The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle

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THE FUTURE OF POLYAMOROUS MARRIAGE: LESSONS FROM THE MARRIAGE EQUALITY STRUGGLE

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Abstract

Amidst the recent legal victories and growing public support for same-sex marriage, numerous polyamorous individuals have expressed interest in pursuing legal recognition for marriages between more than two consenting adults. This Article explores the possibilities that exist for such a polyamorous marriage equality campaign, in light of the theoretical literature on law and social movements, as well as our own original and secondary research on polyamorous and LGBT communities. Among other issues, we examine the prospect of prioritizing the marriage struggle over other forms of nonmarital relationship recognition; pragmatic regulative challenges, like taxation, healthcare, and immigration; and how law and culture shape these struggles and their ability to produce social change.

We argue that legal mobilization for same-sex marriage has produced conflicting pressures for contemporary polyamorous activism. On one hand, same-sex marriage litigation has provided several doctrinal footholds for expanding marriage to polyamorous relationships. On the other hand, same-sex marriage litigation has simultaneously reinforced cultural stigmas against polyamorous relationships—stigmas which constrain the practical utility of those legal tools (especially as means for implementing broader social change beyond the letter of the law). By accounting for these conflicting legal and cultural pressures, this Article provides a comprehensive roadmap of the issues, strategies, and challenges likely to emerge along the path toward polyamorous marriages.

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The radical of one century is the conservative of the next. The radical invents the views. When he has worn them out, the conservative adopts them.¹

INTRODUCTION

On June 26, 2013, hundreds of San Franciscans swarmed excitedly into City Hall in the early morning hours. Giant video screens were positioned for the audience’s benefit, to capture the Supreme Court decision announcements of that morning in two important cases: U.S. v. Windsor;² addressing the constitutionality of the federal Defense of Marriage Act, and Hollingsworth v. Perry;³ addressing the viability of California’s Proposition 8. City Hall had been Ground Zero for these legal challenges; in 2004, then-Mayor Gavin Newsom opened its doors to same-sex couple seeking to get married, in violation of a then-California statute forbidding same-sex marriages.⁴ The San Francisco Superior Court found the statute to be unconstitutional.⁵ Shortly thereafter, in 2008, voters passed Proposition 8, a California constitutional amendment forbidding same-sex marriage.⁶ In 2010, Judge Vaughn Walker found Prop 8 unconstitutional.⁷ The State of California did not appeal the ruling.⁸

¹ Mark Twain, Notebook, 1898.
² 133 S. Ct. 2675 (2013).
³ 133 S. Ct. 2652 (2013).
⁵ Coordination Proceeding, Special Title [Rule 1550(c)], Marriage Cases, 2005 WL 583129.
and when the initiative’s proponents continued the struggle to prevent same-sex marriages, the Supreme Court ruled they had no standing to do so.\(^9\)

As the decisions in both cases were announced on CNN, spectators excitedly exclaimed and squealed. The combined effects of the decisions—the first declaring DOMA unconstitutional, the second putting an end to the barriers to same-sex marriage in California on procedural grounds—would be that thousands of San Franciscan couples could marry,\(^11\) and that same-sex marriages in states that allowed them would be fully recognized by the Federal government, including for purposes of taxation, health care, and immigration.\(^12\) Former Mayor Newsom, Mayor Ed Lee, City Attorney Dennis Herrera, and Phyllis Lyon, the original petitioner in the marriage cases and the first person to be married at City Hall to her female partner, came down the stairs, welcomed by a deafening applause and cheers.\(^13\) As the joyful news sank in, celebrations outside City Hall began, later to continue in the Castro, San Francisco’s historical gay neighborhood.\(^14\)

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\(^12\) The first few green cards were awarded to Cathy Davis, Traian Popov, Karin Bogliolo, and Shaun Stent.


This account of *Windsor* and *Perry* cases exemplifies several of the extralegal outcomes of legal mobilization, which previous sociolegal scholarship has examined in detail.\(^\text{15}\) The public celebrations around the recent Supreme Court decisions—echoing the alternating rounds of celebration and protest in response to marriage decisions in previous years—illustrate how marriage equality litigation has sparked renewed interest and popular participation in LGBT politics.\(^\text{16}\) Same-sex marriage and relationship recognition litigation have also helped to reconstruct the dominant cultural meanings associated with marriage, bringing same-sex couples within its ambit.\(^\text{17}\) Since the LGBT civil rights organizations came to prioritize marriage litigation, public acceptance for same-sex marriage has risen dramatically, from 27% in March 1996 to 53% in May 2013.\(^\text{18}\) Not the least of the successes of same-sex marriage litigation has been the rising tide of legal victories on the issue, creating formal rights that many same-sex couples around the nation benefit from directly.\(^\text{19}\) Even acknowledging the strong criticisms marriage has evoked, both among antigay conservatives\(^\text{20}\) and within the LGBT


\(^{17}\) C.f., Kathleen Hull, *Same Sex Marriage* 76 (2005) (“As these excluded actors appropriate those elements of the institution that are least easily restricted (in the case of marriage, its cultural practices), the institution itself begins to transform.”).

\(^{18}\) By July 2013, after the decision, percentage of supporters rose to 54%. Gallup polls: [http://www.gallup.com/poll/117328/marriage.aspx](http://www.gallup.com/poll/117328/marriage.aspx). See Engel & Munger for a discussion of legal change increasing public acceptance and support for a movement.


\(^{20}\) See e.g., the resentment and unsuccessful efforts to circumvent the Perry decision.
community itself, most people would probably agree that the legal mobilization around marriage has invigorated the LGBT movement and has improved the situation of many LGB people in a predominantly heterosexual society.

Missing from this standard, celebratory account of marriage equality litigation is an assessment of an entirely different class of extralegal effects—specifically, the effects that marriage equality litigation may have produced for sexual minority communities outside the context of the LGBT movement. Indeed, this is an oversight of the legal mobilization literature more broadly. While significant work has been done to examine the extralegal impact of legal mobilization on the specific constituencies whose legal rights are formally implicated, there has been little empirical research into the impact of legal mobilization on other, related social groups, or the conditions under which such an impact is most likely to occur. This oversight is particularly surprising given that the legal constructs evoked through legal mobilization (e.g., marriage, rights, equality) tend to resonate with a broad array of nonmovement actors—suggesting that a movement’s politicization of these terms is likely to generate “spillover” effects in other social groups.

This Article addresses the idea of legal mobilization “spillover” by examining the implications of the LGBT movement’s marriage equality campaign for a sympathetic, but distinct, sexual minority

21 Among the critiques of marriage are its tendency to pressure LGB assimilation into state-favored dyadic, monogamous couplings and that winning marriage benefits is most relevant to the LGBT community’s white and wealthy segments (rather than the poor and of color segments of the community) which are most likely to form marital relationships.

22 See KATHLEEN HULL, SAME SEX MARRIAGE 76 (“The cultural practices that partially constitute marriage have a strong pull on many people, including some who are excluded from marriage as a legal institution. This is true not only of contemporary same-sex couples, but also of other excluded relationships as well. American slaves were forbidden legal marriage but constructed wedding rituals for themselves outside the law. And polygamists, both historically and in the present, draw on the cultural trappings to marriage to enact their ‘plural marriages,’ despite the absence of legal recognition and even the threat of criminal prosecution.”).

group: the polyamorous community. “Polyamorous” relationships are sexually intimate relationships between three or more consenting adults. The polyamorous community distinguishes itself from the religious variant of multiparty relationships, polygamy, in its members’ ethical commitment to nonmonogamy\(^{24}\) and acceptance of queer sexualities. Many in the poly community also view the LGBT community as a natural affinity group\(^{25}\)—so much so that politicized poly activists have historically restrained themselves politically to avoid stepping on the toes of LGBT activists. In 2005, Aviram conducted an ethnography of Bay Area polyamorous activists, and found reluctance to pursue legal avenues, among other reasons out of fear of sabotaging the marriage equality struggle.\(^{26}\) Yet the increasingly victorious legal mobilization around same-sex marriage appears to have emboldened activists to speak out on the issue. For example, Tobi Hill-Meyer of Seattle expressed her complex feelings in reaction to Windsor and Perry in her blog post, titled “I still can’t marry my partner.”\(^{27}\)

However, in your celebrations I want to ask one teeny little favor of you. Please don't say "all couples have the freedom to marry" or "We finally have marriage equality." …[E]ven in states with same sex-marriage, the statement that "everyone can get married now" is just not true. I live in Seattle, and have been

\(^{24}\) Emens, *Monogamy’s Law* 283 (2004) [hereinafter Emens, *Monogamy’s Law*]. (“Polyamory is a lifestyle embraced by a minority of individuals who exhibit a wide variety of relationship models and who articulate an ethical vision that I understand to encompass five main principles: self-knowledge, radical honesty, consent, self-possession, and privileging love and sex over other emotions and activities such as jealousy). Note however that practices constituting polyamory can be quite distinct. See Christian Klesse, *Polyamory: Intimate practice, identity or sexual orientation?*, 17 *SEXUALITIES* 81, 89 (2014) ("As a relational practice, polyamory sustains a vast variety of open relationship or multi-partner constellations, which can differ in definition and grades of intensity, closeness and commitment.)


\(^{26}\) Id. at 264.

hearing this a lot since our state passed same-sex marriage last November… But you see, here's the thing: I still can't marry my partner of 8 years, Ronan Kelly. Because it would mean I couldn't be married to my partner of 15, Fay Onyx.

I know, I know, the marriage movement doesn't want to talk about poly families at all. I've accepted that none of you are going to fight for my marriage to be considered equal. It's been bashed over my head forever that I'm not even supposed to talk about my relationships because we are the evil end of the slippery slope along with bestiality and pedophilia. I'm not asking for you to fight for my rights. I'm just asking you not to pretend that everyone has the right to marry when my family can't even get a civil union.\(^{28}\)

Hill-Meyer is not alone; there seems to be a growing interest within the polyamorous community in legal recognition for multiparty relationships. In a recent survey conducted by Loving More, a polyamory magazine, 65.9% of respondents said they would take

\(^{28}\) *Id.* Recounting the health care and immigration challenges of her multi-partner family, and those of friends, Hill-Meyer adds:

I look at giddy proposals and declarations of love on Facebook and I have to admit, it stings to see so many friends being recognized in a way that I can't. It makes me want that too. Maybe not as much as I want an end of police profiling and harassment of queer youth, people of color, and trans women, but I definitely want it.

When I hear "Everyone can marry their partner now" and I have to add "except me" silently in my head, a little part of me is crushed. I swallow my tears and mumble something about marriage being just a piece of paper and try to get on with my day.

I'm not asking you to stop celebrating, or even to fight for my rights the same way I've fought for yours. But maybe you could avoid erasing me with your words. Maybe you could remember that we're not all equal yet. Certainly not in terms of employment, voting rights, or the criminalization of poverty. And not even in terms of marriage.

*Id.*
advantage of plural marriage if it were legally available. While the 
*Loving More* survey did find considerable ambivalence regarding governmental interference in relationships, a sentiment also reflected in Aviram’s 2005 ethnographic work, the survey suggests that the poly community’s ambivalence toward marriage is now coupled with newfound enthusiasm for legal mobilization, possibly in light of the successes of the LGBT community.

While same-sex marriage litigation may have opened the door to an emulative multiparty marriage campaign, it has simultaneously undercut the potential for this campaign to be effective (at least in the short term). Same-sex marriage advocates have strategically drawn a clear boundary between the struggle for same-sex marriage and a possible struggle for multiparty marriage. This rhetorical move is typically made to address the “slippery slope” arguments by conservatives that expanding marriage to same-sex couples would lead to further expansions for bigamy, polygamy, and incest. The following vignette provides a recent example of the slippery slope argument, as presented by Justice Sonya Sotomayor in the oral arguments of *Hollingsworth v Perry*, followed by the defensive

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30 The Love More survey reported that 66.9% of respondents thought that no relationship structure “deserve[d] special recognition,” indicating ambivalence about the privilege of marriage in general. *Id.* Part I discusses a similar ambivalence in the pre-1993 LGBT movement and argues that it was not incompatible with activists’ concerted political efforts demanding marriage equality at that time.

31 For example, social conservative Rick Santorum stated in 2003 that “If the Supreme Court says that you have the right to consensual 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 . . . [w]hether it’s polygamy, whether it’s adultery, whether it’s sodomy, all of those things, are antithetical to a healthy, stable, traditional family.”

Santorum recently reiterated this view at a public appearance in New Hampshire: http://www.washingtonpost.com/blogs/post-politics/post/rick-santorum-comparres-same-sex-marriage-to-polygamy-in-spirited-exchange-at-nh-college/2012/01/05/gIQAdEwXdP_blog.html
response by attorney Ted Olson, who represented the same-sex couples:

–Justice Sotomayor: If you say that marriage is a fundamental right, what State restrictions could ever exist? Meaning, what State restrictions [would remain] with respect to the number of people…that could get married [or] the incest laws…I can accept that the State has probably an overbearing interest on -- on protecting a child until they're of age to marry, but what's left?

–Ted Olson: Well, you've said -- you've said in the cases decided by this Court that the polygamy issue, multiple marriages raises questions about exploitation, abuse, patriarchy, issues with respect to taxes, inheritance, child custody, it is an entirely different thing. And if you -- if a State prohibits polygamy, it's prohibiting conduct. If it prohibits gay and lesbian citizens from getting married, it is prohibiting their exercise of a right based upon their status.32

Instead of defending multiparty marriage, Olson reaffirms the general tendency among same-sex marriage supporters to insist that same-sex marriage would not lead to multiparty marriage—implicitly accepting the devaluation of multiparty relationships the slippery slope arguments entail. Olson’s response also subscribes to common stereotypes that multiparty marriages generate “exploitation, abuse, patriarchy,” but presents no data to support this assumption.33

Aside from creating thorny legal precedent for future multiparty marriage activists to confront, arguments like Olson’s also create more immediate social repercussions for polyamorous communities.


33 Olson’s response also draws a distinction between “conduct” and “the exercise of a right based upon status” that is murky at best. After all, marriage—between partners of any number or gender—is a type of “conduct.” Furthermore, whether or not prohibitions on multiparty marriages are based on status depends upon whether polyamory (or one’s polyamorous orientation) is a status—and at least some commentators have argued that it could be perceived as such. Ann Tweedy, Polyamory As A Sexual Orientation, 79 U. CIN. L. REV. (2011).
To begin with, these arguments have embittered many polyamory activists who once supported the same-sex marriage struggle. For example, John Ullman, a long-time polyamory activist, argued at the International Conference on Monogamies and Non-Monogamies that the LGBT struggle for marriage equality “threw [poly activists] under the bus.” Ullman recounted the hostility he experienced from LGBT activists when he asked them to consider the possibility of legal recognition of non-monogamies. These instances dovetail with surveys of LGBT people finding a majority of participants objecting to legal recognition for relationships between more than two adults. The LGBT movement’s simultaneous politicization of marriage and erection of a clear rhetorical wedge between LGB and multiparty relationships may have even reinforced the stigmatization of multiparty relationships and nonmonogamous families. This would explain why, despite the salience of nonmonogamous families and lifestyles in public discourse and media (propagated by television shows like Big Love, Sister Wives, and Polyamory: Married and Dating), the public continues to perceive these relationships as qualitatively different from dyadic opposite-sex or same-sex relationships.

This Article explores the future of marriages between more than two consenting adults, in light of the theoretical literature on law and social movements, as well as our own original and secondary research on polyamorous and LGBT communities. A motivating question in this research is how legal mobilization for same-sex marriage has constrained the set of legal and extralegal strategies available to advocates of multiparty marriage—while potentially enabling other directions for advocacy. Previous legal and sociological literature has shown how particular social movement strategies (typically those that are viewed as most successful) tend to become engrained into a

34 3rd International Conference on the Future of Monogamy and Nonmonogamy; https://sites.google.com/site/ipachome/home
35 **locate poll**
36 *Big Love* (HBO television broadcast Mar. 2006- Mar. 2011) [hereinafter *Big Love*].
37 *Sister Wives* (TLC television broadcast Sept. 2010- present) [hereinafter *Sister Wives*].
38 *Polyamory: Married and Dating* (Showtime television broadcast Jul. 2012- present) [hereinafter *Polyamory: Married and Dating*].
standard “toolkit” of political tactics that are borrowed from movement to movement. Our project builds on this idea of diffusion or “spillover” among movement strategies. However, instead of showing how effective strategies travel, our work considers how movement actors’ very perceptions of a strategy’s effectiveness may be shaped by a prior movement’s legal mobilization. Specifically, we examine how a prior movement’s legal mobilization campaign can potentially re-structure the legal and cultural environments in which subsequent movements mobilize—shaping various strategies’ likelihood for producing success and thus their attractiveness as tools for social change.

The Article proceeds in three Parts. Part I provides a detailed historical analysis the early history of same-sex marriage advocacy within the LGBT movement. It discusses an initial radical form of same-sex marriage advocacy that existed among self-identified “gay liberationists” of the 1970s. This radical marriage advocacy was made possible by the low likelihood of gay liberationists actually making legal headway on their demands through the courts or legislatures; in this environment, same-sex marriage activists used litigation as a form of protest—as a way to draw visibility to activists’ resistance to heterosexual marriage laws. As the political climate shifted and LGBT activists grew more conservative in their approach, gay and lesbian civil rights groups pursued more attainable forms of nonmarital relationship recognition, creating increasing legal precedent and cultural visibility for marriage-like gay relationships. Then, in 1992, a case brought by a private attorney in Hawaii generated the first successful challenge to a state ban on same-sex marriage, signaling that marriage had come within LGB couples’ reach. This Hawaii case ushered in the contemporary era of marriage


40 See generally Michael Boucai, Glorious Precedents: When Same-Sex Marriage was Radical, 27 YALE J. L. & HUMANITIES (forthcoming 2015) [hereinafter Boucai, Glorious Precedents].
equality litigation, involving a coordinated effort by mainstream LGBT civil rights organizations to demand constitutional protections for same-sex marriage outright.

