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Marriage, Law and Polyamory. Rebutting Mononormativity with Sexual Orientation Discourse?

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Abstract

This paper traces the genealogy of sexual orientation discourse in US legal scholarship and explores potential drawbacks of the articulation of a sexual orientation argument in the field of relationship recognition. After a long period of refraining from campaigning for legal recognition of multi-partner relationships, polyamory activists have recently shown a stronger interest in litigation. This paper identifies reasons for this shift in recent successes of the campaign for same-sex marriage rights and critically discusses proposals to frame polyamory as a sexual orientation to achieve multi-partner marriage rights through litigation. I argue that advocating a sexual orientation model of polyamory is likely to reduce the complexity and transformative potential of poly intimacies, limit the scope and reach of potential litigation, obstruct the capacity of poly activism to form alliances and increase the likelihood of poly activism to settle for legal solutions (i.e. marriage) that are exclusive and reproductive of a culture of privilege.

Key words

Polyamory; sexual orientation; compulsive monogamy; mononormativity; polygamy; slippery slope; multi-partner marriage; same-sex marriage

Resumen

Este artículo traza la genealogía del discurso sobre orientación sexual en las investigaciones jurídicas de Estados Unidos y explora los posibles inconvenientes de la articulación de un argumento de orientación sexual en el campo del reconocimiento de parentesco. Tras un largo período sin hacer campaña para el reconocimiento legal de las relaciones de múltiples miembros, los activistas del poliamor han mostrado recientemente un mayor interés en litigar. Este artículo identifica las razones de este cambio en los éxitos recientes de la campaña a favor del derecho al matrimonio entre personas del mismo sexo y debate de forma crítica las propuestas para enmarcar el poliamor como una orientación sexual, para alcanzar el derecho al matrimonio entre múltiples miembros a través del litigio. Se argumenta que defender un modelo de orientación sexual de poliamor es probable que reduzca la complejidad y el potencial transformador de las intimidades poli, limite el ámbito y el alcance de potenciales

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litigios, obstruya la capacidad del activismo poli de formar alianzas y aumente la probabilidad de que el activismo poli se conforme con soluciones legales (i.e. el matrimonio) que son exclusivas y reproductivas de una cultura de privilegio.

Palabras clave

Poliamor; orientación sexual; monogamia compulsiva; mononormatividad; poligamia; callejón sin salida; matrimonio con múltiples miembros; matrimonio entre personas del mismo sexo

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1. Introduction

In this paper I will discuss the potential drawbacks for polyamory activism of framing polyamory as a sexual orientation in order to advance recognition of multi-partner relationships and families by the law. Sexual orientation discourses have been strengthening alongside identity political strategies across various terrains of poly activism in North America and Europe. The question of whether polyamory can be understood to be an immutable and possibly inborn personality trait analogous to traditional notions of sexual orientation based on gendered 'object choice' has also become a subject for contemplation by legal scholars working in the fields of human rights, anti-discrimination and family law. This paper traces the genealogy of sexual orientation discourse in US legal scholarship and explores potential drawbacks of the articulation of a sexual orientation argument in the field of relationship recognition. The paper argues that advocating for a sexual orientation model of polyamory would reduce the complexity and transformative potential of poly intimacies, limit the scope and reach of potential legal litigation, obstruct the capacity of poly activism to form alliances and increase the likelihood of poly activism to settle for legal solutions (i.e. marriage) that are exclusive and reproductive of a culture of privilege.

The structure of the paper is as follows: The first part traces the emergence of sexual orientation discourse with regard to polyamory in influential US legal studies publications in the first decade of the 21st century. In the second part, I discuss changes in the relationship of poly communities to the politics of marriage. I interpret the shift from a long period of non-engagement with the question of legal recognition to a recent interest in legal litigation among US (and international) poly activists as a response towards advancements made by the campaign for same-sex marriage rights. The prominence of polyamory and polygamy in scaremongering slippery slope arguments against same-sex marriage provided a powerful barrier for the articulation of concrete demands for legal recognition within poly activism. This section also analyses in closer detail the legal reasoning behind the strategic deployment of sexual orientation models within a marriage framework. In the third part, I present critical thoughts on why the adaption of sexual orientation discourse may have negative impacts on the development of poly activism. My concerns are with questions of the constitution of poly subjects as political actors, the scope for mobilisation and the risks of reductionist and exclusivist strategies. The conclusion sums up the main arguments.

2. From disposition to sexual orientation – Contesting compulsory monogamy and carving out spaces for polyamory in US legal theory

The concept sexual orientation is usually understood as a durable disposition of a person regarding their erotic attraction to people of a certain sex or gender. Sara Ahmed (2006, p. 68) suggests that

[s]exual orientation is often described in terms of the sex of one's object choice: whether that sex is the "same sex" or "other sex", such that, according to Janis Bohan, "one's sexual orientation is defined by the sex (same or other) of the people to whom one is emotionally and sexually attracted" (Bohan 1996, p. xvi).

This view sustains either dualistic or triadic sexual orientation models, depending on whether multiple or fluid attractions are accounted for or not. Evans (2004, pp. 207-208) considers the latter possibility when he defines sexual orientation as: '[a] description of who and what one desires sexually, one's object choice. (...) It is used to refer to whether one is heterosexual, homosexual, or bisexual'. The concept has a long history in many traditions of thought, including sexology, psychology, biology, law and political activism (Klesse 2014a). In contradiction to the notion of 'sexual preference', sexual orientation tends to signify a deeply rooted and immutable feature of a person's 'personality'. Sexual orientation is often seen to be a question of heredity, i.e. of inborn genetically and/or hormonally acquitted qualities and faculties (LeVay 1996, Wilson and Rahman 2005).

In this part, I document a movement towards a position of strategic essentialism within US critical legal studies to contest the mononormativity of the law by framing polyamory as a deeply rooted character disposition, if not a 'sexual orientation'. This position was first presented in Elizabeth F. Emens's (2004) article 'Monogamy's Law: Compulsory Monogamy and Polyamorous Existence', where she argues that '[t]he suggestion of an essential poly identity presents intriguing possibilities for a politics based on an ingenuous or a strategic essentialism through which polys could try to build an image of themselves as a discrete minority' (Emens 2004, p. 352). Strategic essentialism, a term coined by Gayatri Spivak (1988), is offered as a promising vantage point from which to advance a comprehensive polyamorous rights agenda. Ann Tweedy (2011) has recently returned to and developed Emens's proposition in her article 'Polyamory as a Sexual Orientation' in which she explores the scope for inscribing polyamory in anti-discrimination legislation through its discursive fashioning as an essential personality trait. I consider both these articles as landmark publications that provide a road map for the mobilisation of polyamory – or more specific, the *polyamorous subject* – within the law. They provide an important avenue from which to rethink both the exclusion of polyamory from – and its possible inclusion in – legal relationship recognition. The definition of polyamory as a sexual orientation provides powerful arguments for attributing full legitimacy to certain multi-partner relationships within the framework of marriage. This option marks a distinctive position within a wider continuum of approaches to the regulation of multi-partner relationships that range from criminalization to decriminalization, either as an end in itself or paired with proposals for further formalization, recognition or regulation through civil marriage models or alternative frameworks derived from business and contract law (see Strassberg 2003, Emens 2004, Ertman 2005, Davis 2010, Dryden 2015).

Multi-partner relationships take manifold forms. Polyamory and polygamy are two of the major paradigms within which multi-partner relationships are articulated within the US context. Many authors converge that polyamory and polygamy have different histories and are based on distinct premises. Historically, polygamy in the United States has been strongly associated with the model of polygyny practiced within the Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS), a splinter group of the Mormon Church (LDS) that repudiated polygyny in 1890. However, there are also non-Mormon Christian groups that endorse polygyny as practiced in the period of the Old Testament Period. Moreover, polygyny is also practiced within other religious groups, including Muslims (from within African-American and other ethnic diasporic communities). Some Christian groups, such as the Liberated Christians interpret the New Testament as supporting diverse family structures including both multiple husbands and multiple wives. The Unitarian Universalists for Polyamory Awareness (UUPA), too, embrace a gender-egalitarian vision of family diversity (whether monogamous or multi-partner-based) (Stacey and Meadow 2009, Davis 2010). These latter versions of polygamy share more of a common ground with secular or new age approaches to multiple relationships within polyamory.

