See Jonathan Turley, *The Loadstone Rock: The Role of Harm in the Criminalization of Plural Unions*, 64 EMORY L.J. 1905, 1913–14, 1923 (2015).

8. See Kimberly Rhoten, *POV: Somerville, Mass., Delivers a Big Victory for Those in Polyamorous Relationships*, BU TODAY (July 30, 2020), <http://www.bu.edu/articles/2020/pov-somerville-mass-delivers-a-big-victory-for-those-in-polyamorous-relationships> [https://perma.cc/QH2G-LC6J].

Although the Somerville domestic partnership legislation received some coverage in local and national media outlets, including the *New York Times*, the reaction has been surprisingly muted. Well-known same-sex marriage opponents like the National Organization for Marriage and the Alliance Defending Freedom have remained silent, as have pro-LGBT-rights organizations like the Human Rights Campaign and Lambda Legal.

There is every reason to suspect that these partisans will soon have to break their uneasy silence. Cambridge, Somerville's larger neighbor, enacted its own plural relationship status that goes further than Somerville's in several respects.⁹ In April 2021, the town of Arlington, Massachusetts, followed suit.¹⁰ All told, hundreds of municipalities nationwide already have domestic partner registries, and other progressive cities will eventually consider whether to expand their domestic partner legislation to people in plural relationships. Studies indicate that approximately one in five American adults has participated in a consensually nonmonogamous relationship,¹¹ and approximately four percent—the same number of people that compose the LGBT community—are currently in a plural relationship of some sort.¹² The time is ripe to consider what form plural relationship statuses should take.

At this point, it is important to clarify what this Article is *not* about. It is not about polygamy, which refers to *marriage* between more than two people. It is not about whether polygamy or other forms of plural relationships should

9. Cambridge's domestic partnership law, enacted in April 2021, does not require partners to share the same residence as Somerville does, and it expressly allows people to be part of more than one domestic partnership simultaneously, accommodating both group and asymmetric relationships. See Cambridge, Mass., Ordinance 2020-14 (Mar. 8, 2021), https://library.municode.com/ma/cambridge/ordinances/code_of_ordinances?nodeId=1072098 [<https://perma.cc/6SRP-G26V>].

10. See Jesse Collings, *Town Meeting Approves Domestic Partnership for Relationships with More than Two People*, WICKED LOC. (Apr. 30, 2021, 3:01 PM), <https://www.wickedlocal.com/story/arlington-advocate/2021/04/30/arlington-approves-domestic-partnerships-polyamorous-relationships/7410640002> [<https://perma.cc/ZZ63-EBNF>] (noting the town's motion must be approved by the state Attorney General to become law); see also Motion to Amend Definition of Domestic Partnerships, *Arlington Town Meeting* (Apr. 27, 2021), <https://www.arlingtonma.gov/home/showdocument?id=56148&t=637551960792110812> [<https://perma.cc/97NS-P8SD>] (proposing revisions to the town domestic partnership requirements to allow groups of more than two to register as domestic partners).

11. See M.L. Haupert, Amanda N. Gesselman, Amy C. Moors, Helen E. Fisher & Justin R. Garcia, *Prevalence of Experiences with Consensual Nonmonogamous Relationships: Findings from Two National Samples of Single Americans*, 43 J. SEX & MARITAL THERAPY 424, 435-36 (2017). The consensual aspect distinguishes plural relationships from infidelity, in which one or both partners carry out an intimate relationship with others without their primary partner's knowledge or consent.

12. One study of over 2,000 individuals found approximately four percent of relationships were "open," and another eight percent were non-consensually non-monogamous. Ethan Czuy Levine, Debby Herbenick, Omar Martinez, Tsung-Chieh Fu & Brian Dodge, *Open Relationships, Nonconsensual Nonmonogamy, and Monogamy Among U.S. Adults: Findings from the 2012 National Survey of Sexual Health and Behavior*, 47 ARCHIVE SEXUAL BEHAV. 1439, 1446-47 (2018).

be constitutionally protected.¹³ It also sets aside the debate over whether plural relationships are normatively desirable.¹⁴ It is enough that democratically elected bodies are *voluntarily* deciding whether and how to enact plural relationship statuses. That is where this Article intervenes.

Methodologically, this Article decenters marriage: It assumes that marriage is not the starting or ending point.¹⁵ Instead, it builds a status from the ground up by attending to what people in plural relationships need from the law.¹⁶

13. See generally Ronald C. Den Otter, *Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage*, 64 EMORY L.J. 1977 (2015) (analyzing substantive due process and equal protection arguments supporting plural unions); Martha C. Nussbaum, *A Right to Marry?*, 98 CALIF. L. REV. 667, 688–89 (2010) (discussing whether individuals in “polygamous unions” have a constitutional liberty or equality right to marry).

14. This question has already received significant attention. Arguments focus on autonomy, equal treatment, and the lack of concrete and demonstrable societal harm on the one hand, and Judeo-Christian morality and the well-being of women and children on the other. For arguments critical of polygamy and polyamory, see, for example, Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. U. L. REV. 439, 474–86 (2003) (associating polygamy with a form of despotism that undermines the modern liberal state); Marci A. Hamilton, *The Two P's of Gender Inequality: Prostitution and Polygamy—How the Laws Against Both Are Underenforced to Protect Men and Subjugate Women*, FINDLAW (July 9, 2009), <https://supreme.findlaw.com/legal-commentary/the-two-ps-of-gender-inequality-prostitution-and-polygamy-how-the-laws-against-both-are-underenforced-to-protect-men-and-subjugate-women.html> [<https://perma.cc/CE55-FYXT>] (arguing polygamy promotes gender inequality by allowing men to use women instrumentally); Peter de Marneffe, *Liberty and Polygamy*, in AFTER MARRIAGE: RETHINKING MARITAL RELATIONSHIPS 125, 133–56 (Elizabeth Brake ed. 2016) (arguing polygamous relationships do not promote child welfare and exclusive life partnerships as distinctive human goods). For refutations of these arguments, see generally, Luke Brunning, *The Distinctiveness of Polyamory*, 35 J. APPLIED PHIL. 513 (2018) (refuting the argument that one can only have an identity-defining intimate relationship with one other person); Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J. L. & PUB. POL'Y 101 (2006) (same); Turley, *supra* note 7.

15. Marriage is so dominant an institution that it is impossible to avoid completely. See, e.g., Hadar Aviram & Gwendolyn M. Leachman, *The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle*, 38 HARV. J.L. & GENDER 269, 330–31 (2015); Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 112–54 (2014). Marriage also encompasses many relational rights and obligations, some of which would no doubt be useful to people in plural relationships. Cf. NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE 123–207 (2008) (proposing that many of the rights flowing to spouses should go to caring relationships); Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125 (1981) (analyzing the needs of cohabitants by analogy to marriage). As other scholars have observed, though, marriage is not the only way to conceive of intimate relationships. See generally MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995) (arguing against marriage and for recognition of the mother–child dyad as the foundational family relationship). My point is not to deny marriage’s existence but to resist the assumption that marriage is the ideal for all intimate relationships.

16. The few scholarly works that attempt to create a regulatory framework for plural relationships all start from marriage or some other off-the-rack option. See generally MARK GOLDFEDER, LEGALIZING PLURAL MARRIAGE: THE NEXT LEGAL FRONTIER IN FAMILY LAW 17 (2017) (“[O]ur discussions necessarily begin with the understanding that we are working within a marital system . . . instead of trying to get rid of it”); Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1960–61 (2010) (discussing

This process of extraction and refinement reveals values crucial to the support of plural relationships, and, by extension, to all family relationships.

That task is complicated by the fact that plural relationships are incredibly diverse. The category could potentially include people in patriarchal relationships who consider themselves religiously married,¹⁷ same-sex throuples,¹⁸ heterosexuals in open relationships,¹⁹ platonic life partners, and more. Although previous scholarly treatments have acknowledged these variations,²⁰ they have not investigated how these variations affect the legal needs of the partners.²¹ Part I systematically accounts for several important grounds of difference. Relationships may be sexual or nonsexual; every member may be in a relationship with every other, or they may be linked together in different configurations; they may be same-sex or gender differentiated; see the relationship as permanent or transitory; exclusive or open; raise children together and co-own property, or not. These differences threaten to render any single policy approach ineffective and potentially counterproductive.

how plural marriage recognition and commitments are analogous to traditional marriage and business associations); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 123–31 (2001) (analogizing plural marriages to LLCs); Jennifer A. Drobac & Antony Page, *A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law*, 41 GA. L. REV. 349 (2007) (proposing a set of domestic partnerships based on business partnership principles but limiting them to two persons). *But see* Linda S. Anderson, *Marriage, Monogamy, and Affairs: Reassessing Intimate Relationships in Light of Growing Acceptance of Consensual Non-Monogamy*, 22 WASH. & LEE J. CIV. RTS. & SOC. JUST. 3, 44–46 (2016) (proposing a default open union agreement governing the partners' sexual and relational conduct but no other legal incidents).

17. *See, e.g.*, Goldfarb, *supra* note 1, at 159–60 (defining the phenomenon of systemic polygyny and noting it is practiced by tens, if not hundreds, of thousands of religious adherents).

18. *See, e.g.*, Edward Stein, *How U.S. Family Law Might Deal with Spousal Relationships of Three (or More) People*, 51 ARIZ. ST. L.J. 1395, 1396 n.2 (2019) (defining “throuples” as group relationships involving three people).

19. *See, e.g.*, Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 308 (2004).

20. *See, e.g., id.* *See generally* Stein, *supra* note 18 (discussing the treatment of polygamous relationships by the law).

21. Goldfarb and Stein, for example, have raised the possibility of repurposing existing state domestic partnership laws, but have not explained how they would do so. *See* Goldfarb, *supra* note 1, at 166 (declining to “present a detailed blueprint for implementing a ‘plural nonmarital relationship status’”); Stein, *supra* note 18, at 1420 (pointing to a few “promising” scholarly works but stopping short of suggesting how to craft a status appropriate for plural relationships). Davis and Ertman would implement a marriage regime premised on business partnerships but do not explain how differences in relationship structure would affect their proposals. Faucon has proposed a set of rules narrowly focused on religiously motivated polygyny. *See* Casey E. Faucon, *Marriage Outlaws: Regulating Polygamy in America*, 22 DUKE J. GENDER L. & POL'Y 1, 2–4 (2014). The two scholars whose work most directly engages relationship diversity are Mark Goldfeder, *see generally* GOLDFEDER, *supra* note 16 (providing an in-depth analysis of polygamous relationships), and Diane Klein, *see generally* Diane J. Klein, *Plural Marriage and Community Property Law*, 41 GOLDEN GATE U. L. REV. 33 (2010) (similar). Both Klein and Goldfeder only analyze plural marriage, however, and therefore focus their regulatory proposals on marital property regimes.

Part II asks whether the relationships, as diverse as they are, are united by common needs. It identifies three near-universal experiences. First, discrimination. Plural relationships are commonly questioned if not outright condemned. Second, interdependency. Though varied, plural relationships involve dependency, whether financial, emotional, or practical. Injuries, deaths, and accidents can burden these family units like any others, and the law can help to lessen the impact of these hardships. Third, boundary maintenance. Plural relationships are structurally more complicated than monogamous relationships, and, in many cases, open to change by design. Partners need tools to account for the addition and departure of members and manage disputes, often while the relationship is ongoing. These common needs suggest that it is possible to design a status that is universally relevant while preserving a space for relationship diversity.

With these common needs in mind, Part III turns to three principles that should guide the legislative response to these needs. The first is self-determination. Laws should recognize as many different configurations of relationships as possible. They should also avoid standardizing obligations in such a way as to alter partners' relationships or deter them from pursuing recognition. The second is equal citizenship. Legal impediments to the formation of plural relationships, such as zoning restrictions, should be eliminated. Antidiscrimination provisions should root out and prevent discrimination to the greatest possible extent. The third is the meeting of relationship-based vulnerabilities. Tools already exist to address the illness or death of family members. Those same tools could be adapted as appropriate to plural relationships.

The Article concludes in Part IV by exploring the potential of plural relationships to dislodge marriage as a paradigm, weakening its stranglehold on the legal regulation of adult intimacy. It focuses on two examples. Courts have notoriously hesitated to enforce agreements between spouses and cohabitants, generally limiting enforcement to clearly economic exchanges. Although much of this refusal bears the moralistic residue of an earlier time, part of the problem is that marital duties are so salient that judges cannot see beyond them within the context of two-person relationships. But no judge would mistake a plural relationship for marriage. As a result, judges are more likely to see bargains between partners for what they are: Exchanges based on personal assessments of the value of idiosyncratic performances. Second, the fluidity of plural relationships challenges the tendency of the law to assume that relationships are either on or off, that there are distinct moments when relationships—and relational duties—begin and end. This view leads to an artificially narrow understanding of relational rights and duties. The recent efforts to recognize plural relationships promise not only to cast the law's protections more broadly but to prompt reforms of existing institutions.

I. PLURAL RELATIONSHIP DIVERSITY

There is significant variation in how plural relationships are configured. Discourse has centered around two paradigmatic but divergent forms, polygyny and polyamory. Polygyny is typically described as hierarchical and unequal, with one man taking multiple wives. The partners view themselves as married in fact if not in law. By contrast, polyamory is depicted as egalitarian. The partners enjoy freedom to enter additional sexual and/or emotional relationships. Marriage and fixed obligations are not necessarily the end goal. These characterizations are convenient but overly essentialized. Moreover, differences in plural relationships far exceed the differences between these two basic forms. This Part identifies variations in relationship attitudes and structures in and beyond the polygyny/polyamory divide. In the process, it explores how variations in relationship configurations stymie the ability to generalize about plural relationships.²²

A. PATRIARCHY, EGALITARIANISM, AND VIEWS OF MARRIAGE

Arguably the most visible form of plural relationships are religiously affiliated “marriages” between one man and more than one woman, also called polygyny.²³ In the United States, tens-, if not hundreds-of-thousands of people practice polygyny, almost all of it religiously affiliated.²⁴ In typical polygynous relationships, the women are not allowed to have relationships with other men, nor do they have sexual relationships with each other. Yet they may jointly contribute to the maintenance of a single household.²⁵ It is

22. By focusing on the lived experiences of those in plural relationships, I bypass the question whether one can be polyamorous (or polygamous) without being in a plural relationship. Cf. Ann E. Tweedy, *Polyamory as a Sexual Orientation*, 79 U. CIN. L. REV. 1461, 1483–98 (2011) (analyzing evidence and community attitudes regarding whether polyamory is a sexual orientation). I assume that one can be both polyamorous and single, but focus primarily on rules that would govern relationships, not individuals, the exception being antidiscrimination laws.

23. See Davis, *supra* note 16, at 1965 (calling polygyny “the dominant discourse of polygamy in the United States”); see also Emens, *supra* note 19, at 302 (speculating that most Americans think of Mormon polygamy when they think of plural relationships); State v. Holm, 137 P.3d 726, 753 (Utah 2006) (Nehring, J., concurring) (“[I]n the public mind Utah will forever be shackled to the practice of polygamy.”). Davis notes that “[i]n seventy-eight percent of cultures, plural marriage is practiced as polygyny,” but that some cultures do practice polyandry, the marriage of one woman to multiple men. See Davis, *supra* note 16, at 1966. Polyandry is exceedingly rare in the United States. See *id.*

24. See Davis, *supra* note 16, at 1968–70 (pointing to estimates of between 30,000 and 100,000 polygynists in fundamentalist Mormon communities, and identifying other religious and cultural communities practicing polygyny in the U.S. as well); Goldfarb, *supra* note 1, at 160 (noting estimates of between 50,000 and 100,000 American Muslims practicing polygyny); see also GOLDFEDER, *supra* note 16, at 53–55 (contextualizing American manifestations of polygamy in the context of a world in which over three billion people believe in plural marriage and two billion actually practice plural marriage).

25. See, e.g., Emens, *supra* note 19, at 314–17 (describing the story of Elizabeth Joseph, one of eight wives in a polygamous marriage).

this arrangement that many scholars have in mind when they debate decriminalization or the legalization of polygamy.²⁶

An increasingly visible alternative is polyamory, which scholars describe as a “consensual, openly conducted, multiple-partner relationship[] in which both men and women have negotiated access to additional partners outside of the traditional committed couple.”²⁷ The label of polyamory also refers to a community of like-minded people who, in addition to being in or open to polyamorous relationships, may share several commitments that distinguish them from other consensually nonmonogamous individuals.²⁸ In this Article, I use the label “polyam” flexibly to refer to people who either have involvement in polyamorous communities or share many of the ideological commitments associated with the polyamorous movement. It is an amorphous category that is narrower than plural relationships.

Synthesizing the content of numerous sources, Elizabeth Emens has argued that people in the polyamorous community generally share commitments to “self-knowledge, radical honesty, consent, self-possession, and privileging love and sex.”²⁹ Polyam people believe that most people desire nonmonogamy and therefore practice self-denial or deception.³⁰ More love and sex are “better than less” and “jealousy and possessiveness” are negative traits to be overcome through honesty and open communication.³¹

Given their underlying commitments, polygyny and polyamory are incompatible. Although numerous scholars have observed that not all polygynous relationships are “despotic” or “patriarchal,” they mostly remain “hierarchical and gendered.”³² Polyam people, in contrast, “tend to be . . . [politically] liberal,” “intellectual,” “highly educated,” and “devoted to social justice” and “gender equality.”³³ When asked, many polyam activists

26. See Sigman, *supra* note 14, at 108–37; Turley, *supra* note 7, at 1922–29.

27. ELISABETH SHEFF, *THE POLYAMORISTS NEXT DOOR: INSIDE MULTIPLE-PARTNER RELATIONSHIPS AND FAMILIES* 1 (2014); see also Emens, *supra* note 19, at 303–04 (citing *Loving More*, a publication for the polyamorous community, for the proposition that polyamorous relationships are open, honest, and involve adults interested in maintaining loving relationships with more than one other partner).

28. See DEBORAH ANAPOL, *POLYAMORY IN THE 21ST CENTURY: LOVE AND INTIMACY WITH MULTIPLE PARTNERS* 19–26, 99–103 (2010).

29. Emens, *supra* note 19, at 283; see also SHEFF, *supra* note 27, at 21–22 (identifying the following “common guidelines that structure polyamorous relationships[:] . . . [t]here are no rules[,] . . . [t]ell the truth[,] . . . [c]ommunicate, communicate, communicate[,] . . . [i]f he gets more lovers than so does she[,] . . . [m]ake and follow safer sex agreements[,] . . . [t]ake responsibility for self-growth[,] . . . [a]llow for change[,] . . . [and] ‘[d]on’t be a dick”) (emphasis omitted).

30. See Emens, *supra* note 19, at 322.

31. See *id.* at 328 (citation omitted).

32. See Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 356 (2003).

33. See, e.g., SHEFF, *supra* note 27, at 2, 23–24, 28; Hadar Aviram, *Make Love, Now Law: Perceptions of the Marriage Equality Struggle Among Polyamorist Activists*, 7 J. BISEXUALITY 261, 267

have shown no interest in working with Mormon polygynists, citing fundamental disagreements around gender inequality and sexual freedom, not to mention religious differences.³⁴ Polyam people tend to be ambivalent towards the idea of plural marriage, both because other relationship-based rights may take precedence over marriage, and because the institution itself is seen as inegalitarian or retrograde.³⁵

Just as it is important not to conflate polygyny with all forms of plural relationships, it is important to recognize that not all polygamist or polyamorous relationships are alike. Within each model, there are important grounds of difference. Polygyny can be more or less patriarchal or inegalitarian.³⁶ Polyamory is loosely defined and therefore includes a tremendous amount of variation:³⁷ Given their ideological openness, polyam people tend not to police the boundaries of what it means to be polyamorous.³⁸

Moreover, many individuals in plural relationships do not identify with or have awareness of the polyam movement. Some individuals end up in plural relationships not because of a commitment to polyam values but through happenstance.³⁹ People involved in the polyamorous community are

(2008) (noting that most interview subjects within San Francisco's activist polyam community had higher than average levels of education and were politically left-leaning).

34. See Aviram, *supra* note 33, at 274 (interviewing community activists from San Francisco who reported no contact or communication with Mormon polygynists); see also SHEFF, *supra* note 27, at 29–30 (commenting on the importance to polyamorous people of men “step[ping] outside of [the traditional] ownership model” of their women partners); Andrew Solomon, *How Polyamorists and Polygamists are Challenging Family Norms*, NEW YORKER (Mar. 15, 2021), <https://www.newyorker.com/magazine/2021/03/22/how-polyamorists-and-polygamists-are-challenging-family-norms> [<https://perma.cc/85FP-5P2Z>] (interviewing plural relationship activist Diana Adams).

35. See Aviram, *supra* note 33, at 274–82; see also Goldfarb, *supra* note 1, at 165–66 (“Among polyamorists, a common attitude toward marriage is ambivalence.”).

36. See generally GOLDFEDER, *supra* note 16, at 68–72 (noting the feminist, liberatory possibilities of polygamy); David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 80–81 (1997) [hereinafter Chambers, *Polygamy and Same-Sex Marriage*] (noting that not all polygynous marriages are as patriarchal and “sinister” as some scholars make them out to be); Emens, *supra* note 19, at 314–17 (showing that polygyny can enable women to pursue jobs outside the home while relying on a more robust support network within the home). See generally Gregg Strauss, *Is Polygamy Inherently Unequal?*, 122 ETHICS 516 (2012) (arguing that traditional polygyny is inegalitarian but that allowing women to marry each other or to seek other partners would not be).