Part II takes a direct look at the polyamorous community today. It provides a brief background on the emergence of polyamory as an alternative form of intimate relationships, including its ideological foundations in queer and feminist theory (contrasting polyamory from the better known religious form of nonmonogamy, polyamory). We discuss the ties that exist between the LGBT and poly communities, arguing the direct interaction between poly and LGBT constituencies is minimal, poly activists have shown a sense of allegiance to LGBT activism and support for LGBT movement goals. Finally, Part II performs a direct comparison between the contemporary poly community and the early “gay liberation” days of LGBT activism. We highlight the numerous parallels between these communities, including internal values (individualism, antisubordinationist views, antiassimilationist politics) and external political forces (invisibility, “unthinkability” of state relationship recognition) which make these communities quite ripe for comparative study.

Part III turns to examining the decades-long LGBT legal mobilization for marital and nonmarital relationship recognition, and specifically, how this legal mobilization has shaped the cultural and legal climate in which today’s poly community is operating. In general, this analysis suggests that the LGBT legal mobilization may have produced conflicting pressures for contemporary poly activism. While same-sex marriage litigation has created greater traction for legal arguments to expand marriage to poly relationships, it may have simultaneously reinforced cultural stigmas against polyamorous relationships. We propose a set of insights for poly activism, in light of this current situation, including the strategies polyamorous activists could borrow (or avoid), the reactions poly activists should expect to face, and the specific lessons they might learn from the LGBT experience.

Part IV then examines the implications of our analysis for legal and sociological theories of social movements. It uses the analysis in Part II as a springboard for theorizing aspects of social movement
“spillover,” or the “nature of movement-movement influence,” that previous work has not yet considered. While it is well known that social movements borrow strategies from one another, less is known about how movements that may lack common activist networks or that refrain from coalition work come to influence on another. This Article contributes to this literature by positing a range of structural factors and community conditions that enable the flow of strategies (in this case, relationship recognition strategies) among subordinated social groups. Further, this Article expands on previous sociolegal work examining the numerous “radiating effects” of litigation beyond the direct constituency formally affected by that litigation. In particular, we suggest that same-sex marriage legal mobilization has raised several extra-legal consequences, including changes to cultural expectations and definitions of marriage, intimacy, and the role of law in social change, likely to have spillover effects for poly politics and beyond. We suggest several important directions for future research.

We conclude by reviewing the practical implications of this Article in providing a roadmap of issues, strategies and challenges that advocates can use in the path toward polyamorous marriages. We think that the struggle for marriage equality could be a step in the path toward the legal recognition of multiple relationships, and that polyamorous activists mobilizing for legal change have much to learn from the marriage equality struggle. However, our approach in this paper is unique in that it does not privilege “winning” as the ultimate goal of litigation and marker of success. Rather, our purpose in analyzing the multiple phases of LGBT movement litigation is to offers a variety of strategic models for litigation, which speak to different visions of polyamorous community values and politics. The “legal impact” model that defines contemporary same-sex marriage litigation is just one vision of relationship-recognition litigation; we leave it up to polyamorous activists themselves to decide whether to implement such a strategy, or whether to part ways with LGBT activists and forge their own path toward legal acknowledgment of their relationships and families.

I. HISTORICAL BACKGROUND ON SAME-SEX MARRIAGE ACTIVISM

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41 Meyer & Whittier, Social Movement Spillover, supra note 23, at 277.
While contemporary same-sex marriage advocacy has been spearheaded by the well-funded, national civil rights groups in the LGBT movement’s mainstream, same-sex marriage has historically been on much shakier grounds as a movement objective. This Part provides an account of the radical roots of same-sex marriage activism in the LGBT movement. It traces how the meaning of marriage, and its desirability among LGBT activists, has shifted alongside broader changes in the movement’s dominant organizing strategies and political philosophies over the past several decades.

Same-sex marriage was originally championed by locally organized “gay liberationists” of the 1970s as a bold and confrontational assertion of gay empowerment. A far-fetched goal at the time, marriage soon became subordinated to more attainable forms of relationship recognition as a new cadre of national gay and lesbian civil rights organizations rose to prominence. As those civil rights organizations directed an increasingly large share of the movement’s resources into incremental law reform efforts, some activists on the fringe resurrected the marriage issue—in outright defiance of the mainstream gay and lesbian groups’ cautious suppression of the issue. It was not until the mid-1990s, when a Hawaii case brought by individual gay plaintiffs proved that same-sex marriage was within the movement’s reach, that marriage assumed its current position as a centerpiece in the mainstream LGBT movement’s agenda.

A note on terminology is in order before we proceed. Throughout this Article, we have attempted to avoid anachronism by characterizing the LGBT movement by the terms that were most widely used at the time. Accordingly, we refer to the “gay liberation” movement when speaking of activism in the 1970s; to the “gay and lesbian” movement or “queer activists/organizations” when speaking of activism in the 1980s, and to the “LGBT” movement when speaking of activism from the 1990s onward. When discussing specific communities rather than the movement, we have made every effort balance our desire for inclusivity with the need for accuracy. Because marriage equality is an issue related to sexual orientation rather than gender identity, we refer to the individuals affected by marriage equality advances as “LGB” people.
An unprecedented surge in political activity among gay men and lesbians occurred in the late 1960s. Drawing on the same progressive current that animated leftist organizing in the feminist and Black civil rights movements of the day, self-identified “gay liberationists” formed predominantly local, identity-based organizations in cities around the U.S. While gay liberation marked the first time a national common sense of purpose emerged from gay and lesbian political organizing, gay liberationist groups were far from uniform in their political approach or in the goals they espoused. Among the diverse goals these groups pursued were: fostering gay pride and empowerment; promoting the equality of LGB individuals vis-à-vis straight people; broadening sexual freedom; disrupting binary gender expectations; and ridding society of homophobia and patriarchy.

Gay liberationist politics was also novel in its embrace of confrontational tactics. The predecessors of gay liberation, known as “homophile” organizations, had taken an interest-group configuration and employed a much more conservative approach, in attempts to avoid grabbing attention. Gay liberationists, by contrast, defiantly marched in the streets and tried to attract attention thorough disruptive public action. The Stonewall riots that occurred in June 1969,

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44 “Indeed, in the early years of gay liberation, the movement suffered from splintered views over what did constitute the primary goal. Was it, as some argued, to gain the same sort of rights enjoyed by heterosexuals…? Or was the goal, as the more radical forces argued, to gain the right to be our different selves (in which case arguments needed to be made in direct support of the sexual interests that were at the core of our difference?)” PATRICIA CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT 158 (Westview Press 2000), at 92 (hereinafter CAIN, RAINBOW RIGHTS).

45 Boucai, Glorious Precedents, supra note 40.
motivated by a police raid of New York City bar frequented by LGB and transgender patrons, are representative of this confrontational approach.\textsuperscript{46} Far from being an isolated event or the first major LGBT political mobilization, the Stonewall riots were one of many fiery public uprisings that emerged in the late 1960s.\textsuperscript{47} Stonewall and similar uprisings were both inspired by and reinforced the radicalizing trend of gay liberationist politics at the time.\textsuperscript{48}

A surge of activism around marriage equality arose from the new gay liberationist politics.\textsuperscript{49} Interestingly, this issue initially received national attention in the early 1970s during Congressional deliberations regarding the Equal Rights Amendment (ERA).\textsuperscript{50} While the ERA was ostensibly about constitutionalizing antidiscrimination rights for women, conservatives opposing the amendment used homophobic scare tactics to thwart its passage. Calling it the “Pro-Gay E.R.A.,” conservatives argued that ERA legislation at the federal

\textsuperscript{46} Although Stonewall is commonly referred to as the initiating event or event inspiring the “birth” of gay liberation, historical research has demonstrated that the Stonewall riots were just one of several such national riots initiated by LGBT people during this time period. See Elizabeth A. Armstrong & Suzanna M. Crage, \textit{Movements and Memory: The Making of the Stonewall Myth} 725-26 AMERICAN SOCIOLOGICAL REVIEW (2006) (“The Stonewall riots did not mark the origin of gay liberation. They were not the first time gays fought back against police; nor was the raid at the Stonewall Inn the first to generate political organizing. Other events, however, failed to achieve the mythic stature of Stonewall and indeed have been virtually forgotten.”).

\textsuperscript{47} Id. at 736 (“As part of movement radicalization, activists adopted public protest as a strategy. Beginning in the spring of 1965, East Coast Homophile Organizations (ECHO) organized a series of ground-breaking public pickets”).

\textsuperscript{48} See Id. at 736 (“gay liberation was a precondition for…the situation at the Stonewall Inn. Without a radical political approach, activists would not have responded by escalating the conflict”).

\textsuperscript{49} CAIN, RAINBOW RIGHTS, supra note 44, at 158 (“In the early 1970s, a wave of lesbian and gay activity commenced around the marriage issue”).

and state levels would force states to endorse same-sex marriage.\(^{51}\) This appeal to homophobia is considered to have “played a role in the failure of the ERA to win ratification of three-fourths of the state legislatures.”\(^{52}\)

While the feminists carefully avoided the same-sex marriage discussion in their ERA advocacy efforts, many gay liberationists confronted the issue head-on. As for other issues, marriage equality was not a universal priority among the diverse gay liberationist groups. Some activists rejected marriage as a “rotten, oppressive institution”\(^{53}\) and called for its abolition,\(^{54}\) scorning marriage-equality advocates for imitating heterosexual relationships.\(^{55}\) Others took a more romantic view of the long-term commitment to a same-sex spouse as “one more sign on the road to complete liberation.”\(^{56}\) Still others adopted a third path, which saw same-sex marriage advocacy as a radical goal that advanced goals central to gay liberation, such as embracing pride in homosexuality,\(^{57}\) and publicly contesting discriminatory institutions.\(^{58}\)

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52 ESKRIDGE, EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (Routledge 2002), at 8 (hereinafter ESKRIDGE, EQUALITY PRACTICE).

53 Id.

54 Id. (one Seattle based activist who prepared a position statement on marriage for the ACLU of Washington in 1970 “explain[ed] the discriminatory effect of marriage on lesbians and gay men and to call for the total abolition of marriage”).

55 Id. at 159; LEE WALZER, GAY RIGHTS ON TRIAL: A REFERENCE HANDBOOK 129 (ABC-CILO 2002) (hereinafter WALZER, GAY RIGHTS ON TRIAL).

56 Id. The fact that there were “thousands of couples who sought in the wake of Stonewall to solemnize their relationships in private ceremonies,” see Boucai, Glorious Precedents, supra note 40, suggests that there were many LGB people at the time who were in this camp.

57 Boucai, Glorious Precedents, supra note 40 (marriage advocacy “fervently embraced by the gay liberation movement, that ‘gay is good’—even ‘to the degree of being sacred’”).

58 Id. (marriage advocates of the 1970s sent the message that “there’s other [LGB] people like you, and we’re fighting back”).
It is in this context that LGB plaintiffs brought the first same-sex marriage cases to court. These cases, brought in Minnesota,\textsuperscript{59} Kentucky,\textsuperscript{60} and Washington,\textsuperscript{61} raised three central constitutional arguments that have remained essential in same-sex marriage litigation to this day:\textsuperscript{62} first, that same-sex marriage prohibitions constituted sex-based discrimination (violating plaintiffs’ rights to equal protection); second, that same-sex marriage prohibitions constituted sexual-orientation discrimination and that sexual orientation is a presumptively unconstitutional “suspect classification” (again violating plaintiffs’ rights to equal protection); and third, that prohibiting plaintiffs from marrying a same-sex partner denied violated a fundamental right (violating plaintiffs’ constitutional privacy interests).\textsuperscript{63} Each of these arguments is discussed in detail in Part III.

These early same-sex marriage cases were clearly a product of their time in how they were pursued. The plaintiffs filed individually with private attorneys, without being represented by a major LGBT legal organization. This was partly because only a handful of lesbian and gay public interest law firms existed in the early 1970s when these cases were being litigated—\textsuperscript{64} and those law firms that did exist at the time limited their functions largely to providing relief to LGB people whose rights had been violated.\textsuperscript{65} The fact that the early marriage plaintiffs filed claims with private attorneys also reflects the


\textsuperscript{60} Jones v. Hallahan, 501 S.W.2d 588 (1973).


\textsuperscript{62} Boucai, Glorious Precedents, supra note 40. (stating that the Baker, Jones, and Singer cases presented “[e]ach of the most prominent arguments in today’s same-sex marriage arsenal”).

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} CAIN, RAINBOW RIGHTS, supra note 44, at 56 (“In the early 1970s, two public interest law firms were launched…Lambda Legal…and Equal Rights Advocates”).

\textsuperscript{65} \textit{Id.} at 59 (“At first, litigation efforts on behalf of gay men and lesbians were primarily reactive, occurring in cases in which individuals were forced to defend the rights that had been taken from them. Some time would pass before the lawyers for the movement would become sufficiently organized to be proactive.”).
decentralized politics of “gay liberation.” Although some of the plaintiffs were part of lesbians and gay activist organizations (e.g., Richard John Baker, the Minnesota marriage case plaintiff, who belonged to a local gay liberationist group), they did not feel so embedded within a movement community that they needed to seek the approval of other activists before filing suit.  

On one hand, these early marriage cases demonstrate a serious engagement with the idea of legal protections for same-sex marriage. The attorneys in these cases creatively deployed the most compelling legal arguments available. Yet on the other hand, the plaintiffs in these cases had no genuine expectation that they would succeed. In the early 1970s, the idea of same-sex marriage was “unthinkable” to a degree that is difficult to conceptualize today. Defeat was so certain that one of the Washington plaintiffs, in a later interview, recalled his involvement in the case as a “political ploy.” A judge at the time similarly referred to the Minnesota marriage suit an “antic.”

Given the low prospects for success in these early marriage cases, why did activists pursue those cases in the first place? Michael Boucai’s in-depth examination into these cases has shown that a large motivation was to send a political message—to promote goals such as

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66 Id. at 160 (although “Baker was the leader of the gay student group, FREE, at the University of Minnesota,” Baker did not give “any real warning to other activists in the community about their intentions” before deciding to publicly announce their commitment and apply for a marriage license.).

67 As an example of the attorneys’ creativity, all three of the attorneys in these cases raised the claim that prohibitions on same-sex marriage violated the Eight Amendment—a claim that “today’s litigators would not dream of raising.” Boucai, Glorious Precedents, supra note 40.

68 Michael J. Klarmann, From the Closet to the Alter: Courts, Backlash, and the Struggle for Same-Sex Marriage 22 (Oxford University Press 2013) [hereinafter Klarmann, From the Closet to the Alter].

69 Boucai, Glorious Precedents, supra note 40.

70 When one of the first same-sex marriage plaintiffs lost his job as a state employee and sued federal court, the Court of Appeals for the Eighth Circuit called his attempt to marry a man an “antic.” Cain, Rainbow Rights, supra note 44, at 161.
fostering pride and gay visibility,\textsuperscript{71} which resonated with radical gay liberationist ideals.\textsuperscript{72} Accordingly, the strategy reflects less of the standard emphasis on winning, which dominates impact models of social change litigation today. Instead, the model that drove the gay liberationist marriage equality cases was premised on cultural gain rather than formal legal reform.\textsuperscript{73}

Claiming a right to same-sex marriage in the early 1970s also evoked such shock and revulsion from the heterosexual mainstream that the early marriage cases also resonated with the radical politics of gay liberation. These cases were confrontational and disruptive, showing a clear refusal to remain quietly closeted or to patiently wait for society to come around to accepting gay men and lesbians. In addition, demanding marriage rights in a context where plaintiffs could expect to be summarily dismissed sent more of a message regarding the injustice of marriage than a commitment to entering the institution. Indeed, framing marriage as an unjust institution resonated the idea, expressed by one of the Singer plaintiffs, that he thought marriage was “‘wrong,’ ‘oppressive,’ and ‘unnecessary’” and would “would just as soon abolish marriage” as enter into it.\textsuperscript{74} Thus, although subsequent scholarly work has interpreted these cases as representing a romantic, rosy-eyed view of marriage, it is more likely that the meaning that was derived from these cases at the time—and, as Boucai’s work shows, the meaning that the plaintiffs themselves ascribed to the cases—is that the early marriage plaintiffs were using

\textsuperscript{71} Boucai, \textit{Glorious Precedents}, supra note 40. (describing core liberationist principles: “an insistence on gay pride, and especially on the virtue of gay love; a deep commitment to feminism; an intricate critique of marriage and the nuclear family; and a relentless pursuit of visibility (especially to other gay people) through audacious and sometimes playful tactics”).

\textsuperscript{72} The present Article seeks to build upon the counternarrative that Boucai’s work establishes to the traditional, dualist account that pits marriage equality advocacy against gay liberation radicalism. For related work building on this topic, see Douglas NeJaime, \textit{Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage}, 102 CAL. L. REV. 87 (2014) [hereinafter NeJaime, \textit{Before Marriage}].


\textsuperscript{74} Boucai, \textit{Glorious Precedents}, supra note 40.
litigation as a form of protest against unjust, discriminatory marriage laws.75

Why were these early arguments demanding marriage equality so radical, such that they were “all but laughed out of court?”76 The historical context of these cases is also relevant in determining their meaning and interpretation at the time they were pursued. It is not that marriage laws were impermeable to politically motivated reform. Feminists and civil rights activists had in the previous decade challenged antimiscegenation laws and the gendered language of marriage statutes, showing that marriage was malleable enough to bend to political pressure. The answer likely has more to do with the cultural framing of homosexuality, which was mired in notions of shame and deviance, not pride and public visibility. LGB people as a social group had just begun to penetrate the public’s consciousness. The widespread media coverage of the initial marriage lawsuits may have been the first time that the idea of gay relationships entered many people’s scope of vision. Thus, despite the viability of same-sex marriage as a concept whose recognition under law would not entail much of a doctrinal stretch, the cultural climate in which the early marriage cases were raised infused those claims with a sense of radicalism.