According to *The Oxford English Dictionary Online* (2016), polyamory is defined as "the custom or practice of engaging in multiple sexual relationships with the knowledge and consent of all partners concerned". Due to the influence of feminist and queer ideas, within polyamory people of every gender are free to enter multiple relationships and are not constrained by heteronormative partner choice on poly culture (Ritchie and Barker 2007, Deri 2015). Although sexism and heterosexism continue to pose a problem within poly communities (Klesse 2007), there are marked differences between gender-neutral conceptualisations of polyamory (that developed out of counter-cultural notions of free love) and patriarchal definitions of polygamy (derived from religious doctrines and mythologies) (Stacey and Meadow 2009). Proponents of polyamory and heteronormative polygyny have therefore frequently distanced themselves from each other (Strassberg 2003, Klein 2010, Sheff and Hammers 2011). Differences include distinct orientations towards marriage as an

institution. 'Polyamory, literally many loves, *not* many spouses, moreover, is less an alternative form of marriage than an alternative to marriage at all', argue, for example, Stacey and Meadow (2009, p. 193). This characteristic does not apply universally any longer since at least some factions within the poly movement have started to contemplate plural marriage. However, because of their different histories, advocates of polyamory and polygamy may well explore very different avenues for achieving legal recognition. Whereas polyamory may advance a marriage rights position based on a demand for equality based on sexual orientation, advocates of rights for Mormon polygamy are more likely to profit from the constitutional commitment for legal protection of religious difference (Davis 2010).

Despite the common conflation of both concepts in popular discourse, proponents of polygamy and of polyamory have created different campaigns and have often opposed each other. It is therefore not surprising that only a few authors consider possible overlaps between polyamory and polygamy regarding self-identification and/or commitment to certain relational values (West 1996, Emens 2004, Klein 2010, Sheff and Hammers 2011, Tweedy 2011). According to Emens (2004, p. 321), the following values are at the heart of polyamory as an intimate style: self-knowledge, radical honesty, consent, self-possession and the privileging of love and sex over other emotions (such as jealousy). Emens further highlights the enormous diversity inherent in polyamorous practice: 'Because the number of people in poly relationships has no theoretical limit, the models of poly relationships are also theoretically limitless' (Emens 2004, p. 307). Polyamory is a contested concept, with different groups applying slightly different definitions to the label (Klesse 2007). Apart from the boundary skirmishes between polyamory and polygamy, ongoing disputes have referred to the 'delineation of its boundaries with regard to sex and love' (Emens 2004, p. 304). Can more sex-oriented forms of non-monogamy such as casual encounters and swinging be considered to be polyamory? Are non-sexual relations (such as friendships of co-parenting relations) incorporated within the umbrella term of polyamory? (Strassberg 2003, Ertman 2005, Klesse 2006). These questions continue to be debated within poly communities.

This article is primarily concerned with the legal framing and treatment of polyamory. However, I will discuss questions regarding polygamy in many parts of the article, because the public perception of polyamory and polygamy in the United States have been closely intertwined in media discourse, political debate and legal commentary (Antalfy 2011, Sheff 2011). In the following sections, I summarise Emens's (2004) arguments regarding compulsory monogamy and the law and trace the development of her definition of polyamory as a *disposition* into a tacit theory of *sexual orientation* in Tweedy's (2011) more recent discussion. This will provide the backdrop for my discussion of the deployment of sexual orientation themes in the current debate about polyamorous multi-partner marriage in part three.

2.1. Elizabeth Emens – Monogamy's law

Emens's article aims at demonstrating that monogamy is enshrined as a core value in US legislation, including provisions from within civil and criminal law. 'Norms strongly urge people toward monogamy', Emens (2004, p. 284) argues, 'and law contributes to that pressure in various ways (...), namely criminal adultery laws, bigamy laws, marriage laws, custody cases, workplace discrimination, and zoning laws' (Emens 2004, p. 284). It is against this backdrop that Emens describes marriage as 'monogamy's core institution' (Emens 2004, p. 287).

Like many feminists, Emens locates the normative powers of monogamy in the Western patriarchal tradition of romantic love (Stelboum 1999). Sexual control and embodied possession is an implicit part of this arrangement and is evidenced in the gendered nature of jealousy that tends to legitimise male violence exerted during fits of jealousy (Easton and Hardy 2009, Deri 2015).

The gendered double standard of control and possessiveness underpins the differential application of adultery laws, which often depend on the gender status of the actors concerned (see Sweeny 2014, Delman 2015). The social contracts of marriage and romantic love/monogamy (Pateman 1988), thus, work at the expense of women.

The title of Emens's essay is a creative adaptation of Rich's (1983) famous article heading 'Compulsory Heterosexuality and Lesbian Existence'. For Rich, heterosexuality is neither a 'sexual orientation' nor a simple matter of 'choice', it is a 'political institution' (Rich 1983, p. 217). Her notion of the 'lesbian continuum' suggests that many women would be inclined to partake in lesbian relations and women-identified culture if society was not systematically opposed to such identification. Talking of 'compulsory monogamy' highlights power but also opens a vision for a radically transformed society in which the hegemony of monogamy can be broken. Talking of 'polyamorous existence' suggests that under certain conditions polyamory may expand as a practice and blossom far beyond its current constituency.

In Emens's view monogamy is already failing on a grand scale. The mythology of a lifelong monogamous partnership has given way to serial monogamy, rising divorce rates, blended family practices and the common practice of 'cheating' (Emens 2004, pp. 298-299). Moreover, Emens believes that deep down in their hearts many people are disposed to exploring non-monogamy, even if they may not (yet) be ready to bear the brunt of the stigma thrust upon those who claim non-monogamous identities. Theoretically, polyamory provides promising alternatives. This is why, from the point of view of conservative family politics, the law assumes an ever more important role in regulating sexual behaviours.

Objections to polyamory run deep within society. Polyamory is at odds with the widespread assumption that 'a monogamous couple is the most efficient unit for family formation' (Emens 2004, p. 332). Polyamory is also accused of masking patriarchal domination behind the rhetoric of gender egalitarianism. Poly relationships are seen as psychologically unhealthy and deviant. Functioning as a projection screen of multiple anxieties polyamory is vulnerable to exaggerated criticisms from the moral Right. Moreover, polyamory is not legally recognised and many aspects of polyamorous practice are subject to legal discrimination or even criminalization. How could polyamory be reframed in order to remedy the injustices of the law? In response to this question, Emens considers the possibility of casting polyamory as an identity, disposition, preference or orientation, thus leading to the argument that protection from legal and other forms of discrimination could be best achieved through the mobilisation of strategic essentialism in the form of a minority discourse. In the following section, I will briefly sketch the details of this aspect of Emens's reasoning.

2.2. *The paradox of prevalence – Identity, orientation or disposition?*

For Emens, it is paradoxically exactly this *failure of monogamy* that explains the persisting hostility towards polyamory. Emens frames the rejection of polyamory as a kind of aggressive defensiveness of the ego that wards off anxieties triggered by fantasies of transgression in the face of the pervasive temptation of consensual non-monogamy. This is why she proposes to adopt a 'minoritising discursive strategy' as the most effective tool for rebutting compulsive monogamy.

Emens's analysis is inspired Eve Kosovsky Sedgwick's (1995) distinction between universalising and minoritising views on homosexuality. According to Sedgwick, minoritising views suggest 'that there is a distinct population of people who "really are gay"' (cited in Emens 2004, p. 340), whereas the universalising view suggests a strong proximity between – if not overlap of – the categories heterosexual and homosexual and thus frames same-sex desire as a universal human potential. Drawing an analogy between homophobia and anti-polyamory sentiment, Emens (2004) states that 'one lesson from gay politics is that the universal potential of an

identity trait may engender distance rather than empathy, resistance rather than support' (Emens 2004, p. 346). Emens names this problem the 'paradox of prevalence'. It is against the backdrop of this analysis that Emens (2004) proposes 'strategic essentialism' and a discrete minority discourse as the most promising political strategies for the poly movement. 'Convincing the mainstream nonmonogamists that polyamorists are a recognizable group with a distinct identity might be poly's best chance of overcoming the effects of the paradox of prevalence' (Emens 2004, p. 352). This could build upon already existing – but so far minoritarian – voices within polyamory communities that sustain a discourse of poly identity as an in-born and hard-wired identity (see Barker 2005). At this point, Emens adopts what could rightly be described as a sexual orientation discourse on polyamory (see Klesse 2014a).

Yet ultimately, Emens shies away from fully committing to this position. Pragmatic objections include the concern that polyamory may not be 'essential enough', because it is not usually taken seriously as a social identity. Framing polyamory as sexual orientation may further not be 'radical enough', because it fails to grasp the utopian and transformative vision bound up with polyamory in the minds of many of its practitioners. Emens does not fully resolve her dilemma and leaves her readers with a sense of ambivalence. Yet in her subsequent discussion of alternative ways to think about adultery laws, she returns to the more amorphous concept of 'dispositions of desire'. The notion of "disposition" avoids rigid categorisation, since few people would fall squarely into one camp or the other (of monogamists or polyamorists).