37. See, e.g., Emens, *supra* note 19, at 304.

38. See Aviram, *supra* note 33, at 273 (quoting an interview subject for the proposition that polyamorist activists should not attempt to prescribe a “right” way to be polyamorous) (citation omitted).

39. See, e.g., Katherine Frank & John DeLamater, *Deconstructing Monogamy: Boundaries, Identities, and Fluidities Across Relationships*, in UNDERSTANDING NON-MONOGAMIES 9, 18 (Meg Barker & Darren Langdrige eds., 2010) (reporting resistance by some interview subjects in plural relationships to the label “polyamory”); see also *id.* at 19 (describing the experience of a married couple whose ten-year relationship with another couple began after the wife discovered that her husband had an affair with their neighbor, then realized that she was attracted to the neighbor's husband).

overwhelmingly white, straight or bisexual, middle class, and cisgender.⁴⁰ The notable absence of gay or lesbian people in the organized polyam community, juxtaposed with high rates of consensual non-monogamy in the gay male community,⁴¹ suggests that many in same-sex plural relationships may be unaware of or indifferent to the polyam movement's ideological commitments.

Some may even be living in a quasi-plural relationship without fully realizing it. It is not uncommon for married but separated individuals to begin relationships with other partners, resulting in relationships that may implicate the property interests of more than two other adults.⁴²

All of this is to say that the category of plural relationships contains multitudes and that labels like polygamy, polygyny, or polyamory inevitably exclude other people in plural relationships.⁴³ To put it differently, these constructs alone cannot stand in for, or represent, the broader experiences of people in plural relationships. The remainder of this Part identifies additional variations in relationship attitudes and structures that contemplate regulation.

40. Existing studies tend to identify subjects through established polyamorous communities or activists and expand outward. *See, e.g.*, SHEFF, *supra* note 27, at 292–95; Aviram, *supra* note 33, at 266–67. They report that mainstream polyam communities are composed of “mostly heterosexual men and bisexual women, with a significant minority of heterosexual women and a small[] minority of bisexual men.” SHEFF, *supra* note 27, at 30. Gay and lesbian same-sex plural relationships rarely participate in organized polyamorous gatherings. *See id.* at 31, 75–79. Most people in mainstream polyamorous communities are white and middle class. *See id.* at 31–32, 36; *see also* Christopher N. Smith, *Open to Love: Polyamory and the Black American*, 3 J. BLACK SEXUALITY & RELATIONSHIPS 99, 125–26 (2016) (relating an interview subject’s opinion on why Black people who engage in nonmonogamy tend to distance themselves from the polyam community). A review of literature on polyamory produced during the period of the 1990s through early 2000s confirms the lack of diversity in the way the polyam community is described. *See* Melita J. Noël, *Progressive Polyamory: Considering Issues of Diversity*, 9 SEXUALITIES 602, 606 (2006) (noting that most texts presume polyams are “of ‘European stock’, middle-class, college educated, and . . . able-bodied”).

41. *See, e.g.*, Levine et al., *supra* note 12, at 1443 (reporting that 32 percent of gay men are in open relationships); Gabriel Robles, Stephen C. Bosco, Daniel Sauermilch & Tyrel J. Starks, *Population-Specific Correlates of Sexual Arrangements and Communication in a National Sample of Latinx Sexual Minority Men*, 50 ARCHIVES SEXUAL BEHAV. 1449, 1453–54 (2021) (reporting that 45.1 percent of Latinx sexual minority men were in an open relationship and 21.9 percent in a “monogamish” relationship).

42. *See, e.g.*, *Marvin v. Marvin*, 557 P.2d 106, 111 (Cal. 1976) (noting that one cohabitant remained legally married for three years while cohabiting with the plaintiff seeking palimony); *Estate of Roccamonte v. Slackman*, 808 A.2d 838, 840–41 (N.J. 2002) (involving a decades-long cohabitation during which one partner remained married to his wife).

43. One response to this diversity is to focus the analysis on a particular subgroup. *See, e.g.*, Davis, *supra* note 16, at 1957 (focusing on polygynous relationships); Goldfarb, *supra* note 1, at 157 (focusing on the polyam community); Stein, *supra* note 18, at 1396 (focusing on same-sex throuples and quads); Strassberg, *supra* note 14, at 450–52 (focusing on the “polyfidelitous group marriage”).

B. MORE VARIATIONS

1. Sexual and/or Emotional Intimacy

There is no scholarly or popular consensus on whether plural relationships require sexual activity or emotional intimacy. Most discussions of polygyny and polyamory presume the existence of a sexual *and* emotionally connected relationship.⁴⁴ For instance, for some scholars, a distinguishing feature of polyamory is openness to multiple “romantic” relationships, pursuit of more liberatory sex, and the sharing of one’s body.⁴⁵

Yet some would argue that relationships that are just emotional or sexual should fall under the umbrella of plural relationships. Many polyam people believe that polyamory can include relationships based on love and emotional connection, regardless of sex.⁴⁶ Moving away from sex opens the door to friendships and family relationships, some of which are very emotionally intimate.⁴⁷ Some friends undoubtedly form relationship groups that bear many hallmarks of families.⁴⁸ De-emphasizing sex also makes it possible to include asexuals, who may partner with asexual or non-asexual individuals.⁴⁹

44. See ANAPOL, *supra* note 28, at 3–5; GOLDFEDER, *supra* note 16, at 65 (conceiving of plural marriage as a family system with a sexual element); Marcia Munson & Judith P. Stelboun, *Introduction*, in THE LESBIAN POLYAMORY READER: OPEN RELATIONSHIPS, NON-MONOGAMY, AND CASUAL SEX 1, 1 (Marcia Munson & Judith P. Stelboun eds., 1999); Emens, *supra* note 19, at 305–06.

45. See, e.g., SHEFF, *supra* note 27, at 23–25 (discussing the shared commitments of members of the polyam community, all of which revolve around sexual openness); Ani Ritchie & Meg Barker, *There Aren’t Words for What We Do or How We Feel So We Have to Make Them Up’: Constructing Polyamorous Languages in a Culture of Compulsory Monogamy*, 9 SEXUALITIES 584, 585 (2006) (describing the creation of a language to capture the polyamorous experience, much of which revolves around sex and sexual identity).

46. See Christian Klesse, *Polyamory and Its ‘Others’: Contesting the Terms of Non-Monogamy*, 9 SEXUALITIES 565, 567 (2006) (reporting results from an interview study); Emens, *supra* note 19, at 304–05.

47. See Klesse, *supra* note 46, at 568–69. This view is consistent with the work of legal scholars who have argued that the law should recognize relationships based on friendship, pushing back forcefully against the assumption that the only meaningful relationship is a sexual one with a single individual. Laura Rosenbury has argued that laws governing family leave, hospital visitation, and inheritance should expand to encompass friendships, and has further argued against restricting such recognition to a single designated or “best” friend. See Laura A. Rosenbury, *Friends With Benefits?*, 106 MICH. L. REV. 189, 204, 229–31 (2007); see also Elizabeth Brake, *Equality and Non-Hierarchy in Marriage: What Do Feminists Really Want?*, in AFTER MARRIAGE: RETHINKING MARITAL RELATIONSHIPS 100, 120 (Elizabeth Brake ed., 2016) (arguing that modeling marriage-like law on friendship would entail “supports for caring relationships, with no assumptions about sexual interaction, procreation, number of parties, reciprocity of all legal rights, shared totality of lives, or union”).

48. Cf. Danielle Braff, *From Best Friends to Platonic Spouses*, N.Y. TIMES (May 7, 2021), <https://www.nytimes.com/2021/05/01/fashion/weddings/from-best-friends-to-platonic-spouses.html> [<https://perma.cc/KMK7-7M7B>] (describing marriages between platonic spouses but looking at family formation between friends more broadly).

49. See, e.g., Angela Chen, *The Rise of the 3-Parent Family*, ATLANTIC (Sept. 24, 2020, 12:40 PM), <https://www.theatlantic.com/family/archive/2020/09/how-build-three-parent-family-david-jay>

Exemplifying this capacious view, Martha Ertman uses the term “polyamory” to describe “combinations of people who organize their intimate lives together,” such as a lesbian couple who have a child with a known gay sperm donor, all of whom cooperate in the child’s upbringing.⁵⁰ In Ertman’s example, the man’s lack of a sexual relationship with the lesbian couple does not prevent the adults from loving each other and uniting in their love of the child.⁵¹ This broader definition of polyamory is also consistent with the impulse shared by many in the polyam community to reject “strict definitions . . . line-drawing, and exclusion,” in favor of self-identification and inclusiveness.⁵² Under this broader view, plural relationships could comprise friendships or familial relationships.

Yet some push back against the idea of recognizing non-sexual relationships. For them, removing sex from the picture undermines the polyam label’s “signaling function,” meaning that the polyams cannot rely on the label to identify potential sexual partners.⁵³ Downplaying sex also sanitizes polyamory of its transgressive aspects.⁵⁴

There are also those who object to characterizing purely sexual relationships as polyamorous or plural. Two examples of such behavior include “swinging”—engaging in casual sex with multiple partners—and what has come to be called “monogamish” behavior in the gay community, the idea that partners in mostly monogamous relationships will occasionally fulfill their sexual desires with people outside the relationship.⁵⁵ Some members of the polyam movement have argued that it is the openness to multiple sexual *and* romantic partners that defines polyamory.⁵⁶ They place random, non-

/616421 [https://perma.cc/LE6N-CKBK] (profiling David Jay, an asexual visibility advocate in a three-parent co-parenting relationship).

50. Ertman, *supra* note 16, at 124.

51. *See id.* The critical aspect, to Ertman, is that the three adults are “organizing lives together.” *Id.*

52. Emens, *supra* note 19, at 305; *see also* Aviram, *supra* note 33, at 273 (“[P]olyamorous people are less likely to adopt common labels that encompass the entire community, because of their strong preference for individualism, pluralism and fluidity.”).

53. *See* Emens, *supra* note 19, at 305–06.

54. *See id.* at 306. After all, most people would concede that there is nothing wrong with having multiple close friends, close family members, or blended family arrangements.

55. *See* Mark Oppenheimer, *Married, With Infidelities*, N.Y. TIMES (June 30, 2011), https://www.nytimes.com/2011/07/03/magazine/infidelity-will-keep-us-together.html [https://perma.cc/K2NJ-CTXP] (interviewing Dan Savage, the sex advice columnist who is credited with coining the term “monogamish”). As described by Savage, monogamish relationships do not typically involve emotional, or long-term relationships with an additional partner, but are more like a safety valve to temporarily satiate sexual desire while preserving the primary relationship. *See id.*; *see also* Edward Stein, *Adultery, Infidelity, and Consensual Non-Monogamy*, 55 WAKE FOREST L. REV. 147, 156, 168 (2020) (noting that monogamish-ness does not necessarily require both partners’ consent and sits uncomfortably with both swinging and polyamory).

56. *See* Klesse, *supra* note 46, at 573–76 (reporting the views of interview subjects who distinguish polyamory from swinging and sexual promiscuity).

intimate, casual sex outside of polyamory and in the broader category of non-monogamy.⁵⁷

To state the obvious, the definitional stakes are significant. Opening the category of plural relationships to groups of platonic friends or swingers would stretch the category substantially. Yet requiring that relationships be both sexual and emotional would exclude many subjectively valued relationships.

2. Asymmetric or Group Relationships

Another important point of variation in plural relationships is whether every member is in a relationship with every other member, or whether members are linked to some, but not all, of the other members. Some call the former “group” relationships,⁵⁸ and the latter “asymmetric” relationships.⁵⁹

In a group relationship, all partners will consider themselves to be in a relationship with the other partners. Three gay men, for instance, may enter into a relationship based on mutual sexual attraction and/or emotional intimacy. A couple comprising at least one bisexual partner could open the relationship to a third person who has sexual relationships with both of the original partners, forming what some call a “polyamorous triad.”⁶⁰ Or the relationship could be a “polyaffective triad,” a cooperative relationship in which all three partners are emotionally but not necessarily sexually connected.⁶¹ A quad involving two primarily heterosexual couples may all be emotionally, if not sexually, involved with each other.⁶²

Asymmetric relationships can also take a variety of forms. A common relationship form is the open couple—partners in a committed relationship who date other people in addition to their primary partner.⁶³ In this arrangement, the additional partners can be considered “secondary” or “tertiary” depending on the extent to which they keep their lives separate or consider the arrangement casual or committed (for instance, by maintaining

57. *See id.*

58. *See* Klein, *supra* note 21, at 48 (using “group marriage” to refer to a situation in which every partner is married to the other); Stein, *supra* note 18, at 1407–08 (same); *see also* GOLDFEDER, *supra* note 16, at 98–99 (using “group” to refer to “all-with-all” partnerships).

59. Diane Klein has observed that in many polygynous relationships, one husband is married to several wives, none of whom consider themselves married to each other. Because different members of the relationship do not share the same number of spouses, the relationship is asymmetric. *See* Klein, *supra* note 21, at 46–47; *see also* Stein, *supra* note 18, at 1407–08 (calling asymmetric marriages “plural marriages”).

60. *See* SHEFF, *supra* note 27, at 12 (noting that a common arrangement is an open couple consisting of a heterosexual man and bisexual woman who search for a “unicorn,” a bisexual woman who will have a sexual relationship with both of them).

61. Sheff provides the example of a woman, Leah, who had a sexual relationship with two heterosexual men, Bjorn and Gene, who considered each other platonic co-husbands. *Id.* at 13.

62. *Id.* at 13–14.

63. *See id.* at 6.

a separate residence).⁶⁴ Another common form is the “V,” in which one person has two partners, neither of whom have a relationship with the other.⁶⁵ In some of these relationships, two of the partners will be legally married.

An extension of the V is a “hub and spoke” relationship in which the central partner has relationships with more than two others.⁶⁶ This is the form that polygyny often takes: a man with multiple wives, none of whom are each other’s wives. Relationships may also take the form of a “line.”⁶⁷ A partners with B, who partners with C, who partners with D.⁶⁸ A has one partner, B. B has two partners, A and C. C has two partners, B and D. And D has one partner, C. Of course, there are various permutations on this basic structure.

The line between group and asymmetric relationships is not always easy to draw. A polygynous relationship in which the women partners care deeply for each other but are not sexually involved, for example, will be asymmetric if sex is required or a group relationship if sex is deemphasized.⁶⁹ Indeed, all the relationship forms can toggle between categories depending on the types of intimacies shared by the partners and the extent to which they are recognized by the law.

3. Commitment and Exclusivity

People in plural relationships hold varying views about exclusivity and commitment. Levels of commitment vary between and within relationships. Within a group relationship, several partners may consider themselves “primary,” forming a stable core around which secondary or tertiary partners revolve. Not all plural relationships necessarily consist of at least one primary relationship: Some prefer to have multiple partners without entering a primary partnership, a practice called “solo polyamory.”⁷⁰ Others engage in

64. See *id.* at 17 (noting that within the polyam community, secondary partners may discuss major life decisions jointly but will rarely have the final say and will often maintain separate residences and finances); Aviram, *supra* note 33, at 269 (noting that while labels such as “primary,” “secondary,” and “tertiary” were not in vogue with her interview subjects, several structured their relationships along those lines, with the primary partners living like a monogamous couple).

65. See SHEFF, *supra* note 27, at 12; Klein, *supra* note 21, at 45.

66. See Klein, *supra* note 21, at 47.

67. See *id.* at 50–52.

68. Emens notes that the term “line marriage” is alternatively used to describe a situation in which a marriage continually adds younger members as older ones die off. See Emens, *supra* note 19, at 308.

69. Cf. GOLDFEDER, *supra* note 16, at 69–70 (noting the existence of multiple accounts of polygyny as cooperative and affectionate). Not all wives in polygynous relationships are cooperative or mutually supportive. The relationships between the wives can sometimes be competitive and adversarial. See Davis, *supra* note 16, at 1992, n.120.

70. See, e.g., Y. Gavriel Ansara, *Challenging Everyday Monogamism: Making the Paradigm Shift from Couple-Centric Bias to Polycule-Centred Practice in Counselling and Psychotherapy*, 8 PSYCHOTHERAPY & COUNSELLING J. AUSTL. (2020), <https://pacja.org.au/2020/12/challenging-everyday-monogamism-making-the-paradigm-shift-from-couple-centric-bias-to-polycule-centred-practice-in-counselling-and-psychotherapy-2> (referring to situations in which a person has no primary partners but

multiple relationships simultaneously while remaining open to finding one or more primary partners.⁷¹

Expectations about exclusivity also vary. Open relationships are non-exclusive by definition. Traditional polygynous relationships are partially non-exclusive: The man maintains non-exclusive relationships with each of his female partners (including potential partners to come) while the women have sex exclusively with their one husband.⁷²

Not all plural relationships are open. Some polyam people, for example, are polyfidelitous: They expect the partners within the relationship to be sexually and/or romantically exclusive.⁷³ These relationships, which are typically group relationships as opposed to asymmetric ones,⁷⁴ attempt to fix and police their borders. A weaker form of polyfidelity may preserve a group relationship while allowing some sexual play in the joints.⁷⁵

A challenge for assessing exclusivity and commitment is that relationships are not always strictly defined, especially within the polyam community,⁷⁶ meaning that entrance and exit can be gradual and ambiguous.⁷⁷ In contrast to marriage law, which prizes delineation,⁷⁸ not all plural relationships are so easily characterized as on or off. People might be friends first, then lovers, then back to friends.⁷⁹ Even relationships that start as legal marriages can transform over time. Researchers Katherine Frank and John DeLamater bring up the example of a married couple, Kira and Kevin, who agreed to open their marriage to casual sexual encounters.⁸⁰ Kira was upset when Kevin developed feelings for one of two women he began dating.⁸¹ As time passed and the couple successfully negotiated those conflicts, both began to date one individual at a time outside their marriage, which Kira and Kevin conceptualize as a kind

maintains a polyamorous orientation or lifestyle); Zachary Zane, *Here's How Solo Poly Compares to Other Kinds of Polyamory*, MEN'S HEALTH (Jan. 12, 2022), <https://www.menshealth.com/sex-women/a38736485/solo-poly> [<https://perma.cc/CEV2-V5UU>].

71. See SHEFF, *supra* note 27, at 6 (describing “free agents” and “seekers”).

72. See Strassberg, *supra* note 14, at 441, n.11.

73. See SHEFF, *supra* note 27, at 3–4 (defining polyfidelity); ANAPOL, *supra* note 28, at 5–6 (associating these types of commitments with “old paradigm” monogamy); see also Frank & DeLamater, *supra* note 39, at 18–19 (featuring and discussing a polyfidelitous relationship).

74. See SHEFF, *supra* note 27, at 4 (noting that they typically view all partners as family members).

75. See ANAPOL, *supra* note 28, at 5–6.

76. Polygynous marriages have clearer points of entry and exit from the partners' perspectives.

77. See Aviram, *supra* note 33, at 272 (noting a general hesitation among poly interview subjects to essentialize identities or buy into rigid identity categories); Klesse, *supra* note 46, at 570 (noting the existence of a “fluid continuum” between relationship forms like friendships, partnerships, and sexual relationships); see also SHEFF, *supra* note 27, at 121.

78. See, e.g., *Stone v. Thompson*, 833 S.E.2d 266, 269–70 (S.C. 2019) (emphasizing the need for bright lines and predictability in marriage).

79. See Klesse, *supra* note 46, at 570.

80. See Frank & DeLamater, *supra* note 39, at 18–19.

81. *Id.* at 18.

of monogamous, “one person at a time” non-monogamy.⁸² This example shows that attitudes about exclusivity and commitment may be in flux.

4. Forms of Interdependency

Partners can intertwine their lives in many ways. They may cohabit, making them more likely to benefit from economies of scale and share in domestic labor.⁸³ As discussed above, primary partners will often live together, whereas secondary and tertiary partners may not.⁸⁴ Living arrangements may reinforce these informal classifications: One woman in a polyamorous quad opined that she and her primary partner, who were cohabiting, would be less likely to think of the other couple with whom they were romantically involved as “secondary” if they all shared the same residence.⁸⁵ Polygynous relationships typically involve all of the partners sharing a single household. It is important to note that while partners may live under one roof, they can still organize their living arrangements in various ways. Someone living in an in-law unit and paying rent is differently situated from a person who is fully integrated into the household.

Partners also differ in the extent to which they intermingle their finances or make joint investments. For instance, some partners will pool income.⁸⁶ Others will jointly purchase property.⁸⁷ These arrangements can be complex: Hadar Aviram describes the experience of an opposite-sex couple who purchased a house together, only to add a third partner, who paid for the construction of an additional floor on their now-shared house.⁸⁸ The partners executed wills leaving their property to the two others in equal share.⁸⁹

Some in plural relationships will attempt to preserve financial separation. Aviram interviews several people who have insisted on keeping their finances separate to preserve their financial independence.⁹⁰ In one interview, a woman in her early forties with two children, who had lived together with a married couple for five years, did not wish to formalize their financial

82. See *id.* Interestingly, Kira’s boyfriend at the time of the study was monogamous: he only dated her. See *id.*

83. See, e.g., SHEFF, *supra* note 27, at 196–97.

84. See, e.g., *id.* at 17–18; see also *id.* at 6 (describing an open couple whose partners did not cohabit with them, save for one exception). But see Emens, *supra* note 19, at 312–14 (describing a group of four, two of whom live together, the third who lives in a different unit in the same building, and the fourth who lives in the suburbs, all of whom consider themselves to be integral participants in the relationship).