B. Gay Rights Advocacy Puts Marriage on the Fringe

By the 1980s, LGBT activism had undergone major changes that left the marriage issue in decline. As many commentators have noted, the dominant political logic that defined LGB activism shifted from the progressive and radical strain of gay liberation politics to a “gay rights” model defined by traditional civil rights strategies such as

75 See Oneida Meranto, Litigation as Rebellion, in SOCIAL MOVEMENTS AND AMERICAN POLITICAL INSTITUTIONS (A. Costain & A. McFarland eds., 1998); see also CAIN, RAINBOW RIGHTS, supra note 44, at 259 (quoting a Hawaii newspaper as stating that “25 gay couples are expected to file for marriage licenses to protest state ban on same-sex marriages.”).

litigation and lobbying. In this environment, the radical marriage activism of the seventies “languished in a generational purgatory.”

A standard explanation given for this lull in marriage equality activism during the 1980s is that there was too much ideological opposition to marriage coming from within the movement to legitimately prioritize the issue. Yet civil rights groups frequently pursue issues that are not universally supported by their constituencies. Plus, as the early marriage cases show, the prospects for actually winning marriage rights at this time were so low that demands for marriage equality were more meaningful for their radical messaging effects—promoting gay visibility and protesting the discriminatory effects of marriage—than for their ability to bring same-sex couples within the institution’s fold.

Increasing evidence suggests that the reason same-sex marriage advocacy declined in the 1980s was not that gay and lesbian activists were too radical for marriage, but rather that marriage was too radical for them. Lesbian and gay activists faced an onslaught of negative developments, most notably the onset of HIV/AIDS and the

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77 Armstrong, From Struggle to Settlement, supra note 43, at 161 (“Many scholars have remarked upon the transformation of gay liberation from a radical movement into one focused on identity building and gay rights”).

78 WILLIAM N. ESKRIDGE, JR. THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 57 (Free Press 1996); WALZER, GAY RIGHTS ON TRIAL, supra note 55, at 132 (“The failure of these early cases, along with the ideology professed by some segments of the gay and lesbian community, led to a long lull in the effort to win the right to marry”).

79 NeJaime, Before Marriage, supra note 72, at 108.


81 See supra, Part I.A.

82 KLARMAN, FROM THE CLOSET TO THE ALTAR, supra note 68, at 22 (“This was a decade of incremental progress for gay rights, and gay marriage was a radical reform, not an incremental one.”).
mobilization of a powerful antigay countermovement, which set activists back significantly and put many of them on a cautious and defensive track. In this more conservative political climate, the shock value of marriage (which had driven gay liberationists toward the marriage issue) repelled the gay rights groups. In addition, the organizational changes that accompanied the new LGB civil rights approach discouraged activists from pursuing risky issues like marriage. Unlike the small and fragmented set of gay liberationist organizations of the 1970s, the lesbian and gay civil rights organizations of the 1980s were large and bureaucratic, and they invested their significant share of the movement resources into developing long-term national strategic agendas. With this level of organizational weight being thrown into law-reform strategies, much more was at stake in the highly likely event of litigation loss in the marriage equality context.

Interviews with lawyers involved in lesbian and gay rights litigation at the time support the conclusion that caution and conservatism rather than radical politics fueled litigators’ early decisions to avoid marriage cases. In 1989, attorneys from one of the largest lesbian and gay rights legal organizations of the day, the National Gay Rights Advocates (NGRA, disbanded in 1993), had strongly considered representing a gay couple in a state-court challenge to Alaska’s prohibition on same-sex marriage. The attorneys at NGRA, who considered their organization to be more on

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83 C.f., TINA FETNER, HOW THE RELIGIOUS RIGHT SHAPED LESBIAN AND GAY ACTIVISM 45 (U of Minnesota Press 2008) [hereinafter FETNER, HOW THE RELIGIOUS RIGHT SHAPED LESBIAN AND GAY ACTIVISM].

84 See Mary Bernstein, Celebration and Suppression: The Strategic Uses of Identity by the Lesbian and Gay Movement, 103 AMERICAN JOURNAL OF SOCIOLOGY 531 (1997).

85 CAIN, RAINBOW RIGHTS, supra note 44, at 59.

86 FETNER, HOW THE RELIGIOUS RIGHT SHAPED LESBIAN AND GAY ACTIVISM, supra note 83, at 44.

87 For the methodology used in these interviews, see Gwendolyn M. Leachman, From Protest to Perry: How Litigation Shaped the LGBT Movement’s Agenda, 47 U.C. DAVIS L. REV. 101, 150 (2014) [hereinafter Leachman, From Protest to Perry].

88 Minutes, NGRA, Minutes of the NGRA Litigation Committee (Jan. 19, 1989) (copy on file with author).
the “cutting edge” than most of the lesbian and gay legal organizations of the day, had even developed a litigation strategy and were ready to move forward. However, when they presented the idea at an litigator’s roundtable (a regular meeting of the nation’s LGBT legal organizations), the other attorneys in attendance expressed vehement opposition. The reasons for the resistance had to do with the perceived inability of marriage litigation to succeed in court at that time. As one NGRA attorney recalled,

I think that was one of the critiques about NGRA, that we would do stuff like pushing marriage in Alaska…that you won’t get anywhere with that. But it’s like, you’ll get there because you’re advancing a social agenda. You know? The law is in service of social change—that is the whole purpose of it.

These comments suggest that the interviewed NGRA attorney had a view of litigation that was much more in line with the “litigation as protest” model of the 1970s. The flak that he and other NGRA attorneys received for pursuing same-sex marriage can be attributed to the other gay rights attorneys’ “concern[s] about making bad caselaw.” Other individuals attempting to pursue same-sex marriage litigation by enlisting the help of private attorneys faced similar blowback. The plaintiff in a Washington, D.C. marriage lawsuit filed in 1991 reported receiving criticism from gay and lesbian civil rights lawyers (whom one plaintiff called “self-appointed gay legal czars”)

89 Interview with Anonymous, NGRA, in L.A., Cal. (Sept. 17, 2012) (interview no. 51106) (transcript from primary source on file with author).

90 Minutes, NGRA, Minutes of the NGRA Litigation Committee (Jan. 19, 1989) (copy on file with author) (“This suit would be based on the right to privacy and right to equal protection of the law as guaranteed by the Alaska Constitution”); Interview with Anonymous, NGRA, in L.A., Cal. (Sept. 17, 2012) (interview no. 50917) (transcript from primary source on file with author) (“I remember we developed a [marriage] case in Alaska, sort of looking at the different courts, at which ones were more likely to get a positive result down the road.”).

91 Interview No. 51106, supra note 89 (reporting other attorneys “wanting us to hold back on that” and “telling us not to move in that direction”).

92 Interview No. 51106, supra note 89 (saying that the other LGB legal organizations “thought it [marriage] wasn’t the right time”).

93 Id.
fearful that the case would set bad precedent. These stories suggest that caution, rather than political ideology, was the primary strategic force driving the major gay and lesbian civil rights organizations’ resistance to marriage litigation in the late 1980s and early 1990s.

Over time, increasing numbers of activists became frustrated with the leading gay and lesbian civil rights groups’ incremental law-reform strategy. A newly minted brand of activists, who called themselves “queer” (rather than “gay and lesbian”), began to organize a new political agenda in outright opposition to the mainstream movement’s civil rights groups. Queer groups modeled themselves on their radical predecessors in the gay liberation movement. Their members used confrontational, creative direct action, aimed at transforming the dominant sexual culture to affirmatively embrace not only homosexuality, but other non-normative sexual practices and forms of intimacy as well.

The queer groups on the fringe of the lesbian and gay movement were the first to revive same-sex marriage in an organized fashion. As early as 1989, queers around the country began staging “marry-in” demonstrations, during which same-sex couples would solemnize marriage vows (although oftentimes not so solemnly) in public protest over their exclusion from state marriage laws. One Queer Nation “marry in” in San Francisco in 1990 provides a feel for the tenor of these marriage protests. Participants entered the city’s marriage bureau in pairs and created a spectacle when the clerks refused to issue them marriage licenses—kissing at the window, refusing to leave, even calling the clerks “accomplices to murder.”

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94 Craig R. Dean, Demanding gay marriage; One gay man's account of the struggle to have his union recognized, 19 GAY COMMUNITY NEWS 7 (1991).

95 Video footage of a 1989 ACT-UP marriage protest can be seen at http://www.towleroad.com/2013/03/27/.

96 QUEER NATION, QUEERNATION/CHICAGO ADVOCATES LEGAL RIGHTS FOR SAME-SEX COUPLES (available at San Francisco Gay and Lesbian Historical Society, copy on file with author).

97 See QUEER NATION, YOU ARE CORDIALLY INVITED TO A QUEER WEDDING (1990) (copy on file with author) (describing how Queer Nation protestors in San Francisco performed a marry-in at City Hall in 1990 while donning “[s]igns, placards, and post-modern wedding drag”).

They then engaged in a mass mock wedding ceremony at city hall wearing campy “wedding drag” attire.

As this depiction suggests, these queer “marry-ins” involved far more revelry than reverence—suggesting that queers, like gay liberationists, were fully prepared for their demands to fall on deaf ears. The purpose of these protests, however, was not to actually get married; it was rather to send a message about the injustice of discriminatory marriage laws and how those laws stigmatized and subordinated LGB people. Indeed, even though the queer marry-in participants were demanding marriage rights, the goal for at least some of the protestors seems to have been to create a mockery of marriage. Archival sources documenting these protests suggest that many, if not most, of the members of the queer groups staging the protest were critical or outright opposed to marriage. One Chicago queer organization advocating for marriage acknowledged that many of its members “personally do not endorse the institution of marriage.”

Other queer groups’ pro-marriage position papers would refer to marriage as “an institution we all agree oppresses us” and denounce the patriarchal roots of marriage.

Remarkably absent from the queer groups’ writings on marriage was the sense that members were particularly torn about their organization’s marriage focus. The documents these groups produced suggest that members did not see demanding marriage rights as discordant with opposing marriage. For example, one flyer denounced marriage and encouraged members to participate in demanding marriage rights in the same breath:

“Those who have problems with marriage in general can still express their outrage at an institution which we all agree oppresses us, whether by omission or commission. What a better place to hold a kiss-in and demand that the privileges associated with marriage be extended to everyone.”

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99 Queer Nation/Chicago, “QUEER Nation/Chicago advocates legal rights for same-sex couples” (copy of original flier on file with author). An open letter to San Francisco’s Queer Nation chapter similarly noted that “The question most vocally raised today about marriage is the notion that it is patriarchal i.e., an institution created by man to capture and enslave women.” John Mayflower, Legalized same-sex marriage, Correspondence from January 23, 1991 (copy of original on file with authors).

100 Queer Nation, “What to do at a Queer Marry-In,” supra note 98.
This passage again suggests that demanding marriage was aimed less at endorsing marriage and more at expressing queers “outrage” at marriage and shocking the public.

The queer marriage strategy exemplifies how the legal and cultural context of marriage-related political action can thoroughly transform the meaning and interpretation of that action. Early marriage advocacy was able to send a marriage-destabilizing message precisely because the idea of same-sex marriage held no cultural or legal resonance at the time. The inaccessibility of marriage—the fact that the gay couples demands for marriage would unquestionably be summarily denied—is what enabled the early activists to construct a radical same-sex marriage campaign, using litigation to send a message of marriage’s institutional illegitimacy.

C. Marriage Equality Enters the Mainstream

While the mainstream LGBT civil rights groups of the late 1980s and early 1990s actively discouraged same-sex marriage litigation, some “rogue” marriage cases represented by private attorneys arose at this time nonetheless. This section turns to examining how a victory in one of those same-sex marriage cases—a victory made possible in part by the mainstream groups’ efforts to secure nonmarital recognition of marriage-like relationships between same-sex couples—transformed marriage equality from a radical concept to a tangible movement goal. Once marriage was within reach, mainstream LGBT organizations shifted focus, coming to prioritize the pursuit of same-sex marriage rights that has remained a central priority to this day.

101 ANDERSEN, OUT OF THE CLOSETS AND INTO THE COURTS, supra note 76, at 177.

Although explicit advocacy for same-sex marriage remained taboo among mainstream gay and lesbian civil rights groups in the early 1990s, attaining legal recognition of and benefits for same-sex relationships was a central priority. The U.S. Supreme Court decision *Bowers v. Hardwick* (1986),\textsuperscript{103} which upheld the constitutionality of state laws criminalizing sexual intimacy between gay adults, derailed much of these organizations’ impact litigation strategies in the federal courts,\textsuperscript{104} prompting largescale shifts in legal strategy.\textsuperscript{105} Among these shifts was the decision to prioritize the issue of relationship recognition.\textsuperscript{106} Gay and lesbian civil rights groups sought legal recognition for LGB couples in areas from insurance benefits, to employment discrimination, to family law. A main priority targeted by the National Center for Lesbian Rights, for example, was custody and visitation rights for lesbian mothers who were denied access to their children after being separated from the children’s biological mothers. Another priority was securing insurance benefits for same-sex partners. National Gay Rights Advocates pursued cases where partners were essentially living like married couples but were refused insurance benefits such as discounts granted to married people, access to joint “umbrella” liability policies (saving them nearly half the cost of separate policies), or access to employer-provided health insurance benefits for the same-sex partners of insured LGB employees.

While the lesbian and gay rights organizations that pursued these nonmarital relationship recognition cases may have considered those cases a “safe” alternative to marriage litigation, their efforts—in the court of public opinion at least—tended to be construed as advancing the cause of same-sex marriage.\textsuperscript{107} Newspaper articles covering


\textsuperscript{105} Cummings & NeJaime, *Lawyering for Marriage Equality*, supra note 6, at 1249.


\textsuperscript{107} NeJaime, *Before Marriage*, supra note 72, at 161 (“Both supportive and hostile responses filtered LGBT claims through the lens of marriage, and such responses often redirected advocates’ energy and constrained potentially more transformative visions.”).
nonmarital relationship recognition cases framed those cases as compensating for the fact that the “law does not recognize any form of gay marriage.” For example, one 1990 article in the New York Times covering the increasing number of custody cases involving LGB parents described the origins of the phenomenon as follows:

As homosexual men and women become more public, and an increasing number of lesbian couples choose to rear children, they are taking their private problems to court. Increasingly, judges face the daunting task of handling what amount to divorces involving people who cannot legally marry. They must address contracts disputes, the division of property and businesses, and support payments.

This article reflects the dominant tendency in the mainstream media’s framing of nonmarital relationship recognition cases as being necessitated by out-of-date marriage laws that arbitrarily excluded otherwise marriage-like same-sex relationships. Whatever the “true” motivations that gay and lesbian civil rights attorneys might have intended in pursuing these cases, the interpretation promoted by the press was that the problem was the narrowness of marriage—suggesting that marriage should be extended (not abolished). Thus, while lesbian and gay litigation groups may have pursued nonmarital relationship recognition to avoid creating too much of a splash, their efforts in this area ultimately worked in tandem with the more radical, explicit marriage activism by queer protest groups (and the gay liberationists before them) to awaken the heterosexual public’s consciousness to the idea of same-sex marriage.

It was in this setting—following years of nonmarital relationship recognition advocacy and radical same-sex marriage “protests” in the

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109 Without ascribing a specific motivation to the attorneys pursuing the nonmarital relationship recognition efforts, there is evidence to suggest that marriage did in fact figure strongly in the LGB attorneys’ framing of these cases. NeJaime, Before Marriage, supra note 72; see also Leachman, Protest to Perry, supra note 87, at 106.

110 C.f., Barclay & Fisher, Cause Lawyers in the First Wave of Same-Sex Marriage Litigation, supra note 50, at 90-91 (arguing that the early marriage signaled to the public that the “sexual configuration associated with marriage was now contested and that the imposed sexual hegemony was no longer simply accepted as natural.”).
courts and streets—that the first state court came to recognize a constitutional right for same-sex couples to marry. In 1991, gay couples in Hawaii (represented by private counsel111) challenged on state and federal constitutional grounds the state’s refusal to grant them a marriage license. While a circuit court initially dismissed these plaintiffs’ complaint for failing to state a cognizable claim, the Hawaii Supreme Court later vacated the circuit court’s decision, holding that denying same-sex couples the right to marry violated the state constitution’s equal protection clause.112 The Hawaii Supreme Court rejected as “circular” the state’s argument—an argument that had been readily accepted by previous state courts in Minneapolis and Washington113—that the traditional, dictionary definition of marriage as between individuals of the opposite sex forbade same-sex couples from marrying.114

While one cannot know exactly what motivated the Hawaii Supreme Court’s interpretation, it is worth noting how distinguishable it was from previous cases, which had assumed a heterosexual definition of marriage without question. One possibility reason for the Hawaii court’s departure is that the legal and political mobilization around same-sex marriage that occurred in the intervening years between the early same-sex marriage cases of the 1970s and Baehr called into question the traditional definition of marriage and laid the foundation for the Hawaii court to interpret marriage, and same-sex couples’ access to it, differently than it had been interpreted in the past.

111 The couples were represented by ex-ACLU attorney Dan Foley. ANDERSEN, OUT OF THE CLOSETS AND INTO THE COURTS, supra note 76, at 178. “Foley approached both Lambda and the ACLU for assistance in the case, but they both decline the invitation to become cocounsel.” Id.

112 Hawaii’s Equal Protection Clause is broader than the federal version; it includes a specific provision that no one should be denied equal protection on the basis of sex.

113 These earlier decisions upheld state prohibitions on same-sex marriage through little more than a recital of the dictionary definition of marriage as a the union between two opposite-sex individuals.

Whatever the Hawaii Supreme Court’s motivations for deciding in favor of the same-sex couples in *Baehr*, the decision itself became the focus of massive public attention\(^\text{115}\) and has been credited for numerous ripple effects, not the least of which was triggering widespread changes in the mainstream gay and lesbian civil rights groups’ strategic position on same-sex marriage. Previous empirical work suggests that *Baehr* motivated the major gay and lesbian movement groups to begin prioritizing same-sex marriage.\(^\text{116}\) The initial *Baehr* decision, for example, motivated leading LGBT rights organization Lambda Legal to intervene as co-counsel for appeals in the case,\(^\text{117}\) and later to establish a Marriage Project that aimed to “coordinate and facilitate state-by-state political organizing and public education around the issue of same-sex marriage.”\(^\text{118}\) All of the major LGBT legal groups have since taken cases and created projects devoted to same-sex marriage.