While Emens does not stick with her proposal for a poly rights agenda in the name of an essentialist poly identity, her article defines the rationale for such politics in very clear terms. It is not surprising that her thought experiment has subsequently been taken up and developed further by others. In the following section, I discuss a more recent publication by Ann E. Tweedy who builds on Emens's framework to propose the inscription of polyamory as a sexual orientation category in work-place anti-discrimination law.

2.3. Ann E. Tweedy – Polyamory as sexual orientation?

In her article 'Polyamory as a Sexual Orientation', Ann E. Tweedy (2011) explores the question of whether polyamory could be understood as a sexual orientation for the purpose of expanding US state employment anti-discrimination legislation. After a thorough reflection and intense wrangling with the advantages and disadvantages of such a move, Tweedy comes to the conclusion that 'expanding the definition of sexual orientation to include polyamory for purposes of anti-discrimination law appears to be a reasonable choice' (Tweedy 2011, p. 1509). Like Emens, Tweedy is wary of the essentialist qualities of sexual orientation models and their inherent reductionism and sex/gender binarism.

In order to draw on counter-tendencies in the literature on sexual orientation that recognise flexibility or fluidity (see, for example Diamond 2008), Tweedy mobilises the more general meanings attached to the word 'orientation'. Outside the specific and narrow psychobiological and legal definitions of the term, sexual orientation could also 'refer to a type of settled "sense of direction or relationship" or "choice or adjustment of associations, connections, or dispositions" that relate to "libidinal gratification"' (Tweedy 2011, p. 1474). This move promises a certain malleability of the concept and sustains Tweedy's (2011, p. 1511) hope that the inclusion of polyamory in sexual orientation discourse may help to 'open up' the category itself.

Tweedy is aware that essentialist interpretations of polyamory are not very common within poly communities and that there is widespread scepticism towards identity politics. Although she believes that polyamory is a relationship based – and thus inherently *practice*-related – concept, she suggests that polyamory is sufficiently 'embedded' in a person's sense of self to qualify as a sexual orientation. This is the case, because: (a) poly identities sustain a sense of community; (b) polyamory is

based on a set of cherished ethical values; (c) polyamorists take upon themselves significant risks to live polyamorous lives; (d) polyamory resonates with the normative significance of romantic relationships in US culture; and (e) poly identities are comparable with LGB identities in terms of social status and discrimination in the light of socio-legal research. These factors indicate a 'moderate embeddedness' of polyamory as a character trait. This in turn warrants an equation with sexual orientation.

One further requirement needs to be fulfilled to legitimise an argument for legal protection from workplace discrimination on the grounds of sexual orientation. According to Tweedy, anti-discrimination law should only apply to practices, conducts or identities that are implied in supra-individual asymmetrical power relations (on institutional or community levels) (see Cooper 2004). Polyamory meets this requirement, Tweedy argues, since 'polyamorists risk custody loss, workplace discrimination, loss of friends, alienation from their families, and ostracism from spiritual and other communities as a result of revealing their polyamory.' (Tweedy 2011, p. 1498). This amounts to considerable discrimination that can impose heavy and devastating burdens on polyamorists, their partners and families. Anti-non-monogamy sentiment is widely embedded in US culture and institutionalised in the law. The evidence Tweedy reviews includes discrimination against polyamorists in custody cases and also in court procedures (such as rape, murder and obscenity cases). For Tweedy, polyamory therefore stands up to scrutiny with regard to all the important criteria:

Because polyamory appears to be at least moderately embedded as an identity, because polyamorists face considerable discrimination, and because non-monogamy is an organizing principle of inequality in American culture, anti-discrimination protections for polyamorists are warranted. Moreover, polyamory shares some of the important attributes of sexual orientation as traditionally understood, so it makes conceptual sense for polyamory to be viewed as part of sexual orientation. (Tweedy 2011, p. 1514).

While Tweedy shares many of the reservations of defining polyamory as a sexual orientation, she accomplishes the pragmatic task of its constitution as exactly such in a specific field of legal discourse.

2.4. From disposition to sexual orientation: Forging sexual orientation discourse

Emens and Tweedy repeatedly flag that they are well aware that their suggestions are at odds with many features of lived poly intimacy and culture. They are not the first nor the only legal studies scholars who are troubled by the incommensurability of legal concepts with the messiness and complexity of lived experience. The rigidity of the legal definitions and the one-dimensionality of the subject within legal categories have in particular troubled scholars working within deconstructive and queer intellectual traditions (Stychin 1995, Cooper 1995, Beger 2004). Yet despite the cautionary nature of the proposals by Emens and Tweedy, their texts are part of a movement towards the *concretisation* of a previously largely nebulous or abstract notion of polyamory as sexual orientation.

Neither Emens nor Tweedy are exclusively concerned with the question of civil marriage. Emens articulates her position in terms of an orientation towards a larger polyamory (civil) rights agenda. Her main examples are adultery laws, but it is remarkable that she opens and closes her discussion with references to the campaign for same-sex marriage. Moreover, references to marriage and marriage laws are subtly woven into her discussion. The question of marriage rights thus provides the over-arching framework for her critique of 'monogamy's law'.

Tweedy (2011) is primarily interested in anti-discrimination law. Yet references to the marriage question figure prominently in her text, too. A critique of the exclusivist practices bound up with the institutionalisation of monogamous heterosexual marriage is core to her demonstration that polyamory warrants protection by anti-

discrimination law (Tweedy 2011, pp. 1505-1507). Moreover, drawing on Janet Halley (2000) she discusses the marriage equality movement and its 'civil rights models of homosexual difference' as the prime example of a 'minoritising politics' (Tweedy 2011, pp. 1468-1469).

The arguments put forward by Emens and Tweedy therefore have a strong bearing on the questions of whether or how polyamory communities may want to position themselves with regard to the institution of civil marriage. It is no surprise that their arguments have entered into more recent discussions of polyamory and marriage rights campaigns. In the following part, I will discuss how sexual orientation models of polyamory have played out in debates around the institution of marriage.

3. Polyamory, relationship rights and the campaign for same-sex marriage rights

In the first decade of the 2000s, there were few signs of a public demand for marriage rights within polyamorous communities. Polyamorists in the USA were sceptical of a legal formalisation of their relationships and often rejected marriage in an outright manner. Only recently has polyamory activism become more publicly engaged around the question of multi-partner marriage (Robinson 2013, Aviram and Leachman 2015). In the first section of this part, I suggest that this shift is partly due to recent successes in the campaign for same-sex marriage rights. In the second section, I will turn to an analysis of slippery slope arguments to show that polyamory assumed a prominent discursive position in the debates around same-sex marriage long before the emergence of any visible poly activism in this field. The successful conflation of same-sex marriage with polygamy and polyamory in right-wing rhetoric hindered an open discussion about legal recognition. In the last section, I will discuss recent legal academic commentary that explores the suitability of sexual-orientation discourses for poly legal activism through an engagement with the history of litigation in response to the same-sex marriage campaign.

3.1. Historical developments –Turning points of legal consciousness

Hardar Aviram (2009, 2010) notes that in the mid-2000s few of the politically active members of the polyamory communities in the San Francisco Bay area considered advancing poly relationship rights through a demand for civil multi-partner marriage. Research participants who had established longer-lasting family ties often made alternate legal arrangements outside of marriage to formalise their relationships using various contractual procedures, such as wills, trusts and power-of attorney documents. In this regard, polyamorous families tended to deploy similar strategies as cohabiting couples (Aviram and Leachman 2015, p. 304, see Dryden 2015, pp. 178-181). Although most respondents showed an acute awareness of legal discrimination (for example through anti-bigamy laws and adverse custody decisions), they had strong objections to a politics of marriage. This common sentiment was shaped by a disdain for the law (as a normative institution) and a dislike of government (if it expanded beyond welfare to a regulation of ways of life) (Aviram 2010, p. 91). Most respondents saw polyamory as a matter of spontaneity and individuality and rejected the idea that there was any particular 'proper way' to practice it. These attitudes were sustained by a common commitment to certain brands of utopianism (derived from science fiction literature, certain strands of paganism, sexual liberationism or queer activism) that did not mesh well with legal lobbying. Polyamorists who also were BDSM practitioners¹ felt that they had to 'go vanilla' and present a desexualised image of themselves in public, if they ever wanted to gain legal recognition (Aviram and Leachman 2015, p. 323). Others saw their reluctance to claim legal rights as a question of solidarity and suggested that 'same-sex marriage must take precedence over an effort on behalf of polyamorous families' and that only after same-sex marriage became acceptable 'would [it] be timelier for

¹ On the proximity of and overlap between BDSM and poly communities, see Sheff and Hammers (2011).

public opinion to mature into acceptance of multi-partner relationships' (Aviram and Leachman 2015, p. 305).