85. SHEFF, *supra* note 27, at 17–18.

86. See, e.g., *id.* at 8–9, 196–97 (describing the Campo family’s efforts at pooling resources).

87. See Aviram, *supra* note 33, at 268–69 (describing the property arrangements of Steve, Jessica, and Doug).

88. See *id.*

89. *Id.*

90. *Id.* at 269.

relationship despite her “less privileged background,” saying, “I feel better if I don’t owe anyone anything.”⁹¹

As this example illustrates, many plural relationships involve formally married people. A committed triad that starts as an open marriage, for instance, involves two partners with significantly different legal rights than the odd person out.⁹² Relationships like quads or moresomes often form when several married couples come together to form a single unit.⁹³ The legally married spouses enjoy a set of rights and obligations that does not extend to their other partners.

Individuals in plural relationships often have children.⁹⁴ The children may be brought into the family unit from previous relationships or have been born to two of the partners within the relationship.⁹⁵ In many ways, the co-raising of children by multiple adults is nothing new in our society. Children of divorced or never-married monogamous parents may shuttle between households, have multiple stepparents, or live with multiple adults over the course of their childhood.⁹⁶ A child whose heterosexual parents divorce and then marry other people will have up to four adults in parental roles: a father, mother, stepfather, and stepmother. The relationship between the stepparents and the child might be close or casual.⁹⁷ Any subsequent breakups and new partnerships will only increase the number of adults in the picture for the

91. *Id.* (internal quotation marks omitted).

92. *See, e.g.*, Emens, *supra* note 19, at 312–14 (describing a triad in which the original couple eventually got legally married “to get health insurance”) (internal quotation marks omitted).

93. *See, e.g.*, SHEFF, *supra* note 27, at 182–83 (describing a quad that began as a sextet of three married couples and morphed over 20 years).

94. *See* ANAPOL, *supra* note 28, at 129 (noting that about half of those surveyed in the polyam community were raising children).

95. *See, e.g.*, Solomon, *supra* note 34. There are also instances in which adults in a group relationship will collectively decide to bring children into their family. *See, e.g.*, Faith Karimi, *Three Dads, a Baby and the Legal Battle to Get Their Names Added to a Birth Certificate*, CNN (Mar. 6, 2021, 12:51 PM), <https://www.cnn.com/2021/03/06/us/throuple-three-dads-and-baby-trnd/index.html> [<https://perma.cc/8W2M-8YNU>] (describing a gay male throuple who became legal parents of two children through surrogacy).

96. *See* Margaret M. Mahoney, *Stepparents as Third Parties in Relation to Their Stepchildren*, 40 *FAM. L.Q.* 81, 82–84 (2006) (discussing stepparenthood); *see also id.* at 82–83 (noting that between 3.3 and 4.9 million children were living in households headed by stepparents based on data from the 2000 census and a 1996 Census Bureau survey); *see also* Marilyn Coleman, Lawrence Ganong, Luke Russell & Nick Frye-Cox, *Stepchildren’s Views About Former Step-Relationships Following Stepfamily Dissolution*, 77 *J. MARRIAGE & FAM.* 775, 775 (2015) (citing estimates that one third of U.S. children will live with a stepparent during childhood).

97. *See* Coleman et al., *supra* note 96, at 775; Mary Ann Mason & Nicole Zayac, *Rethinking Stepparent Rights: Has the ALI Found a Better Definition?*, 36 *FAM. L.Q.* 227, 229 (2002) (noting that “the roles stepparents play in the lives of their stepchildren differ greatly from family to family, even among residential stepparents”).

child.⁹⁸ And these new relationships all come with the possibility of stepsiblings or half-siblings.⁹⁹

These same dynamics exist when adults in plural relationships have children, although there are some notable patterns specific to polyam families.¹⁰⁰ Studies report that children frequently view the adults as friends, older siblings, or aunts and uncles rather than as parent figures.¹⁰¹ Parents in plural relationships discuss family formation issues openly with their children.¹⁰² They also often favor raising all the children, even from more transitory adult relationships, as part of a single family of co-siblings.¹⁰³ The adults commonly pool their time and other resources, sharing childrearing duties, providing attention and affection, and serving as role models.¹⁰⁴ In the polyam community, it is common for former adult partners to continue caring for their former partners' children.¹⁰⁵

* * *

A wide range of relationships plausibly fall under the umbrella of a plural relationship status. Any single package of rights and obligations—such as marriage—will fit uncomfortably with many plural relationship configurations. This fact complicates any attempt to transpose marital rights and obligations to people in plural relationships as lawmakers did when creating domestic partnerships and civil unions for same-sex couples.

Here lies the dilemma for advocates of a plural relationship status. A limited set of rights will leave people without many welcomed protections. Yet an overinclusive set of rights comes with its own set of risks, imposing obligations that might harm the partners or deter them from voluntarily joining the status in the first place.

98. See Coleman et al., *supra* note 96, at 776, 786 (noting the likelihood that stepfamilies will break up and lead to the formation of new stepfamilies and analyzing the impacts).

99. See Katya Ivanova & Nicoletta Balbo, *Cementing the Stepfamily? Biological and Stepparents' Relationship Satisfaction After the Birth of a Common Child in Stepfamilies*, 40 J. FAM. ISSUES 1346, 1347–48 (2019) (discussing the birth of common children between parents in stepfamilies and its impact on the parents' relationship).

100. See ANAPOL, *supra* note 28, at 130–31 (noting the positive and negative impacts of multiple adult figures and transitions on children of polyam parents).

101. See SHEFF, *supra* note 27, at 159. The factors influencing whether children see adults as parent figures include their biological relatedness, the child's age at relationship onset, whether the child and adult share living space, and duration of the relationship. See *id.* at 158–59.

102. See ANAPOL, *supra* note 28, at 140–47 (discussing case studies); SHEFF, *supra* note 27, at 163.

103. See, e.g., Solomon, *supra* note 34 (describing Eric, Tamara, their various partners, and how their children and partners' children think of each other as siblings).

104. See SHEFF, *supra* note 27, at 201–04, 209–13; see also Karimi, *supra* note 95 (describing the childrearing and household duties shared by Ian, Alan, and Jeremy).

105. See SHEFF, *supra* note 27, at 209–13 (describing the phenomenon of “otherfathering”).

II. UNIFYING EXPERIENCES

The previous Part provided a comprehensive description of plural relationships, highlighting their diversity. This Part focuses on their similarities. It asks what unites people across plural relationship types, with an eye toward identifying inclusive legal interventions that will come close to being universally relevant. One obvious answer is that people in plural relationships face stigmatization and discrimination. Additionally, like other families, they experience vulnerability when faced with circumstances like illness or economic displacement. They also navigate interpersonal conflicts and negotiations that can be made more complicated because of the relational dynamics that follow from having multiple partners, as well as the impact of partners' arrivals and departures on their respective interests. Although these challenges impact relationships differently, few plural relationships will escape them completely.

A. STIGMA AND DISCRIMINATION

Despite widespread nonmonogamous behavior and even more widely held nonmonogamous desire, monogamy is held out as the societal norm.¹⁰⁶ It is highly valued, bringing with it significant social rewards.¹⁰⁷ Consensual nonmonogamy,¹⁰⁸ by contrast, is stigmatized.

106. Elizabeth Emens has argued that there is a certain universality to “the desire to be sexually involved with more than one person.” Emens, *supra* note 19, at 342. Studies consistently report that approximately one quarter of married men, and a slightly lower percentage of married women, have committed adultery at some point in their lives. See Eric Anderson, *Five Myths About Cheating*, WASH. POST (Feb. 13, 2012), https://www.washingtonpost.com/opinions/five-myths-about-cheating/2012/02/08/gIQANGdaBR_story.html [<https://perma.cc/782N-FWKN>] (noting that Alfred Kinsey found, in a post–World War II study, that 50 percent of husbands and 26 percent of wives committed adultery, and that more recent studies reported rates between 25 percent and 72 percent for married men); Emens, *supra* note 19, at 299 (citing, *inter alia*, the National Health and Social Life survey, which reported rates of 35 percent for married men and 20 percent for married women); Stein, *supra* note 55, at 165–67 (noting that studies with large, national probability sampling produce results in the 11 to 25 percent range for men and 11 to 15 percent range for women, but also noting that there might be under-reporting).

107. See Terri D. Conley, Amy C. Moors, Jes L. Matsick & Ali Ziegler, *The Fewer the Merrier?: Assessing Stigma Surrounding Consensually Non-Monogamous Romantic Relationships*, 13 ANALYSES SOC. ISSUES & PUB. POL'Y 1, 5–6, (2013) (noting that monogamy is accompanied by a “halo effect,” an often-unwarranted positive impression extending beyond monogamy to other traits).

108. There are a growing number of empirical studies of perceptions of people in nonmonogamous relationships. Most use a broad definition, for example: “[P]olyamory is the practice, desire, or acceptance of having more than one intimate relationship at a time with the knowledge and consent of everyone involved.” Sarah M. Johnson, Traci A. Giuliano, Jordan R. Herselman & Kevin T. Hutzler, *Development of a Brief Measure of Attitudes Towards Polyamory*, 6 PSYCH. & SEXUALITY 325, 328 (2015) (internal quotation marks omitted). One study has differentiated between swinging (casual sex), open relationships (sex without love without a partner’s participation), and polyamory (loving more than one person at a time). See generally Jes L. Matsick, Terri D. Conley, Ali Ziegler, Amy C. Moors & Jennifer D. Rubin, *Love and Sex: Polyamorous Relationships Are Perceived More Favourably Than Swinging and Open Relationships*, 5 PSYCH. & SEXUALITY 339 (2014) (comparing and contrasting public perception of polyamorous relationships with “strictly sexual,” multi-partner relationships).

The concept of stigma refers to a discrediting attribute or personal characteristic that spoils or taints the stigmatized person in the eyes of society.¹⁰⁹ Stigmatized persons are regarded by society as “not quite human”¹¹⁰ and “unequal in some respect.”¹¹¹ Although the original Greek meaning of the term “stigma” refers to a physical sign either cut or burnt into the body “expos[ing] something unusual and bad about the moral status of the signifier,”¹¹² what ultimately matters is that the stigmatized identity is socially evident.¹¹³ There is little dispute that invisible characteristics, such as homosexuality, mental illness, or adherence to certain religious faiths, have been the subject of opprobrium and disdain.¹¹⁴ Social scientists and legal scholars have applied the concept to disfavored behaviors as well.¹¹⁵

Studies show that the public holds negative perceptions about consensual nonmonogamy. Polyamorous people are thought to be immoral and untrustworthy.¹¹⁶ They are perceived, wrongly, to practice unsafe sex and to be less satisfied in their relationships.¹¹⁷ They are also negatively associated with several arbitrary traits: They are perceived as less caring, less satisfied with life, less kind, less successful in their careers, and even less likely to recycle regularly.¹¹⁸

109. See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 1–5 (1963); see also SHEFF, *supra* note 27, at 217 (describing the sociological definition of stigma).

110. GOFFMAN, *supra* note 109, at 5.

111. Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 6 (1977) (arguing that stigma is antithetical to equal citizenship).

112. GOFFMAN, *supra* note 109, at 1. For sources applying the concept of stigma to visible manifestations of race and disability, see generally, e.g., Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397 (2000) (disability); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004) (race).

113. 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, 497, n.43 (1998).

114. See *id.* at 520–21.

115. For sources applying the concept to disfavored behaviors such as polyamory, see, e.g., SHEFF, *supra* note 27, at 217; Conley et al., *supra* note 107, at 5; Brenda Major & Laurie T. O’Brien, *The Social Psychology of Stigma*, 56 ANN. REV. PSYCH. 393, 395 (2005); cf. Brenda Major & Richard H. Gramzow, *Abortion as Stigma: Cognitive and Emotional Implications of Concealment*, 77 J. PERSONALITY & SOC. PSYCH. 735, 735–37 (1999) (discussing the stigma of abortion).

116. See Kevin T. Hutzler, Traci A. Giuliano, Jordan R. Herselman & Sarah M. Johnson, *Three’s a Crowd: Public Awareness and (Mis)perceptions of Polyamory*, 7 PSYCH. & SEXUALITY 69, 80 (2016); see also Conley et al., *supra* note 107, at 18 (finding that people were likely to find polyamorous relationships unacceptable).

117. See Hutzler et al., *supra* note 116, at 80; see also Conley et al., *supra* note 107, at 18 (identifying public perceptions that polyamorous relationships are more sexually risky and less satisfying); see also Matsick et al., *supra* note 108, at 344–46 (confirming these negative attitudes but finding that swinging relationships fared much worse than polyamorous relationships). To be fair, study participants did associate polyamorous people with some positive attributes like better communication skills and greater physical attractiveness. See Hutzler et al., *supra* note 116, at 80.

118. See Conley et al., *supra* note 107, at 22; see also generally Amy C. Moors, Jes L. Matsick, Ali Ziegler, Jennifer D. Rubin & Terri D. Conley, *Stigma Toward Individuals Engaged in Consensual*

Anecdotal accounts are rife with instances of social rejection.¹¹⁹ Nearly four in ten polyamorous people in therapy will not disclose their relationship status for fear of rejection or uncomfortable conversations.¹²⁰ As evidence of how far the taint of nonmonogamy extends, academics report dismissive attitudes towards studies of nonmonogamous relationships, difficulty getting research projects approved by Institutional Research Boards, and difficulty getting studies of polyamory published in mainstream journals.¹²¹

Stigma causes a variety of harms to stigmatized individuals. The very fact that people in plural relationships can evade detection brings its own distinct challenges. The ability to “pass” as a member of the dominant group creates a pressure to do so. Passing, however, imposes several harms. One, as Kenji Yoshino has argued, “is the alienation that the passer feels from both the nonstigmatized group into which he has passed and the stigmatized group from which he has passed. Passers are uniquely isolated. The support they get from the nonstigmatized group is not support they receive for their real stigmatized selves.”¹²² By infiltrating the in-group, they open themselves up to expressions of disdain for their stigmatized identities.¹²³

Passing is also a lot of work.¹²⁴ Studies of lesbians and gay men who attempt to pass as straight reveal the work the subjects put into constantly deciding whether or whom to tell about their sexual orientation, monitoring their speech so as not to reveal their feelings, and maintaining a professional distance from others.¹²⁵ In addition to directly affecting their public lives, the burden of these efforts spills over into their private lives as well.¹²⁶

Nonmonogamy: Robust and Worthy of Additional Research, 13 ANALYSES SOC. ISSUES & PUB. POL'Y 52 (2013) (defending the findings of Conley et al., *supra* note 107).

119. See, e.g., SHEFF, *supra* note 27, at 124–25, 218–19.

120. See ANAPOL, *supra* note 28, at 170.

121. See SHEFF, *supra* note 27, at 125; ANAPOL, *supra* note 28, at 172–73.

122. Yoshino, *supra* note 113, at 527 (emphasis omitted).

123. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1711–12 (1993) (describing the author’s grandmother’s experiences passing as a white worker in 1930s Chicago).

124. Yoshino, *supra* note 113, at 527–30; see also Jonathan J. Mohr & Christopher A. Daly, *Sexual Minority Stress and Changes in Relationship Quality in Same-Sex Couples*, 25 J. SOC. & PERS. RELATIONSHIPS 989, 990–91 (2008).

125. See Yoshino, *supra* note 113, at 528; see also David M. Frost et al., *Couple-Level Minority Stress: An Examination of Same-Sex Couples’ Unique Experiences*, 58 J. HEALTH & SOC. BEHAV. 455, 460 (2017) (noting the added work of managing stigmatized identities, ensuring safety in new environments, and more); John E. Pachankis, *The Psychological Implications of Concealing a Stigma: A Cognitive–Affective–Behavioral Model*, 133 PSYCH. BULL. 328, 328, 332–35 (2007) (summarizing the psychological literature on the harms of concealment); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 813 (2002) (noting the effort it takes to maintain the right appearance, suppress the wrong traits, and familiarize oneself with the cultural currency of the dominant group).

126. See Allen J. LeBlanc, David M. Frost & Richard G. Wight, *Minority Stress and Stress Proliferation Among Same-Sex and Other Marginalized Couples*, 77 J. MARRIAGE & FAM. 40, 46–48 (2015) (noting that the same forces that can cause minority stress on an individual level can create relationship-specific forms of stress, such as managing their relational identity or being excluded from social events as a unit).

Passing also exacts a moral toll. As Yoshino says, “[p]assing is not merely a movement from an oppressed position to a privileged one. Rather, it is a movement that would not be possible without deception. To pass is always to trespass; the individual who passes always simultaneously takes on the identity of a liar.”¹²⁷ Studies indicate that people who conceal secrets begin to perceive the concealed information as shameful based on the concealment itself, and then perceive themselves in a more negative light.¹²⁸ Self-denial may lead a person to feel that he has betrayed himself and others with whom he is associated.¹²⁹

Many people in plural relationships conceal those relationships from co-workers, friends, and family. As a result, they experience the demands of passing and must navigate the coming out process¹³⁰ if they choose to disclose their relationships to others.¹³¹

Beyond the risk of social rejection is the threat of discrimination on the basis of relationship status. In a recent study, over 61 percent of a sample of 724 individuals in consensual nonmonogamous relationships reported experiencing at least one form of discrimination related to their relationships, including being demoted or denied a promotion, losing custody of a child, or being stereotyped by a mental health provider due to their practices related to consensual nonmonogamy.¹³² Surveys from 20 and 10 years ago, respectively, report that 43 percent and about 29 percent of polyam people personally experienced discrimination on the basis of plural relationship status.¹³³ Antidiscrimination laws do not clearly prohibit discrimination against people in plural relationships, so people can be fired from their jobs or denied housing for being in a plural relationship.¹³⁴ Parents in polyamorous relationships have

127. Yoshino, *supra* note 113, at 528 (footnote omitted).

128. See Pachankis, *supra* note 125, at 334 (associating concealment with greater emotional distress); Mohr & Daly, *supra* note 124, at 990 (noting that concealment threatens one’s sense of self-integrity).

129. See Pachankis, *supra* note 125, at 337 (showing that working-class students at an elite law school felt as though they were betraying their families and social class by concealing their working-class origins).

130. People in plural relationships must decide whether to disclose their relationships to friends, family, co-workers, and children. See, e.g., SHEFF, *supra* note 27, at 140–48, 165–72 (describing the process of parents coming out to children and children revealing their parents’ relationship to their peers, as well as telling family and friends); Elisabeth A. Sheff, *Coming Out as Polyamorous, Part I*, PSYCH. TODAY (Mar. 10, 2015), <https://www.psychologytoday.com/us/blog/the-polyamorists-next-door/201503/coming-out-polyamorous-part-i> [<https://perma.cc/XgNN-R7Eg>] (same).

131. See ANAPOL, *supra* note 28, at 159–60, 167–68; see also SHEFF, *supra* note 27, at 118–19.

132. Ryan G. Witherspoon & Peter S. Theodore, *Exploring Minority Stress and Resilience in a Polyamorous Sample*, 50 ARCHIVES SEXUAL BEHAV. 1367, 1373, 1378 (2021).

133. See Hutzler, *supra* note 116, at 70 (noting that the 28.5 percent number was over double the rate of discrimination reported by African Americans).

134. See *Frequently Asked Questions (FAQs)*, POLYAMORY LEGAL ADVOC. COAL., <https://polyamorylegal.org/faqs> [<https://perma.cc/VSB6-WRAC>]; see also Solomon, *supra* note 34 (relating the story of a polyamorous triad whose members fear job loss if they come out).

lost custody of their children based on judgments about their relationships. One court removed a child from a polyamorous triad after the child's paternal grandmother petitioned for custody based on the triad's "immoral lifestyle."¹³⁵ The trial court rejected the testimony of four court-appointed experts that the child had not been negatively affected by the mother's relationship, pointing "to . . . concern[s] with the moral upbringing of the child."¹³⁶ Sometimes, polyamorous parents prevail in these disputes.¹³⁷ Regardless of the actual likelihood that they will lose custody of their children, parents in plural relationships are aware, and fearful, of the threat.¹³⁸

In addition to being singled out for negative treatment because of their relationship status, people in plural relationships are denied many of the benefits that those in sanctioned relationships take for granted. The same benefits that same-sex couples sued to obtain when they were denied the right to marry are denied to people in plural relationships, from property rights and eligibility for Social Security benefits¹³⁹, to private benefits like country club memberships,¹⁴⁰ and family leave.¹⁴¹ Stigma props up this differential treatment by marking plural relationships as unworthy of respect.¹⁴² The discrimination in turn reinforces the stigma by limiting access to important life domains.¹⁴³

135. See Emens, *supra* note 19, at 310–12 (describing April Divilbiss's custody dispute); see also ANAPOL, *supra* note 28, at 147–48 (describing the same); Kimberly Rhoten, Elisabeth Sheff & Jonathan D. Lane, *U.S. Family Law Along the Slippery Slope: The Limits of a Sexual Rights Strategy for Polyamorous Parents*, 0 SEXUALITIES 1, 8 (2021).