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This section has traced the development of same-sex marriage from its original position as a radical, fringe issue to its current position at the heart of LGBT activism. Expanding on recent work,\(^\text{119}\) this account further problematizes the standard historical account of

\(^{115}\) Cain, Rainbow Rights, *supra* note 44, at 259 (the local and national media focused intently on every stage of the Hawaii litigation).

\(^{116}\) Andersen, Out of the Closets and into the Courts, *supra* note 76, at 177 (“Until 1993, none of the major gay legal groups treated same-sex marriage as an immediate priority. That all changed when the Hawaii Supreme Court handed down its groundbreaking decision in *Baehr* v. Lewin.”).

\(^{117}\) Andersen, Out of the Closets and into the Courts, *supra* note 76, at 179 (“The 1993 decision in Baehr…served as the impetus for widespread gay rights mobilization around same-sex marriage rights. Preeminent among the newly mobilized in this area was Lambda. After the decision came down, Lambda reversed its earlier stance on nonaction with respect to same-sex marriage. Part of the reason for this reversal may have been staff turnover….Interviews with present and former staff members, though, indicate that the legal opening provided by Baehr was the primary stimulus for Lambda’s change of heart.”).

\(^{118}\) *Id.* at 179.

\(^{119}\) Boucai, Glorious Precedents, *supra* note 40; NeJaime, Before Marriage, *supra* note 72.
same-sex marriage activism, which draws a bright line between “assimilationist” marriage advocacy efforts and “radical” queer and liberationist politics. Instead, our analysis supports the emerging view of marriage equality as a political issue that can assume new and quite different meanings depending on the historical and cultural context in which it is advocated.

This historical account of the shifting meaning and politics of same-sex marriage illustrates several points that are relevant to poly marriage activism today. First, it shows that mobilization around state relationship recognition can take various forms—each of which offers a distinct model of legal mobilization that poly activists may choose to implement. One form of marriage mobilization sees demanding marriage equality as a radical form of politics. Like many poly activists today, lesbian and gay activists have historically been quite mindful of the problematic nature of marriage as a patriarchal institution that involves the state in privileging certain forms of intimacy over others. Yet as this Part shows, it is possible for activists to construct alternative, radical models of marriage litigation if they are so inspired; pre-Baehr marriage equality activists, facing certain defeat in court, pursued marriage litigation in part to expose and protest the injustice marriage produces—a radical message aimed to destabilize marriage as an institution. By contrast, the more recent models of gay and lesbian litigation—the nonmarital relationship recognition campaign and the post-Baehr campaign for marriage equality—exemplify the much more careful, incremental approach that impact litigation groups are known for taking.

Second, this Part has given several examples of how the legal and cultural climate in which a movement operates (along with the shared norms among activists within a given movement) can fundamentally shape the types of strategies those actors will pursue. In the gay liberation years, the lack of legal or cultural resonance around same-sex marriage created the possibility for a marriage equality campaign that promoted transgression and furthered radical ideals. Once the legal doctrine and cultural ideas about homosexuality had shifted enough that marriage right were actually within LGB people’s reach, the meaning of demanding marriage became equivalent to the desire to access a prominent social institution—not to destroy it.\(^{120}\) Thus, the

\(^{120}\) For this reason, the pursuit of marriage rights cannot be considered an inherently an assimilationist or radical goal.
increasing legal acceptance and cultural acclimatization toward same-sex relationships reconstituted the meaning of marriage equality litigation, such that the more assimilationist LGBT movement groups that eventually became the movement’s mainstream organizations could come to accept the strategy as a central one on their agenda.\(^{121}\)

II. THE POLYAMORY COMMUNITY AND ITS (MULTIPLE) VIEWS ON MARRIAGE

The radical roots of LGBT marriage activism, and the comparison to the radical notion of multiparty marriage today, may suggest that the polyamorous community currently occupies the same political, cultural, and legal space that Gay Liberationists occupied in the 1970s. That would be a fairly simplistic, ahistorical notion, which ignores the fact that poly activism today operates in spaces and against constraints formed, in part, by the struggles, successes, and failures of the LGBT community, and therefore in a more nuanced and complicated legal, political, and cultural terrain than that which surrounded Gay Liberationists in the early days of “marry-ins” and radical protest. In order to understand the complex relationships between the two movements, we proceed to provide background on the polyamorous community, its activists and advocates, and the way in which members of the community relate to the marriage equality struggle.

A. Polyamory: Definition, Nomenclature, Demographics

Polyamory, a portmanteau of Greek and Roman words, is a term coined in 1990 by Morning Glory Zell-Ravenheart, a well-known public figure in the Pagan and polyamorous communities, to describe “the practice, state or ability of having more than one sexual [or, for some, romantic] loving relationship at the same time, with the full knowledge and consent of all partners involved.” Before the 1990s,\(^{122}\)

\(^{121}\) A quotation by Mark Twain is relevant here: “The radical of one century is the conservative of the next. The radical invents the views. When he has worn them out the conservative adopts them.”

\(^{122}\) DEBORAH ANAPOL, POLYAMORY: THE NEW LOVE WITHOUT LIMITS: SECRETS OF SUSTAINABLE INTIMATE RELATIONSHIPS (InNet Resource Center 1997) [hereinafter ANAPOL, POLYAMORY]; For some relationships activists who are “poly-friendly,” however, an important aspect of polyamory is its contribution to the appreciation of non-sexual love as
it was common to refer to similar lifestyles and practices as “responsible nonmonogamy.” Many polyamorous people stress the distinction between polyamory and swinging, which some define as involving sexual exchanges between couples rather than full relationships of more versatile patterns. Polyamory is also frequently defined as the opposite of “cheating,” arguing that, as opposed to the frequent and discreet sexual infidelities in ostensibly monogamous couples, the practice is built on a foundation of honesty and consent.

There are various types and structures of polyamorous relationships, and the community members’ fierce individualism often stands in the way of providing one way of “doing poly right.” Many polyamorous relationships consist of a “primary” dyad, a couple sharing a household, in which each partner also has “secondary” and “tertiary” relationships with outsiders to the household. While this arrangement is fairly common, and the equally important and meaningful.; See also WENDY MILLSTONE, REDEFINING OUR RELATIONSHIPS: GUIDELINES FOR RESPONSIBLE OPEN RELATIONSHIPS (Defiant Times 2002); WHITE, 2003.


124 Poly vs. swinging: http://www.serolynne.com/polyvsswing.htm

125 Poly vs. cheating

126 Multiple studies of heterosexual fidelity have found that around one-third of men and one-quarter of women report at least one instance of sexual infidelity during a monogamous relationship. See Kristen P. Mark, Erick Janssen, & Robin R. Milhausen, Infidelity in Heterosexual Couples: Demographic, Interpersonal, and Personality-Related Predictors of Extradyadic Sex, 40 Archive of Sexual Behavior 971, 971 (2011).

127 ANAPOL, POLYAMORY, supra note 122; EASTON & LISZT, THE ETHICAL SLUT, supra note 123.

128 Aviram, Make Love, Not Law, supra note 25.

129 Id.
“primary/secondary” terminology is in wide use,\textsuperscript{130} many polyamorous people tend to regard the structure as overly confining, arguing instead that all their relationships, though different in nature, involve love and commitment.\textsuperscript{131} Other common structures are the “polyamorous vee”, in which two people have romantic relationships with the same person, but not with each other (though they may share a non-romantic sense of affection and commitment); a triad or a quad, in which all three or four members are romantically involved with each other; or an intimate network of friends, in which relationships are more fluid and involve several people in different and ever-changing relationship structures. All these structures may, or may not, involve “polyfidelity” – a commitment to have sexual or romantic relationships only with members of the group, which was more popular in the earlier days of the polyamorous community.\textsuperscript{132} However, growing concerns about sexually-transmitted diseases have popularized careful protocols, such as adherence to clear disclosures regarding number of partners, and a general attitude of caution regarding “fluid bonding” (sexual intercourse without barrier methods).\textsuperscript{133}

The versatility in genders, sexual orientations, and sexual identities, distinguish the polyamorous community from other groups that practice nonmonogamies as part of a religious or ethnic tradition, and activists frequently identify the differences.\textsuperscript{134} A 2012 survey conducted by the polyamorous magazine Loving More\textsuperscript{135} and the National Coalition for Sexual Freedom,\textsuperscript{136} yielding 4062 responses

\textsuperscript{130} See generally TRISTAN TAORMINO, OPENING UP: A GUIDE TO CREATING AND SUSTAINING OPEN RELATIONSHIPS (2008).
\textsuperscript{132} NEARING, LOVING MORE, supra note 123.
\textsuperscript{133} Akien Maclain and Dawn Davidson conduct workshops on polyamorous agreements. See http://www.loveoutsidethebox.com/workshops.html.
\textsuperscript{134} Sister Wives, supra note 37; Aviram, Make Love, Not Law, supra note 25.
\textsuperscript{135} What Do Polys Want?, supra note 29.
\textsuperscript{136} National Coalition for Sexual Freedom, available at: https://www.ncsfreedom.org/
from respondents ranging in age from 16 to 92, revealed a high percentage of people involved in relationships with partners of both sexes (46.3% for women, 18.8% for men.) The polyamorous population was significantly more educated than the U.S. general population; 35% of respondents had a bachelor’s degree and 27.4% had a graduate degree, compared with 17.9% and 10.4% respectively in the general population. Household composition varied, but included, on average, more adults and less children than in the general population. The survey also found polyamorous respondents to be happier, in better health, and experiencing more sex with more partners than the general population.

B. A Brief History of the Polyamorous Community

The practice of the set of lifestyles referred to since 1990 as “polyamory” can be traced, for some activists who self-define as “old hippies”, to the 1960s movements of free love and sexual freedom. It was during this era that nonmonogamy became much more culturally prevalent, with the popularization of swinging (a practice closely associated with polyamory until the 1980s) and the diffusion of sexual liberation organizations, communes, and magazines. While in the early 1960s there were hardly any cultural role-models or resources for people seeking nonmonogamy, the mid-1960s offered more such resources, such as Jefferson Airplane’s song Triad and Robert Heinlein’s influential science fiction novel Stranger in a Strange Land. The book, which is still regarded by many poly activists as the catalyst for their lifestyles, tells the story of a man

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137 What Do Polys Want?, supra note 29.
138 Id.
139 Id.
142 JEFFERSON AIRPLANE, TRIAD (RCA 1968).
143 ROBERT HEINLEIN, STRANGER IN A STRANGE LAND (Putnam Publishing Group 1961).
raised on Mars who returns to Earth and teaches a group of humans about Martian culture, including a life in “nests” – intimate network units of men and women who reside together and share love in a nonpossessive fashion. The book found a particularly enthusiastic readership among members of the Pagan community; inspired by its plot, founded a real life spiritual organization, the Church of All Worlds (CAW), which provided the framework for a life in familial “nests”, as well as published an alternative magazine, Green Egg, which ran from 1968 to 2001. At the time, other communes – not necessarily affiliated with Paganism or Earth-based spirituality – came into existence. The Kerista collective, which existed in the 1970s in San Francisco, ran a successful computer repair business, and was composed of families with 36 members each.

The collective relied on a model of polyfidelity (fidelity within each family) and on a rotational sleeping schedule between its members.

While some polyamorous relationships adhere to a polyfidelity model like that used in the Kerista collective, there is a deep of resistance within the polyamorous community to such compulsory limitations on sexual partnering outside of established relationships. Indeed, such regulations on partnering are a key component of monogamy, the sexually regulatory institution that polyamorists collectively resist. This resistance to monogamy—the core value that unites the individuals in quite diverse polyamorous relationship structures—resonates strongly with not only a sexual-liberationist philosophy, but also with feminist and queer political philosophies. The feminist critique of monogamy highlights how norms against infidelity are more binding on women than men and are historically rooted in a proprietary view of women. Several polyamorous commentators cite such feminist understandings of monogamy and women’s sexual control as a driving force in their decisions to pursue

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145 Id.
146 See Judith P. Stelboum, *Patriarchal Monogamy*, in *THE LESBIAN POLYAMORY READER: OPEN RELATIONSHIPS, NON-MONOGRAMY, AND CASUAL SEX* 39, 42 (Marcia Munson & Judith P. Stelboum eds., 1999) (“Feminist scholars state that the origins of monogamy have their source in patriarchal thinking. Viewed as the possessions of the male, women were used for barter and/or procreation. Legitimacy of a child relates to acknowledgement of the child’s father, not to the child’s mother.”).
polyamory, creating a visible sex-positive feminist presence in the polyamorous community.

In addition to feminism, queer politics has also deeply influenced polyamory. As noted above, queer politics emerged in the 1980s as a fiery new brand of confrontational sexuality-based activism. Queer politics emerged in response to both the virulent stigmatization of deviant sexualities in the wake of the AIDS epidemic and the increasingly rigid use of identity politics by mainstream lesbian and gay rights organizations. The queer approach was concertedly more inclusive than traditional lesbian and gay politics, and focused on cultivating pride in multiple stigmatized sexual practices in addition to homosexuality (e.g., BDSM and nonmonogamy). The openness of queer politics to sexual diversity, and the common stigmatization of nonmonogamy and homosexuality provoked by AIDS-phobia, created a natural affinity between polyamorous and queer communities. In certain places, such as San Diego, California, polyamorous activism became closely linked to queer, and specifically bisexual, activism; for bisexual polyamorists, nonmonogamy was the path for

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147 Emens, Monogamy’s Law, supra note 24, at 325 (“A number of prominent poly writers describe their embrace of polyamory as fueled by their insights about power and possessiveness in monogamy and by their desire for autonomy within their relationships. This aspect of polyamory builds in part on the feminist understanding of monogamy as a historical mechanism for the control of women’s reproductive and other labor.”).

148 This sexual liberationist and feminist aspects of polyamory distinguish the latter from the religiously founded multiparty relationships such as polygamy. See Joan Iversen, Feminist Implications of Mormon Polygamy, 10 FEMINIST STUD. 505, 518 (1984) (“One cannot truly apply the term ‘feminist’ to the Mormon plural wives because feminism and patriarchal religion are incompatible.”); Emens, Monogamy’s Law, supra note 24, at 307 (“the sex-based hierarchy of traditional Mormon polygyny seems incompatible with the typical poly dedication to principles of equality and individual growth, causing some polys and commentators to exclude Mormon polygyny from the umbrella of polyamory.”).

149 See supra, Section I.B.

150 Steven Seidman, Symposium: Queer theory/sociology: A dialogue, 12 SOCIOLOGICAL THEORY 166, 171-72.

This is especially true for bisexual men. The fear of AIDS increased the visibility of bisexual men, who were blamed for spreading the disease to the straight population. Interview with Claire (activist) in 2005, on file with first author.
manifesting their sexual orientation, in that it allowed them to conduct relationships with people of both genders simultaneously.152

Another important force in the development of the polyamorous community was the advent of the Internet and its function as a social resource. Polyamorous activists interviewed by Aviram in 2005 were technologically sophisticated, and various technological vocations were overrepresented in the interview sample.153 Currently, there is a wide variety of Internet resources available for polyamorous people who need advice and help,154 as well as a specialized dating website,155 and the mainstream dating website OK Cupid caters to nonmonogamous clients.156 There are also web-based “meetup” groups for the purpose of meeting new potential partners, as well as befriending other poly people and exchanging advice and support.157

The Bay Area offers the polyamorous community various support systems, ranging from the national organization Loving More, which publishes the magazine and runs two regional conferences per year, to local groups that meet on a regular basis for social purposes. Most of my interviewees attended Loving More weekend workshops and/or workshops run by the Human Awareness Institute. The workshops focus mostly on the emotional management of polyamorous relationships, and are designed to help attendees develop skills such as jealousy management, conflict resolution, and the development of “comersion” - vicarious rejoice and empathy for a loved one who is involved with someone else.158 Online lists such as SfBay-Poly and Love+Politics meet on a regular basis, both socially and to discuss articles and courses of action. In addition, various subcultures of the Bay Area, though not polyamorous by definition, are particularly friendly to polyamorous individuals; some of these communities include science fiction conventions (“cons”), Pagan and queer forums,  

152 Interview with Claire (activist) in 2005, on file with first author.
153 Aviram, Make Love, Not Law, supra note 25.
154 See e.g. Love Outside the Box, available at: http://www.loveoutsidethebox.com/.
156 OKCupid, available at: https://www.okcupid.com/.
158 Anderlini-D’Onofrio, The Essential Glossary, supra note 131.
the Society for Creative Anachronism and other historical-recreational venues, and several left-wing, progressive social milieus.

C. Polyamorous Perspectives on the Same-Sex Marriage Struggle

Two efforts to gauge the perception of the marriage equality struggle among polyamorous people were made. The first was a series of in-depth interviews conducted by Aviram in 2005 with “active and salient” members of the polyamorous community in the San Francisco Bay Area. The second was the aforementioned large-scale web survey conducted by Loving More and the NCSF in 2012. While the different methodologies and populations do not allow for a direct quantitative comparison, they do suggest a shift in the community’s interest in legal recognition, likely prompted by the success of the struggle for same-sex marriage.

Polyamorous people, of course, are well aware of the fact that they cannot be legally married to more than one partner; since 1854 (and later amended in 1882 and 1887), Federal law prohibits polygamy, and there have been no attempts, certainly not outside the context of Mormon polygamy, to revise the legal status of multiple marriages. Until the mid-2000s, the only publicized attempt to obtain legal recognition for a polyamorous relationship involved a child custody battle in Tennessee, between a polyamorous mother,

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159 Aviram, Make Love, Not Law, supra note 25; See also Hadar Aviram, Geeks, Goddesses, and Green Eggs: Political Mobilization and the Cultural Locus of the Polyamorous Community in the San Francisco Bay Area, in UNDERSTANDING NON-MONOOGAMIES 87 (Meg Barker & Darren Langdridge eds., 2010) [hereinafter Aviram, Geeks, Goddesses, and Green Eggs].