At the end of the first decade of the 21st century, a shift seems to be taking place in poly politics. Polyamory activists in the USA have turned closer attention to the question of relationship rights and the topic of marriage. A variety of factors have worked together to enable this shift of political orientation. The recent successes of the campaign for same-sex marriage rights have created the impression that it is possible to create change through litigation, even in situations where the opposition seems overwhelming and the prospects for success appear to be slim.

After the conservative turn of the federal courts in the 1970s and the crushing defeat in *Bowers v. Hardwick* (1986), in which the United States Supreme Court upheld the constitutionality of Georgia sodomy law, litigators for LGBT rights avoided the federal courts for many years and used state constitutions to push for marriage equality in state courts (Pierceson 2013). Encouraged by the positive judgments of *Romer v. Evans* (1996) and *Lawrence v. Texas* (2003), activists re-engaged with federal litigation. Federal challenges of the constitutionality of sections of the Defense of Marriage Act (DOMA) (1996) brought to the fore signs of acceptance of marriage equality arguments. A shift of opinion with regard to the question of same-sex marriage in the Obama administration in 2011 also played a role. On February 23, 2011 Attorney General Eric Holder stated: 'The President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional' (cited Pierceson 2013, p. 223). He went on to declare that the administration would continue to enforce DOMA but not defend it court.

In *United States v. Windsor* (2013), the United States Supreme Court held that Section 3 of DOMA was unconstitutional both under Due Process Clause and the Fifth Amendment, as a result of which state courts could no longer be restrained to limit the interpretation of 'marriage' and 'spouse' as relating to heterosexual relationships only. In *Obergefell v. Hodges* (2015), the United States Supreme Court came to the landmark decision that same-sex couples have a fundamental right to marry as guaranteed by both the Due Process and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (Denniston 2015, Fischel 2016). The judgement struck down all remaining laws that ban same-sex marriage or the recognition of marriages enacted outside a federal state. Aviram and Leachman (2015) suggest that the growth of interest in poly marriage is a kind of 'spill-over effect' between the same-sex marriage movement (largely sustained by LGB activism) and the polyamory movement: 'As same-sex marriage gained mainstream support (...) the polyamorous community may have developed more of a taste for the political and cultural benefits of legal activism', the authors argue (Aviram and Leachman 2015, p. 323). Many polyamorists feel that they no longer have to worry that their activism might undermine the same-sex marriage rights movement, because support for this project has spread widely throughout the state and legal apparatus.

The new 'taste for the political and cultural benefits of legal activism' is evidenced by the frequent tabling of discussion topics related to legal relationship recognition at international Polyamory Conventions and Conferences. 'Political summits' on relationship recognition featured in the programmes of the World Polyamory Association's meeting in the summer of 2013 and at the Annual International Academic Conference on the Future of Monogamies and Non-monogamies (Aviram and Leachman 2015, p. 306). The *Loving More Survey* (2012) 'What do Polys Want' suggested that 66.9% of all respondents believed that multi-partner relationships deserved 'special relationship recognition'.

Further inspiration is derived from recent court cases that have involved challenges of anti-polygamy legislation in Utah. In *Brown v. Buhman* (2013), the U.S. District Court in Utah declared in response to a lawsuit by the Browns, a polygamous Mormon

family known for their participation in the Reality TV Series *Sister Wives*, that it was unconstitutional to include a criminal prohibition on cohabitation between a married person and a person who is not his or her spouse as part of a law enacted with the intention of banning polygamy. *Brown* upheld the general prohibition of polygamy, following *Reynolds v. United States* (1878), but confined it to situations of legal marriage, i.e. situations where a person has fraudulently obtained two or more allegedly valid marriage licenses from the state for the purpose of marrying more than one partner (Aviram and Leachman 2015). The ruling was seen by many polygamists and polyamorists as a positive development and an indicator of changing attitudes with regard to the legal treatment of multi-partner relationships and families. On September 25, 2014, the State of Utah appealed the ruling to the Court of Appeals for the Tenth Circuit. On April 11, 2016, the Tenth Circuit ordered the district court to dismiss the case on the grounds that the question was now moot. The Court took the view that the district judge should have refrained from deciding on the constitutional claims, because the announcement of a policy statement by the Utah County Attorney's Office (UCAO) in 2012 that "the UCAO will prosecute only those who (1) induce a partner to marry through misrepresentation or (2) are suspected of committing a collateral crime such as fraud or abuse", rendered prosecution of a family in the position of the Browns incredible (cited Robson 2016). As a result of this, Utah's anti-polygamy statute remains in power, even if the policy is to enforce only under certain circumstances (Robson 2016).

Irrespective of the outcomes, these developments led to a heightened attention within poly communities to the question of relationship recognition. However, it is important to recognise that polyamory had been fully present in the discourses around marriage reform long before this change in legal consciousness. This is because opponents of same-sex marriage have evoked the possibility of the legalisation of polygamy and polyamory as the ultimate threat of a liberalisation of marriage laws by allowing same-sex couples to marry.

3.2. Polyamory as threat – Slippery slope arguments in the same-sex marriage debates

Although there have been few signs of original poly marriage activism, polyamory and polygamy have been at the core of the public debate on same-sex marriage for a very long time. This is mainly due to the strategy of same-sex marriage opponents on the moral Right to incite public anxiety by suggesting that marriage rights for same-sex partners would erode the normative status of the institution of marriage and also open the door for bigamists and polyamorists (and other stigmatised 'unwanted groups') to demand marriage rights. Same-sex marriage would undermine the cultural consensus that marriage between a man and a woman is the only natural and healthy family form and make it impossible to object to legal recognition of other bonds, whether polygamy, adult incest or 'chosen families' outside of romantic frameworks (Whitehead 2012).

The 'slippery-slope' argument has been a powerful tool in the hands of secular and religious conservative demagogues to discredit the advancement of gay rights in general and the same-sex marriage rights campaign in specific. Before the US Supreme Court decided on the constitutionality of Texas sodomy law in *Lawrence v. Texas* (2003) Senator Rick Santorum stated in an interview:

If the Supreme Court says that you have the right to consensual (gay) sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything. (cited Loughlin 2003)

These sentiments were echoed by forceful statements from the dissenting judges in *Lawrence*. For example, Justice Scalia pointed to the potentially damaging long term effects of a legal decision which claims to protect a 'right to liberty', but which will ultimately undermine any attempt to curtail sexual behaviours on moral grounds.

From this perspective, *Lawrence v. Texas* could lead to the striking down of state laws against same-sex marriage, bigamy, obscenity, adult incest, masturbation, adultery, fornication, etc. (see Ashbee 2007). Sexual liberty – and gay rights as a driver of sexual liberalisation – will thus foster moral decay and the decline of civilization.

Slippery slope arguments have been salient in virtually all debates around legal landmark decisions around same-sex marriage rights. For example, advocates of the Defense of Marriage Act (DOMA) in 1996 suggested that 'gay marriage' would result in the legalisation of polygamy, incest, bestiality and pedophilia (Emens 2004, pp. 279-280). Similar fears were articulated after the United States Supreme Court related a 'fundamental right to marry' to same-sex couples in *Obergefell v. Hodges* (2015) (George 2015, see Ertman 2015). The link between same-sex marriage and bigamy, polygamy and polyamory has been most persistent, such that these concepts are usually collapsed into another without attention being paid to nuances and distinctions in terms of definition and practice (Denike 2010).

Polygamy has been criminalised in the United States since the 19th century because it has been considered to be immoral and an inadequate form of life for a modern nation (Myers 2009). In the 19th century, governments endorsed monogamy as an icon of the supremacy of western Christian civilization, dismissing all forms of non-monogamy as signs of primitive promiscuity (Willey 2006). Polygamy, specifically Mormon polygamy, was seen as a cultic endorsement of personal rule within a family formation, which was intrinsically opposed to abstract democratic political citizenship (Strassberg 1997, Myers 2009). As a practice based on patriarchal rule within the family, polygamy was (and continues to be) framed as a source of harm for women and children (Gher 2008, Myers 2009; see Lenon 2016). Mormon separatism was further perceived as a threat to the cohesion of the United States. The charge of national treason was aggravated by the representation of Mormons as engaging in a 'barbaric' practice. This amounted to an affront of 'race treason', the denigration of whiteness in an imperial settler society based on white supremacy (Ertman 2010). Polygamy has been framed as essentially 'un-American' and racism has structured the legal measures to suppress Mormon plural marriage (Stacey and Meadow 2009).