136. Emens, *supra* note 19, at 311 (quoting *In the Matter of A.M.*, No. K1719 (Juv. Ct., Memphis and Shelby County, Tenn., Apr. 16, 1999) (decision on file with Emens)).

137. See, e.g., *V.B. v. J.E.B.*, 55 A.3d 1193, 1205–07 (Pa. Super. Ct. 2012).

138. See, e.g., ANAPOL, *supra* note 28, at 171–72 (describing a student's recollection of his mom's fear that discovery of her relationship would lead the state to take away her child); *Frequently Asked Questions (FAQs)*, *supra* note 134 (noting the vulnerability to custody challenges); Solomon, *supra* note 34 ("Members of Julie's family have made it clear that, if she dies, they will demand custody of [her] daughter . . .").

139. See *Obergefell v. Hodges*, 576 U.S. 644, 669–70 (2015); Solomon, *supra* note 34 (discussing benefits that come with marriage that polyamorous families cannot access as readily, such as health and tax opportunities).

140. See, e.g., *Koebke v. Bernardo Heights Country Club*, 115 P.3d 1212, 1214–17 (Cal. 2005) (involving the denial of country club family privileges to domestic partners).

141. See, e.g., Family and Medical Leave Act, 29 U.S.C. § 2612(a)(1) (1993) (restricting leave to spouses).

142. Cf. Karst, *supra* note 111, at 6–8 (describing the personal effects of stigmas as they relate to equal citizenship).

143. Major & O'Brien, *supra* note 115, at 396.

B. VULNERABILITY

All people are vulnerable to tragedies such as serious illness, job loss, accidents, violence, and, ultimately, death.¹⁴⁴ People in relationships are affected when these tragedies befall their partners.¹⁴⁵ In this way, people in plural relationships are not unique. Yet it bears mentioning that people in plural relationships will experience many of the same harms as people in dyadic relationships. Of course, the type and severity of these effects will differ based on the types of interdependencies created by the partners, whether financial, emotional, or physically proximate, as well as their baseline level of financial vulnerability. If people in the polyam community are wealthier and have higher levels of education than people in other types of plural relationships, for example, many of these impacts could be less severe for them.¹⁴⁶ But the nature of intimate relationships means that partners cannot completely avoid these ill effects, as this Section will illustrate.

1. Job Loss

Imagine that a partner loses her job, either because she was fired for being in a plural relationship or for a more mundane reason such as a workplace closure. If she and her other partners pool income and expenditures, the loss of income will jeopardize the family to the extent they depend on her income to make ends meet. They may struggle to pay rent or a mortgage or have to deplete their savings to cover their costs.¹⁴⁷ Even if the partners split expenses rather than pool resources,¹⁴⁸ the inability of one partner to pay her share will

144. See Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 8–10 (2008) (noting that vulnerability flows from our human embodiment).

145. Fineman notes that “vulnerability . . . [is related] to inevitable dependency,” which she characterizes as “universal . . . [but] episodic” in contrast to vulnerability’s constancy. See *id.* at 9 n.25.

146. See *supra* notes 33, 40.

147. See, e.g., Conor Dougherty, *Pandemic’s Toll on Housing: Falling Behind, Doubling Up*, N.Y. TIMES (Sept. 10, 2021), <https://www.nytimes.com/2021/02/06/business/economy/housing-in-security.html> [<https://perma.cc/D6A4-23S3>] (noting that people behind on rent or mortgage payments take out loans and rack up debt); Michael Kolomatsky, *How Has the Pandemic Affected Rent and Mortgage Payments?*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/real-estate/missed-rent-and-mortgage-payments-coronavirus.html> [<https://perma.cc/DMH7-B4A5>] (noting that the 22 million American jobs lost during the first two months of the COVID-19 pandemic led to a substantial increase in the nonpayment of rent).

148. Pooling is thought to create greater financial interdependence than splitting. See, e.g., Fenaba R. Addo & Sharon Sassler, *Financial Arrangements and Relationship Quality in Low-Income Couples*, 59 FAM. RELS. 408, 410–11 (2010); June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 61–69 (2016) (showing that courts value the degree to which cohabitants commingle their funds); Carolyn Vogler, *Cohabiting Couples: Rethinking Money in the Household at the Beginning of the Twenty First Century*, 53 SOC. REV. 1, 18 (2005).

place strain on the remaining partners, who may have to cover her costs to avoid losing their residence or defaulting on obligations.¹⁴⁹

Beyond financial vulnerability, job loss results in psychological harm to partners as well as the worker herself. A study of the effects of job loss on spouses and cohabiting partners found that their life satisfaction decreased significantly.¹⁵⁰ Importantly, these losses were demonstrated even separate from income loss.¹⁵¹ In other words, while one might certainly expect cohabiting or financially commingled partners to experience decreased life satisfaction based on their financial vulnerability, the negative effects may exist even where the relationship is emotional and not financial. Adverse psychological impacts are perhaps even more likely if the working partner is terminated for a discriminatory reason. In that scenario, partners may be called upon to provide emotional support or perform duties that the terminated partner is unable to perform because of her victimization, both of which constitute additional burdens.¹⁵² That the partners share the targeted characteristic will make the termination more difficult to bear.

2. Accidents and Illness

Accidents or illness can have devastating effects on the other partners. Medical expenses are often significant and are a leading cause of bankruptcy filings.¹⁵³ And, as Congress noted when it enacted the Family and Medical

149. Typically, the loss of a job also jeopardizes the family's health care. *See generally* Sumit D. Agarwal & Benjamin D. Sommers, *Insurance Coverage After Job Loss—The Importance of the ACA During the Covid-Associated Recession*, 383 NEW ENG. J. MED. 1603 (2020) (discussing the impact of COVID-19 on the ACA and other government insurance-related programs). This outcome is somewhat less likely for partners in plural relationships given that employers usually do not provide health benefits to nonmarital partners and, when they do, likely restrict those benefits to one other person. *See* Kaiponanea T. Matsumura, *Beyond Property: The Other Legal Consequences of Informal Relationships*, 51 ARIZ. ST. L.J. 1325, 1339 (2019) [hereinafter Matsumura, *Beyond Property*] (showing that approximately 40 percent of employers now offer insurance benefits to a worker's nonmarital partner). Yet one of our hypothetical worker's partners may be covered under her employer-provided insurance plan.

150. *See* Milena Nikolova & Sinem H. Ayhan, *Your Spouse Is Fired! How Much Do You Care?*, 32 J. POPULATION ECON. 799, 808 (2019) (finding a decrease in life satisfaction for both men and women whose partners lost their jobs).

151. *See id.* at 811 (controlling for income, disposable income, and other financial resources). Some studies have found negative mental health consequences for partners following spousal job loss, but those results are more mixed. *See, e.g.*, Melisa Bubonya, Deborah A. Cobb-Clark & Mark Wooden, *Job Loss and the Mental Health of Spouses and Adolescent Children*, 6 IZA J. LAB. ECON. 1, 19 (2017) (reporting that husbands' mental health does not deteriorate when their wives involuntarily lose a job and that wives suffer mental health effects in a statistically significant way only if their husbands' job loss is sustained).

152. *See* Zachary A. Kramer, *After Work*, 95 CALIF. L. REV. 627, 640–41 (2007) (discussing harms to partners as a result of workplace discrimination).

153. *See* Daniel A. Austin, *Medical Debt as a Cause of Consumer Bankruptcy*, 67 ME. L. REV. 1, 21 (2014); *see also* TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* 145 (2000).

Leave Act of 1993, serious illness affects a person's ability to work, which, if not protected, leads to job loss and the consequences that flow therefrom, including financial vulnerability and the risk of physical displacement.¹⁵⁴

Even if the partners do not cohabit or commingle their funds, they might attempt to defray medical costs or provide caregiving rather than sitting on their hands. Caring for seriously ill family members might require tending to the ill person's physical discomfort, maintaining an upbeat atmosphere, and serving as a conduit between medical professionals and patients.¹⁵⁵ These tasks take an emotional toll on caregivers, commonly leading to worries that they are inadequate and neglectful, or to feelings of resentment, all of which spawn more guilt.¹⁵⁶ Caregivers often experience stress and exhaustion as a result.¹⁵⁷

Separate from caregiving, partners may experience emotional harm and stress by bearing witness to their partners' ill health or injuries. Studies show that "sudden illness[es] or accident[s] may propel a family into crisis, dramatically affecting the maintenance of the marital relationship and the family system."¹⁵⁸ These events cause "emotional strain, physical demands, uncertainty, fear of the patient's death, altered roles and lifestyles . . . existential and sexual concerns," and more.¹⁵⁹

Clearly, partners with a deep emotional connection are more likely to be affected by their partner's suffering than partners who have a less emotionally intimate relationship. That does not mean, however, that partners in a primarily sexual relationship escape harm when their partners are sick or injured. Studies indicate that "an overall climate of positivity, playfulness, and responsiveness in a relationship facilitates adaptive responses to everyday relationship stressors, making it easier to 'ride out' periods of strain."¹⁶⁰ A climate of positivity, as well as healthy sexual activity, can occur in relationships that are primarily sexual. Sex itself is correlated with better physical health.¹⁶¹ In addition to providing physical pleasure, sex fulfills social needs and promotes

154. S. REP. NO. 103-3, at 11-12 (1993), as reprinted in 1993 U.S.C.C.A.N. 3, 13-14.

155. See Bonnie Teschendorf et al., *Caregiver Role Stress: When Families Become Providers*, 14 CANCER CONTROL 183, 185 (2007).

156. *Id.* at 185-86.

157. See *id.*; cf. Michael J. Poulin et al., *Does a Helping Hand Mean a Heavy Heart? Helping Behavior and Well-Being Among Spouse Caregivers*, 25 PSYCH. & AGING 108, 112-13 (2010) (noting that while studies repeatedly confirm the negative impacts of caregiving on caregiver well-being, active caregiving can have positive effects when not counterbalanced with other forms of caregiving).

158. Kathleen Ell, *Social Networks, Social Support and Coping with Serious Illness: The Family Connection*, 42 SOC. SCI. & MED. 173, 173 (1996).

159. *Id.*

160. Lisa M. Diamond & David M. Huebner, *Is Good Sex Good for You? Rethinking Sexuality and Health*, 6 SOC. & PERSONALITY PSYCH. COMPASS 54, 60 (2012).

161. See *id.* at 56-57 (reviewing studies of the health effects of sex). *But see id.* at 61 (noting that these benefits might not attach when sex is not mutually satisfactory).

intimacy and bonding, all of which contribute to a person's overall well-being.¹⁶² Both can be affected by accidents or illness.

3. Death

The death of a partner causes various disruptions. For partners who pool their finances or cohabit, the loss of income can place the family finances in jeopardy. Even for those who do not, the loss of a loved one (or lover) will likely be emotionally disturbing. For traditional families, the law steps in, compensating family members for deaths caused by third parties,¹⁶³ extending Social Security survivors' benefits to family members presumably dependent on the deceased wage earner's support,¹⁶⁴ and providing default inheritance rules for people without estate plans. People in plural relationships lack these legal protections.

Even if they do not otherwise commingle their finances, cohabiting partners are vulnerable to various hardships. If a lease is in the deceased partner's name, the surviving partners may face eviction.¹⁶⁵ If rents rise in the area, they may not be able to negotiate a favorable lease for the residence in which they lived or a comparable residence in the immediate vicinity.¹⁶⁶ Relocation not only involves moving expenses but can also disrupt community and family ties.¹⁶⁷ These burdens likely compound feelings of personal loss.

Whereas one cannot necessarily presume from the existence of a plural relationship alone that surviving partners will suffer financially from the death of a partner, it is safe to assume that a greater portion will suffer emotionally.¹⁶⁸

162. See, e.g., Susan Frelich Appleton & Susan Ekberg Stiritz, *The Joy of Sex Bureaucracy*, 7 CALIF. L. REV. ONLINE 49, 60–61 (2016); Diamond & Huebner, *supra* note 160, at 54–55; DAVID SATCHER, DEP'T HEALTH & HUM. SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO PROMOTE SEXUAL HEALTH AND RESPONSIBLE SEXUAL BEHAVIOR 1 (2001).

163. See Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 543–45 (2005) (describing how tort law responds to economic and emotional harms occasioned by unexpected deaths).

164. See *Califano v. Jobst*, 434 U.S. 47, 50–51 (1977).

165. Succession rights like those offered under New York law protect family members, including people in “family-like” relationships, by allowing survivors to assume the lease that was in the decedent's name. See *What You Need to Know About Succession Rights in Rent-Stabilized Apartments*, LEGAL AID SOC'Y, <https://legalaidnyc.org/get-help/housing-problems/what-you-need-to-know-about-succession-rights> [<https://perma.cc/8PKG-F6R4>]; see also *Alliance Housing Assocs., LP v. Garcia*, No. 69191/2015, 2016 WL 6908354, at *3–4 (N.Y. Civ. Ct., Nov. 21, 2016) (extending succession rights to residents in Section 8 housing).

166. See *Braschi v. Stahl Assocs.*, 543 N.E.2d 49, 52, 54 (N.Y. 1989) (describing the legislative history and purposes of rent control and anti-eviction laws).

167. See *id.* at 54.

168. Cf. Andrew J. Oswald & Nattavudh Powdthavee, *Death, Happiness, and the Calculation of Compensatory Damages*, 37 J. LEGAL STUD. S217, S226–30 (2008) (finding that people were more bereaved after the death of a spouse than the death of a child, and more bereaved after the death of a child than the death of a parent).

The death of a loved one triggers grief¹⁶⁹ and also presents a range of mundane but draining tasks like funeral planning, often while the survivors are engaged in full-time employment.¹⁷⁰ Indeed, many studies show that workers struggle to process their grief while balancing work commitments, and that their ability to function effectively suffers as a result.¹⁷¹ Even when they are able to satisfy work demands, they may struggle to manage their emotions in work environments that are expected to be “professional,” hence, unemotional.¹⁷² In some instances, the inability to strike an appropriate balance leads people to leave their jobs entirely.¹⁷³

These burdens are compounded when the relationship is not officially recognized by the employer. For example, before same-sex marriage was legalized, a woman in a same-sex relationship wondered whether she could take bereavement leave following the death of her partner.¹⁷⁴ When she reached out to human resources, she was sent a copy of the official policy with a statement in bold text that the leave applied only to certain members of the immediate family.¹⁷⁵ Although Human Resources did not explicitly deny her claim, the response put the onus on her to potentially violate workplace policies.¹⁷⁶ People in plural relationships could face similar experiences.

4. Abuse

Domestic violence is a reality for intimate partners regardless of formal family status or sexuality.¹⁷⁷ Data collected by the CDC’s National Intimate

169. See Donna M. Wilson, Andrea Rodríguez-Prat & Gail Low, *The Potential Impact of Bereavement Grief on Workers, Work, Careers, and the Workplace*, 59 SOC. WORK HEALTH CARE 335, 338–40 (2020) (noting that workers experienced deep and disruptive grief after the deaths of spouses, parents, and children).

170. These challenges justify widespread private adoption of bereavement leave. See SOC’Y FOR HUM. RES. MGMT., 2018 EMPLOYEE BENEFITS: THE EVOLUTION OF BENEFITS 24 (2018), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/2018%20Employee%20Benefits%20Report.pdf> [<https://perma.cc/JU7E-T7TR>] (reporting 88 percent of member employers provide the benefit); Anne Patterson, *Is It Time to Rethink Your Bereavement Leave Policy?*, INT’L FOUND. EMP. BENS. PLANS, (July 31, 2018), <https://blog.ifebp.org/index.php/is-it-time-to-rethink-your-bereavement-leave-policy> [<https://perma.cc/M2WP-J2VP>] (noting that 83 percent of U.S. organizations provided bereavement leave in 2016 as a paid benefit).

171. See, e.g., Wilson et al., *supra* note 169, at 336. Wilson et al.’s qualitative analysis found that many respondents received a combination of several days of paid bereavement leave, short- or long-term disability leave, and unpaid leave, but that almost all found that a few days off was not enough of an accommodation to process their grief. See *id.* at 340–41.

172. See generally Janell C. Bauer & Margaret A. Murray, “Leave Your Emotions at Home”: Bereavement, Organizational Space, and Professional Identity, 41 WOMEN’S STUD. COMM’N 60, 67–71 (2018) (noting gender differences regarding the appropriateness of expressing grief at work).

173. See Wilson et al., *supra* note 169, at 336.

174. See Bauer & Murray, *supra* note 172, at 70.

175. See *id.*

176. See *id.*

177. See Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841, 1855–59 (2006) (exploring the expansion of domestic violence protections to unmarried

Partner and Sexual Violence Survey suggest that one in four women and one in ten men will experience physical or sexual violence or stalking at some point in their lifetimes.¹⁷⁸ These incidents impact victims' physical and mental health and result in significant societal costs related to medical expenses, lost productivity, and the criminal justice system.¹⁷⁹

Due to a few highly visible examples of domestic abuse within polygynous communities, such as the abuse of women in Warren Jeffs' Fundamentalist Church of Jesus Christ of Latter-Day Saints ("FLDS") community, polygyny and plural relationships more broadly are portrayed as being prone to violence.¹⁸⁰ Defenders of laws that criminalize bigamy point to these instances of abuse to justify the continued prohibition of polygamous relationships.¹⁸¹

I raise intimate partner violence to address these perceptions about plural relationships and correct the record. Evidence of a heightened risk of domestic abuse and violence is anecdotal. There are no studies demonstrating that rates of violence are higher in polygamous marriages than monogamous marriages, much less studies of violence in other forms of plural relationships.¹⁸² Virtually all reported incidents of domestic violence occur within monogamous partnerships.¹⁸³ Indeed, some scholars suggest that rates of violence may be lower in polyamorous relationships given the commitment of most polyam people to gender equality and open communication.¹⁸⁴

If it can be shown that certain configurations of relationships are significantly more likely to give rise to violence or abuse, those findings should

persons); Joanna Bunker Rohrbaugh, *Domestic Violence in Same-Gender Relationships*, 44 FAM. CT. REV. 287, 287-89 (2006) (reporting on studies that indicate the same rates of domestic violence in same-gender relationships as opposite-gender relationships).

178. See *Violence Prevention: Fast Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html> [<https://perma.cc/QB7W-GKTS>].

179. See *id.* (estimating the average cost of intimate partner violence over a woman's lifetime at \$103,767 and \$23,414 for men).

180. See, e.g., Judy Mann, *The Brutal Truth About Polygamy*, WASH. POST (Aug. 12, 1998), <https://www.washingtonpost.com/archive/lifestyle/1998/08/12/the-brutal-truth-about-polygamy/903ab7ae-0120-4819-b756-69c64c76be6e> [<https://perma.cc/DB3D-CQD4>] (reporting on instances of domestic abuse within a sect of the FLDS in Utah); Turley, *supra* note 7, at 1918, 1948 (noting the role of perceived harm and abuse to women in polygynous relationships within the FLDS community as the primary justification to criminalize polygamy); see also Goldfarb, *supra* note 1, at 161-62 (noting the highly visible accounts of abuse within some polygynous relationships but questioning whether those harms can be extrapolated to polyamorous families).

181. See Turley, *supra* note 7, at 1948 (citing the testimony of Professor Marci Hamilton in favor of upholding polygamy bans); see also Kenji Yoshino, Comment, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 178 (2015) (arguing that bans on polygamy could be upheld because of concerns that "men are subordinating their wives").

182. See, e.g., GOLDFEDER, *supra* note 16, at 71 (pointing out the lack of studies and noting that the available evidence suggests the possibility that violence occurs within particular, dysfunctional families); Turley, *supra* note 7, at 1949-50.

183. See GOLDFEDER, *supra* note 16, at 71.

184. See, e.g., Goldfarb, *supra* note 1, at 163.

be taken into account.¹⁸⁵ In the meantime, there is little reason to treat people in plural relationships with greater suspicion or deny them existing legal protections against partner violence.

C. BOUNDARY MAINTENANCE

Plural relationships are more structurally complicated than monogamous relationships and, in some cases, intentionally left open to change. Further, they are subject to destabilizing forces like discrimination and also miss out on the beneficial effects of positive role models and established social scripts. Literature from a few decades ago suggests that plural relationships might be inherently less stable and more transitory than dyadic relationships, but more recent studies are challenging that assumption. For instance, studies conducted within the last five years suggest that plural relationships do not trail dyadic relationships in self-reported relationship satisfaction and commitment.¹⁸⁶ That said, researchers continue to presume that the comparative complexity of plural relationships requires increased communication and boundary maintenance on the part of the partners.¹⁸⁷

Little research exists on the overall stability or average duration of plural relationships.¹⁸⁸ Researchers have hypothesized that the lack of role models or relationship scripts may hasten entrance and exit.¹⁸⁹ For instance, sociologists have studied how norms and expectations coalesce into social institutions such as marriage, contributing to the stability of relationships governed by them.¹⁹⁰ Conversely, they have established that in some contexts,

185. If in fact people in rigidly hierarchical polygynous relationships are more likely to experience violence—a conclusion for which there is no current support—that could be a reason to treat those types of relationships differently. Sally Goldfarb has argued that people in those types of relationships would probably be less likely to opt into an egalitarian nonmarital relationship status in any event. *See id.* at 165.