160 What Do Polys Want?, supra note 29.

161 Morrill Anti-Bigamy Act of 1862.

April Divilbiss, and the paternal grandmother, which ended in the mother’s loss of custody. The interviewee group was, overall, very political and active, and there was a surprising juxtaposition between their vibrant involvement in workshops, conferences, meetups, potlucks and other poly-themed events and their overall lack of enthusiasm for legal mobilization. Many of Aviram’s interviewees were dyadic primary couples with lovers outside the household, who had no desire to legally formalize their relationships with their secondary partner. The members of “vees,” triads, and quads in the study, particularly those who had spent several years as a family unit, used various contractual mechanisms, such as wills, trusts, power-of-attorney documents, and the like, to mimic some of the economic and logistical aspects of marriage and facilitate management of the household. These mechanisms strongly resembled those advocated by attorneys for cohabitating, unmarried same-sex and opposite-sex couples.

Beyond the lack of a strong “push” for instrumental rights and benefits, Aviram’s interviewees reported political and cultural reasons for their reluctance to mobilize legally. Many interviewees expressed disdain of identity politics and a strong sense of individualism and personal agency, which made them resent governmental interference with their personal and emotional life. The interviewees repeatedly stressed the importance of freedom and fluidity in personal relationships, which, for them, meant that seeking the mainstream’s

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163 Emens, Monogamy’s Law, supra note 24.
164 Aviram, Make Love, Not Law, supra note 25; Aviram fieldnotes.
165 Aviram, Make Love, Not Law, supra note 25.
166 Aviram Make Love, Not Law, supra note 25, 268-269 (referencing wills and power-of-attorney documents).
169 Aviram, Make Love, Not Law, supra note 25. 278.
stamp of approval in the form of yet one more oppressive “box” to check on official forms would be an unwanted concession.\textsuperscript{170}

Aviram attributed this strong support of self-actualization and visionary individualism in part to the cultural locus of the community she studied, which had roots in visionary science fiction and fantasy literature, as well as in earth-centered religions,\textsuperscript{171} but also to the extent to which respondents identified with queer politics and ideology. Many of Aviram’s interviewees identified as bisexual, or refused to identify as having any particular sexual orientation.\textsuperscript{172} Moreover, several interviewees mentioned the overlap between polyamorous lifestyles, the BDSM and kink community, and other sex-positive communities.\textsuperscript{173} As sexual minorities in more than one way, the interviewees were concerned about the need to “go vanilla” and present a socially-palatable, sex-negative image to the public in the effort to attain legal recognition.\textsuperscript{174} The interviewees’ identification with sexual minorities was also important to them in that they understood the same-sex marriage struggle as incremental. Several interviewees mentioned that same-sex marriage must take precedence over any effort on behalf of polyamorous families, saying that their “gay and lesbian brothers and sisters” deserve “their moment in the sun,” and that after same-sex marriage became acceptable it would be more timely for public opinion to mature into acceptance of multipartner relationships.

The 2012 survey suggests an important shift in the community’s perspective on legal mobilization. When presented with the question, “if it were legal, would you be open to being legally married to more than one person concurring,” \textit{76.7\%} of respondents answered “yes.”\textsuperscript{175} Moreover, a large majority—\textit{91.9\%} of all respondents and \textit{93.1\%} of currently unmarried respondents—agreed or strongly agreed with the statement, “consensual, multi-party marriages among adults should enjoy the same legal recognition, privileges and obligations as

\textsuperscript{170} Id., 279.
\textsuperscript{171} Aviram, \textit{Geeks, Goddesses, and Green Eggs}, supra note 159.
\textsuperscript{172} Aviram, \textit{Make Love, Not Law}, supra note 25, 267.
\textsuperscript{173} Id., 273.
\textsuperscript{174} Ibid.
\textsuperscript{175} \textit{What Do Polys Want?}, supra note 29.
two-party marriages.” However, this seemingly strong support hides a more nuanced and complex understanding of the law’s place in intimate relationships. A reported 66.9% of all respondents, and 70.6% of unmarried respondents, believed that no relationship configuration deserved special recognition or privileges over others, but the problematic phrasing of the question does not allow to conclude whether the privileged “relationship configuration” in the question was monogamous marriage, multi-party marriage, or any other formalized family arrangement. At best, we can conclude that the interest in, and enthusiasm for, legal recognition for multi-party relationships is complicated by a resentment over prioritization of legally-recognized relationships for various legal aspects. This interpretation is supported by comments from Aviram’s in-depth interviewees, who stated, for example, that rather than advocating for health care via multi-partner marriage, they would prefer to see universal healthcare offered to all U.S. residents, regardless of their familial status.

The renewed interest in legal mobilization and political action is manifested beyond survey answers. Two well-attended community conferences, the World Polyamory Association’s meeting in Summer 2013 and the International Academic Conference on Monogamies and Nonmonogamies in 2013 and 2014, featured a “political summit” in which various alternative approaches to legal recognition were discussed. Activists’ exploration of the pros and cons of legal

176 Id.

177 The exact phrasing of the question was: “Jones believes that any form of intimate relationship between consenting adults is fine, but that none deserve special recognition or privileges. Smith believes that certain types of relationships are more socially valuable than others and deserve official recognition and privileges in order to encourage their formation,” Respondents were asked whether they agreed with Jones or with Smith. Survey.

178 Aviram, Make Love, Not Law, supra note 25, 279.


mobilization were notably informed by the same-sex marriage struggle, and the suggestions made at the summits often echoed strategies actually employed in the same-sex marriage context, such as arriving innocently to City Hall and requesting a marriage license for three people.  

In summary, as this background to the two communities suggests, while the polyamorous community is far from identical in composition to the Gay Liberationists of the 1970s, there are some pertinent similarities that inform the analysis of legal strategies. Gay liberationist and polyamorous communities have expressed similar normative commitments to inclusivity and sexual diversity, as well as a drive for individual autonomy that resists a centralized or uniform approach to politics. Members of these communities also generally ascribe to progressive political values, rooted in feminist and sexual liberationist ideals. This may explain the ambivalence voiced by members of both communities around the idea of pursuing the marriage rights; while drawn to marriage, gay liberationists and polyamorists have remained mindful of the problematic nature of marriage as a patriarchal institution that involves state privileging of certain forms of intimacy over others.

In addition to these internal similarities, the contemporary polyamorous community confronts a similar cultural environment to the one confronted by the gay liberationists of the 1970s. In both communities, conservative backlash began mounting even before marriage equality efforts were officially underway; just as conservative rhetoric around the ERA once prompted preemptive opposition to same-sex marriage, conservative rhetoric around same-sex marriage has recently prompted preemptive opposition to polyamorous marriage. Also like the gay liberationists before them,

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182 First author’s field-notes (Aviram attended all three summits).

183 See supra, Section I.A.

184 See Jessica Bennett, Polyamory: The Next Sexual Revolution, NEWSWEEK, July 28, 2009, available at: http://www.newsweek.com/polyamory-next-sexual-revolution-82053 (accessed August 13, 2014) (Polyamorists “are beginning to show up on the radar screen of the religious right, some of whose leaders have publicly condemned polyamory as one of a host of deviant behaviors sure to become normalized if gay marriage wins federal sanction. ”This group is really rising up from the underground, emboldened by the success of the gay-
polyamorists have been abandoned by perceived allies in the wake of this backlash. Feminist advocates of the ERA refused to respond to gay baiting with a defense of same-sex marriage—a striking parallel to the recent LGBT advocates’ response to the “slippery slope” arguments against same-sex marriage. Thus, while one might assume that the LGBT movement’s continuous work toward marriage equality since the 1990s would have created a cultural opening to alternative marriage structures, winning the legal battle for polyamorous marriage is just as “unthinkable” today as winning on same-sex marriage during the era of gay liberation.

More generally, LGBT and polyamorous communities, as sexual minorities, are also similarly institutionally situated in a way likely to generate common strategic innovations and raise common challenges. As for other stigmatized sexual minorities, these groups’ subordination arises largely from the social institutions that define and regulate sexuality. One such institution is the criminal law, which may ban “deviant” sexual conduct outright, or prohibit certain practices that sexual minorities may be siphoned into (like public

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185 Instead of defending same-sex marriage—a reaction that may have drawn attention to the substantial number of lesbians and bisexuals in the feminist movement—the feminists insisted that the ERA would not in fact lead to same-sex marriage. CAIN, RAINBOW RIGHTS, supra note 44, at 257. It is possible that the feminists making these arguments were disdainful of marriage as an institution and thus deliberately chose not to weigh in on the value of same sex marriage. The message that comes across in their assuaging conservatives’ fears of same-sex marriage implicitly accepts the conservative devaluation LGB relationships. C.f., Clifford J. Rosky, Fear of a Queer Child, 61 Buff L Rev 607 (2013).

186 Constructivist theories in sociology hold that persistent inequalities tend to be perpetuated through multiple institutional arenas of society (i.e., law, medicine, science, media, etc.), which comprise practices and belief systems that privilege one social group over another. See generally Elizabeth A. Armstrong & Mary Bernstein, Culture, Power, and Institutions: A Multi-institutional Politics Approach to Social Movements, 26(1) Sociological Theory 74, 89. Heteronormativity and monogamy are examples of belief systems that are reinforced through multiple institutional arenas. Id. (describing “heteronormativity” as “embedded within major institutions” and as “multisited” domination”).
Sexual minorities also face stigmatization due to their exclusion from sexually-defined institutions like marriage and the family. Accordingly, these communities face similar choices regarding the targets for political action.\(^{187}\)

The striking parallels raised here suggest that a prospective polyamorous marriage campaign will likely invite similar strategic innovations and raise similar challenges to those seen in the historical gay liberationist marriage campaigns. Our intention in focusing on the commonalities between these communities is not make the determinist argument that future polyamorous marriage activism will closely follow the course of LGBT activism. Rather, our aim is to make a case for the utility of the comparative analysis presented in this Article—to demonstrate that the communities are sufficiently similar (in their value orientation and in many structural respects) that the LGBT experience will be informative for polyamorists moving forward. However, as with any comparative research, it is important to be mindful of differences among the compared groups that are likely to create divergence in their actions. For example, polyamorists will likely face a unique pressures derived from factors like: the specific cultural history of Mormonism in the U.S. and use of anti-polygamy laws to assimilate that community; the intersecting stigmatization against multiparty marriage derived from its association with Islam; and the politicization of multiparty marriage that has arisen from the LGBT movement’s same-sex marriage campaign. In the subsequent Parts, we delve further into these and other community-specific differences that are likely to become relevant in evaluating strategies for future polyamorous marriage advocacy.

III. LEGAL AND EXTRA-LEGAL LESSONS FROM THE MARRIAGE EQUALITY STRUGGLE

The LGBT movement has much to offer for polyamorous activists who are contemplating legal mobilization for multiparty marriage or

\(^{187}\) For example, in seeking legal recognition for their alternative forms of intimacy, both LGB and polyamorous people are tasked with deciding whether to demand legal rights to marriage—the readymade, state-sponsored model of intimacy linked to a panoply of rights and benefits—or whether to avoid marriage and pursue piecemeal forms of relationship recognition subsumed within marriage. See infra, Section III.C.
other nonmarital relationship recognition. In this Part, we map out the set of legal and cultural strategies that the LGBT movement has developed through its multiple decades of litigation in this area, assessing which of these tools would be most relevant to poly activists. Our analysis here draws on the LGBT experience not only to propose a set of strategic tools that poly activists might borrow or avoid, but also to understand how the LGBT movement’s own strategic choices may have constrained or enabled the possibilities for poly activism.

A. Legal Arguments

1. Legal Arguments to Borrow

One of the first accepted legal arguments in the LGBT marriage struggle was an Equal Protection Clause argument based on sex. This argument enjoyed great judicial sympathy in one of the first cases to favorably decide a LGBT rights issue—Baehr v. Lewin, the case discussed in the previous Part. In Baehr, the Supreme Court of Hawaii found that the prohibition of same-sex marriage violated the Hawaii Constitutions’ equal protection clause, and that the five stated interests in barring same-sex marriages—protecting children, fostering procreation, securing recognition of marriage in other jurisdictions, protecting the state’s fiscal situation, and protecting civil liberties—were not sufficiently “compelling” to overcome the constitutional challenge, and even if they had been, the state failed to prove that the statute was narrowly tailored.

The reason for this stringent constitutional test was that the Court relied not on the petitioners’ sexual orientation, but on their sex, for the equal protection analysis. In other words, because the state treated female-female and male-male couples differently than female-male couples, it was discriminating because of the sex of one of the


189 As a reaction to the decision, Hawaii citizens voted for Constitutional Amendment 2, which allowed the state to legislate a ban of same-sex marriages, thus removing the legal problem upon which the Baehr decision relied. More on this backlash below.
partners.” The doctrinal appeal of this argument is obvious: since sex is a suspect classification, relying on sex as the discriminatory category situates discriminatory marriage laws in the context of heightened scrutiny, requiring the state to present compelling reasons to deny the right.

The downside of the sex discrimination argument is its reductionist nature. Not only does it reduce the importance of marrying a particular person to the gender of the parties, it ignores the strong feeling among many queer activists—LGBT, poly, and others—that treating gender as a binary is inherently problematic.

Moreover, in the context of polyamory, the argument will not be incredibly helpful in an era in which same-sex marriage is universally recognized. A petitioner who wishes to marry a person of the opposite sex AND a person of the same sex could face the following mandate: Either of the marriages is allowed—so as to avoid discriminating the petitioner on the basis of sex—but s/he will have to pick which of the two marriages to pursue.

A more promising legal avenue, therefore, would be an Equal Protection Clause argument based on sexual orientation. While sexual orientation, as opposed to race or gender, has not historically been considered a suspect class that should trigger a strict scrutiny standard, some recent decisions have awarded it a heightened status. One example is Justice Carlos Moreno’s notable dissent to the decision to uphold Proposition 8 in California. The dissent made it clear that “[t]he question before us is not whether the language inserted into the California Constitution by Proposition 8 discriminates against same-sex couples and denies them equal

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190 Eskridge, Equality Practice, supra note 52, at 8.


193 C.f., Eskridge, Equality Practice, supra note 52, at 8 (arguing that the “sex discrimination analogy provides no basis for arguing that state refusals to give benefits to cohabiting or polyamorous couples are an invidious kind of discrimination ‘like’ race discrimination.”).
protection of the law; we already decided in the Marriage Cases that it does.” Rather, the question was whether such discrimination could be accomplished through a constitutional amendment. Justice Moreno repeatedly refers to the people who wished to get married as a “suspect classification”, arguing that discrimination against them “strikes at the core of the promise of equality that underlies our California Constitution”. For Moreno, all disfavored minorities suffer from a similar rule – it is to defend them that the equal protection clause—“inherently countermajoritarian” by nature—exists. Moreno’s dissent makes it clear that the discrimination category was sexual orientation:

Prior to the enactment of Proposition 8, the California Constitution guaranteed “this basic civil right to all Californians, whether gay or heterosexual, and to same-sex couples as well as to opposite-sex couples.” (43 Cal.4th at p. 782.) “In light of the fundamental nature of the substantive rights embodied in the right to marry — and their central importance to an individual’s opportunity to live a happy, meaningful, and satisfying life as a full member of society — the California Constitution properly must be interpreted to guarantee this basic civil right to all individuals and couples, without regard to their sexual orientation.” (Id. at p. 820, fn. omitted.)

A somewhat different legal tack was adopted by Judge Vaughn Walker of the District Court, whose decision that the same-sex marriage ban violated the constitution was based on sexual orientation as well. For Judge Walker, however, finding sexual orientation to trigger strict scrutiny was unnecessary for the ultimate finding of unconstitutionality. According to Walker, given the illegitimacy of the state interest to ban same-sex marriage, even if sexual orientation were not to be considered a suspect class, the state would fail the rational choice test.

There are several ways for polyamorous activists to benefit from the equal protection tack, but those would require fashioning a plausible argument according to which, to use Justice Moreno’s terminology, polyamorous people are a “disfavored minority” whose discrimination “strikes at the core of the promise of equality” offered to all citizens—that is, that polyamory should be a suspect class for
the purposes of equal protection. Traditionally, determinations as to whether a social group constitutes a suspect class have included political powerlessness, a history of discrimination, and an immutable or distinguishing characteristic that bears no relationship to the ability to contribute to society. Poly activists, like the LGBT activists before them, will likely have no trouble making a case for political powerlessness and the history of discrimination. Furthermore, poly activists may also benefit from the LGBT movement’s litigation of the “immutability” prong. In the face of queer and scholarly critiques of immutability arguments for sexual orientation, LGBT advocates in the mid-1990s collectively decided to avoid such arguments— even as a means of prevailing in court. Instead, LGBT litigators claimed that a showing of immutability was not actually legally required, or they would reframe the legal definition of immutability (e.g., as a characteristic that is so “integral to their identity that it would be inappropriate to require them to change it to avoid discrimination”). Courts have increasingly come to agree with LGBT litigators on these points.