Anti-bigamy laws exist in all American states and are enshrined in the state constitutions of Arizona, Idaho, New Mexico, Oklahoma and Utah. Throughout American legal history, state laws have imposed specific exclusions and restrictions on not only practitioners but also advocates of polygamy. Examples include a bans on voting, prohibitions on holding public office or serving as a juror, prohibitions on teaching polygamy and the denial of immigration status (Klein 2010, p. 36). Nineteenth century debates on monogamy and non-monogamy North America were profoundly shaped by the politics of race and took their distinctive form in the context of racist conflicts along the frontlines of different colonial projects. Contemporary conflicts and debates about the legal status of polygamy in the USA are still shaped by racialised logics, even if discourses have changed.

Slippery slope arguments thus unfold their ideological force through a specific mixture of sexual, gendered, racial and national meanings which taken together create the abhorrent image of moral/racial/national decline (Stacey and Meadow 2009). Bound up with the notions of immorality, patriarchal domination and national and/or racial treason, polygamy is perceived as the ultimate threat to the nation. Polyamory is often dealt with within the same scenario. It is either subsumed within the category of polygamy or positioned in close proximity to it, usually as the next item on the list of lewd practices. Even if falling short of a full-fledged equation, accumulative acts of representing a relationship of proximity, too, can result in a transference of meanings (here stigma) in the slippery slope argument (see Ahmed 2011).

Slippery slope arguments have circulated far beyond the court rooms and have spread out into the wider media (Myers 2009, Antalffy 2011, Whitehead 2012). The

publications of Stanley Kurtz, a fellow at the Hoover Institution who in the early 2000s regularly wrote for conservative periodicals such as *the National Review* and *The Weekly Standard*, have been particularly influential. His polemics were widely reproduced by Christian rights organisations, such as the family Research Council, Focus on the Family, Concerned Women for America and the Traditional Values Coalition. His work has also been discussed and cited in Congress and by federal government representatives (Ashbee 2007).

Kurtz has linked gay marriage to polygamy and polyamory in manifold ways. Deploying anti-gay, anti-promiscuity discourses, Kurtz suggests that 'gay marriage' will break the connection between marriage and the ethos of monogamy and open the floodgates for litigation seeking legal recognition of polygamous and polyamorous relationships.

Among the likeliest effects of gay marriage is to take us down a slippery slope to legalized polygamy and "polyamory" (group marriage). Marriage will be transformed into a variety of relationship contracts, linking two, three, or more individuals (however weakly and temporarily) in every conceivable combination of male and female. (Kurtz 2003)

Kurtz argues that it will be impossible to deny polygamists, polyamorists or even cohabiting relatives and friends the same rights as those granted to same-sex married couples and that the special status of marriage as a heterosexual monogamous unit will be eroded forever. In other publications, Kurtz (2005) warns of the likelihood that arguments for treating either polyamory or bisexuality as a form of sexual orientation could be effectively used to achieve a legal status for multi-partner marriage.

Due to their prominence and power in the media and in courtrooms, slippery slope arguments have also set limits to and shaped the discourse adopted by same-sex marriage rights activists. The demand for civil marriage rights has frequently been framed as a question of 'marriage equality', and many activists and legal supporters have publicly denied that they would want to alter the institution of marriage by challenging the monogamy requirement. In order to advance with litigation, the marriage equality movement tended to reproduce the assumption of the importance of romance, the superiority of monogamy and the naturalness of the couple bond (Whitehead 2012). Polygamy has often been framed as 'hyper-patriarchal, perverse, and inherently inequitable', whereas marriage has been cast as "normal", "democratic" and illustrative of sex and gender equality' (both quotes Denike 2010, p. 138). The defensive condemnation of polygamy has also included a distancing from polyamory. Coalitions with polyamory groups have been deemed to be impossible, counter-productive and damaging to the goals of the same-sex marriage rights movement (Redding 2010). Aviram and Leachman (2015, p. 276) argue that 'The LGBT movement's simultaneous politicization of marriage and erection of a clear rhetorical wedge between same-sex and multiparty relationships may have even reinforced the stigmatization of multiparty relationships and non-monogamous families.' Many poly activists therefore feel embittered about having been let down by their 'brothers and sisters' within LGBT activism.

However, it is important to note that poly activists, too, have responded defensively to the slippery slope discourse, with no show of solidarity towards polygamous family forms. Strassberg (2003) and Emens (2004) document cases in which polyamory advocates have contested any space for Mormon polygyny within the framework of polyamory.

The constant opposition to polyamory in the context of marriage equality litigation has profoundly shaped the discursive terrain for any attempts to raise the issue of poly relationship rights beyond the context of same-sex marriage. Aviram and Leachman (2015) believe that rather than opening space for an effective mobilisation around poly relationship rights, the history of activism around same-sex marriage may have narrowed this space. While this campaign has been very successful in

changing the legal discourse around marriage, the possibility of realising something like 'multi-partner marriage' may be smaller than ever. In the following section, I show how sexual orientation discourse has been seen to offer a pragmatic tool for achieving 'the impossible'.

3.3. *Learning from same-sex marriage rights activism? Sexual orientation arguments and polyamorous marriage*

In the article 'The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle', Aviram and Leachman (2015) evaluate the history of litigation around same-sex marriage rights in the United States in order to identify feasible legal strategies for polyamory rights activists. If poly movements do decide to engage in litigation to pursue relational rights through a politics of legal recognition, many options will be open to them. This may not be surprising, since the marriage equality movement followed a strongly 'minoritising' approach based on civil rights models of homosexual difference (see Halley 2000).

The first major strategy they set out would focus on the argument that the prohibition of multi-partner marriage infringes the fundamental right to marry. According to Aviram and Leachman (2015, pp. 314-315), '[t]here is, at this point no question about whether there is a fundamental right to marry. In the context of same-sex marriages, the question raised by opponents was whether "gay marriage" constituted something entirely different from heterosexual marriage'. In order to advance their argument proponents of same-sex marriage demanded formal equality on the grounds of similarity. Not everyone liked this approach. Opponents of this strategy within the LGBTQ movements suggested that this approach smacked of assimilation (Warner 1999, Barker 2012, pp. 109-110). Yet Aviram and Leachman (2015) argue that if poly marriage advocates decide to walk down the route suggested by this first strategy, they, too, would have to present the case that 'in essence, the right to marry more than one person is nothing but a subset of the more general right to marry' (Aviram and Leachman 2015, p. 315).

In *Obergefell v. Hodges* (2015), the United States Supreme Court ruled in that this 'fundamental right' also applies to same-sex couples. Chief Justice Roberts warned in his dissent that the majority's opinion would apply with equal force to polygamy. Aviram (2015) is cautious and comments that it remains a difficult task to demonstrate exactly this in the courts. At the same time, many advocates of multi-partner marriage believe that the Supreme Court's ruling has brought the legalisation of polygamy (and other forms of plural marriage) closer in sight (deBoer 2015). The 'constitutionalized, fundamental right to marry', argues for example Fischel (2016, p. 182) 'slicks the slope for multi-partner intimate arrangements'.

The second major legal strategy Aviram and Leachman set out would involve an Equal Protection Clause argument, but within this strategy there are many different ways that an equal protection argument could be framed. In the case of same-sex marriage litigation, such an argument was successfully made for example in *Baehr v. Lewin* (1993), where the Supreme Court of Hawaii established that the prohibition of same-sex marriage constituted a form of sex discrimination that violated Hawaii's constitutional Equal Protection Clause.² Sex is recognised as a suspect classification that triggers the requirement of heightened scrutiny, i.e. the imposition of a burden on the state to present compelling reasons to deny the rights under question. Limitations of the approach adopted in *Baehr* lie in its reliance upon sex-binary reasons. This is where sexual orientation may provide an alternative route. Aviram and Leachman (2015, p. 310) argue that an Equal Protection Clause argument based on sexual orientation may be 'a more promising legal avenue'. Although sexual orientation has not yet been accorded the status of a suspect class that would trigger

² The reason here was that male-male and female-female couples were treated differently by the law than male-female couples.

the heightened scrutiny standard and there has been no *formal* expansion of the categories considered under this rubric since the 1970s, the authors argue that some decisions in the context of same-sex marriage litigation have *implicitly* awarded heightened status to sexual orientation.