186. *See, e.g.,* Terri D. Conley, Jes L. Matsuck, Amy C. Moors & Ali Ziegler, *Investigation of Consensually Nonmonogamous Relationships: Theories, Methods, and New Directions*, 12 *PERSPS. ON PSYCH. SCI.* 205, 210–11 (2017) (finding similar levels of self-reported satisfaction and commitment between monogamous and consensually nonmonogamous individuals, although when disaggregated, people in open relationships were less satisfied and people in polyamorous relationships were more satisfied than monogamous people); Jessica Wood, Serge Desmarais, Tyler Burleigh & Robin Milhausen, *Reasons for Sex and Relational Outcomes in Consensually Nonmonogamous and Monogamous Relationships: A Self-Determination Theory Approach*, 35 *J. SOC. & PERS. RELATIONSHIPS* 632, 649–50 (2018) (finding no significant differences between monogamous and consensually nonmonogamous respondents in their relationship and sexual satisfaction).

187. *See* Conley et al., *supra* note 186, at 221–23 (hypothesizing that the lack of established norms, lack of clear paths for relationship stability, and additional relationships to manage, will result in the need for constant communication and negotiation).

188. *See* Alicia N. Rubel & Anthony F. Bogaert, *Consensual Nonmonogamy: Psychological Well-Being and Relationship Quality Correlates*, 52 *J. SEX RES.* 961, 978–79 (2015) (summarizing existing studies and commenting on their limitations).

189. SHEFF, *supra* note 27, at 121.

190. *See* Andrew Cherlin, *Remarriage as an Incomplete Institution*, 84 *AM. J. SOCIO.* 634, 634 (1978).

the absence of clearly defined social norms and expectations mean that relationships are more likely to dissolve.¹⁹¹ Polyam research subjects report lacking a clear view of how their relationships should turn out. Even those with a clear vision of their ideal relationship at the outset may change their minds over time, in many cases because they are more open-minded about relationship configurations in the first place.¹⁹² One might imagine that a platonic friend group might similarly struggle with the lack of norms or expectations of permanency. Non-normative relationships may also be more fluid because they are “less likely to be tightly integrated into networks of others who are in more traditional relationships.”¹⁹³ Although the hypothesis is untested among people in plural relationships, ethnographic studies of polyamorous partners appear to confirm the absence of partners who remain together out of a sense of obligation when they would prefer to move on.¹⁹⁴

Discrimination, stigma, and related stress also impact relationship quality broadly speaking.¹⁹⁵ Studies have not conclusively established a link between decreased relationship quality and relationship stability, but there are reasons to suspect that a linkage exists. Analyzing same-sex relationships in the years preceding nationwide marriage equality, researchers examined how “fear of prejudice and discrimination may lead some LGB individuals to conceal their same-sex relationship from others,” which could lead to less social support.¹⁹⁶ If people in plural relationships face similar forms of minority stress, they may also face reduced social support, which could undermine their relationship stability.¹⁹⁷

191. See Steven L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. FAM. ISSUES 53, 56 (1995) (noting that cohabiting relationships may be less stable because there is not even consensus as to what to call a cohabiting partner, much less what it means to be a cohabiting partner).

192. See SHEFF, *supra* note 27, at 81–108 (describing several relationships in which a core of two people expanded into different configurations, often not what they initially sought).

193. Nock, *supra* note 191, at 56; see also SHEFF, *supra* note 27, at 81–108 (highlighting the impact of the lack of clear social expectations); Frost et al., *supra* note 125, at 461, 465 (reporting the experiences of same-sex couples who often found it difficult to fully integrate their relationships into their extended family networks because of bias, or who were denied social support when experiencing relationship problems).

194. I base this statement on my reading of ANAPOL, *supra* note 28; SHEFF, *supra* note 27; Aviram, *supra* note 33.

195. See Hongjian Cao et al., *Sexual Minority Stress and Same-Sex Relationship Well-being: A Meta-Analysis of Research Prior to the U.S. Nationwide Legalization of Same-Sex Marriage*, 79 J. MARRIAGE & FAM. 1258, 1269–70 (2017); Wendy D. Manning, Susan L. Brown & J. Bart Stykes, *Same-Sex and Different-Sex Cohabiting Couple Relationship Stability*, 53 DEMOGRAPHY 937, 948–49 (2016).

196. See Mohr & Daly, *supra* note 124, at 990.

197. An important caveat in relying on the literature analyzing same-sex couples is the fact that studies of same-sex couples show that internalized homophobia had a greater negative impact on relationship quality than experiences with discrimination. See Cao et al., *supra* note 195, at 1270. Although relationship status is a stigmatized characteristic, not enough is known about whether people in plural relationships internalize their relationship status to the same extent as sexual orientation.

Despite these challenges, recent research questions the assumption that plural relationships are more unstable than monogamous relationships. Numerous studies demonstrate that people in consensually nonmonogamous relationships are just as satisfied with, committed to, and trusting of their partners as people in monogamous relationships.¹⁹⁸ Earlier literature suggested that jealousy would be a significant destabilizing force in plural relationships.¹⁹⁹ The prevailing wisdom in the organized polyamorous community was that certain relationship scenarios—like “one partner in an open couple with children [starting] a relationship with a new person”—were especially likely to cause problems and required the performance of acts calculated to defuse jealousy.²⁰⁰ A problem with those older studies, however, was that they let assumptions about emotions like jealousy dictate the research questions, or framed questions based on the assumption that monogamy was desirable.²⁰¹ When authors of a recent study employed measures of jealousy not affected by monogamist assumptions—for instance, they asked participants to report how positively or negatively they would feel if their partner engaged in a variety of sexual activities with another person, and how often they engaged in activities like questioning their partner about their phone calls²⁰²—they found that monogamous individuals scored substantially higher on anticipated jealousy and somewhat higher on jealous behaviors than people in consensually nonmonogamous relationships.²⁰³

Moreover, stability, and especially longevity, may not be a particularly valuable measurement of relationship success for plural relationships. For monogamous relationships, maintenance of a particular relationship is a goal in and of itself.²⁰⁴ Longevity is taken as a mark of success.²⁰⁵ However, longevity is not necessarily coextensive with satisfaction, as illustrated by enduring but unhappy marriages.²⁰⁶

198. See, e.g., Conley et al., *supra* note 186, at 210 (reporting no significant differences regarding global satisfaction, commitment, or passionate love); Rubel & Bogaert, *supra* note 188 at 977 (summarizing previous studies employing the Dyadic Adjustment Scale which found no differences with respect to dyadic satisfaction, cohesion, consensus, and affectional expression); Wood et al., *supra* note 186, at 649–50 (finding no difference between survey participants regarding relationship satisfaction and relationship quality).

199. See, e.g., Pepper Mint, *The Power Mechanisms of Jealousy*, in UNDERSTANDING NON-MONOGAMIES 201, 201–06 (Meg Barker & Darren Langdridge eds., 2010); Léa J. Séguin, *The Good, the Bad, and the Ugly: Lay Attitudes and Perceptions of Polyamory*, 22 SEXUALITIES 669, 678 (2019).

200. See SHEFF, *supra* note 27, at 116; see also Mint, *supra* note 199, at 204–05 (describing the various strategies employed to downplay jealousy).

201. See Conley et al., *supra* note 186, at 207.

202. See *id.* at 209.

203. See *id.* at 210.

204. See *id.* at 220.

205. See *id.*

206. See *id.* at 220–21.

What all this research indicates is that there is little data on how plural relationships begin and end. That said, leading scholars suspect that plural relationships may be somewhat more likely to shift over time than monogamous relationships²⁰⁷ and also entail reassessments of the relationship by the partners.²⁰⁸ These occurrences add certain burdens, like communication and negotiation, but do not establish that the relationships are of lesser quality.

* * *

This Part has shown that despite their many differences, plural relationships lead to a range of shared experiences. Some, like stigmatization and fluidity, pose unique challenges for people in plural relationships.²⁰⁹ Others, like the many different forms of vulnerability that follow from a shared life, are common to all relationships involving emotional and financial dependency.

III. FOUNDATIONAL PRINCIPLES OF A PLURAL RELATIONSHIP STATUS

The previous Parts show that plural relationships are highly diverse in ways that challenge the straightforward extension of marriage-like rights and obligations to people in those relationships. Yet these relationships, as different as they are, share many of the same vulnerabilities to discrimination and other destabilizing events and forces. As Carl Schneider has famously observed, family law has met these types of challenges by protecting people from physical, economic, and psychological harms, helping people to organize their lives in ways they prefer, resolving disputes that may arise between them, and expressing societal values.²¹⁰ States and municipalities could (and have) conclude(d) that plural relationships promote individual and collective well-being and should be protected like other families.²¹¹

207. See *id.* at 221.

208. See *id.* at 222–23.

209. This is not to say that people in monogamous relationships cannot experience these phenomena; only that they experience them differently and to different extents.

210. Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 497–98 (1992) (describing five functions: protective, facilitative, arbitral, expressive, and channeling); see also Ertman, *supra* note 16, at 125 (“Family law recognizes that society and individuals benefit when individuals need not stand alone against emotional, physical, and financial challenges.”); David L. Chambers, *The “Legalization” of the Family: Toward a Policy of Supportive Neutrality*, 18 U. MICH. J.L. REFORM 805, 817–21 (1985) (resisting the expressive function but noting the importance of the facilitative and arbitral functions); Chambers, *Polygamy and Same-Sex Marriage*, *supra* note 36, at 81 (arguing that the law should “[play] a facilitative role [in allowing polygamous] families to prosper”).

211. Here, I rely on a positivist understanding of what constitutes family: whatever the state decides. I note, however, that all plural relationships, whether purely sexual or emotional, or some combination of the two, involve some degree of interdependency, mutual vulnerability, and self-identification that mark recognized family relationships. Cf. Dorian Solot & Marshall Miller, *Taking Government Out of the Marriage Business: Families Would Benefit*, in MARRIAGE PROPOSALS:

This Part discusses how the law can best address the needs of people in plural relationships while respecting their differences. It delineates three principles of recognition that meet these basic requirements: facilitation of self-determination; promotion of equal citizenship; and amelioration of relationship-based vulnerabilities. In keeping with these broad commitments, this Part paints in broad strokes, offering suggestions for legislatures at both the local and statewide level as well as courts.

A. SELF-DETERMINATION

The law should facilitate partners' choices regarding the formation and transformation of their relationships, as well as the legal consequences that flow from them. Decisions about whether and with whom to partner are an important aspect of self-determination.²¹² The Supreme Court has said that the choice to marry is "central to individual dignity and autonomy," one "that define[s] personal identity and beliefs."²¹³ "[Choosing to] marr[ie] shape[s] an individual's destiny."²¹⁴ If "marr[riage] is [one of] life's momentous acts of self-definition,"²¹⁵ then not marrying or choosing to exit a marriage will have a similar impact on one's identity.²¹⁶

Relationships are self-definitional in at least two respects. First, the choice of partner matters a great deal. The prohibitions on interracial and same-sex marriage interfered with an individual's choice of partner—one of a different race or same sex.²¹⁷ Marriage is self-definitional because "two persons together"²¹⁸ make a reciprocal choice to enter a legally and socially significant relationship. Moreover, the choice to marry is important because it frames rights and commitments in ways that both the spouses and third parties can understand.²¹⁹ As the Court put it, the spouses "define themselves by their

QUESTIONING A LEGAL STATUS 70, 76 (Anita Bernstein ed., 2006) (arguing that the law should "recogni[ze] . . . people who fulfill critical caretaking responsibilities and consider themselves family members").

212. As Carl Schneider has argued, family law has "help[ed] people organize their lives and affairs in the ways they prefer," what he calls the "facilitative function." Schneider, *supra* note 210, at 497.

213. *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015).

214. *Id.* at 666.

215. *Id.* (internal citation and quotation marks omitted).

216. See Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 *FORDHAM L. REV.* 1509, 1541–44 (2016) [hereinafter Matsumura, *A Right Not to Marry*].

217. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (noting the importance of being able "to marry . . . a person of another race") (emphasis added); *Obergefell*, 576 U.S. at 666 (noting that the choice to marry is important "for all persons, whatever their sexual orientation").

218. *Obergefell*, 576 U.S. at 666.

219. See generally Kaiponanea T. Matsumura, *The Integrity of Marriage*, 61 *WM. & MARY L. REV.* 453, 500 (2019) (noting the role of marriage law in clarifying the nature of the commitment that spouses make to each other).

commitment to each other.”²²⁰ The commitment takes the shape of social and legal rights and obligations.²²¹

Plural relationships likewise embody self-defining choices, both in terms of the identity of partners and the nature of their relational obligations. It follows that laws designed to facilitate choice regarding partners and obligations would support self-determination.²²² A legal regime that restricts the choice of partners or imposes mandatory obligations (by limiting the number of partners to three, or by requiring that all should share property equally), would cabin the range of self-defining choices. To the greatest possible extent, then, the law should support the partners’ commitments and recognize their vulnerabilities without seeking to substitute majoritarian understandings of a good life for the partners.

1. Choosing Partners

An effective plural relationship status should allow individuals to determine whether their own relationships should result in legal consequences. The law currently declares that only emotionally intimate *and* sexual adult partnerships are deserving of the highest respect. Marriage is definitionally an emotional and sexual relationship.²²³ Domestic partnerships and civil unions have followed this model, requiring partners to be in a mutually supportive relationship that is also presumptively sexual.²²⁴ These laws exclude relationships that people subjectively value and that often perform functions like caregiving that the law ought to support.

Opening plural relationships to emotionally intimate but non-sexual relationships would allow the law to recognize relationships between family

220. *United States v. Windsor*, 570 U.S. 744, 763 (2013).

221. *See Obergefell*, 576 U.S. at 670.

222. *Cf.* HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* 69 (2017) (noting the importance of a multiplicity of options to the ability to make self-defining choices).

223. *See, e.g., Schletewitz v. Schletewitz*, 193 P.2d 34, 37 (Cal. Dist. Ct. App. 1948) (“The conjugal rights of married persons include the enjoyment of association, sympathy, [and] confidence . . . as well as the intimacies of domestic relations.” (quoting *Hawkins v. Hawkins*, 286 P. 747, 748 (Cal. Dist. Ct. App. 1930)); Laurence Drew Borten, Note, *Sex, Procreation, and the State Interest in Marriage*, 102 COLUM. L. REV. 1089, 1091–92 (2002) (demonstrating, using transgender marriage cases, that sexual intercourse has been a defining feature of marital relationships); *id.* at 1093–118 (demonstrating that the law has granted annulments for impotence, concealed desire not to consummate the relationship, infertility, and more); Courtney Megan Cahill, *The Genuine Article: A Subversive Economic Perspective on the Law’s Procreationist Vision of Marriage*, 64 WASH. & LEE L. REV. 393, 413–14 (2007) (examining cases standing for the proposition that marriages without procreation are incomplete); Twila L. Perry, *The “Essentials of Marriage”*: *Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 30–31 (2003) (examining cases for annulment based on concealed impotence).

224. *See, e.g., CAL. FAM. CODE* § 297(b)(2) (2020) (specifying that partners cannot be “related by blood in a way that would prevent them from being married,” which implies that incest is a concern); 750 ILL. COMP. STAT. 5/212(a) (2014) (prohibiting civil unions between ancestors and descendants, siblings, aunts/uncles with nieces/nephews, and first cousins).

members and friends. There is some precedent for treating family members as legally recognized partners: Hawaii's reciprocal beneficiary status and Colorado's designated beneficiary status both allow individuals to name any individual, including a family member, as a partner.²²⁵ Colorado allows any two adults, including friends, to register as designated beneficiaries, provided they are not in a civil union or marriage.²²⁶ These laws acknowledge that people in a non-sexual relationship may still live interdependently in a way that the law should support.

Conversely, allowing people to designate "mere" sexual partners as plural relationship partners would affirm the value of sex separate from the demands of marriage.²²⁷ It would send a strong signal that sex does not require emotional intimacy to have independent value.²²⁸

Beyond expanding the range of eligible partners, the law should allow group relationships comprising more than two individuals and also recognize the ability of an individual to be part of more than one relationship at a time. In other words, people should be allowed to enter group relationships or asymmetric relationships.²²⁹ Allowing a person to maintain multiple relationships simultaneously would mean that an individual would not have to choose between a "best" friend and a romantic partner, but could have relationships with both.²³⁰ It would take the Colorado and Hawaii legislation

225. See John G. Culhane, *After Marriage Equality, What's Next for Relationship Recognition?*, 60 S.D. L. REV. 375, 383–85 (2015) (describing the eligibility requirements for both statuses).

226. *Id.* at 384.

227. The law has historically punished sex for pleasure, from criminalizing prostitution and sex outside of marriage to imposing financial penalties on adulterous spouses at divorce or support obligations on men who unintentionally father children. See Susan Frelich Appleton, *Reproduction and Regret*, 23 YALE J.L. & FEMINISM 255, 329 (2011) (noting that family law's treatment of sex imposes penalties and punishments outside of the criminal law); Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 COLUM. L. REV. 573, 578–79 (2016) (describing historical perspectives on how criminal laws regulated sex in several domains, including "fornication," incest, and adultery); see also Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361, 1386 (2005) (arguing that *Lawrence v. Texas* protected homosexual sodomy and other sex outside marriage because it was intimate and marriage-like).

228. Cf. Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 813–14, 828–29 (2010) (noting the stigmatization of non-intimate sex and the politics of respectability). Although sex positivity could spur a strong backlash, practically speaking the absence of an emotional connection would make it unlikely that people would seek legal recognition of a purely sexual relationship.

229. The Cambridge domestic partnership legislation, for example, permits more than two individuals to be part of a single domestic partnership and also permits one individual to be a part of more than one domestic partnership simultaneously. Cambridge, Mass., Ordinance 2020-14 (Mar. 8, 2021). This legislation recognizes both group and asymmetric relationships. In contrast, the Somerville domestic partnership legislation only recognizes group relationships. Somerville, Mass., Ordinance 2020-16 (June 25, 2020).

230. Cf. Rhaina Cohen, *What if Friendship, Not Marriage, Was at the Center of Life?*, ATLANTIC (Oct. 20, 2020), <https://www.theatlantic.com/family/archive/2020/10/people-who-prioritize-friendship-over-romance/616779> [<https://perma.cc/XD9P-S9Q3>] (questioning whether significant

a step further, potentially allowing a person to designate friends, family members, and romantic partners.

Practically speaking, this expanded choice will best be facilitated through some sort of formal registration. Formalities promote autonomy by providing partners certainty, at the outset, about the legal status of their relationship.²³¹ Devices like licenses, registries, and official ceremonies help to identify partners to the state and third parties.²³² As a result, formalities address concerns about fraud or opportunistic behavior.²³³ Employers, for example, could rely on formal status to determine eligibility for family leave. Importantly in this context, formalities can shield people from moralistic judgments. A marriage license insulates spouses from probing inquiries about whether their conduct is sufficiently marriage-like to receive recognition in a way that functionalist analyses do not.²³⁴ Because plural relationships are completely un-institutionalized, it is hard to imagine courts rendering predictable decisions about the significance of a group's sexual, romantic, and domestic behavior.

Registries would enable partners to manage their relationship statuses, allowing people to be part of numerous partnerships simultaneously. Consider a relationship between A and her two partners, B and C, who are friendly with each other but are not in a sexual or emotionally intimate relationship: a classic “V.” A might prefer to enter two concurrent partnerships, one with B and one with C. If B and C are emotionally intimate, the three might prefer their group relationship to be legally recognized as a single partnership. A registry could recognize both forms of multiplicity: multiple relationships and multiple partners. A court? Perhaps not.

others or spouses should be “No. 1,” challenging the narrative that romantic partners come first but buying into the idea that one individual outranks all others).

231. The classic statement of the importance of formalities is Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941), in which Fuller argued that formalities serve evidentiary, cautionary, and channeling functions. *See id.* at 800–01 (noting the role of formalities in ensuring that a person makes a well-considered choice). It is helpful to understand the legal consequences of one's behavior in advance so that one can conform one's behavior to those consequences. *See* LON L. FULLER, *THE MORALITY OF LAW* 33–38 (1964) (noting the importance to the rule of law of clear and intelligible laws to which people can conform their conduct).

232. *See, e.g.*, Jessica A. Clarke, *Identity and Form*, 103 CALIF. L. REV. 747, 773, 786 (2015).

233. *See* PNC Bank Corp. v. Workers Comp. Appeal Bd., 831 A.2d 1269, 1278–80 (Pa. Commw. Ct. 2003) (noting the potential for fraud or opportunistic behavior if people could alternatively claim that they were common law married or not).

234. *See, e.g.*, Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1765 (2005); Katharine K. Baker, *What Is Nonmarriage?*, 73 SMU L. REV. 201, 203–04 (2020); Katharine K. Baker, *Equality and Family Autonomy*, U. PA. J. CONST. L. (forthcoming 2022) (manuscript at 57–58) (on file with author). *But see* Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 19–26 (2012) (examining how marriage fraud doctrines allow state actors to second-guess the validity of marriages even in the presence of formalities). For an additional discussion of these tradeoffs, see Kaiponanea T. Matsumura, *Breaking Down Status*, 98 WASH. U. L. REV. 671, 727–28 (2021) [hereinafter Matsumura, *Breaking Down Status*].