194 U.S. v. Carolene Products Co, supra note 191.
196 William B. Rubenstein, Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns, 106 Yale L.J. 1623, 1643 & 1661 (1997). (This decision came in reaction to the substantial amount of LGBT litigation that previously framed sexuality as immutable or innate. Originally, many LGBT litigators had, for strategic and other reasons, focused on harnessing scientific evidence for the innateness of sexual orientation to the pursuit of legal rights. This strategy proved successful in the narrow context of legal rights for LGBT people: for example, there are some indications, particularly in the context of jury selection, that sexual orientation is close to be recognized, alongside race and gender, as a special category of potential jurors that cannot be systematically excluded using peremptory challenges. However, the overwhelming resistance to immutability arguments changed advocates’ tune.).
197 Id. at 1643.
199 Id., citing See Watkins, 875 F.2d at 726; Obergefell, 2013 WL 6726688, at *17; Bassett, 2013 WL 3285111, at *16; Griego v. Oliver, 2013 WL 6670704, at *17 (N.M. 2013); Windsor, 699 F.3d at 182; Pedersen, 881 F. Supp. 2d at 325-26; Golinski, 824 F. Supp. 2d at 986-87; Kerrigan, 957 A.2d at 438; Varnum, 763 N.W.2d at 893; In re Marriage Cases, 183 P.3d at 442-43.
An alternative possible path would be for bisexual polyamorous people to make an equal protection claim based on their bisexuality.\textsuperscript{200} A bisexual person seeking to marry a member of their own sex AND a member of the opposite sex would be the ideal petitioner. This approach is not ideal for several reasons. First, the argument would be limited to a fairly narrow subset of the polyamorous community, and presumably not available to heterosexual petitioners wishing to marry several people of the opposite sex or to gay and lesbian petitioners wishing to marry several people of the same sex. Second, the argument would face some serious logical challenges. Presumably, petitioner would try and argue that, but for his/her bisexual orientation, he/she could marry the person they love; but straight and gay people don’t get to marry more than one person. A possible judicial answer to this argument could be that the petitioner can be married to men and to women, but not simultaneously, and that the possibility of divorce or death followed by remarriage sufficiently allows the petitioner to express his/her bisexual identity. Again, the LGBT movement’s expansion of immutability might be used here to expand the pursuit of rights on the part of people whose identity is not as rigidly constructed as genetically or biologically determined identities.

A more inclusive path could be to argue that polyamory itself is a sexual orientation. The benefit here would be that, should the argument be successful, it could advance the goals of a more diverse population, and that it addresses, head-on, the issue of marital exclusivity. Even following the retreat in LGBT advocacy from “hard-wired” immutability arguments, it is likely that advocates for the polyamorous community would have to focus considerable energy to marshal evidence that polyamory is “integral to their identity that it would be inappropriate to require them to change it to avoid discrimination.” To the extent that this definition calls for a showing that polyamory is “natural”, there have been some efforts in this direction; Christopher Ryan and Cacilda Jethá’s recent book Sex at

\textsuperscript{200} C.f., Michael Boucai, Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality, 49 San Diego L. Rev. 415 (2012).
Dawn uses evolutionary psychology findings to show that humans most resemble communities of bonobos, for whom sex is a means of social engagement and closeness, and for whom sexual exchanges and promiscuity are an inexorable part of social life. Based on this and other sources, Ann Tweedy argues that polyamory could be considered a sexual orientation. Indeed, for some poly activists, being polyamorous is a fundamental part of their self definition regardless of their relationship structure at any given time, to the extent that they report that efforts to be monogamous feel unnatural to them. Notably, one of the difficulties with presenting polyamory as integral to a given person’s identity is that evolutionary psychology does not suggest a “Kinsey scale” of propensity toward nonmonogamy; rather, it claims that all humans are, to some degree or other, nonmonogamous.

But even if polyamory, or nonmonogamy, does not come to be regarded as a core aspect of personhood that is worthy of special constitutional protection, it may be possible to address the issue by arguing that the state effort to stop multiple marriages does not even amount to rational basis, as in Judge Walker’s decision. For this line of argument to succeed, the state must not even have a legitimate interest in forbidding marriage between more than two people. The arguments presented in section 2 below would, therefore, need to be defeated, and preferably with the support of scientific evidence.

A potential practical difficulty of the suspect class argument may be that the Supreme Court has not formally granted heightened scrutiny to any additional groups since the 1970s, when it granted

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201 CHRISTOPHER RYAN & CACILDA JETHÁ, SEX AT DAWN: HOW WE MATE, WHY WE STRAY, AND WHAT IT MEANS FOR MODERN RELATIONSHIPS (Harper Collins 2012) [hereinafter RYAN & JETHÁ, SEX AT DAWN].

202 Id. at 101.


204 Fieldwork, December 2004-April 2005 (on file with first author.)

205 RYAN & JETHÁ, SEX AT DAWN, supra note 201.
heightened review to gender and illegitimacy classifications. Yet recent developments stemming in part from LGBT movement litigation again limit the challenge here. Several of the Court’s recent LGBT rights decisions have suggested that the Court may be moving away from hinging formal review on a formal finding that a classification falls within one of its traditional three tiers of scrutiny. These recent cases, while failing to specifically state a standard of review, have invalidated anti-LGBT discrimination using a more robust form of constitutional review than traditional rational basis. These LGBT rights cases suggest that poly activists may be able to get more searching constitutional scrutiny for discrimination without having to engage with traditional suspect class analysis.

Another line of argument would pursue the right to marry not as an equal protection issue, but rather on a mandate not to infringe upon a fundamental right. There is, at this point, no question 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. And, indeed, much of the struggle to receive recognition was focused on presenting same-sex marriages as essentially similar—in love, intimacy, sharing of responsibilities, economic partnership, and a joint project of raising children—to opposite-sex marriages.


208 *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”).

Similarly, poly marriage advocates will have to argue that, in essence, the right to marry more than one person is nothing but a subset of the more general right to marry. Here, previous litigation in the LGBT and feminist movements has expanded the legal construction of marriage in several ways which may be helpful for poly people. Feminist arguments around contraception and abortion have removed procreation as a crucial function of marriage, helping advance the conception of “companionate” or romantic marriage that same-sex marriage litigation has further institutionalized.\(^{210}\) Thus, if poly activists take the fundamental rights approach—arguing that group marriage enhances the parties’ lives in the same way as couple marriages do—the characteristics of marriage they will have to contend with will be: the ability to share love and intimacy, the benefits of long-term commitment, the economic and practical stability of the household, the ability to distribute responsibilities and chores among the different partners, and the child-rearing goals for some relationships. The courts’ openness to a due process argument largely depends on what the state will present as its “legitimate interest” for forbidding group marriage, and two such interests are analyzed below: child-rearing objections and logistical hurdles.

2. Legal Counterarguments to Watch Out For

The main non-religious (at least ostensibly) argument brought against same-sex marriages pertained to the impact of such marriages on children. This argument came in several flavors: concerns about discouraging procreation and parenthood by approving partnerships that were not physically capable of producing biological offspring,\(^{211}\) and concern about the welfare of children raised by same-sex couples.\(^{212}\) We expect the former variant to be less of an issue in the

\(^{210}\) *Walzer, Gay Rights On Trial*, supra note 55, at 139 (noting also that “the primary goal of marriage today is to provide love, support, and companionship”).


\(^{212}\) Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41(4) SOC. SCIENCE RESEARCH 752 (2012) (hereinafter Regnerus,
context of polyamorous families, many of which involve partners of both sexes, and the recent decisions to strike down legal provisions that forbid same-sex marriages have repeatedly discredited that line of thought.\textsuperscript{213} More thought should be given to the latter variant of the “think of the children!” argument—namely, the concern that it is unsafe or ill-advised to legitimize child-rearing in multi-parent households. Indeed, much of the pro-marriage-equality advocacy in the contest of same-sex marriages focused on disproving the notion that same-sex couples were not suitable for child rearing.\textsuperscript{214} Nonetheless, concerns about child-rearing are still raised in the context of same-sex marriage; earlier in 2014, the state of Utah’s brief in the same-sex marriage case there cited a discredited “study” by Mark Regnerus of UT-Sociology suggesting that children are harmed by gay marriage.\textsuperscript{215} It is, therefore, a reasonable expectation that such objections will be raised against multi-parent households and properly addressed by poly marriage activists.

Very little scientific literature addresses parenting and child welfare in the polyamorous community save for Elisabeth Sheff’s pioneering work.\textsuperscript{216} Sheff’s work, based on in-depth interviews with adult polyamorous family members and children, has highlighted several important findings that will hopefully be expanded upon in future research. Young children, Sheff observes, are less likely to be

\begin{itemize}
\item \textit{How Different Are the Adult Children of Parents Who Have Same-Sex Relationships?}. \\
\textsuperscript{213} Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 992 (N.D. Cal. 2012) hearing in banc denied, 680 F.3d 1104 (9th Cir. 2012) and appeal dismissed, 724 F.3d 1048 (9th Cir. 2013) (“Furthermore, to the extent Congress was interested merely in encouraging responsible procreation and child-rearing by opposite-sex married couples, a desire to encourage opposite-sex couples to procreate and raise their own children well would not provide a legitimate reason for denying federal recognition of same-sex marriages.”).
\item \textsuperscript{214} Zach Walls, address to Utah legislature, available at: https://www.youtube.com/watch?v=yMLZO-sObzQ.
\item \textsuperscript{215} Regnerus, \textit{How Different Are the Adult Children of Parents Who Have Same-Sex Relationships?}, supra note 212.
\item \textsuperscript{216} ELISABETH SHEFF, \textbf{THE POLYAMORISTS NEXT DOOR: INSIDE MULTIPLE-PARTNER RELATIONSHIPS AND FAMILIES} (Rowman & Littlefield 2013) at 135 [hereinafter SHEFF, \textbf{THE POLYAMORISTS NEXT DOOR}].
\end{itemize}
preoccupied with their parents’ relationships and number of partners; they relate to the adult members of the household through their particular relationship to each adult, such as “the person with whom I go rollerblading” or “the person that builds lego houses with me.”

Teenagers tended to be more aware of their parents’ lifestyle and made several important observations. First, they felt that they received considerably more attention and supervision than teens with monogamous parents—which, while some of them resented, could be regarded as a positive phenomenon. Second, they felt that different partners brought into the household different parenting strengths, often mentioning being able to talk with one of the partners, or being less able to “get away” with behaviors that the other parents could not cope with. Third, the teens mentioned that instability in the household was a source of sadness and stress for them, and that they missed partners that had left the household.

With regard to this last category, Sheff helpfully compares these teens’ experience to that of children of divorced parents, or children in composite families in which some relatives move away. Similar concerns about stability could be raised about those families, which are not explicitly sanctioned or outlawed.

As more research emerges to support and complement Sheff’s findings, the community may be able to effectively counterargue that polyamorous families are not, per se, harmful to children. Even in the absence of such research, we feel that a fruitful counterargument could rely on the comparison Sheff makes between polyamorous households and households produced by serial monogamies, in which people often stay in touch with former partners and their children while forming new families and having children with new partners.

Since the marriages that produce those families are not under scrutiny,

\footnote{\textit{Id.}}

\footnote{\textit{Id. at XX.} too much supervision.}

\footnote{\textit{Id. at XX.} parenting strengths.}

\footnote{\textit{Id. at XX.} departed parents.}

\footnote{Some emerging literature examines these questions in the Australian context: Maria Pallotta-Chiarolli, \textit{Polyparents Having Children, Raising Children, Schooling Children}, 7(1) LESBIAN AND GAY PSYCHOLOGY REVIEW 48 (2006).}

\footnote{\textit{Sheff, The Polyamorists Next Door}, supra note 216, at XX. Cite Sheff’s analogy.}
a comparison could be made, arguing that there is nothing endemic to polyamory that produces a worse parenting environment. We expect that divorce and separation statistics may play an important part in attempting to prove that polyamorous families are not, by definition, less stable than monogamous ones, and possibly even that separation in polyamorous families does not typically leave children with a single parent.

It is also possible that concerns about more than two parents can be addressed by referring courts to various contexts in which the law is concerned with single parenting, and with the stereotyping of single parenting as unsuitable for children. If the argument against single parenting relies on the difficulty of providing resources, supervision and attention without relief from a second parent, it may well be that multi-parent households offer more of those resources.

But there is another argument that might be made against multi-partner marriages, which is purely logistical. Such arguments were made against same-sex marriage advocates as well, mostly concerning the need to conserve resources, and were rejected. Nonetheless, it’s reasonable to assume that such concerns will not be as easily rejected for multi-partner marriage advocates, because, since many legal and administrative constructs in the United States rely on the structure of marriage as involving two parties, multi-partner relationships create more difficult regulative challenges. The classic examples of such challenges are taxation, health care, and immigration. Serious consideration of these three contexts leads to the conclusion that, from a logistical standpoint, legalizing same-sex marriage was hardly a radical move; forms, legal structures, and administrative processes that take into account dyadic marriages are already in place, and the only change is gender. In fact, the changes in tax forms are as minor

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224 For examples of more expansive rights to married couples than cohabiting/domestic partners, see Civil Unions and Domestic Partnership Statutes at: http://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx.
as the changes in marriage forms, and same-sex partners whose marriages were federally recognized by Windsor received marriage-based immigration status the very next day. By contrast, poly marriage advocates will have to confront the state’s interest in preventing a bureaucratic hassle required by the need to update policies, processes, and forms. We proceed to take each one in turn.

In the tax context, federal tax forms require single people to file as single, and married people to file jointly. While the federal government does not have an explicit policy to reward or penalize marriage, according to the U.S. General Accounting Office, there are 59 provisions in the individual income tax code that contribute to a marriage tax or subsidy, and over a thousand federal laws in which benefits received or taxes paid depend in some way upon marital status. Until 1948, taxes were levied individually, but the adoption of community property regimes in several states led to geographic inequities between spouses in community property states who could report half the income as joint and spouses that could not. To resolve the inequity, Congress extended community property treatment to all married couples, and in 1948 the practice of income splitting between spouses was adopted for all couples. The result was that married spouses filed a joint tax return, for which the usual tax brackets were doubled.

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228 U.S. General Accounting Office 1996

229 Field, supra note 227.

230 Ibid.

231 Ibid.

232 Ibid.
Whether or not filing singly or jointly is more advantageous to a given taxpayer is closely related to the income gap between the spouses. Originally, family taxation was advantageous to married couples because it lowered their average tax rate and thus commonly resulted in a marriage subsidy. However, single taxpayers were relatively disadvantaged, and this penalty on singles grew over time. Despite subsequent statutory changes designed to alleviate the burden, income splitting meant that a single taxpayer's liability could be as much as 40 percent higher than that of a married couple with equal income.\textsuperscript{233}

The Tax Reform Act of 1969 addressed the disparity between single and married persons by creating a new tax schedule for single taxpayers, under which the differential between the tax liability of a single person and that of an equal-income married couple could not exceed 20 percent.\textsuperscript{234} There was no actual change in the tax burden imposed on married persons, but the introduction of the new single schedule caused their relative position to worsen. This change created the marriage penalty: in a reversal of the previous situation, the combined tax liability of two single people often increased with marriage.\textsuperscript{235} Since the reforms of 1969, numerous modifications have been made to the income tax laws that have altered the magnitude of the marriage penalty. However, most recent evidence documents that many married couples still face a tax penalty.\textsuperscript{236}

Whether a couple is married or not has, therefore, genuine tax consequences, and allowing multiple-partner marriage on the federal level might mean allowing more than two partners to file jointly as married, which would require an update of the tax brackets, as well as careful consideration of the tax consequences. It is unclear whether the conventional wisdom, according to which filing jointly is more advantageous for partners with different income levels,\textsuperscript{237} would hold

\begin{flushleft}
\textsuperscript{233} Ibid.
\textsuperscript{234} Ibid.
\textsuperscript{235} Ibid.
\textsuperscript{237} Adam Bold, When 'Married Filing Separately' Makes Sense, BUSINESS INSIDER, February 28, 2012, available at:
\end{flushleft}
true for partnerships between three, four, or five people. Currently, there are some scenarios that would allow working polyamorous partners to claim nonworking partners as dependents;\(^{238}\) while these scenarios cannot be generalized to the entire polyamorous community, it is unclear whether marrying all partners and filing jointly would provide an advantage from the tax perspective.\(^{239}\) In any case, it is clear that allowing multiple partner marriages would require substantial tax reform, the difficulties of which could be claimed as a state interest, and which could be overcome only if courts consider the goal of making marriage available to multiple partners valuable enough to overcome this hassle.

A more palatable alternative to reforming the tax system in a way that accommodates poly families might be for polyamorous marriage activists to join the growing movement to eliminate the marriage election from tax forms.\(^{240}\) Proponents argue that, as women enter the workplace, the impact of community property law no longer merits joint filing.\(^{241}\) Supporting this movement would generate already-existing allies, and may do more for equalizing all kinds of families, not only polyamorous ones.

As an aside, multiple-partner marriages could also be suspected of being pursued with the objective of avoiding the payment of estate taxes, which non-married heirs have to pay in the probate process.\(^{242}\) But this concern is real only to the extent that the financial advantages

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\(^{238}\) The scenario is as follows: A and B are married and work. C, their third partner, stays home and cares for the family’s children. A and B could claim C, as well as the children, as dependents on their tax forms, because the definition of dependant is that of a nonworking person in the household.


\(^{242}\) In fact, estate taxes were grounds for Edie Windsor’s lawsuit – U.S. v. Windsor was won on the premise that requiring Ms. Windsor to pay estate taxes was an impermissible equal protection violation.
involved outweigh the emotional complications, stigma, and other social implications, of being openly married to more than one partner, which may not be as much of a serious concern—or at least not a more serious concern than that of dyadic marriages pursued for strategic ends.243

A second area of law in which marriage sometimes plays a pivotal role is health care. Same-sex marriage advocates focused much energy on concerns about marriage-based health insurance,244 as well as on the need to provide partners with a status that would allow hospital visits.245 These two issues generate different challenges, with the former addressing the financial rights of partners vis-à-vis employers, and the latter addressing hospital personnel obligations to partners and partner decisionmaking on health issues.

The concern about health insurance raises some issues in the polyamorous context that are unaddressed in the same-sex marriage context. Since health insurance is primarily provided in the United States through employment,246 extending benefits to more than one adult person beyond the employee would create a higher burden on the employer. Currently, health benefits are also extended to

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243 For more on this from a religious polygamous perspective, see Sam Brunson, Polygamous Tax Evasion, By Common Consent (2014), available at: http://bycommonconsent.com/2014/02/24/polygamous-tax-evasion/


children, but assuming that children of poly families receive the benefits through their parents irrespective of the marriage, like children of dyadic families, it will be more of an uphill battle to advocate for insurance benefits extended to more adults. This may mean that spousal insurance, like other benefits extended to partners, may need to become a financial benefit in which the employee has to specify to whom they would like the benefit extended, with a numerical limit on the number of partners.