If polyamorists decide to advance litigation strategies on the ground of sexual orientation, they, too, will have to show that polyamory qualifies – at least in principle – as a suspect class. This could be done by demonstrating that polyamorists are politically powerless as a group, have suffered a history of discrimination and have an immutable characteristic that does not impact upon their ability to contribute to society. According to Aviram and Leachman (2015), the requirement of immutability has already been softened in law. The definition of immutability has shifted from purely biological definitions towards more cultural interpretations that capture characteristics that are deeply engrained in a person's identity and cannot be expected to be discarded to avoid discrimination (Aviram and Leachman 2015, p. 312).

The authors propose two major ways in which sexual orientation discourse could be played out by advocates of multi-partner marriage. The first approach would posit *bisexuality* as a sexual orientation and would involve making the claim that the denial of the right to marry a man *and* a woman would amount to discrimination on the grounds of sexual orientation. A similar approach is explored by Elizabeth Brake (2013): '[I]f gendered desire is understood as an essential part of identity, bisexuals may have a strong claim for polyamorous orientation (Tweedy 2011, Vernallis 2013). (...) Because bisexuals are attracted to both men and women, expressing their sexual identity fully might require simultaneous relationships – or so Kayley Vernallis has argued in "Bisexual Marriage."' (Brake 2013)

Aviram and Leachman (2015) quickly point to a few problems with this approach. First, the argument could easily be challenged on the grounds that bisexual petitioners already can marry the person they love (if same-sex marriage is legal either a man or a woman, otherwise only a partner of the 'other sex') and that heterosexuals and homosexuals too, can only marry one partner (even if they may love many more). Second, the argument can only be applied to relationships displaying certain gender constellations and consequently to a small subset of the polyamorous community. Moreover, I would add, the strategy also reproduces normative assumptions regarding what makes a person bisexual. It mobilises a dualistic gender scheme or sex binary, which is evident in the suggestion by Aviram and Leachman (2015, p. 305) that '[a] bisexual person seeking to marry a member of their own sex *and* a member of the opposite sex would be the ideal petitioner'.

The authors conclude that the presentation of polyamory as a sexual orientation would be the most inclusive option here. They cite arguments from within evolutionary psychology and critical legal studies to demonstrate the feasibility of this approach. References to Tweedy's (2011) paper are core to the authors' proposition here. By offering sexual orientation reasoning as a promising route for future litigation, Aviram and Leachman add a further layer to the on-going construction of polyamory as a sexual orientation in legal discourse. All but one of the options presented by Aviram and Leachman can be said to fall within the category of 'minoritising strategies'. Only the argument based on a 'fundamental right to marriage' describes a different route that mobilises notions of sameness and translates into a universalising approach. The sexual orientation strategy, with its strong allusion to immutability and essential difference, is arguably the most minoritising approach of all.

4. Minoritising strategies and marriage reform. On the pitfalls of sexual orientation discourse

In parts two and three, I have traced a genealogy of polyamory as a sexual orientation category in US legal scholarship. Sexual orientation discourse has been

considered as a potentially helpful tool in advancing a poly rights agenda, including the field of relationship recognition. Whereas US poly communities did not demonstrate a strong interest in legal activism for many decades, this has more recently started to change in the light of advancements made by the campaign for same-sex marriage rights. The prominence of minoritising approaches and the sexual orientation category in LGB marriage equality politics have re-vitalised both academic and activist conversations about polyamory as an essentialist 'hard wired' identity and personality trait. These conversations draw on a long existing but usually rather marginal discourse on an inborn poly orientation (see Barker 2005, Klesse 2014a). In the field of activism around relationship recognition, sexual orientation discourses and a fixation on rights through access to marriage seem to reinforce each other. It is important to remember that campaigners, scholars and legal professionals have developed many different models for extending rights, resources and protection to lesbian, gay, bisexual, transgender and queer relationships. Important debates have taken place as to whether legal recognition should take the form of civil unions or civil marriage. Alternatives to civil marriage have been sought in registered partnership schemes (within an 'opt-in' system) or in statutorily-defined qualifying relationships (based on cohabitation or selection) (Bailey-Harris 2001, p. 607, Barker 2012). Different pathways to legal recognition have been explored in different countries (Heaphy 2007). There has been virulent criticism of the campaign for marriage equality from within the LGBTQ political spectrum, notably from what could be called the 'queer left', both because of the exclusivity of marriage as a basis for distributing rights and privileges and its inherent racial, class and gender politics (Conrad 2010, Barker 2012, Whitehead 2012). That notwithstanding, the dominant approach of groups campaigning around the issue of relationship recognition has been to demand same-sex marriage, often as a second move after the introduction of civil partnership schemes that were (rightly) perceived as creating a secondary status for same-sex couples in countries, where they were exclusively designed for same-sex relations (see Barker 2012 for a discussion of UK laws). Same-sex marriage rights have been framed as a matter of formal equality. Consequently, political rhetoric has rested upon the mobilisation of collective identity categories, namely gay and lesbian (and to a lesser extent, bisexual). Transgender concerns have been largely absent from the debate. As a result, the same-sex marriage campaign lost touch with the demands of other groups struggling for protection and support for their diverse family practices. As Schmeiser (2009, p. 1521) argues, "These days, few proponents of same-sex marriage predicate their strongest claims to access for gay and lesbian couples on the argument that this bundle of state-sponsored benefits should be broadly available to diverse family forms'.

According to Polikoff (2009) family law reform should 'build on the principle that law should support the diverse families and relationships in which children and adults flourish' (Polikoff 2009, p. 91). However, at least in the US context from which Polikoff is arguing, marriage does not – and often cannot – provide the solutions for certain relationships or families that are suffering social and economic disadvantage. This applies to unmarried couples, single-headed families, many multi-partner families and/or extended families. According to Polikoff, marriage-related organizing and advocacy across the LGBT political spectrum lacks the creative vision to look for solutions for larger coalitions of people and ultimately fails to address the needs of *diverse families*:

The marriage-equality movement wants the benefits of marriage granted to a larger group: same-sex partners. With few exceptions, advocates for gay and lesbian access to marriage do *not* say that "special rights" should be reserved to those who marry. But the marriage-equality movement is a movement for gay civil rights, not for valuing all families. As a civil rights movement, it seeks access to marriage as it now exists (Polikoff 2009, p. 93).

For this reason alone, the campaign for same-sex marriage can be seen as a prime example of a minoritising strategy of identity politics (Tweedy 2011).

By accepting the marriage model, the marriage equality movement also accepts the logic of the privatisation of care that structures neoliberal marriage-focused family policies (Whitehead 2012). In the following section, I present a range of arguments against the deployment of minoritising discourses and more specifically sexual orientation models in the field of poly relationship rights activism. My discussion will focus on the following concerns: first, sexual orientation discourse undermines the disruptive and transformative potential of polyamory as a practice; second, it presents a reductionist approach that limits the kinds of non-monogamy that are likely to benefit from any rights that may be achieved in its name; and third, it undermines the capacity and inclination of the poly movement to forge wider alliances around relational rights.

4.1. Potential effects regarding the transformative potential of polyamory

Polyamory functions as an umbrella term for many approaches to non-monogamy and diverse (usually) multi-partner constellations of relationships or families. Many poly-identified people argue that the main – and most radical – point about polyamory is that it refuses to provide any prescriptive or normative mould for how consensual non-monogamy or polyamory should be practiced (Klesse 2007, Aviram 2009). Polyamory is based on an ethics of negotiating emotional dynamics and relationship form in a continuous process. Despite extensive debates on poly relationship types (see, for example Benson 2008, Anapol 2010), polyamory tends to privilege process over formal status or structure. From this perspective, polyamory endorses change and fluidity. Although many poly practitioners may lay claim to conventional identity labels, the programmatic openness of polyamory and its commitment to a discourse of ‘limitless love’ mitigates rigidly defined sexual orientation categories (such as heterosexual and gay/lesbian, even bisexual) (Barker 2005, 2013). Commentators influenced by queer and/or bisexual theory have stressed the potential of polyamory to trouble deeply engrained binaries around male/female and straight/gay-lesbian (Anderlini-D’Onofrio 2009, Callis 2014). The transgressive potential of polyamory to shake up taken-for-granted notions of sex/gender and sexual orientation would be lost if polyamory were to be treated as a sexual orientation in its own right. The intrinsic fluidity of polyamory renders also questionable any ambition to ‘recognise’ polyamory through universal models construed around conjugal relationships. For many, non-sexual caring and affectionate (‘loving’) relationships fall within the realm of polyamory (Ertman 2005). These relationships can arguably not be represented within a model of civil marriage or civil partnership schemes conceived in the spirit of the latter. Advocating for a definition of polyamory based on sexual orientation would certainly help to decentre the interpretation of immutability criteria in equal protection challenges to discriminatory legislation. Although some poly-identified people present an identity narrative around the theme of being ‘born poly’, definitions of polyamory as a disposition and a deeply rooted character trait are more convincing and more likely to stand ground in the courts (Emens 2004, Aviram and Leachman 2015). As I have shown in the previous section, the definition of immutability has already begun to shift in the course of litigation around same-sex marriage rights. However, alternate proposals imply that there is no need whatsoever to deploy argumentative schemes hinging upon immutability. For example, Schmeiser (2009) suggests that litigation better focusses on the question of the persistence and systemic nature of oppression. Even with regard to gay and lesbian orientation claims, immutability arguments have frequently failed in US courts. The same is likely to happen with regard to polyamory. However, more important for my argument is the critique that the mobilisation of polyamory as sexual orientation legitimises a deeply engrained way of thinking about sexual identities and desires, which continuously produces outsiders.