Formalities also help with streamlined exit procedures. Before California's domestic partnership status came to include mutual property obligations, for example, all that partners needed to do to officially terminate their domestic partnership was file a Notice of Termination of a Domestic Partnership with the Secretary of State, and to notify any third parties to whom the partners presented a Declaration of Domestic Partnership to claim a right or benefit that the partnership was terminated.²³⁵

Of course, overreliance on formalities has its downsides. People who defend functional, informal approaches argue that non-recognition denies partners the legal protections that should flow from relationships that serve important purposes (like caregiving) or are configured in ways that resemble marriage (like commingling finances or co-parenting children).²³⁶ They contend that the recognition of marriage and the complete non-recognition of informal, functionally similar relationships promotes inequality.²³⁷ To the extent that the partners expect the law to step in and provide support, non-recognition also frustrates those expectations.²³⁸ Relatedly, insistence on *ex ante* formality ignores that preferences about relationships can evolve over time, such that initially casual relationships can turn into deeply committed ones.²³⁹

Although registration can help to determine that certain laws apply, nothing about registration precludes a functional analysis. For instance, courts have looked beyond formalities when enforcing domestic violence laws, which criminalize intimate partner violence because of the vulnerabilities inherent in the relationship, irrespective of marriage.²⁴⁰ Antidiscrimination laws also apply when discriminatory conduct is based on the perception that a person exhibits a protected characteristic, whether or not the person actually falls within that class.²⁴¹ It would make little sense to treat an employer's decision

235. See 1999 Cal. Legis. Couns.' Dig. Ch. 588, A.B. No. 26 (setting out termination provisions in CAL. FAM. CODE § 299(b)–(c) (West 2022)).

236. See, e.g., Blumberg, *supra* note 15, at *passim* (arguing for the extension of most marital rights to functionally similar relationships).

237. See PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.02, cmt. b (AM. L. INST. 2002) (noting that it would be unfair not to “require[] that individuals closely implicated in the economic circumstances of persons with whom they lived as domestic partners [to] assume some economic responsibility for those circumstances”).

238. See Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 972–74 (2019).

239. See PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.02, cmt. a (AM. L. INST. 2002). The circumstances make it less likely that more than two people will accidentally end up in a consensual multi-partner relationship or lack the communication skills or ability to reassess the nature of their relationship point when they are in the middle of it.

240. See Matsumura, *Beyond Property*, *supra* note 149, at 1346–51 (collecting cases).

241. See, e.g., CAL. GOV'T CODE § 12926(o) (West 2021) (extending protections under the California Fair Housing and Employment Act to the perception that a person exhibits protected characteristics such as marital status and sexual orientation); *Morse v. Fidessa Corp.*, 62 N.Y.S.3d 696, 700 (App. Div. 2017) (holding that the act of firing an employee based on his perceived (not actual) marital status was unlawful under New York City's Human Rights Law).

to terminate an employee based on his membership in a same-sex quad differently depending on whether the partners had formally registered. Some jurisdictions have (correctly in my view) allowed partners to register for statuses like domestic partnerships while still allowing courts to extend legal consequences to functionally similar informal relationships.²⁴²

Importantly, with the exception of intimate partner violence, the examples of informal recognition in the previous paragraph involve requests by the partners themselves to address harms caused by third parties. Thus, they do not risk the imposition of majoritarian values irrespective of the partners' preferences.

2. Determining Obligations

As discussed above, the ability to choose the consequences that flow from one's relationship facilitates self-determination. In contrast to antidiscrimination laws and anti-discriminatory zoning ordinances, which offer protections to people in plural relationships without dictating the substance of those relationships, laws governing property and related obligations establish the partners' respective rights and duties.

Default rules such as marital property rules and intestacy statutes are justified by assumptions about what the relationships should normatively entail or what most people would prefer. Intestacy laws, for example, are majoritarian: They are based on the probable intent of the average decedent rather than expectations about how people should divide their property.²⁴³

Marital property rules, as well as proposals to extend marriage-like rules to cohabitants, are based on normative views about what people in these relationships should owe each other. Although the justifications for marital property have shifted over time and are by no means settled, a popular current view is that spouses form an economic partnership during the relationship and should therefore divide property earned during the marriage equitably, regardless of who earned it.²⁴⁴ This view of marital relationships is highly normative: Spouses are expected to be partners collaborating in furtherance of a shared goal, such that their different contributions are substantially

242. For example, New Jersey extends standing to sue for torts like negligent infliction of emotional distress to people in relationships involving mutual dependency and emotional closeness. *See* *Moreland v. Parks*, 191 A.3d 729, 737–38 (N.J. Super. Ct. App. Div. 2018). Registered partners would bypass this functional analysis, thereby insulating them from probing inquiries into the nature of their relationship.

243. *See* Emily S. Taylor Poppe, *Choice Building*, 63 ARIZ. L. REV. 103, 115 (2021).

244. *See* Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2316–20 (1994). For a nuanced account of this partnership concept that considers the roles of identity, autonomy, and equality between the spouses, *see* Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 81–93 (2004); *see also* UNIF. PROB. CODE § 2-202(a) (UNIF. L. COMM'N. amended 2010) (“The surviving spouse . . . has a right . . . to take an elective-share amount equal to 50 percent of the value of the marital-property portion of the augmented estate.”).

equivalent regardless of their market value.²⁴⁵ To encourage a separate tallying of the spouses' contributions or to suggest an unequal distribution would be to challenge marriage's communal and egalitarian attributes.²⁴⁶

Majoritarian and normative defaults pose different, but similarly grave, threats to plural relationships. Scholars have recognized that majoritarian defaults are not useful when preferences are heterogenous.²⁴⁷ Plural relationships vary tremendously—no form dominates. Partners within a single relationship may have different levels of commitment. And relationships are prone to change over time, both in terms of composition and partners' expectations. Any rule chosen under these circumstances would likely be an ill fit for most plural relationships.

Moreover, research suggests that people in plural relationships are more likely to resist the imposition of relationship-based norms and expectations.²⁴⁸ They might be distrustful of externally imposed assumptions about how their relationships should function. They are also more likely to negotiate, or at least communicate about, the way their relationships are arranged.²⁴⁹ Therefore, the imposition of default rules around property, parentage, inheritance, and medical decision-making, especially in the absence of a clearly majoritarian approach,²⁵⁰ runs counter to the ethos of these relationships.

Thus, the focus should be on facilitating private ordering by enforcing agreements, medical and other directives, and estate plans.²⁵¹ In a sense, the previous sentence merely describes the status quo. That is, most states currently allow people in nonmarital relationships to enter contracts regarding property if sex does not form the consideration for the exchange.²⁵² States allow individuals to execute powers of attorney, advance directives, and guardianships regarding matters like medical decisions,²⁵³ responsibility for children,²⁵⁴ and

245. See Regan, *supra* note 244, at 2316.

246. See Frantz & Dagan, *supra* note 244, at 81–83, 91–94.

247. See Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591, 1611–12 (1999); Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L. REV. 643, 645–46 (2014) (noting the impact of changes to family structures and the loosening of social norms).

248. See Aviram, *supra* note 33, at 270–73 (explaining the polyam community's distrust of identity politics and importance of “individualism, pluralism, and fluidity”).

249. See SHEFF, *supra* note 27, at 21–22; Aviram, *supra* note 33, at 269–70.

250. See generally *supra* Part I (noting the lack of a clearly dominant form of plural relationships).

251. To be clear, I do not oppose the creation of an additional status that includes many marital rights, or the extension of marriage itself to plural relationships, although that is not my focus here.

252. See generally Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67, 96–97 (2021) (summarizing the scholarly literature regarding nonmarital contracting); Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983, 2019–21 (2018) (examining permutations in state approaches).

253. See Alexander A. Boni-Saenz, *Sexual Advance Directives*, 68 ALA. L. REV. 1, 11–13 (2016).

254. See Deirdre M. Smith, *Keeping It in the Family: Minor Guardianship as Private Child Protection*, 18 CONN. PUB. INT. L.J. 269, 273 (2019).

property-related transactions.²⁵⁵ Individuals also have broad testamentary freedom to dispose of their estates as they see fit.²⁵⁶

Yet courts have “refuse[d] to enforce agreements” regarding non-monetary exchanges between intimate partners (whether spouses or cohabitants).²⁵⁷ For example, they routinely refuse to enforce exchanges of property for the performance of domestic services like housekeeping²⁵⁸ or travel companionship,²⁵⁹ despite the fact that they have no problem with those same transactions between strangers.²⁶⁰ Also, and potentially of great importance to people in plural relationships, they refuse to enforce agreements regarding sex or other relational behaviors—what I will call “amatory terms”—based on public policy.²⁶¹ Many people in plural relationships attempt to set parameters regarding how to negotiate multiple sexual partners and what types of communication they require. These amatory terms are currently unenforceable,²⁶² and the inclusion of these terms risk infecting an otherwise valid agreement.²⁶³

255. See Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 5–14 (2001) (discussing the history and uses of the durable power of attorney).

256. See John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975) (noting the singular importance of testamentary freedom in wills law).

257. See, e.g., Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 73, 78–92 (1998) (showing that nonmonetary terms are typically not enforced between spouses and examining the courts' reasoning); Antognini, *supra* note 252, at 102–22 (examining such agreements between cohabitants); Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 YALE J.L. & FEMINISM 159, 178, 181–83 (2013) [hereinafter Matsumura, *Public Policing*] (examining the nonenforcement of nonfinancial terms in agreements between spouses and between individuals “regarding the use of reproductive technologies”).

258. See Antognini, *supra* note 252, at 105–09, 113–22.

259. See, e.g., *Graham v. Graham*, 33 F. Supp. 936, 936–37 (E.D. Mich. 1940) (refusing to enforce an agreement in which the wife allegedly induced the husband to quit his job and be her travel companion in exchange for \$300 per month); *Jones v. Daly*, 176 Cal. Rptr. 130, 131–32 (Ct. App. 1981) (rejecting a contract involving the exchange of travel companionship and other services for lifelong financial support).

260. See Matsumura, *Breaking Down Status*, *supra* note 234, at 714.

261. See, e.g., *Boudreaux v. Boudreaux*, 745 So. 2d 61, 63 (La. Ct. App. 1999) (declining to enforce a husband's promise to pay \$1500 monthly alimony if he filed for divorce for any reason in exchange for the wife remaining married to him); *Favrot v. Barnes*, 332 So. 2d 873, 875 (La. Ct. App. 1976), *rev'd* on other grounds, 339 So. 2d 843 (La. 1976) (refusing to enforce an agreement limiting sexual intercourse to once a week); *Diosdado v. Diosdado*, 118 Cal. Rptr. 2d 494, 495–96 (Ct. App. 2002) (refusing to enforce an agreement providing a penalty if the husband ever committed adultery, which the agreement defined as “kissing on the mouth or touching in any sexual manner”) (internal quotation marks omitted); see also *Spires v. Spires*, 743 A.2d 186, 192, app. at 193 (D.C. 1999) (Schwelb, J., concurring) (condemning a marital agreement that required the wife not to dispute the husband in public and “conduct herself in accordance with all scriptures in the Holy Bible applicable to marital relationships” and expressing shock that the husband would have the “temerity” to attempt to enforce it in court).

262. See *supra* note 261 (providing cases).

263. See Antognini, *supra* note 252, at 105–09 (reviewing cases in which the mere presence of a sexual relationship clouds courts' perception of the domestic services rendered).

There is also a general skepticism toward novel family structures that extends beyond contracts to inheritance and agency law. For example, when same-sex relationships were less common and less well-established, courts were often skeptical of bequests to same-sex partners, leading to a greater risk that the will would be invalidated on grounds of undue influence.²⁶⁴ Powers of attorney between same-sex partners were similarly vulnerable to challenge.²⁶⁵

To address these concerns, state legislatures or the courts themselves could declare a policy favoring enforcement of private agreements, wills and trusts, advance directives, powers of attorney, and the like for people in plural relationships. Regarding contracts, the law could specifically emphasize that domestic services can be consideration for an agreement.²⁶⁶

Although municipalities lack the authority to affect the property consequences of plural relationships, they could encourage partners at the time of registration to formalize their property relationships through contracts and estate plans. They could do the same regarding powers of attorney and advance directives.

What of other legal incidents, such as employer-provided health insurance or Social Security benefits?²⁶⁷ Here I sound a note of caution: The benefits might not be worth the costs.

To see this, consider the extension of marriage-related employment benefits like health insurance to unmarried partners. Many people obtain insurance

264. See, e.g., Rhonda R. Rivera, *Lawyers, Clients, and AIDS: Some Notes from the Trenches*, 49 OHIO ST. L.J. 883, 892 (1989) (pointing to a handful of appellate decisions and noting that anecdotal evidence from lawyers at the time pointed to the regularity of such challenges); Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 242–46 (1981) (identifying the phenomenon based on early appellate decisions).

265. See David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 458 n.38 (1996). Most scholars and advocates have supported executing powers of attorney and advance directives notwithstanding these concerns. See generally Jennifer K. Robbennolt & Monica Kirkpatrick Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Preventative and Therapeutic Approach*, 41 ARIZ. L. REV. 417 (1999) (examining the current state of the law that affects unmarried cohabiting partners' long-term property and health care planning and proposing a "therapeutic jurisprudence and preventive law" framework for addressing such issues).

266. See UNIF. COHABITANTS' ECON. REMEDIES ACT § 6(b) (UNIF. L. COMM'N, 2021) ("Contributions to the relationship are sufficient consideration for a cohabitants' agreement.").

267. The Polyamory Legal Advocacy Coalition ("PLAC") has conducted informal surveys of polyam community members to determine their legislative priorities. Access to health insurance for partners is at or near the top of the list. Zoom Interview with Alexander Chen, Founding Member of PLAC and Director of the LGBTQ+ Legal Clinic, Harvard Law School (Mar. 23, 2022). In arguing, as I am about to do, that health insurance benefits should be deprioritized, I do not mean to excuse the discriminatory treatment of people in plural relationships as compared to people in marriages or other formally recognized partnerships. I also agree with those who have argued that health care should be a universal right rather than one obtained through intimate partners or employers. See Naomi Cahn & June Carbone, *Uncoupling*, 53 ARIZ. ST. L.J. 1, 23–26, 54–57 (2021). One's need for health care does not turn on relationship or employment status.

coverage through their spouse's employers.²⁶⁸ Given the high cost of insurance premiums, this is a valuable benefit.²⁶⁹ Several states and municipalities have required that employers provide benefits to domestic partners on the same terms as married spouses.²⁷⁰ They have also committed to providing these benefits to domestic partners of their own employees.²⁷¹ It would be tempting to advocate for the extension of these benefits to people in plural relationships as well.

The problem is that tying eligibility for health benefits to relationships status predictably (even if unjustifiably) results in requirements that either exclude relationships or demand that they conform to marriage-like standards. Because of the high cost of providing family-linked health benefits, most employers, including government employers, currently require—and would likely *continue* to require—nonmarital partners to aver that they are cohabiting or are financially interdependent to qualify for health insurance benefits.²⁷² As Douglas NeJaime has shown, when it came to expanding eligibility for benefits to same-sex domestic partners in the 1980s and 1990s, both employers and legislators (including Democrats like then-Mayor of San Francisco Dianne Feinstein) refused to extend benefits to partners who were not “bona fide” or “true” dependents.²⁷³ The “quid” for the “quo” of domestic partner benefits was demonstrating a marriage-like level of commitment.²⁷⁴

268. See Megan Leonhardt, *29% of Couples Have Separate Health Insurance—and They May Be onto Something*, CNBC (Nov. 8, 2019, 4:24 PM), <https://www.cnbc.com/2019/11/08/29-percent-of-couples-have-separate-health-insurance.html> [<https://perma.cc/52AE-HTYD>] (reporting that approximately 70 percent of spouses are on the same insurance plan).

269. See Matsumura, *Beyond Property*, *supra* note 149, at 1339 (citing a 2017 report showing that employers pay \$7,500 more to cover insurance for families than for single employees).

270. See, e.g., CAL. INS. CODE § 10121.7(a) (West 2022) (requiring employers who provide group health insurance to married spouses to provide it to domestic partners on the same terms); S.F., CAL., ADMIN. CODE § 12B.2(a) (2022) (requiring city contractors to provide domestic partners with access to health insurance and other employment benefits on the same terms as spouses).

271. See, e.g., *Member Eligibility*, S.F. HEALTH SERV. SYS. (Jan. 11, 2022), <https://sfhss.org/eligibility-rules> [<https://perma.cc/STL5-9W55>] (noting that registered domestic partners are covered as dependents).

272. See, e.g., Matsumura, *Beyond Property*, *supra* note 149, at 1340–41 (noting that most private employers that offer health insurance coverage for employees' nonmarital partners require the employees to establish the closeness and interdependency of the relationship); CITY & CNTY. OF S.F. HUM. RTS. COMM'N, THE EQUAL BENEFITS ORDINANCE: RESOURCE MATERIALS FOR CHAPTER 12B OF THE SAN FRANCISCO ADMINISTRATIVE CODE 9 (2007), https://sfgsa.org/ftp/HRC_for_GSA/uploadedfiles/sfhumanrights/docs/ResourceMaterials9-07.pdf [<https://perma.cc/7M6Z-6FFR>] (noting that its domestic partnership affidavit requires partners to affirm, *inter alia*, that they “share the same principal residence(s),” “agree to be responsible for each other's basic living expenses,” and “also agree that anyone who is owed these expenses can collect from either of us”).

273. See NeJaime, *supra* note 15, at 114–21.

274. See *id.* As a result, drafters of these municipal ordinances emphasized cohabitation, “shar[ing] the common necessities of life,” “responsib[ility] for each other's welfare,” and monogamy. See *id.* at 120 (internal quotation marks omitted); see also Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM.

In providing health insurance benefits for domestic partners in plural relationships, the City of Cambridge appears to have followed this approach: Partners must proclaim that “[t]hey are in a relationship of mutual support, caring and commitment and intend to remain in such a relationship; and . . . are not related by blood closer than would bar marriage.”²⁷⁵ To the extent that this requirement requires mutual *financial* support, it excludes partners who do not cohabit or commingle their finances. It also expresses a preference for long-term relationships although many polyams may not prefer to bind themselves in that way. Finally, it excludes relationships between parents and children, siblings, and the like. In short, it will likely operate to exclude relationships that do not hew relatively closely to marital norms.

In sum, self-determination exists in tension with fixed obligations, many of which are highly valuable. I propose to strike a balance that includes a broader spectrum of relationships, and caution against the tendency to craft a package of rights and obligations that comes too close to being brought within the orbit of marriage.

B. EQUAL CITIZENSHIP

Jurisdictions that consider plural relationships worthy of recognition will undoubtedly be motivated by the desire to confer on the individuals in those relationships what scholars have alternatively called “equal citizenship” or “equal dignity.” Expanding on the evolution of dignity in the Supreme Court’s jurisprudence, Laurence Tribe has argued that the writings of Justice Kennedy embrace the principle of “equal dignity,” “the idea that *all individuals* are deserving in equal measure of personal autonomy and freedom to ‘define their own concept of existence’ instead of having their identity and social role defined by the state.”²⁷⁶ As Tribe makes clear, the law promotes dignity by respecting people’s personal choices rather than constraining them. Kenneth Karst has linked “respect for each individual’s basic humanity” to “full membership in . . . society.”²⁷⁷ He argues that “the dignity” of full membership is “[t]he essence of equal citizenship.”²⁷⁸ Equal citizenship requires safeguards to prevent

degradation or the imposition of stigma When one is freed from stigma, her sense of individual identity is strengthened precisely

L. REV. 1164, 1192 (1992) (noting that all domestic partnership ordinances as of the date of writing required partners to aver that they were responsible for each other’s general welfare).

275. CAMBRIDGE, MASS., MUN. CODE § 2.119.020(D) (2021).

276. Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 22 (2015) (alteration in original) (footnote omitted); see also Note, *Equal Dignity—Heeding Its Call*, 132 HARV. L. REV. 1323, 1329 (2019) (contending that equal dignity involves “according respect for [the] intimate choices of an individual, regardless of one’s membership in a particular social group” and protecting those choices from “stigmatic subordination harm that threatens such dignity”).

277. Karst, *supra* note 111, at 5, 8.

278. *Id.* at 5.

because she is no longer defined by others in terms of the stigma; she is regarded as a full human being, worthy of respect and dignity.²⁷⁹

In short, legal protections against discrimination are an initial step toward promoting the sense of belonging that communities want to confer upon their members.

The law can prevent discrimination against plural relationships in two ways. First, it can eliminate rules that burden or interfere with plural living arrangements. Second, it can promote equal access and resist the imposition of stigma by prohibiting discriminatory conduct.

Several laws operate to exclude or punish plural relationships. The identification of all such laws goes beyond the scope of this Article, but obvious examples are zoning laws that restrict occupancy to narrowly defined family units and criminal laws that regulate intimate conduct outside of marriage.

Cities have historically legislated on a wide range of local needs, including infrastructure, public health, education, and zoning.²⁸⁰ The zoning power, in particular, has been used to shape allowable family configurations by limiting the number of unrelated individuals who can live in a dwelling, prohibiting multi-generational living units, and more.²⁸¹ Such laws typically limit the number of unrelated individuals—those not “related by blood, marriage, or adoption”—to two, three, or sometimes four.²⁸² Some state courts have held that zoning laws that burden functional families are unconstitutional, but most courts have upheld zoning regulations.²⁸³ These laws obviously stand in the way of many plural living arrangements.²⁸⁴

279. *Id.* at 6–8.

280. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 15 (1990) [hereinafter Briffault, *Our Localism*]; see also *id.* at 39–58 (exploring the comparative strength of local authority over zoning even as compared to the state).