Concerns about hospital visits from a same-sex partner of the patient have raised humanitarian issues of compassion, and those may arise in the context of polyamorous partners as well; it seems like this may be sorted out through legislation specifically requiring hospitals to allow any partners of the patient to visit. A surprisingly less complicated issue arises in the context of decision-making power for patients unable to express their will. Controversies abound in struggles between spouses and parents of adult patients, such as the infamous struggle concerning Terry Schiavo. With the adoption of New York’s Family Care Health Decisions Act in 2010, Missouri is the only state that does not regulate spousal rights to make decisions on behalf of their partners. State regimes are complemented by federal law, which expands the decisionmaking power of partners.

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249 The recommendation frequently made to families is to create power-of-attorney documents.

250 Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1289 (11th Cir. 2005).


Notably, however, the Probate Code does not give spouses automatic agency over each other’s fate, and spousal will does not necessarily govern in such situations, and spouses do not have precedence over other family members. Moreover, in some cases, any family member’s wishes can be overridden by medical staff. In this respect, same-sex couples, opposite-sex couples, polyamorous partners, and unmarried domestic partners all face similar quandaries in such situations, and the universal solution to the problem is to sign an Advance Health Care Directive (AHCD), in which a person assigns the power to make health care decisions to whoever he or she wishes, be it a legal spouse, a partner, a relative, or a friend.  

A bitter struggle might take place on the immigration arena. The United States grants immigrant visas (“green cards”) and, consequently, citizenship, to spouses of American citizens.  

While providing immigration status to same-sex partners of American citizens occurred almost immediately after the decision in U.S. v. Windsor, immigration authorities may be concerned about sham multiple marriages created solely for the purpose of immigration. Currently, immigration officials conduct interviews with spouses to ensure the genuineness of the marriage, and there is no reason why such interviews cannot be conducted with more than two partners; the costs and logistical hassle will probably be negligible. As it is, a finding that a prospective U.S. entrant professes belief in nonmonogamy in his or her country does not preclude receiving immigration status, but practicing polygamy, and intending to

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253 This is a recommendation frequently extended to any person, regardless of his/her marital status.


255 See supra note 226.


practice it in the United States, would preclude him or her from receiving an immigrant visa.  

Interestingly, immigration law may not have anticipated modern, nonreligious polyamory, as it specifically refers to bigamy based on “historical custom or religious practice”. But any argument attempting to distinguish between religious and customary polygamy and nonreligious polyamory might leave the arbitration power as to which is “legitimate” in the hands of immigration officials, which would be highly problematic. Not only could this create undue discrimination, but any nonmonogamous person admitted to the United States on the basis of such a distinction would still have to deny that he or she intends to practice nonmonogamy after immigration, which would defeat the purpose of granting him or her spousal-based immigration status. It is fairly clear, therefore, that if and when multi-partner marriage is recognized nationally, immigration law will have to be carefully and thoughtfully revised.

In summary, polyamorous marriage legal advocates may rely on similar legal arguments to those that same-sex marriage advocates successfully used in court, though they may face some challenges regarding the logistics of legalizing multi-partner marriages. We now turn to other dimensions of the marriage equality struggle and their impact on the polyamorous community.

B. Extra-Legal Strategies and Challenges

In her article *Evaluating Legality*, Idit Kostiner argues that activists for legal change view the role of law through three main schemas: instrumental (the pursuit of actual, material rights), political (galvanization and political power to the movement), and cultural (receiving symbolic recognition and value.) At the end of

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258 Id. “if the alien purposely married more than one wife or husband at the same time based on historical custom or religious practice”.


260 Id. at 339.

261 Id. at 342.
the article, Kostiner hypothesizes that, as movements grow and mature, they progress from mere instrumental goals to political and cultural goals. In the first author’s ethnography of the polyactivist community in the San Francisco’s Bay Area, the fieldwork for which was conducted in 2005 (a year after the first wave of same-sex marriages in San Francisco), the interviewed polyamorous activists expressed little interest in pursuing legal status for multi-partner marriages on all three fronts. Instrumentally, many interviewees did not feel that they needed official rights because they lived in a household with only one primary partner and engaged in other relationships that did not call for legalization. Other interviewees, who lived in multi-partner households, used a variety of private law mechanisms, such as power-of-attorney documents, wills, and trusts, to mimic some of the benefits of marriage. Politically, interviewees expressed hesitation about initiating a legal struggle before gay and lesbian marriage activists succeeded with their own struggle, and did not want to adopt a mainstream, bland, normatively-appealing image that would erase the more radical, sex-positive character of a good part of the community. Culturally, many interviewees expressed suspicion and dislike for legal categories or “boxes”, expressing a desire for fluidity and flexibility that was incompatible with legal regulation of, and government involvement in, their relationships.

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. We now turn to those, and to the extra-legal hurdles of cultural backlash.

262 Id. at 364.
263 Aviram, Make Love, Not Law, supra note 25.
264 Aviram, Make Love, Not Law, supra note 25, 264.
265 Aviram, Make Love, Not Law, supra note 2, 267-268.
266 Aviram, Make Love, Not Law, supra note 25, 270.
267 Aviram, Make Love, Not Law, supra note 25, 274.
268 Fluidity, Aviram, Make Love, Not Law, supra note 25. This distaste for mainstream legal categorization may stem from the cultural roots of polyamory in the Bay Area, which relies on science fiction, fantasy, and alternative spiritualities. Aviram, Geeks, Goddesses, and Green Eggs, supra note 159.
1. Strategies to Adopt

As the history of same-sex marriage activism demonstrates, the movement’s focus on marriage helped galvanize the community around an issue whose salience was clear, even if its prioritization over other issues was debatable. As Part I shows, pursuing marriage licenses in the early days of gay liberation was a radical, politically transformative act, and it was only later in the history of the movement that it became the vehicle of instrumental rights. Similarly, marriage could potentially play a galvanizing role for poly activists, to the extent that their reluctance to pursue it for political and cultural reasons is less strong As to the political rationales, polyamorous marriage advocates may find that, in the post-Windsor, post-Perry era, focusing on marriage would not anymore constitute a risk of sabotage of LGBT struggles, especially given the now-commonplace public support for same-sex marriage. But beyond these tactical considerations, in considering whether to make marriage the focal point of mobilization, the movement will have to overcome its traditional support of individuality. In 2005, polyamorous interviewees highlighted how important it was for them not to be told “how to do polyamory right”, and some of them expressed negative feelings toward certain workshop organizers whose presentation of agreements, jealousy management, and other polyamory relationship practices amounted, in the interviewees’ opinion, to patronizing. And several interviewees also highlighted their strong affinity with the BDSM community, which consistently receives questionable and controversial press coverage, stressing that “going vanilla” for the purpose of achieving legal recognition would be too high a price to pay. But it is important to keep in mind that the same-sex marriage issue, despite its unifying power, always generated critique from those arguing against heteronormativity and assimilationism, and that pursuing legal recognition of relationships for those who wants them has not precluded the LGBT community from other strands of

269 Aviram, Make Love, Not Law, supra note 25.
270 Aviram, Make Love, Not Law, supra note 25.
activism over the years. It is therefore recommended that, like the LGBT community, the polyamorous community adopt a “suits and streets” approach, simultaneously pursuing legal rights in the courtroom and with the legislature and focusing on more radical expressions and goals in public venues, protests, and on the media.

There is, however, a culturally important issue, that dovetails with the concerns raised by polyamorous interviewees in 2005: the choice whether to portray polyamorous partnerships as unique and different from mainstream culture or as similar to monogamous partnerships. Many commentators on the same-sex marriage struggle highlight the transition in the 1980s from portraying LGBT people as different and unique\(^ {272} \) to focusing on portraying them as similar to the mainstream population\(^ {273} \) and it may well be that, before major achievements can occur in the legal arena, activists will have to come to the conclusion that the immense symbolic power of marriage in the United States, and the political legitimacy it garners, is well worth the price.

It may be that some of them, witnessing the symbolic cultural victory of same-sex couples, will come to this conclusion as well. In \textit{Same Sex Marriage: The Cultural Politics of Love and Law}, Kathleen Hull showed how, before same-sex marriage was legal federally and in many states, same-sex couples recurred to symbolic affirmations of their relationships via public commitment rituals, and how much the appeal to the aesthetics and cultural understandings of marriage meant to the couples that engaged in them.\(^ {274} \) Similarly, Kimberly Richman’s more recent \textit{License to Wed} included a wealth of interviews with same-sex couples that spoke of the acceptance of their relationships as legitimate and real by family and friends because of the official “stamp” of marriage.\(^ {275} \)

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\textsuperscript{275} KIMBERLY RICHMAN, \textit{LICENSE TO WED: WHAT LEGAL MARRIAGE MEANS TO SAME-SEX COUPLES} (NYU Press 2013).
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Similar issues of acceptance by the outside world are prevalent in the polyamorous community. Polyamorous people report that their nonconventional relationship has caused them alienation from family members unable to accept their lifestyle, difficulties in joining social organizations such as churches, and sometimes even active steps taken by adult children to break up their parents’ relationships with other partners. The combination of a more positive public opinion and legal recognition may yield the cultural acceptance that these activists yearn for.

In striving toward cultural acceptance, polyamorous activist may face the repercussions of their representation in mainstream media. In the last decade, there has been an explosion of coverage and interest in polyamorous relationships and lifestyles. The first television show to portray a nonmonogamous family, Big Love, was a fictional account of the life of a Mormon businessman married to three women; the show veered between showing the family’s everyday life as normal and mainstream to highlighting the nonconventional, and sometimes alarming, aspects of life in the household and in their extended family, including members living in a religious compound. Two reality shows exploring nonmonogamy in very different ways are Sister Wives, depicting Kody Brown and his four wives, Meri Brown, Janelle Brown, Christine Brown, and Robyn Sullivan, and aiming at portraying a normal, low-drama life, and Polyamory: Married and Dating, which focuses on non-


\[\text{277 See one church’s attempt to address poly families at: http://www.uupa.org/Literature/Christians.pdf}.\]

\[\text{278 Aviram, Make Love, Not Law, supra note 25}.\]


\[\text{280 Big Love, supra note 36}.\]

\[\text{281 Sister Wives, supra note 37. More on the dismissal of the criminal case against them below}.\]

\[\text{282 Polyamory: Married and Dating, supra note 38}.\]
mainstream, countercultural young people in the Los Angeles area, portraying their lives as a continuum of drama, orgies, and unstable couplings. If the community chooses a more mainstream path, its representation in the media may also include child-rearing, household chores, mortgages and jobs, as in television shows that accompanied the change in public opinion on same-sex marriage: *Queer as Folk* and *The L-Word*.

2. *Extra-Legal Challenges to Watch Out For*

One concern associated with litigation for rights is the fear of political and social backlash. Indeed, one of the most common critiques of the LGBT impact litigation strategy was the “narrow” use of the courts rather than the usage of more democratic appeals. Some commentators, like Michael Klarman, attribute the enactment of the Defense of Marriage Act to the judicial decision in *Baehr*.283 According to Klarman, the decision was perceived as undue “judicial activism”, producing federal legislation that limited marriage to one man and one woman. This interpretation follows, to some extent, the logic of Gerald Rosenberg’s *The Hollow Hope*.284 Based on several examples, including *Brown v. Board of Education*285 and its aftermath, Rosenberg argues that seeking rights in the courtroom tends to produce social and political backlash and sometimes an adverse legislative or regulative response.

But critics of Rosenberg’s approach argue for a more nuanced understanding of the relationship between litigation and rights,286 according to which legal victories can, over time, actually facilitate public acceptance even if there is an initial backlash.287 Moreover,

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283 KLARMAN, FROM THE CLOSET TO THE ALTER, supra note 68.


287 William Eskridge argues that Gerry Rosenberg is wrong, and that law sometimes can create social change, but at the same time he shows, via Gallup polls, how public opinion regarding same sex marriage changed
recent commentary on the same-sex marriage struggle argues that the preemptive anti-gay-marriage countermovement actually served as a catalyst for the very processes it sought to prevent and destroy.\footnote{\textcite{dorftarrow2014}}

Without making little of the deep homophobic public sentiments that produced the Defense of Marriage Act, Proposition 8, and other anti-same-sex marriage actions, the stigma against polyamory runs very deep. Polyamory is deeply threatening to the mainstream in several psychological and historical ways. While political moderates might not be concerned that providing gay and lesbian people with rights will “infect” heterosexual people with a “gay agenda” or a “gay lifestyle”, polyamory strikes at the core of an issue that is pertinent to the life of anyone who has experienced, or is contemplating, questions of love, relationships, and long-term commitment. Fidelity and loyalty, especially through the gendered prism of female chastity, has been a fundamental concept in the creation of the relatively new institution of romantic marriage.\footnote{\textcite{coontz2006}} Concerns about abandonment, jealousy, infidelity and betrayal are at the heart of much of mainstream discourse regarding romantic commitment. Marriage vows include an edict to “forsake all others.”\footnote{\textcite{weddings}} Sexual betrayal, which is a fairly common phenomenon in monogamous marriages,\footnote{\textcite{treagiesen2000}} is constructed in culture as a dealbreaker and a legitimate reason for ending the relationship, and even when partners are encouraged to attempt reconciliation, the process can be long and reflect very deep hurt.\footnote{\textcite{corcoran1997}} Public figures caught in marital infidelity suffer grave repercussions to their public image.\footnote{\textcite{clintonweinerpetreaus}} Mainstream culture holds a

\textcite{dorftarrow2014}

\textcite{coontz2006}

\textcite{weddings}

\textcite{treagiesen2000}

\textcite{corcoran1997}

\textcite{clintonweinerpetreaus}
great deal of attachment to the idea of sexual exclusivity, and subverting this ethos—albeit, ironically, in the opposite way; honestly and ethically—can constitute a great threat to the symbolic power of sexual fidelity. Moreover, nonmonogamy has yielded very strong antagonistic feelings in the United States specifically in the context of the historical prohibition of Mormon polygamy in Utah, whose constitution states that plural marriages are “forever prohibited.”

Another important variable is anti-Islamist sentiment, which has intensified in the United States after the terrorist attacks of 9/11.

It is, however, notable that a recent Utah bigamy prosecution against the polygamous Brown family, protagonists of the aforementioned reality show *Sister Wives*, was dropped based on a privacy rationale not unlike the one in *Lawrence v. Texas*. A subsequent civil lawsuit on behalf of the Browns resulted in a judicial decision that struck down the anti-cohabitation portion of Utah law as unconstitutional, and though the prohibition on polygamous marriage remained in effect, commentators considered the law “weakened” by the decision.

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294 Utah Const. art. III


In addition to the negative stigma from mainstream culture, polyamorous activists frequently complain of the antagonism and lack of support from the LGBT community—the very community they wanted to support by suppressing their own potential aspirations to legal recognition. A recent poll on LGBT magazine The Advocate found close to 70% of respondents opposing multi-partner marriage. Polyamorous activists need to combat these negative opinion by reaching out to LGBT activists and reminding them of the support they received from the poly community during their struggle for marriage equality.

C. Alternatives to Marriage

While polyamorous marriage activists can learn much from same-sex marriage advocacy, they might also learn important lessons from periods and phases in the equality struggle in which activists prioritized other issues over marriage, or perceived them as worthy stepping stones on the way to full equality. Here, we consider two such strategies: anti-discrimination struggles, including workplace discrimination and the struggle against bullying, and various forms of non-marital relationship recognition, including child custody arrangements, adoption, employment benefits, immigration status for nonmarried partners, and regulatory regimes akin to domestic partnerships that provide bundles of rights that mimic some aspects of marriage.

1. Anti-Discrimination, Anti-Bullying

Looking outside the sphere of relationship recognition, and into areas of public life such as employment and education, might be a more hopeful area for poly activists seeking quicker signs of progress for polyamorous individuals. In the LGBT movement’s case, litigation targeting the public realm gained cultural and legal acceptance more quickly than litigation targeting the private realm. In terms of cultural acceptance, employment discrimination was one of the arenas in which public opinion changed most quickly in the LGBT struggle, with a majority of public opinion turning in favor of workplace protections for sexual orientation as early as the 1990s. Public opinion on relationship recognition and same-sex marriage has

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300 **locate poll**
remained steadily negative, experiencing an uptick in some regions only very recently.\footnote{Barclay & Fisher, \textit{Cause Lawyers in the First Wave of Same-Sex Marriage Litigation}, supra note 50.} In terms of legal victories, Patricia Cain has pointed out that “the greatest gains” in the first few decades of LGBT impact litigation “were in the public sphere,” such as in the areas of free speech and public education.\footnote{\textit{Id.}} The movement at the time saw far fewer victories in the area of family law; “[n]o court ruled in favor of recognizing the legal right of lesbian and gay partners to share their lives, to be together, to claim that they were a family.”\footnote{\textit{Id.}}

Employment discrimination is a particularly advantageous area for pursuing rights and public recognition because it appeals to a dominant sensibility according to which employment should reflect merit rather than discriminatory notions unrelated to the job. Litigation in this context should be pursued deliberately and carefully, as some areas of employment may be easier to litigate than others; LGBT activists have faced more problems in the context of K-12 education. It is important to point out that this public sensibility has been fueled by the rhetoric of previous civil rights struggles and judicial interpretation, which define antidiscrimination as irrational individual animus.

In recent years, much of the energy of the LGBT community has been directed toward anti-bullying campaigns, through initiatives such as the It Gets Better initiative\footnote{It Gets Better Project: Give Hope to LGBT Youth, \textit{available at:} www.itgetsbetter.org/.} and the Trevor Project,\footnote{The Trevor Project, \textit{available at:} www.thetrevorproject.org/.} which attract many straight allies to empower gay children, teens and adolescents and protect them from harm. Similar energies can be put into protecting children in multi-parent families from harassment and hassle regarding their family structure.