Promoting polyamory as sexual orientation will sustain and reinforce the exclusionary operations of identity claims, rather than resulting in an opening up of their critical interrogation. How many partners must a person be involved with to prove that

polyamory is their sexual orientation? What kind of love narrative do they have to present to show that their behaviours are reflecting a deep-rooted disposition and not only a flimsily impulse towards sexual gratification? Sexual orientation discourse will reify and limit not only poly subjectivity, but also poly relationality.

4.2. Potential effects regarding the scope and reach of legal litigation

The deployment of poly sexual orientation discourse can bolster equality arguments used to challenge discrimination. Such argumentation can be used in litigation to seek relationship recognition within registered partnerships or civil marriage law (Dryden 2015, Aviram and Leachman 2015). However, reliance on sexual orientation discourse would construct poly legal activism as a civil rights movement for polyamorous people. Polikoff's criticism of the same-sex marriage reform movement, discussed above, would apply equally to a poly marriage reform movement. Constructing the movement in these terms would prevent legal action to address the problems of single-headed families and extended families not based on romantic love or erotic multi-partner bonding. In brief, it would fall short of the more transformative aim of law reform 'to recognize all families' (Polikoff 2009, p. 87).

The equality framework would further limit the scope of litigation seeking access to marriage as it is. It is questionable whether the recognition of poly relationships could be achieved by simply expanding the existing the legal principles enshrined in marriage or civil partnership law. Commentators have rightly pointed out that integrating multi-partner relationships within existing marriage (or civil partnership) laws would be a much more challenging and difficult exercise than the inclusion of same-sex relationships. Klein (2010) highlights the formal and pragmatic complexity of this undertaking and Davis (2010) goes further by rejecting that capacity of the legal dyadic marriage framework to address the complexity of poly relationships that are marked by an open-ended dynamic (around entrances and exits) and shape different bargaining situations. For many of these authors, business law or property law provide better sources for the creation of more flexible arrangements between poly partners (see Ertman 2005). Ultimately, such visions lead away from the notion that a singular legal framework could address the need for recognition and support in the face of contemporary relationship diversity (Fischel 2016).

Strassberg (2003), too, is sceptical whether civil marriage could accommodate complex and fluid polyamorous relationships. In contradistinction to the authors referred to above, Strassberg presents a strong argument for the value of monogamous marriage as a regulatory tool of the liberal state for fostering individuation, personal autonomy and a strong public sphere. Her Hegelian functional analysis of the compatibility of polyamory with the liberal state's conception of marriage as a *universalising institution* raises many concerns as to whether polyamory is at odds with the modern state's interests in regulation:

Even if polyamorous marriage replaced monogamous marriage as the only legal offering, the multifarious nature of polyamorous relationships makes it questionable that a single legal institution could suffice. Rather than universalizing participants through a single legal institution, multiple relationship forms would emphasize the diversity of individual need and the inadequacy of law to meet these needs (Strassberg 2003, p. 562).

Conservative commentators, such as Kurtz (2005) have been unequivocal in their judgement that the multiplicity of polyamory will do away with the universality of marriage and result in the inevitable destruction of this institution.

However, I wish to leave aside the question of the practical feasibility of the representation of *all* forms of polyamory through a *singular* institution such as marriage. More interesting for my argument is to dwell on the observation that those who are willing to consider such steps reckon that it would be necessary to impose constrictions on polyamory in order to perceive of poly marriage as a legitimate and desirable project. For example, Strassberg (2003) raises a range of normative and

ethical concerns regarding the inherently open and potentially limitless nature of poly love and intimacy (see Easton and Hardy 2009). 'Love without limits', Strassberg reckons, could lead to group dynamics that destabilise relationships through jealousy and blur rational distinctions of the public/private divide and undermine democratic individualism³. If polyamorists abandoned such transgressive practices and put a cap on their aspirations, their practices would be much more compatible with marriage as a governmental practice. 'If the polyamorous were to accept limits, and focus their experimental energies on triads or quads, the reality of these forms might prove many of the concerns generated by the dynamics of larger groups inapplicable' (Strassberg 2003, p. 563). Constraint is the price that polyamorists are expected to pay for inclusion into marriage here. Strassberg's demand underscores the key role of marriage as regulatory tool of governance and citizenship (Cossman 2007).

Aviram and Leachman (2015) argue that many poly activists in the San Francisco Bay area feared the normative power of the field of law. They worried that they would have to 'go vanilla' to make their claims heard and understood in the legal sphere. Strassberg's arguments show that these concerns are well founded. The inclusion in marriage (whether on sexual orientation or any other grounds) will depend on the fulfilment of certain conditions. This is likely to exclude certain styles of non-monogamy or put the pressure on polyamorists to assimilate into the mainstream marriage discourse. In the following quote, Strassberg makes clear that any argument for polyamory's inclusion into marriage ultimately rests on the equation of polyamory with 'romantic love'. Marriage and romantic love are closely connected in Western culture and law (Coontz 2005, Whitehead 2012). '[I]t would seem that the notion of romantic love brought to polyamorous relationships is likely to be similar to the monogamous notion of romantic love', Strassberg (2003, p. 489) argues. Deploying a constructionist argument, she suggests that polyamorists, like everybody else, are likely to be socialised into the culture of romantic love. This is good, because '[t]he polyamorous view of romantic love would (...) seem to be at least as affirming of individuality as the romantic love which grounds both same- and opposite-sex monogamous marriage' (Strassberg 2003, p. 489).

Brake (2013) contests such fixations on romantic love. She calls for the extension of marriage rights to all caring networks (such as friends and poly relations), irrespective of question of emotionality (romance) or sexuality (consummation). She criticises what she calls 'amatonormative discrimination – that is, unjustified privilege given to romantic sexual relationships as opposed to non-sexual, life-structuring friendships' in the marriage equality debates (Brake 2013). Her proposal for 'minimal marriage' would support all caring relationships, including friendships, urban tribes, care networks and polyamorous relationships. Brake's ideas chime with Fineman's (1995, 2001) arguments that marriage concerns itself too much with the number of adult partners and the sexual status of their relationship at the expense of any provisions for care relations with dependents. According to Fineman, the state should protect and support care relations and the individuals who engage in them whether they are single, coupled or in plural relationships and irrespective of their sexual preference and the nature of the emotional bond between them (see West 2007, pp. 123-124). While I am sympathetic with Brake's (2003) broad vision of what constitutes families or simply 'caring relationships', I am less convinced of her belief that this agenda could be realised in the name of 'marriage'. Due to the heavy legacy of romantic symbolism that has shaped the understanding of marriage as a *conjugal* emotional-sexual union (see, for example, George 2015), I am doubtful as to whether an anti-amatonormative⁴ agenda can be achieved under the label of 'marriage'.

³ Strassberg's (2003) rather dystopian depiction of polyamory does not take account of the widely established ethical community standards and experimentally generated and culturally mediated skills on how to constructively deal with jealousy in complex poly relationship contexts (Wosick-Correa 2010, Deri 2015).

⁴ Brake (2013) defines 'unjustified privilege given to romantic sexual relationships as opposed to non-sexual, life-structuring friendships' as 'amatonormative discrimination'. Amatonormativity is the

Moreover, marriage is an institution of privilege and the call for marriage equality is a liberal demand for the inclusion into meritocratic systems and institutions (West 2007). Access to marriage does not provide the answer to poverty and the multiple sources of discrimination. I will explore this question in more detail in the following section.