281. See generally *Moore v. City of East Cleveland* 431 U.S. 494 (1977) (declaring unconstitutional a local zoning ordinance that prohibited various forms of extended families from occupying a single-family dwelling); see also Frank S. Alexander, *The Housing of America's Families: Control, Exclusion, and Privilege*, 54 EMORY L.J. 1231, 1247–50, 1257–64 (2005) (describing the origin of single-family zoning and the adoption of restrictive definitions that centered the nuclear family). The mid-Twentieth Century saw a turn toward formal, restrictive zoning as a result of the desire to protect property values, organize living around the nuclear family, and resist countercultural living arrangements like communes. See Kate Redburn, Note, *Zoned Out: How Zoning Law Undermines Family Law's Functional Turn*, 128 YALE L.J. 2412, 2438–46 (2019).

282. Alexander, *supra* note 281, at 1260.

283. See Redburn, *supra* note 281, at 2453–54 (citing *McMaster v. Columbia Bd. of Zoning Appeals*, 719 S.E.2d 660, 664–65 (S.C. 2011) (upholding a zoning ordinance limiting the number of unrelated people in a single-family dwelling to three)).

284. See *id.* at 2454–55 (providing the example of “the ‘Scarborough 11’[:] . . . two married couples, their biological children, an unmarried couple, and two unrelated single adults” who attempted to live together as a family but were served a cease-and-desist notice based on their violation of the zoning code).

Criminal laws that prohibit nonmarital cohabitation, fornication, or adultery also pose risks to people in plural relationships. Once ubiquitous, these laws are now suspect under *Lawrence v. Texas*,²⁸⁵ which held that a statute that criminalized private, same-sex sodomy was unconstitutional. Still, a significant minority of states still have laws on the books criminalizing adultery or fornication.²⁸⁶ These laws are rarely enforced.²⁸⁷ But until these laws are removed or declared unconstitutional, they continue to criminalize the conduct of sexually intimate partners in plural relationships, especially if those relationships involved at least one married couple.²⁸⁸ The same goes for bigamy laws, which have been used as a tool to prosecute religiously motivated polygynous relationships.²⁸⁹ Just as the threat of criminal prosecution loomed over same-sex partners regardless of the unlikelihood of criminal prosecution, these laws impose stigma and justify discrimination against people in plural relationships.²⁹⁰

Beyond identifying and repealing laws that burden plural relationships, states and municipalities can also enact antidiscrimination laws to attempt to reduce private discrimination. As established in the previous Part, plural relationships are stigmatized.²⁹¹ Stigma imposes psychological harms and can result in acts of discrimination. Antidiscrimination laws cannot fully eradicate stigma and discrimination, but they express support for stigmatized individuals

285. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

286. See, e.g., Stein, *supra* note 55, at 148–49, 149 n. 4 (noting that adultery is a crime in 19 states); JoAnne Sweeny, *Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws*, 46 LOY. U. CHI. L.J. 127, 130 (2014); see also, e.g., ARIZ. REV. STAT. ANN. § 13-1408(A) (West 2021) (“A married person who has sexual intercourse with another than his or her spouse, and an unmarried person who has sexual intercourse with a married person not his or her spouse, commits adultery and is guilty of a class 3 misdemeanor.”); IDAHO CODE ANN. § 18-6603 (West 2022) (“Any unmarried person who shall have sexual intercourse with an unmarried person of the opposite sex shall be deemed guilty of fornication . . .”).

287. See Sweeny, *supra* note 286, at 150–51.

288. As Edward Stein has observed, these laws have other effects, such as penalizing spouses during divorce proceedings and justifying termination of employment. See Stein, *supra* note 55, at 149–50. And they potentially threaten those who register their plural relationships at the municipal level in hostile states. See Note, *Three’s Company Too: The Emergence of Polyamorous Partnership Ordinances*, 135 HARV. L. REV. 1441, 1450–51 (2021).

289. See, e.g., *State v. Green*, 99 P.3d 820, 822, (Utah 2004) (affirming the conviction of a “avowed polygamist” under the state’s bigamy law, which criminalizes the attempt to marry an individual known to be legally married to another individual).

290. See Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 103–05 (2000); see also, e.g., Kaiponanea T. Matsumura, *Transcending Time and Place: Judge A. Wallace Tashima and the Liberation of LGBT Identity*, 66 UCLA L. REV. 1910, 1912–13 (2019) (showing how courts relied on the criminalization of sodomy to justify the exclusion of gay people from the military and other forms of discrimination).

291. As discussed in the previous Part, nonmonogamy is stigmatized. People who eschew marriage also face stigma. Thus, it is likely that even platonic partners would experience stigma and discrimination. See discussion *supra* Section II.A.

and can prevent some instances of discriminatory conduct.²⁹² In so doing, they promote equal treatment and equal dignity—the notion that people are inherently worthy of others’ respect. These antidiscrimination protections, moreover, universally benefit people in plural relationships however they are configured. They apply whether the partners have formally registered and benefit those who are not even in a plural relationship but might be oriented to it.

Both states and municipalities could prioritize legislation that affirmatively protects people in plural relationships from discriminatory acts. Existing antidiscrimination laws, such as those that prohibit discrimination on the basis of sexual orientation or marital status, provide a model on which to build.²⁹³ Those laws commonly prohibit discrimination in employment, housing, and public accommodations.²⁹⁴ The state of California, for example, makes it

292. Cf. Chad A. Readler, Note, *Local Government Antidiscrimination Laws: Do They Make a Difference?*, 31 U. MICH. J.L. REFORM 777, 797–805 (1998) (analyzing the efficacy of municipal antidiscrimination laws and expressing skepticism about their impact); Michael A. Woods, Comment, *The Propriety of Local Government Protections of Gays and Lesbians from Discriminatory Employment Practices*, 52 EMORY L.J. 515, 527–28 (2003) (evaluating Readler’s argument and noting that the deterrent effect of the laws might still be strong).

293. As an initial matter, courts could hold that people in plural relationships are *already* protected by prohibitions on sexual orientation, marital-status, or family-status discrimination. For instance, marital status discrimination has been interpreted to reach not only single individuals, but nonmarital cohabitants as well. See *Smith v. Fair Emp. & Hous. Comm’n*, 913 P.2d 909, 915–16 (Cal. 1996). People discriminate against people in consensually non-monogamous relationships precisely because they do not adhere to the norm of monogamy, which has its ultimate expression in marriage. If cohabitation is protected because it violates the marital norm, see *id.* at 915, then the same should be true for people in non-monogamous relationships. That said, state and local governments could add protections for “relationship structure” or “relationship status,” clearly expanding antidiscrimination protections to people in plural relationships. The City of Berkeley, for example, entertained the possibility of adding “relationship structure”—referring to “the number of consenting adults involved in an intimate [personal] relationship and/or the number of intimate personal relationships in which each consenting adult is simultaneously involved[,] . . . includ[ing] an individual’s ‘disposition’ or desire for a certain relationship structure”—to its list of protected characteristics. See Memorandum from Linda Maio, Councilmember, City of Berkeley, to Honorable Mayor and Members of the City Council (Dec. 19, 2017), https://www.cityofberkeley.info/Clerk/City_Council/2017/12_Dec/Documents/2017-12-19_Item_27_Prohibiting_Discrimination.aspx [<https://perma.cc/2WYR-V3L3>] (proposing the amendment of chapter 13.31 of the Municipal Code to include a wide range of protections) (internal quotation marks omitted).

294. See, e.g., Nancy Leong, *Negative Identity*, 88 S. CAL. L. REV. 1357, 1406 (2015) (noting that 22 states and the District of Columbia have statutes prohibiting marital status discrimination in employment and that 24 states have statutes prohibiting marital status discrimination in housing); HUM. RTS. CAMPAIGN, 2020 STATE EQUALITY INDEX 12–14 (2020), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/HRC-SEI20-report-Update-022321-Final.pdf?mtime=20210322114741&focal=none> [<https://perma.cc/Q72R-YJEX>] (noting that approximately half of the states prohibit discrimination on the basis of sexual orientation and gender identity in employment, housing, and public accommodations); Yishai Blank & Issi Rosen-Zvi, *The Geography of Sexuality*, 90 N.C. L. REV. 955, 978 (2012) (noting, at the time of writing, that 127 municipalities prohibited discrimination on the basis of sexual orientation in employment, housing, and public accommodations).

unlawful for employers to refuse to hire, fire, discriminate in compensation or terms of employment, or advertise positions that discriminate based on, among other things, sexual orientation and marital status.²⁹⁵ Nor can the owner of any housing accommodation discriminate against, harass, inquire about, or publicize any preference against or limitation regarding those protected characteristics.²⁹⁶ “[B]usiness establishments of every kind” must provide “full and equal accommodations, advantages, facilities, privileges, or services.”²⁹⁷

Municipalities can also enact or extend antidiscrimination protections. The City of Berkeley, California, for example, first embraced a policy of eliminating discrimination on the basis of sexual orientation in 1978, prohibiting discrimination in employment, housing, and public accommodations.²⁹⁸ Several municipalities, including Berkeley, have expanded the reach of their laws by requiring parties entering contracts with the city to adopt these non-discrimination provisions in the performance of their contract.²⁹⁹ These provisions ensure that a city’s contracting partners, often private entities located outside of the jurisdiction, comply with the city’s antidiscrimination laws.³⁰⁰

If the experiences of gay and lesbian people are any guide, municipalities are likely to lead innovation in this area.³⁰¹ Municipal ordinances offer the benefit of “devolving policymaking to communities with particular conditions, preferences, and concerns.”³⁰² They lower the stakes of polarizing debates, allowing the accommodation of differing viewpoints across the state.³⁰³

Despite their advantages, municipal ordinances are vulnerable to preemption by state law. The intricacies of preemption have received ample treatment elsewhere so I only summarize them here.³⁰⁴ Whether a particular

295. See CAL. GOV’T CODE § 12940 (West 2021).

296. See CAL. GOV’T CODE § 12955 (West 2022); see also *id.* § 12955(e), (f), (i), (j) (extending prohibitions to mortgage companies, real estate brokers, and other market participants).

297. CAL. CIV. CODE § 51(b) (West 2016).

298. See BERKELEY, CAL., ORDINANCE 5106-NS, § 1 (1978) (codified at BERKELEY, CAL., CODE § 13.28.010 (2021) *et seq.*). For another example of antidiscrimination legislation, see CAMBRIDGE, MASS., CODE § 2.76.120 (2018) (covering discrimination in employment, public accommodations, and more).

299. See BERKELEY, CAL., CODE § 13.26.070 (2021); see also CAMBRIDGE, MASS., CODE § 2.76.100 (2018) (requiring any contractors with the City of Cambridge, Massachusetts, to agree not to violate the city’s antidiscrimination laws).

300. See BERKELEY, CAL., CODE § 13.26.010 (2021).

301. See Blank & Rosen-Zvi, *supra* note 294, at 957 (focusing on the history of sexual orientation-protective legislation and noting how efforts began at the municipal level).

302. Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2027 (2018).

303. See *id.*

304. See, e.g., Briffault, *Our Localism*, *supra* note 280, at 7–18 (laying out the basic relationship between local and state governments); Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1133–53 (2007) (examining intrastate preemption battles); Erin Adele Scharff, *Hyper Preemption*:

aspect of an antidiscrimination regime will be preempted depends on the state-municipal relationship created by state law, the extent to which state or federal laws explicitly preempt the particular antidiscrimination ordinances at issue, and the way specific courts have construed and applied preemption doctrines.³⁰⁵ States can attempt to bypass this analysis by expressly preempting municipal ordinances or expressly stripping municipalities of the power to enact categories of legislation. For instance, in 2011, Tennessee expressly preempted local antidiscrimination ordinances that extend protections beyond state law, and several other states have followed suit.³⁰⁶

These concerns certainly cast a shadow over municipal lawmaking but should not dissuade municipalities from adopting robust antidiscrimination protections. Even if the laws are not consistently enforced, they may still deter instances of discriminatory conduct.³⁰⁷ Moreover, they can change social norms, lessening the stigma faced by people in plural relationships. Antidiscrimination laws express the community's determination that people belonging to particular groups are entitled to respect. "[L]aw matters for what it says in addition to what it does."³⁰⁸ The law can alter the way a particular action—like refusing to rent to a polyam family—fits with (or fails to fit with) the community's norms and practices.³⁰⁹ Moreover, the law may change a person's views about something like polyamory: Recent studies suggest that the legalization of same-sex marriage at the statewide level reduced implicit and explicit antigay bias.³¹⁰ Laws recognizing plural relationships could have

A Reordering of the State-Local Relationship?, 106 GEO. L.J. 1469, 1474–86 (2018) (describing traditional forms of preemption and identifying a new, aggressive form of preemption); Woods, *supra* note 292, at 530–48 (examining state preemption of local antidiscrimination ordinances).

305. See Diller, *supra* note 304, at 1140–57 (noting variations in the approaches); Woods, *supra* note 292, at 531–38 (considering further approaches). Compare *Delaney v. Superior Fast Freight*, 18 Cal. Rptr. 2d 33, 38 (Ct. App. 1993) (holding that Los Angeles's ordinance prohibiting discrimination on the basis of sexual orientation was preempted by the state Fair Employment and Housing Act), with *City of Atlanta v. McKinney*, 454 S.E.2d 517, 521 (Ga. 1995) (upholding the City of Atlanta's antidiscrimination ordinance as a valid exercise of the city's police powers, noting that prohibiting discrimination could be justified in the name of protecting the health, safety, and general welfare of the public).

306. See Scharff, *supra* note 304, at 1472.

307. Even assuming many private employers are unaware of the law or disregard it because of the minimal threat of enforcement, some private actors may be law abiding. The municipality would also be highly likely to abide by its own antidiscrimination laws.

308. Richard A. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 373 (2000) (hypothesizing that local laws enacted by the legislature are more likely to be viewed as legitimate expressions of community values).

309. See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1525 (2000); see also Marie-Amélie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 ALA. L. REV. 793, 826 (2017) (noting that the "law can change the social meaning of an action").

310. See Eugene K. Ofose, Michelle K. Chambers, Jacqueline M. Chen & Eric Hehman, *Same-Sex Marriage Legalization Associated with Reduced Implicit and Explicit Antigay Bias*, 116 PROC. OF THE NAT'L ACAD. OF SCI. J. 8846, 8849 (Claude M. Steele, ed., 2019). But see Margaret E. Tankard &

a similar effect. Even if they do not, changing the norm still makes compliance more likely because people can perceive and react to changing social norms even if they do not change their personal views.³¹¹

Many of these benefits arguably redound even if municipal ordinances are eventually preempted. As Heather Gerken has observed, global minorities (like people in plural relationships) can be local majorities, or at least enjoy political power on a local level.³¹² When they act in furtherance of their objectives, “[t]hey are able to offer a real-world example of what their principles would look like in practice.”³¹³ The topic goes from an abstract argument to a concrete decision. It is more visible and cannot easily be ignored.³¹⁴ There is also likely to be an endowment effect or status quo bias, potentially favoring the minority position or at least shaping the types of arguments that the global majority must marshal to overturn the decision.³¹⁵ Of course, decisive acts risk backlash, like Tennessee’s broad preemption law. However, the long-term impacts of backlash must be weighed against the benefits of agenda-setting and the possibility that a backlash will never come.³¹⁶

C. MEETING VULNERABILITY

Courts and legislators should also reimagine the role of the law in meeting the specific types of relational vulnerabilities shared by people in plural relationships. Laws already protect some relationships in times of crisis—such as after an accident, the onset of a serious illness, or death. It is the *crisis*, and the law’s ability to remedy it, that matters; *not* any predetermined conception of family.

Elizabeth Levy Paluck, *The Effect of a Supreme Court Decision Regarding Gay Marriage on Social Norms and Personal Attitudes*, 28 PSYCH. SCI. 1334, 1341–42 (2017) (finding inconclusive support for changed personal views as a result of legalization, but significant support for changed social norms).

311. See Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 595 (1998); George, *supra* note 309, at 826; Tankard & Paluck, *supra* note 310, at 1335, 1342 (noting that people perceived norms around same-sex marriage to have shifted in response to nationwide legalization).

312. Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748 (2005).

313. *Id.* at 1754 (citing, as an example, San Francisco’s issuance of marriage licenses to same-sex couples in 2004).

314. See *id.* at 1761–62 (noting that because it takes the form of an official act, it binds people in a jurisdiction, requiring the majority to take it seriously).

315. See *id.* at 1764; see also *id.* at 1766 (arguing that the minority decision “remap[s] the politics of the possible”).

316. Gerken notes that San Francisco’s issuance of marriage licenses to same-sex couples prompted officials in other jurisdictions to act in similar ways, forced states across the country to consider whether they would recognize those marriages, and forced California courts to decide whether the marriages were lawful. See *id.* at 1764–65. Evidence of backlash in the 2004 elections immediately following San Francisco’s actions was mixed. *Id.* at 1765. And in hindsight, the backlash was relatively short-lived in light of the U.S. Supreme Court’s decision legalizing same-sex marriage in 2015.

These laws fall into several different buckets. Tort law allows family members to seek damages for harms caused by others' negligence. Leave laws protect workers when they need to take time off work to take care of sick family members or mourn their loss. Visitation laws allow people to visit hospitalized or incarcerated family members. Succession rights protect family members who might otherwise be displaced from affordable or rent-controlled housing. Because they respond to vulnerabilities that people in plural relationships experience, many of these laws should be offered to people in plural relationships. Examining how all of these laws could apply to plural relationships could be the subject of its own article. Here, I briefly discuss tort law and family leave benefits to illustrate how the analysis might unfold.

The tort system recognizes that injuries to individuals will also harm their family members. The torts of loss of consortium, infliction of emotional distress, and wrongful death grant standing to family members to sue for injuries like deprivation of companionship, emotional upheaval, or loss of financial support that they experience as a result of the tortfeasor's conduct.³¹⁷ In a majority of states, courts have refused to extend standing to bring these claims to adults in nonmarital relationships.³¹⁸ One leading justification for these decisions is that formal family categories help to constrain the scope of liability, containing what otherwise would be "an intolerable burden on society."³¹⁹ Another is that opening the door to claims by people in relationships functionally equivalent to marriage would overburden courts, for instance by requiring them to decide which relationships involve sufficient levels of dependency to sustain a claim.³²⁰

Both objections would be addressed by state legislation making registered partners eligible to bring these tort claims. California has previously accomplished this result in two separate ways: It amended the state wrongful death statute to specifically identify the rights of domestic partners to

317. See generally DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, HORNBOOK ON TORTS §§ 28.1, 29.10, 29.11 (2d ed. 2016) (describing wrongful death, negligent infliction of emotional harm, and loss of consortium claims). Most plural relationships involve sufficient emotional or physical intimacy and companionship to justify standing to bring claims for emotional distress or loss of consortium. Wrongful death claims are trickier in that the tort is meant to address financial dependency and inheritance. See *Steed v. Imperial Airlines*, 524 P.2d 801, 805 (Cal. 1974); *Holguin v. Flores*, 18 Cal. Rptr. 3d 749, 759 (Ct. App. 2004); see also John G. Culhane, A "Clanging Silence": *Same-Sex Couples and Tort Law*, 89 KY. L.J. 911, 978 (2001) (analyzing the ways in which wrongful death differs from loss of consortium). If the plural relationship status is defined capaciously as I have advocated, not all partners will be in a financially interdependent relationship. Thus, it may be less accurate to presume that their inheritance rights will necessarily be impacted in such a way as would justify standing to bring the claim.

318. See Culhane, *supra* note 317 at 947-48, 951-53, 970 n.285; William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1933-34 (2012).

319. *Elden v. Sheldon*, 758 P.2d 582, 586, 588 (Cal. 1988).

320. See *id.* at 587 (noting that the inquiries would also be intrusive).

maintain lawsuits,³²¹ and it stated in its domestic partnership legislation that partners would be treated identically to spouses whether the rights at issue derive from statutes, government policies, or common law.³²² It could easily do the same for plural relationships.

These objections could arguably be addressed by municipal registries as well. The two courts to have considered the issue rejected arguments that municipal registries confer standing to bring these tort claims, holding that such claims are preempted by state law.³²³ But the plaintiffs in both lawsuits argued that the mere fact of registration conferred standing under state tort law, a claim the courts quickly and correctly rejected. They apparently did not argue that municipal registries constrain the universe of liability substantially by differentiating registered partners from all other potential claimants, or that the fact of registration would relieve courts from having to decide whether the relationship was sufficiently close to confer standing.

Finally, more state courts could join the growing minority of states that confer standing to partners in relationships that perform the relevant functions, such as emotional support or mutual dependency.³²⁴ Scholars have compellingly argued in favor of this approach, pointing to the unjust impact of unremedied harms suffered by people in relationships functionally similar to marriage.³²⁵ As I cautioned in Part III.A, these functional analyses simultaneously exclude nonconforming relationships and risk reinscribing marital norms in a way that can do long-term damage to plural relationships.³²⁶ However, there are several reasons to be less concerned about functional analyses in this context. First, these risks are lessened if functional analysis supplements formal registration because it allows people to rely on formalities to bypass the functional analysis in the first place. Second, extending standing to sue does not obligate the other partner to bring an unwanted lawsuit. As such, it does not pose much of a risk to the parties' right to self-determination.