\section*{2. Non-Marital Relationship Recognition}
Other avenues that polyamorous activists may choose to focus on, in lieu of formal marriage or as a precursor to it, are various forms of relationship recognition. One particularly important issue pertains to parental rights. There have been documented cases in which polyamorous people have lost custody of their children because of judicial antipathy toward their family structure, but there are already documented early successes in which stable, normative, responsible three-parent families have prevailed in custody battles. The availability of three-parent adoption as a legal recourse was not intended to accommodate polyamorous parents—indeed, when hailed by supportive politicians in the media, the examples provided included amicable divorces and same-sex couples in close communication with the biological parent—but it can be a useful legal vehicle in such cases. Additionally, as mentioned above in our discussion of health care, flexible negotiation of employment benefits might not generate a problem for the employer as long as, for example, the employee chooses which of his or her partners is to receive the benefits. As explained in Part II above, LGBT impact litigation in the early 1990s prioritized these alternative areas of relationship, garnering so much support that same-sex marriage antagonists argued later that the existence of civil unions and domestic partnerships renders marriage unnecessary.

3. The Shadow of Marriage

In light of these alternative litigation options, why should polyamorous activists be concerned with marriage? It may be that, as

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306 April Divilbiss case; See http://www.polyamorysociety.org/Divilbiss_Families_Case_Ends.html.

307 Amy Nash-Kille, How to Be an Ally for Poly Marriage, Red Thread Farm, May 22, 2014, available at: http://redthreadfarm.com/2014/05/22/how-to-be-an-ally/ (last checked August 14, 2014). Amy and her two partners, David Nash and Mark Kille, have won a custody battle over Mark’s son from a previous marriage and all three of them have adopted Amy and David’s children (private conversations, on file with first author.)

a first step toward legal recognition, the polyamorous community should follow in the footsteps of the LGBT community, which would also have the salutary effect of improving public opinion to the point that litigating marriage will not be as much of an uphill battle. However, it is important to note that, even when LGBT activists have pursued alternatives to marriage, it has been exceedingly difficult for them not to use marriage as a key reference point, a model for arguments regarding the types of relationships that merit recognition. As work by Douglas NeJaime has shown, even as LGBT litigators pursued alternatives to marriage, they often used marriage as a key reference point.\textsuperscript{309} Attorneys would often talk about their nonmarital cases in marriage-like terms, stressing things like emotional and economic interdependence, mutual support, intimacy, and length of time together. NeJaime’s case study of domestic partnership work in California in the 1980s and 1990s, NeJaime shows that:

\textit{[T]o achieve nonmarital recognition, advocates appealed to marriage’s conventions, pointed to the unique exclusion of same-sex couples from marriage, and stressed same-sex couples’ commonality with married couples. In building domestic partnership, they emphasized marital norms—such as adult romantic affiliation, mutual emotional commitment, and economic interdependence—capable of including same-sex couples. By challenging marriage’s primacy while arguing for recognition in terms defined by marital norms, advocates contested, accepted, and ultimately shaped the institution of marriage while simultaneously portraying same-sex relationships as marriage-like.}\textsuperscript{310}

Furthermore, even if attorneys in the nonmarital recognition cases had chosen to highlight alternative sexual affiliations and family structures that were not “marriage-like,” it is unclear what meaning the public or the courts would take away from those narratives. Marriage is so deeply embedded within dominant cultural definitions of intimacy, or as a dominant cultural schema for understanding and evaluating intimate relationships,\textsuperscript{311} that it is difficult to image it

\textsuperscript{309} NeJaime, Before Marriage, supra note 72.

\textsuperscript{310} NeJaime, Before Marriage, supra note 72, at 113.

\textsuperscript{311} See Areila r. Dubler, Wifely Behavior: A legal History of Acting Married, 100 Colum. L. Rev. 957 (2000).
would not end up playing a role in any public poly relationship recognition campaign. Indeed, media coverage of the LGBT movement’s nonmarital recognition cases of the 1990s often framed them as proto-marriage-equality cases, attributing the cases’ origins to marriage laws that were out-of-touch with an emerging social reality.\textsuperscript{312}

Poly advocates should consider the danger that their litigation campaigns—regardless of whether they directly advocate for poly marriage or whether they advocate for nonmarital forms of poly relationship recognitions—are prepared to evoke public scrutiny of poly relationships that holds those relationship to the dominant marriage-like framing. It may be possible for the immense symbolic potential of marriage to work to the advantage of poly advocates, helping them as a powerful frame for garnering legitimacy. Yet polyamorous activists must strongly consider how evoking marriage may just as soon work to assimilate poly communities as to offer a stepping stone to more transformative visions of intimacy.

IV. DISCUSSION AND IMPLICATIONS

Taken together, the analysis in Part III suggests that the LGBT legal mobilization may have produced conflicting pressures for the contemporary poly community. On one hand, we have identified numerous areas in which same-sex marriage litigation has expanded the doctrinal resonance of legal arguments in favor of polyamorous marriage (or other forms of relationship recognition). Yet a theme that also emerges from this analysis is how LGBT legal mobilization for same-sex marriage may have reinforced cultural stigmas against polyamorous relationships. This Part turns to considering this possibility, and its implications for the scholarly understandings of law and social movements.

What effect has LGBT movement advocacy for same-sex marriage had on cultural constructions of polyamorous people? At the very least, same-sex marriage litigation appears to have opened the

\textsuperscript{312} See Eloise Salholz et al., The Future of Gay America, NEWSWEEK, Mar. 20, 1990, at 20; CAIN, RAINBOW RIGHTS, supra note 44, at 259; Patrice Gaines-Carter, Legal Snag Keeps Gays from Tying the Knot: Couple Denied Marriage License Sues D.C., WASH. POST, Dec. 6, 1990, at C5.
door to a renewed national discussion about multiparty marriage. As noted earlier, the issue of polyamory (or polygamy) is often raised in same-sex marriage cases, as part of the inevitable “slippery slope” argument against expanding marriage to LGB couples. The widespread animosity toward multiparty relationships—which shades into anti-Mormonism,13 Orientalism, and anti-promiscuity—increases the news value of polyamory, an issue that has historically received rapt media attention.15 The inevitable slippery-slope-to-polygamy arguments that arise in same-sex marriage litigation are often centrally featured in media coverage of those cases,316 providing a compelling hook for reader interest. To the extent that this coverage relates the framing of multiparty marriage in the courtroom—as a frightening possible consequence of same-sex marriage recognition317—the media and public focus on polyamory is unlikely to ameliorate its stigmatized status.

Furthermore, LGBT advocates’ responses to the specter of legalized polygamy may have even furthered the stigmatization of polyamorous individuals. LGBT advocates have countered slippery slope arguments by drawing a bright line between same-sex couples and multiparty relationships. This strategy acquiesces to the unspoken

13 Martha Ertman argues that legal restrictions on polygamy derive not only from the threat posed by Mormons’ separatism (which challenged U.S. political cohesion) but also to Mormons’ “racial treason” or “adoption of a supposedly barbaric [nonwhite] marital form.” Martha M. Ertman, Race Treason: The Untold Story of America’s Ban on Polygamy, 19 COLUM. J. GENDER & L. 287, 287.

14 A remarkable recent decision by Utah district court Judge Clark Waddoups used Edward Said’s Orientalism framework in analyzing the legal prohibition of polygamy, concluding that “the comparison with non-European peoples and their practices is precisely what made the Mormons’ practice of polygamy problematic.”


16 See e.g., Kirk Johnson, Iowa Justices Hear Same-Sex Marriage Case, NEW YORK TIMES, December 10, 2008, A24 (opening with the following sentence: “In a case that could make Iowa the first Midwestern state to legalize same-sex marriage, the Iowa Supreme Court on Tuesday pressed lawyers for both sides with sharp questions on topics like the 4,000-year-old history of marriage and whether a ruling favoring gay couples would open the door to polygamy.”).

17 Id.
message in the conservative arguments: that multiparty relationships are of less value than monogamous ones and undeserving of the sanctity of marriage. In assuaging conservatives’ fears of polygamy, LGBT advocates express implicit agreement as to the devaluation of multiparty relationships. Thus, the public discourse LGBT advocates have sparked around polyamory has not been a debate, but rather a one-sided reinforcement of the dominant view that polyamorous relationships as beyond the scope of accepted sexual mores.

The public positioning of LGB people as distinct from polyamorists—and closer to the mainstream—may have also furthered the stigmatization of polyamorous communities. While (straight, monogamous) mainstream public discourse rejecting polyamory reinforces dominant sexual norms, LGBT community discourse rejecting polyamory adds additional texture to hierarchy of sexual norms and stigmatization. When LGBT advocates—themselves on the fringes of the mainstream—distance themselves from polyamorists, the latter are pushed even further to the margins.  

In addition, same-sex marriage litigation may have increased the stigmatization of polyamorous people by opening them up to conservative backlash—or “forelash,” given that polyamorists have yet to mobilize en masse. Polyamory has been a constant focus of opposition to same-sex marriage, figuring strongly in arguments made both inside and outside the courtroom. For example, the year after Massachusetts’s high court found bans on same-sex marriage unconstitutional, the Family Research Council issued a pamphlet entitled “The Slippery Slope of Same-Sex Marriage.” After describing polyamory as a new front of the “movement to redefine marriage,” the pamphlet argues that like same-sex marriage, polyamory “looms ahead for our society unless a bulwark is created in the form of a constitutional amendment protecting marriage.” In 2008, another of

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the major organizations leading the fight against same-sex marriage, Focus on the Family, issued a similar statement raising the threat of polyamorist relationship recognition “on the heels” of LGBT movement victories in the marriage realm.\textsuperscript{321} While this earlier attention to polyamory seems to have been an offshoot of conservative efforts to hobble same-sex marriage, more recent rhetoric indicates that conservatives are starting to focus on polyamory as an issue in its own right.\textsuperscript{322} It could be, as one polyamorous blogger suggested, that conservatives are increasingly giving up the ghost on same-sex marriage and are instead “turning their sights more directly onto the next target down their slippery slope.”\textsuperscript{323}

In raising the potential cultural consequences of same-sex marriage litigation on a prospective polyamorous marriage campaign, we are not suggesting that LGBT movement activists should be held responsible for these consequences. Many of the consequences we mention, such as the media attention to and conservative backlash against polyamory, have occurred in areas outside the LGBT movement’s control. For the areas within activist control, such as litigators’ strategic line-drawing and disassociation from


\textsuperscript{322} See, e.g., Jennifer Leclaire, Forget Gay Marriage, Mainstream Media Now Pushing Polyamory, CHARISMA NEWS, Feb. 21, 2013, available at: http://www.charismanews.com/opinion/watchman-on-the-wall/42881-forget-gay-marriage-mainstream-media-now-pushing-polyamory (accessed Aug. 12, 2014); Patrick F. Fagan, Domestic Disturbances: The Rising Polyamorous Culture is out to get your Children, TOUCHSTONE: A JOURNAL OF MERE CHRISTIANITY, January/February 2010, available at: http://www.touchstonemag.com/archives/article.php?id=23-01-042-c (in arguing that culture war has broken out between the “culture of polyamory” and the “culture of monogamy,” the article makes no mention of LGBT people or same-sex marriage); see also See Jessica Bennett, Polyamory: The Next Sexual Revolution, NEWSWEEK (available at: http://www.newsweek.com/polyamory-next-sexual-revolution-82053) (Polyamorists “are beginning to show up on the radar screen of the religious right, some of whose leaders have publicly condemned polyamory as one of a host of deviant behaviors sure to become normalized if gay marriage wins federal sanction.”).

\textsuperscript{323} See Alan, Polyamory in the News, December 9, 2013 (available at: http://polyinthemedia.blogspot.com/2013/12/conservatives-shifting-their-aim-to.html).
polyamorists, it is difficult to pass judgment without full awareness of the competing pressures that motivated LGBT activists’ strategic decisions. The major point here, as throughout the article, is to assess the legal and cultural tools and obstacles that polyamorists are likely to encounter in the road ahead. The discussion here specifies particular environmental changes that have emerged from the LGBT movement’s marriage campaign, which may hinder the viability of the favorable legal arguments that the LGBT movement has simultaneously put into effect.

An additional contribution of this discussion is to help build understandings of the far-reaching effects that one social movement’s actions may have (even inadvertently) on another social movement. This Article has shown how the mainstream LGBT movement, which had almost no formal engagement with polyamorists, has had profound implications for that group and its potential for future mobilization. This idea of movement-movement influence resonates with a large body of sociolegal work on social movement “spillover,” or the impact of previous social movements on subsequent ones.\(^\text{324}\) In a foundational Article investigating the influence of the women’s movement’s on the U.S. peace movement, sociologists David Meyer and Nancy Whittier identify four major types of social movement spillover: the adoption of a previous movement’s political “frames”; the spread of innovative protest tactics; the selection of leadership; and the implementation of common organizational structures. One of the key mechanisms that allows for these spillover effects to occur, according to Meyer and Whittier, when one movement achieves certain change in the external environment achieved, which subsequently restructure the opportunities and challenges available to the next movement.\(^\text{325}\) The present Article contributes to these sociological insights by applying these theories in the context of social movement legal mobilization. As a result, we identify different forms of spillover that sociologists have largely ignored, including not only the doctrinal legal arguments presented in court, but perhaps more importantly, the various cultural models of litigation that a movement can use to achieve different extra-legal goals (e.g., to the radical “litigation as protest” model versus the more traditional impact

\(^{324}\) Meyer and Whittier, Social Movement Spillover, supra note 23.

\(^{325}\) Id. at 281 (“The cultural changes promoted by a social movement affect not only the external environment but also other social movements”).
These socio-legal movement strategies, which do not fit neatly into the categories of spillover identified in the sociological work, suggest a more complex type of spillover may be at play in legal mobilization.

An additional benefit of investigating social movement spillover in the context of legal mobilization is that it allows for a more nuanced understanding of the interrelated movement-inspired changes in the cultural and legal environments, which subsequently shape future movements. Previous research tends to conceptualize a movement’s influence on its external environment as either cultural or legal; cultural influence is usually defined as spreading movement-related ideologies (e.g., feminist or antiracist ideals, which future movements import), while legal influence is usually defined as winning precedent on particular legal arguments. Our approach in this Article incorporates a sociolegal perspective into the idea of environmental change, which sees law and culture as mutually influential and overlapping spheres of social life. For example, in evaluating the potential spillover of LGBT legal strategies, we have weighed not only their resonance with existing doctrine but also their cultural meaning and messaging effect. Similarly, we have discussed the numerous cultural effects of social movement litigation, and how those cultural effects can seep into and affect other communities’ possibilities for legal mobilization. Our identification of these cultural effects of litigation outside a litigating movement has opened a fruitful area for further empirical exploration.

CONCLUSION

This Article has identified a common set of characteristics that the polyamorous community today shares with the gay liberationists of the early 1970s who initially pushed for same-sex marriage—suggesting a ripe setting for the diffusion of marriage equality strategies from the LGBT movement to the poly context. Yet in addition, we have suggested that the LGBT movement’s longstanding legal mobilization around issues of legal relationship recognition has also shaped the contemporary landscape for poly activism, in ways that are likely to constrain the cultural resonance of poly marriage.

326 Meyer and Whittier, Social Movement Spillover, at 281.
327 ANDERSEN, OUT OF THE CLOSETS AND INTO THE COURTS, supra note 76.
while simultaneously bolstering the legal resonance of some constitutional arguments for poly marriage. By examining the potential diffusion of strategies between these movements, and how the possibilities for such diffusion are partially contingent on the environmental changes enacted through previous LGBT movement mobilization, this project has forged a path for theoretical development around issues of social movement spillover.

In addition to its theoretical contributions, this Article is also useful for its practical utility. Part III provides the first roadmap of issues, strategies, and challenges that advocates can expect to see in the path toward polyamorous marriage or other legal relationship recognition. Incorporated in our discussion of potential poly strategies is a sensitivity to the interaction between the legal and cultural implications of social movement litigation that is rare in legal scholarship—especially in legal scholarship that aims to have a practical impact, as ours does. For instance, even as we outline several legal arguments that have become acceptable and endorsed by judges, which would be favorable to a poly marriage campaign, we have also identified the potentially culturally problematic aspects of those arguments. Arguments in the post-Baehr same-sex marriage context, which continue to exalt marriage as an intimate expression of identity and as a primary vehicle for family formation, may be strategically effective for winning in court, while simultaneously chafing with those in the poly community who hope to “queer” marriage or think more broadly about their community.

In addition to the typical impact litigation strategies, the history of LGB relationship recognition litigation provides several examples of litigation strategies that may be better suited to non-legal cultural goals. The nonmarital relationship recognition approach may be more effective at reducing stigma against alternative family forms and building ties with allied political movements. The “litigation as protest” approach—advocating for marriage before it is legally viable—may be more effective at pointing out the discriminatory effects of marriage laws and challenging the dominance of marriage as an institution. While these alternative models for legal mobilization might not have been the surest winners in the courtroom (at least initially), it is important to signal the opportunities they might present for poly activists seeking other types of goals.
Thus, our practical roadmap for poly activists is unique in that it does not assume that winning is, or should be, the purpose of poly marriage litigation. As the experience of the LGBT movement suggests, pursuing an approach that is narrowly targeted at legal reform will not always get at the movement’s core motivations for litigating. Our purpose in tracing the multiple models of relationship recognition mobilization in the LGBT context has been to show poly activists how litigation can satisfy a range of movement imperatives, from the formalistic, to the immediate and practical, to the radical.

At this juncture, it is up to poly people have to decide what is at the core of their politics. Is it the affirmation and recognition of poly lifestyles that marriage provides (an identity politics movement)? The freedom to define one’s family and lifestyle without state interference (a liberal rights issue)? The redistribution of social wealth to bridge the economic gap between state-sanctioned couples and others (non-sexual co-parents, extended families, care-giving relationships, elderly companions) (a social justice issue)? In presenting the LGBT movement’s experience as multiple models for legal mobilization, and showing how those models link with various underlying motivations for legal mobilization—our hope is not to direct the course of poly advocacy, but rather to provide additional tools and perspectives for them to use in constructing a nuanced and historically informed mobilization strategy—if they so desire.