4.3. Potential effects regarding the poly movement's capacity and inclination to forge wider alliances around relational rights

Major currents of polyamory activism in Europe and North America have already been marked by a strong tendency to a politics of distinction that presents polyamory as the most reflexive, emotionally grounded and ethically refined style of consensual non-monogamy (Klesse 2007). The turf wars around boundaries and belonging with regard to other non-monogamous practices (e.g. recreational, casual or more pleasure-focused practices) were partially born out of a defensive gesture aimed at assimilation. Advocating for the recognition of poly relationships on the ground of sexual orientation based claims to equality is likely to reinforce these tendencies. Mooring the definition of polyamory in a notion of personality type (rather than a form of practice) results in a more narrow construction of membership within poly 'communities' (or the constituency of the polyamory movement)⁵. Polyamory activism is likely to transform into a more rigidly defined version of identity politics. This has implications beyond the question of what 'typologies of non-monogamy' are represented by the category of polyamory. Sexual orientation based litigation emphasises and marks *one aspect* of people's multi-faceted subjectivities as particularly meaningful. It renders salient or overinvests in what will usually be one identity among others that matter for poly people and establishes its priority in defining context and nature of the campaign. Sexual orientation discourse therefore mitigates against more coalitional interpretations of identity politics, as they have been advocated for many decades by Black and Third World feminists (see Carastathis 2013). As a result, the imagined constituency of social struggles shrinks to represent an authentic core movement defined in quite narrow and essentialist terms. This will likely foster a tendency to frame political struggles within a framework of cultural recognition, rather than within a broader agenda aimed at social and economic transformation (see Fraser 1997a, 1997b).

The history of litigation around same-sex relationship rights shows how closely sexual orientation-based strategies are tied to a politics of gaining the formal right to access *civil marriage* (rather than any other arrangement or set of rights which could safeguard the economic, social and emotional well-being of family members). As Polikoff (2008) has shown, campaigns for marriage status implicitly endorse a policy of 'special rights' for married people, which is reductionist and leaves out many relationships and families. Not only same-sex couples (in the United States) were denied vital rights and protections before *Obergefell v. Hodges* (2015). 'Excluded families include unmarried couples of any sexual orientation, single parent households, extended family units, and any other constellation of individuals who form relationships of economic interdependence that do not conform to the one-size-fits all marriage model' (Polikoff 2008, p. 2).

A multi-tier approach that aims to legally support family functions (such as, for example, parenting and care work) rather than a rigidly defined relationship status would better suit the aim of valuing all families. In her critique of the demand for same-sex marriage, she argues that '[s]uccessful reform that values all families may not come in the name of gay rights. It may come under the banner of, for example,

assumption that everybody should aspire to build 'amorous' (or loving) relationships and that love relationships are preferable over and of a higher order than other types of relationships.

⁵ Judith Butler's (1990) arguments about the feminist movements are helpful to grasp this process theoretically.

patients' autonomy, family pluralism, and the needs of children' (Polikoff 2009, p. 102).

Poly marriage would face the same problem as same-sex marriage in that it will not capture those who either cannot or do not want to marry. Nobody should be expected to marry in order to gain access to basic rights and protections. The call for marriage equality thus endorses the continuation of a practice of state-sanctioned culture of privilege. Moreover, *formal* equality (in terms of access to marriage status) does not guarantee *substantive* equality (see Barker 2012) and multiple patterns of discrimination may in fact prevent certain groups of people from accessing such a status. For example, Farrow (2010) states in his discussion of the racial politics around the US same-sex marriage campaign that he is convinced 'that even if same-sex marriage becomes legal, white people will access that privilege far more than black people. This is especially the case with poor black people who, regardless of sexual preference or gender, are struggling with the most critical needs (housing, food, gainful employment), which are not at all met by same-sex marriage' (Farrow 2010, p. 30).

I am suggesting that advocating in favour of sexual orientation discourse is likely to narrow the scope of legal strategies which poly activists are likely to explore should they decide to take on the question relationship rights. This is because of the way sexual orientation has been written into legal discourse in the history of litigation around same-sex marriage. Marriage rights activism can be seen as a single-issue form of politics. Anna Marie Smith (2001) has rightly argued that single-issue campaigns tend to be 'under-complex' and fail to address the full range of social justice violations experienced by any particular group. All these effects converge in that they undermine the capacity to create campaigns based on larger coalitions that address issues that concern many people (often across the specifics of relationship status, style of intimacy, family formation or identity labels), such as for example financial security, health care provision, education and freedom from discrimination. What counts is relational autonomy, that is, the 'capability to codetermine intimate and/or sexual relationships' (Fischel 2016, p. 181). Relational autonomy always depends on the material and cultural conditions to exercise choices – in the present and the future. A focus on relational autonomy invites us to think about the larger context and wider agendas (Klesse 2014b). In contradistinction, sexual orientation discourse constructs a narrow base for the potential constituency of poly activism. It returns to a concern with boundaries of who is properly represented by the very concept of polyamory (thus excluding many positions from the poly spectrum). As a struggle for equality within a system of privilege, marriage activism is likely to appeal only to certain groups from within the larger non-monogamous and polyamorous spectrum (and certain positions within these respective groups). As a single-issue reform struggle, it loses sight of a wider and more nuanced socio-economic and socio-political agenda. This again implies a turn away from actively seeking out coalitions for a more over-arching social justice agenda.

5. Conclusion

Over recent years, a discourse which posits polyamory as a sexual orientation has gained momentum. In this paper, I have traced the genealogy of this discourse in the United States legal studies literature. Sexual orientation arguments have provided an important tool in litigation around same-sex marriage rights. Scholars and activists have recently started to explore whether similar strategies could be useful for poly activists who wish to advocate for the legal recognition of their relationships and families.

I have argued that such a strategy may have detrimental effects by reducing the challenge and critical potential of polyamory, channelling activism towards narrow goals defined by a self-limiting equality agenda and undercutting the inclination of the movement to enter larger coalitions around wider social-justice-based struggles.

Multi-partner relationships are excluded from recognition and any protections by the law and certain manifestations of plural marriage face criminalization and prosecution. The damaging impacts of the 'monogamy of the law' have been powerfully demonstrated in many studies (Emens 2004, Polikoff 2008, Brake 2013). The history of the campaign for same-sex marriage rights in the United States shows that a piecemeal strategy of litigation can lead to long-term change in expanding the rights allocated to certain institutions and legal statuses (Pierceson 2013). Yet these pragmatic successes cannot mask the fact that the marriage equality campaigns of the LGBT movement has drawn upon an 'antipluralist and exclusionary conception of marriage' (Calhoun 2005, p. 1036). Marriage is more accessible and matters more to certain parts of the population (Farrow 2010, West 2007). Moreover, the privileged focus on the rights to marriage have had the effect of limiting the imagination of the advocates for LGBT families to explain the causes of discrimination in a mono-causal fashion. The goal of marriage equality does not necessarily enhance a critical and creative paradigm. Polikoff (2009) suggests that 'a law reform agenda that values all families and relationships and by extension those of heterosexual as well, does *not* start with the package of rights that marriage gives different-sex couples and work down from there, strategizing how many of those rights politicians are willing to grant same-sex couples who sign up with the state in a status called civil union or domestic partnership. Instead, such an agenda starts by identifying the needs of all LGBT people and works up from there to graft legislative proposals to meet those needs' (Polikoff 2009, p. 209).

Poly activism runs the risk of falling into the same trap if it deploys a simple analogy between same-sex marriage and plural marriage. Fischel (2016) proposes a wider social-justice agenda around the value of relational autonomy, rather than a fixation on a 'fundamental right to marry'. A valuing-all families approach is more inclined to look for legal solutions beyond a singular route to recognition. 'All families, relationships, and households struggling for stability and economic security will be helped by separating basic forms of legal and economic recognition from the requirement of marital and conjugal relationship', posits the collective statement 'Beyond Same-Sex Marriage: A New Strategic Vision for all our Families & Relationships' (2006). This argument shares common ground with the concerns of feminist scholars, who want the law to focus on supporting care networks, rather than romantic, conjugal and/or sexual relationships (Fineman 1995, West 2007).

Sexual orientation models of polyamory may work well to construct marriage equality arguments, but they are at odds with the inherent plurality of polyamory as a social and intimate practice. They may obstruct rather than sustain the creative thinking needed to guarantee access to rights and resources through a more comprehensive law reform agenda. For all these reasons, I agree with Barker and Langdrige (2010, p. 16) who argue that '[p]otentially there is more to be gained (politically and theoretically) from a non-monogamy discourse which positions these divisions and boundaries as relevant to all, across the spectrum of relationships (universalizing), rather than one which sees them as an issue of active importance for only a small, relatively fixed, self-defining, non-monogamous (minoritizing) minority'. Rather than framing polyamory as a distinctive identity or orientation, it is helpful to see polyamory as a multi-positional but integrated field of intimate and sexual practices whose participants share at least potentially some concerns with others, both within the non-monogamous spectrum and beyond.

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