Laws allowing partners to take leave to care for their partners and children recognize the important role that partners play in providing care to the ill, as well as the jeopardy in which they find themselves if they must

321. See CAL. CIV. PROC. CODE § 377.60 (West 2022).

322. See CAL. FAM. CODE § 297.5(a) (West 2022); see also *Ponting v. Lowe's HIW, Inc.*, No. C 12-06442, 2014 WL 59995, at *1 (N.D. Cal. Jan. 7, 2014) (applying the statute to a loss of consortium claim).

323. See *Ponting*, 2014 WL 59995, at *1; *Lennon v. Charney*, 797 N.Y.S.2d 891, 892-93 (Sup. Ct. 2005) (noting that municipal legislation was upheld by appellate courts in part because it did not occupy the same field as state law).

324. See Eskridge, *supra* note 318, at 1934 (noting a trend among states to recognize dependency); Matsumura, *Beyond Property*, *supra* note 149, at 1352-54 (identifying contemporary cases).

325. See POLIKOFF, *supra* note 15, at 193-96; Culhane, *supra* note 317, at 947-48, 953.

326. For an analysis of the relationship between marital norms and polyamory, see Katharine K. Baker, *The Polyamorous Threat to Nonmarriage*, FAM. CT. REV. (forthcoming 2022) (draft on file with author).

choose between providing that care and remaining employed.³²⁷ Many partners provide caregiving irrespective of formal relationship status. This is also true for children that the adults may jointly be raising.

One silver lining of the COVID-19 pandemic was the extent to which the illness revealed the importance of caregiving networks irrespective of formal family status. Neighbors and roommates became responsible for providing meals and companionship.³²⁸ The government response to the COVID-19 pandemic acknowledged as much by providing paid family leave to workers with “a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider).”³²⁹ Nothing in the statute restricted coverage to a limited range of established relationships, such as parent-child or marital relationships.

Leave laws can and should respond to this more realistic understanding of the universality of vulnerability. In fact, as Deborah Widiss has recently observed, a small but growing number of states have begun to extend family leave to people in informal relationships.³³⁰ These state laws take one of four approaches: They may extend benefits to partners whose relationships are marked by the presence of non-exclusive factors that establish interdependency; allow workers to demonstrate that their relationships are equivalent to established family relationships; allow partners to claim that they have a significant personal bond; or simply cover relationships in which the ill individual is dependent upon the worker for care.³³¹ While all of these approaches are an improvement over leave laws that only cover marriage, states that require partners to analogize to marriage will still exclude relationships that do not hew closely to marital norms. The latter two approaches, which depend more on self-identification or caregiving (rather

327. See POLIKOFF, *supra* note 15, at 168–72. In remarks to a joint session of Congress, President Biden explained the paid leave proposals in his American Families First plan by saying, “No one should have to choose between a job and paycheck or taking care of themselves and their loved ones—a parent, a spouse, or child.” Remarks by President Biden in Address to a Joint Session of Congress (Apr. 29, 2021), in <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/29/remarks-by-president-biden-in-address-to-a-joint-session-of-congress> [<https://perma.cc/94UL-WUN3>]. My argument acknowledges the truth of President Biden’s reasoning beyond narrow formal categories.

328. See, e.g., Joanne Kaufman, *My Neighbor, My Pandemic Pal*, N.Y. TIMES (Jan. 24, 2021), <https://www.nytimes.com/2021/01/22/realestate/coronavirus-neighbors.html> [<https://perma.cc/8DCX-5XNX>] (describing how neighbors provided companionship in the face of social isolation); *How Families and Roommates Can Effectively Self-Quarantine, Self-Isolate*, JOHNS HOPKINS UNIV.: HUB (Mar. 23, 2020), <https://hub.jhu.edu/2020/03/23/how-to-self-quarantine-self-isolate> [<https://perma.cc/9XZ2-SSKK>] (discussing the logistics of living with and supporting someone who may have COVID-19).

329. *Families First Coronavirus Response Act: Employee Paid Leave Rights*, WAGE & HOUR DIV., U.S. DEP’T LAB., <https://www.dol.gov/agencies/whd/pandemic/ffcr-employee-paid-leave> [<https://perma.cc/L752-L39L>].

330. See Deborah A. Widiss, *Chosen Family, Care, and the Workplace*, 131 YALE L.J. F. 215, 230–34 (2021).

331. See *id.*

than financial interdependency) come closer to vindicating the purposes of family leave and should be emulated and extended.

The point here is that many existing laws address vulnerabilities common to plural relationships notwithstanding their variations. As long as these laws do not impose obligations (like paid leave laws, which allow a fixed amount of leave but do not require that people take it), their inclusion in a plural relationship status will protect partners rather than exclude them.

This Part identifies tradeoffs—for instance, between providing benefits like health insurance at the cost of insisting upon and elevating a narrower conception of valued relationships—to highlight the risks and opportunities for advocates and policymakers. It shows that it is possible to craft a status that responds to relational vulnerability and promotes equal dignity while simultaneously preserving a relatively open space for partners to define their relationships and mutual obligations as they see fit.

IV. POTENTIALITIES

Extending legal rights and protections can provide a significant degree of support to people in plural relationships while preserving relational diversity. I conclude the Article by exploring potential impacts beyond plural relationships. My central suggestion is that plural relationships may weaken marriage's influence over the full range of caring adult relationships, allowing other relationships, and individuals, to flourish.

For decades, scholars have forcefully protested the law's continued privileging of marriage over other family forms. If other relationships perform the same functions, the argument goes, it is unjust to favor marriage over those other relationships.³³² While marriage has declined in popularity over the years,³³³ it has continued to monopolize the law's regulation of adult relationships.³³⁴ Marital duties constrain the types of private agreements that unmarried individuals can enter.³³⁵ Marriage also shapes the rights and

332. See, e.g., ELIZABETH BRAKE, *MINIMIZING MARRIAGE: MARRIAGE, MORALITY, AND THE LAW* 3 (2012) (“While there may be special goods in caring relationships, they do not depend on marriage—and, indeed, the special value attributed to marriage has penalized caring relationships that fail to fit the marital norm.”); POLIKOFF, *supra* note 15, at 3 (“Marriage as a family form is not more important or valuable than other forms of family I advocate solutions to the needs all families have for economic well-being, legal recognition, emotional peace of mind, and community respect.”).

333. Fewer American adults are married than unmarried. See *Marital Status, Table S1201, American Community Survey*, U.S. CENSUS BUREAU (2019), <https://data.census.gov/cedsci> (type “marital status” in the search box; click “View All 21 Products” under “S1201: MARITAL STATUS”; choose “2019: ACS 1-Year Estimates Subject Tables” on the dropdown box; click “Margin of Error” to unhighlight the selection).

334. For more on this topic, see generally Kaiponanea T. Matsumura, *The Marital Habitus*, 99 WASH. U. L. REV. (forthcoming 2022) [hereinafter Matsumura, *The Marital Habitus*] (demonstrating how difficult it is for parties, courts, and scholars to see beyond marriage's mold).

335. See generally Antognini, *supra* note 252 (explaining that marriage is a recognized limit on the right to contract); Courtney G. Joslin, *Nonmarriage: The Double Bind*, GEO. WASH. L. REV.

obligations that states offer to domestic partners.³³⁶ Some states have even converted domestic partnerships and civil unions to marriages irrespective of the partners' wishes.³³⁷ Marriage still exercises what Katherine Franke has called a "gravitational pull": It is the yardstick against which the law measures "all things that have elements of intimacy, love, commitment, sex, or the like."³³⁸

Franke argues that merely protesting or critiquing marital hegemony has done little to displace it.³³⁹ What is needed is something that displaces marriage "by interposing a competing and normatively disorienting gravitational pull that could result in the disorganizing of bodies, intimacy, sexuality, and publics in interesting and productive ways."³⁴⁰ Plural relationships, with their permeable boundaries, capaciousness, and fluidity, provide that new frame.

Recall the law's general refusal to enforce non-monetary agreements between both spouses and people in intimate or familial relationships. This rule originates in marital coverture, specifically, the twin notions that wives lost their separate legal identity upon marrying and that spouses' obligations were set by law.³⁴¹ To this day, when spouses attempt to exchange services they are already obligated by the marital relationship to perform, the law will not recognize the agreement.³⁴² As Albertina Antognini has shown, courts apply this same reasoning when adjudicating claims between *unmarried* cohabitants.³⁴³ That is, they assume that partners who perform "wifely" services have done so gratuitously instead of as part of a bargained-for exchange.³⁴⁴ They see services like child-rearing and housekeeping as "part of the give-and-take of an intimate relationship."³⁴⁵ Another way of looking at it is that some courts cannot understand why two adults who live in a marriage-like relationship,

(forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3932553 [<https://dx.doi.org/10.2139/ssrn.3932553>] (explaining that nonmarital partners are in a "double bind," being denied protection under both family law and market law).

336. See Melissa Murray, *Paradigms Lost: How Domestic Partnership Went from Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291, 294–96 (2013); NeJaime, *supra* note 15, at 111, 121–54 (describing the dialogical relationship between marriage and domestic partnerships).

337. Matsumura, *A Right Not to Marry*, *supra* note 216, at 1518.

338. Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2701 (2008).

339. See *id.* at 2702.

340. *Id.* Franke suggests that friendship could provide that normative frame. See *id.* at 2703.

341. See Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2196–205 (1994) (exploring the extension of coverture into the reasoning of modern contract cases); see also Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 500–02 (2005) (examining the "preexisting duty to provide domestic services to the other" for no contractual consideration); Matsumura, *Public Policing*, *supra* note 257, at 178–79, 191–93 (examining the "separate spheres" between "the family and the market").

342. See Siegel, *supra* note 341, at 2199–210; see also *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16, 18–20 (Ct. App. 1993) (referencing the paramount public interest of the state in marriage).

343. Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2159–61 (2019).

344. See *id.* at 2161–73.

345. See *id.* at 2173.

and could choose to marry at any time, would attempt to enter into an agreement involving domestic services without just getting married.³⁴⁶ Marriage blinds courts to other possibilities.³⁴⁷

Plural relationships can help to remove these blinders. Most importantly, because no jurisdiction allows more than two people to marry, courts cannot assume that the partners would have married if they wanted legal rights. Relatedly, the parties themselves will likely be less tempted to assert that they agreed to marriage-like rights and obligations based on vague discussions about “economic equality”³⁴⁸ or “agreement[s] to live as husband and wife.”³⁴⁹ Although some partners in polyfidelitous group relationships may be tempted to replicate equal division or equitable division of all property and assets, many will likely take a more customized, asset-by-asset approach. These agreements, in turn, will reveal to courts that it is possible for partners to make commitments regarding the legal consequences of their relationships outside of marriage. Most judges will likely lack preconceptions about how plural relationships should be structured,³⁵⁰ reducing the temptation to substitute their judgment for the parties’.

These insights can possibly extend to non-economic contract terms. The non-enforcement of contracts between intimate partners highlights the persistence of traditional spousal duties.³⁵¹ In *Favrot v. Barnes*, for instance, the court refused to find that a wife’s alleged breach of a promise “to limit sexual intercourse to about once a week” was divorce-causing fault.³⁵² The court reasoned that such an agreement, if enforced, would violate the duty of spouses to “fulfill ‘the reasonable and normal sex desires of each other.’”³⁵³ The need for agreements regarding whether and to what extent partners will engage in sexual conduct in plural relationships is apparent. That is, one can easily imagine that with multiple partners, this type of coordination may be a

346. See, e.g., *Davis v. Davis*, 643 So. 2d 931, 936 (Miss. 1994) (affirming a trial court decision rejecting an alleged contract to form an economic partnership because the plaintiff previously turned down a marriage proposal); *Friedman v. Friedman*, 24 Cal. Rptr. 2d 892, 899 (Ct. App. 1993) (holding that the failure of a heterosexual couple to marry amounted to proof that the couple did not intend to incur any legal obligations).

347. For a deeper exploration of this argument, see Matsumura, *The Marital Habitus*, *supra* note 334.

348. *Friedman*, 24 Cal. Rptr. 2d at 895 (internal quotation marks omitted).

349. *Davis*, 643 So. 2d at 933.

350. Although it seems highly likely that many judges share the same negative perceptions of people in plural relationships as the public at large, I assume that most judges will attempt to apply the law impartially. Moreover, those who do not will not have a reason to favor one party over any other, as all will be “guilty” of participating in a non-normative relationship.

351. See Matsumura, *Public Policing*, *supra* note 257, at 178–79 (discussing the concept which Reva Siegal has called “preservation through transformation”) (internal quotation marks omitted).

352. *Favrot v. Barnes*, 332 So. 2d 873, 875 (La. Ct. App. 1976), *rev’d on other grounds*, 339 So. 2d 842 (La. 1976). The husband contended that the wife “sought coitus thrice daily,” a claim the wife denied, although she admitted frustration that she could not even touch her husband. See *id.*

353. *Id.* (quoting *Mudd v. Mudd*, 20 So. 2d 311, 313 (La. 1944)).

central part of the parties' living arrangement.³⁵⁴ If sexual arrangements are a subject that people in a plural relationship might reasonably specify in advance, why would it be unreasonable for people in a dyadic relationship to do the same?

Plural relationships can also challenge the assumption that marriage involves a clear starting and ending point and the doctrines that the assumption upholds. Plural relationships are often fluid, adding and subtracting members, and toggling between sexual and affective or primary and secondary relationships.³⁵⁵ Adrienne Davis has insightfully observed within the context of polygamy that unlike dyadic marriage, the departure of a partner during an ongoing relationship does not necessarily result in the termination of the relationship, at least when two or more partners are interested in continuing it.³⁵⁶ In that sense, the relationship can live on indefinitely in different forms.³⁵⁷ This notion of a relationship in a perpetual state of becoming is at odds with marriages, which are alternately conceived of as eternal³⁵⁸ and subject to clear points of demarcation.³⁵⁹

The conventional all-or-nothing view of marriage props up several legal rules. For example, courts will seldom intervene to address spousal disputes over property or other matters until the relationship's end.³⁶⁰ The primary justification for the rule is that interference in an ongoing marriage—one that does not involve separation or abandonment—would be destructive to the relationship.³⁶¹ Of course, once the marriage ends, the state has substantial authority to divide property, impose support obligations, and manage the parties' conduct. Although some courts have held that property acquired during periods of cohabitation prior to marriage can be treated as marital

354. See, e.g., SHEFF, *supra* note 27, at 90–99 (discussing the practice of communicating over issues pertaining to sex, exclusivity, and more).

355. See *supra* notes 64–69 and accompanying text.

356. See Davis, *supra* note 16, at 1994–95.

357. See, e.g., Solomon, *supra* note 34 (describing a polygynous relationship between Rich Austin and several women, with some women coming and going during the course of the relationship).

358. See *Obergefell v. Hodges*, 576 U.S. 644, 666–68, 681 (2015) (characterizing marriage as “permanent,” “enduring,” and “embod[ying] a love that may endure even past death”).

359. See *Drake v. Drake*, 725 A.2d 717, 721 (Pa. 1999) (noting that “the purpose of . . . no-fault divorce . . . is to effect a ‘clean break’ between spouses”); see also *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (characterizing divorce as a means to “liberate [oneself] from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage”).

360. See, e.g., *Mary Anne Case, Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL'Y 225, 225–27 (2011) (describing judicial resistance to the enforcement of agreements during marriage); Saul Levmore, *Love It or Leave It: Property Rules, Liability Rules, and Exclusivity of Remedies in Partnership and Marriage*, 58 LAW & CONTEMP. PROBS. 221, 225–26 (1995) (noting that courts do not aid spouses in remedying breach of agreements or failing to perform spousal duties adequately); Silbaugh, *supra* note 257, at 71 (noting judicial refusal to enforce agreements between spouses governing conduct during an ongoing marriage).

361. See *McGuire v. McGuire*, 59 N.W.2d 336, 341–42 (Neb. 1953).

property because of the parties' subsequent marriage,³⁶² other courts have upheld the line between the two. They have insisted that only property acquired after marriage can be characterized as marital, or that spouses must demonstrate that special circumstances justify considering as marital property when acquired during cohabitation.³⁶³

Even doctrines that admit the possibility that conventional relationships are something less than perfectly monogamous will still promote exclusivity. When courts award alimony, they recognize that one former spouse may still be dependent upon the other even though the marriage is over.³⁶⁴ Alimony gives rise to the possibility that a paying former spouse who marries again will have to support two individuals simultaneously. In these circumstances, we might say that the law's desire to privatize dependency overrides its preference for pure monogamy. However, almost all states have a rule that once the party receiving alimony remarries (or cohabits, in many jurisdictions), the paying spouse's duty ends.³⁶⁵ The dependent spouse becomes someone else's responsibility.³⁶⁶ These rules aim to enforce monogamy by imposing clear boundaries on liminal relationships.³⁶⁷

Plural relationships unseat these assumptions by illuminating the permeability of borders and categories. Additionally, they will require courts to intervene in ongoing relationships to resolve disputes and enforce legal rights. If courts must hear the claims of a departing partner, it is not a stretch to imagine that they could adjudicate claims between remaining partners, or,

362. See, e.g., *Malek v. Malek*, 768 P.2d 243, 246 (Haw. Ct. App. 1989); *Nelson v. Nelson*, 384 N.W.2d 468, 472 (Minn. Ct. App. 1986).

363. See, e.g., *Chase v. Chase*, 109 P.3d 942, 948 (Alaska 2005) (requiring special findings to justify the invasion of separate property); *Floyd v. Floyd*, 436 S.E.2d 457, 459 (Va. Ct. App. 1993) (rejecting cohabitation alone as a valid consideration); *Simoneau v. Simoneau*, 693 A.2d 1135, 1136–37 (Me. 1997) (drawing a hard line); *Smith v. Smith*, 749 A.2d 921, 927 (Pa. Super. Ct. 2000) (refusing to treat property acquired during a period of cohabitation prior to re-marriage as marital property).

364. See Cynthia Lee Starnes, *One More Time: Alimony, Intuition, and the Remarriage-Termination Rule*, 81 IND. L.J. 971, 983–84 (2006) (noting the traditional emphasis on spousal need and lifetime responsibility); see also Perry, *supra* note 223, at 23–25.

365. See, e.g., Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276, 1316–20 (2014) (analyzing cohabitation-termination); Perry, *supra* note 223, at 25–26 (exploring termination due to remarriage and cohabitation); Starnes, *supra* note 364, at 978 (remarriage-termination).

366. See Starnes, *supra* note 364, at 978 (observing that the rule functions to ensure that a person is only being supported by one spouse at a time).

367. Given the frequency with which cohabiting relationships begin when one or both cohabitants are already married, see *supra* note 42 (collecting cases), one might expect that the law would impose a rule prioritizing the spouse's claim over the cohabitant's. Cf. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.01(5) (AM. L. INST. 2021) (making domestic partner rights acquired through cohabitation subservient to the rights of spouses). In fact, the issue seldom arises, and, even under circumstances where it should, courts have not addressed it explicitly. See, e.g., *In re Estate of Roccamonte*, 808 A.2d 838, 846 (N.J. 2002) (allowing a cohabitant to bring a claim against her married partner's estate but not considering the impact on the spouse's share).

for that matter, adjudicate disputes between the partners even in the absence of an exit by one of them.

In fact, courts often enforce agreements or police behavior within the context of long-term relationships involving open-ended duties.³⁶⁸ In a recent example of contract enforcement during an ongoing relationship, a court upheld an exclusive management contract between a boxer and his promoter over the boxer's objection, concluding that the promoter exercised "best efforts to secure remunerative boxing contests."³⁶⁹ Despite the boxer's dissatisfaction with the promoter's performance, the court issued a declaratory judgment that the boxer could not unilaterally terminate the agreement, on which 837 days remained.³⁷⁰ The court's intervention, in short, adjudicated a dispute between the parties over one party's performance, and preserved the relationship pursuant to the terms of the agreement. Another category of examples are lawsuits adjudicating disputes between employees and employers during an ongoing employment relationship. Pay disputes between tenured faculty members and universities is not uncommon, for instance, and those disputes are resolved by courts while faculty members continue to perform their duties under their employment contracts.³⁷¹ Plural relationships would bring this logic into the family realm.

* * *

Stepping back, it is both maddening and illuminating that the law will treat a person in a quad or polyamorous V as single rather than recognizing the relationship for what it is. This categorization reveals a willful blindness that borders on the absurd, challenging the meaningfulness of all family categories. In fact, all individuals toggle between relationship types, even if more subtly. Single people partner off; partners leave or die. Relationships are in a perpetual state of becoming and unbecoming, a truth for which the law must better account.

368. See, e.g., IAN MACNEIL, *THE NEW SOCIAL CONTRACT* 22–23 (1980) (noting that employment agreements struggle to specify or define what attributes or performances make a worker particularly good).

369. *Franklin v. Haak*, 499 F. Supp. 3d 379, 383, 389–91 (E.D. Mich. 2020).

370. *Id.* at 395. The court concluded that the promoter's record of obtaining 17 remunerative boxing contexts was ample evidence of reasonable diligence, even if the boxer was dissatisfied with the opportunities that the promoter secured. See *id.* at 390–91.

371. See, e.g., *Freyd v. Univ. of Oregon*, 990 F.3d 1211, 1218–19 (9th Cir. 2021) (involving a dispute over disparate pay); *Kalia v. City Univ. of New York*, No. 19-CV-6242, 2020 WL 6875173, at *1–2 (S.D.N.Y. Nov. 23, 2020) (describing the history of disputes over promotion to full professor and distinguished professor between a tenured faculty member and his institution).