Queer Mobilizations

LGBT Activists Confront the Law

EDITED BY

Scott Barclay, Mary Bernstein,

and Anna-Maria Marshall

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Contents

Acknowledgments vii

1 The Challenge of Law: Sexual Orientation, Gender Identity, and Social Movements 1
Mary Bernstein, Anna-Maria Marshall, and Scott Barclay

PART I Social Movement Strategies and the Law

2 Deferral of Legal Tactics: A Global LGBT Social Movement Organization's Perspective 21
Ashley Currier

3 Queer Legal Victories: Intersectionality Revisited 38
Darren Rosenblum

4 Intimate Equality: The Lesbian, Gay, Bisexual, and Transgender Movement's Legal Framing of Sodomy Laws in the *Lawrence v. Texas* Case 52
Nicholas Pedriana

5 Deciding Under the Influence? The "One-Hit Wonders" and Organized-Interest Participation in U.S. Supreme Court Gay Rights Litigation 76
Courtenay W. Daum

6 Parents and Paperwork: Same-Sex Parents, Birth Certificates, and Emergent Legality 103
Susan M. Sterett

PART II Activism, Discourse, and Legal Change

7 The Reform of Sodomy Laws From a World Society Perspective 123
David John Frank, Steven A. Boutcher, and Bayliss Camp

8 Like Sexual Orientation? Like Gender? Transgender Inclusion in Nondiscrimination Ordinances 142
Amy L. Stone

9 Pushing the Envelope: Dillon's Rule and Local Domestic-Partnership Ordinances 158
Charles W. Gossett

mitment to activism, exemplifying the way artistic commemoration acts as an agent for political change.

By studying these documentaries from the standpoint of critical queer studies, we learn that there is no fixed form of justice, that "not forgetting" must take shape in ways that run the gamut from coming out to protest to making documentaries. Mann's play ends with a tableau reminiscent of both the Stonewall Riots and the encounter that opens her drama: we see Sister Boom Boom in City Hall taunting the police, who raise their shields during the White Night Riots—riots that gain compelling resonance in archival footage of *The Times of Harvey Milk*. These dramatic scenes, with their intermixing of confrontation and questioning about forms of retribution, seem to recognize that dramas of social injustice must be played out, as Victor Turner asserts, in the multifaceted acting of everyday life, whether those scenes take place in the theater, the courtroom, the streets, the classroom, or the bedroom. As the Harvey Milk legacy teaches, we all must struggle inside and outside the halls of justice to ensure that trials always impanel a jury of one's queers.

14 The Gay Divorcée

The Case of the Missing Argument

Ellen Ann Andersen

Marriage is the first step on the road to divorce.
—Raoul Felder, celebrity divorce lawyer

ARGUMENTS OVER THE propriety and wisdom of permitting same-sex couples to marry currently occupy a prominent place in the American landscape. The debate has played out in many venues, from courts to legislatures to ballots to books to blogs. No matter what the medium, a core argument advanced by marriage equality advocates has been that without the ability to marry, committed same-sex couples are denied access to a host of legal rights and responsibilities designed to promote familial and economic security. And, indeed, the list of legal rights and responsibilities attendant on marriage is a long one. A Government Accounting Office (GAO) report issued in 2004 itemized 1,142 separate federal benefits, rights, or privileges that depend on marital status. Hundreds of additional rights and responsibilities fall under the auspices of state law. One study of Washington state statutes itemized 423 separate provisions that convey rights or imposing obligations on the basis of marital status (Pederson 2004).

Some of these legislatively accorded rights are relatively trivial or narrowly focused. Under Washington law, for example, various fishing licenses pass automatically and without charge to the surviving spouses of license holders.[1] Others have much broader application. A small sampling of these rights includes the following: married couples may file tax returns jointly, inherit from each other automatically in the absence of a will, share income from governmental programs such as Social Security and Medicare, obtain wrongful-death benefits for a surviving partner, obtain joint insurance policies, and partake of employer-provided benefits such as access to health insurance and pension protections. They are treated as each other's next of kin for purposes of medical decision making, hospital visitation, and burial arrangements. They may take bereavement or sick leave to care for each other or for their children. Importantly, couples can obtain relatively few of these relationship-based rights in any way other than through marriage.[2]

The legal-harms argument can be found everywhere in right-to-marry advocacy. Its centrality is self-evident in litigation, where gay rights litigators such as GLAD

(Gay and Lesbian Advocates and Defenders) and Lambda Legal have taken pains to assemble groups of plaintiffs who have been demonstrably harmed by their inability to marry. In the words of Lambda Legal attorney Susan Sommer:

> The critical role that the client families play is to make real for the court and for the public that this is not just a fight about symbols and theories, that it's about concrete harms that hurt real people. . . . It's also important for us to have plaintiffs with children because the harms to those families are particularly poignant. (Pizer and Sommer 2006)

The eponymous Goodridges in the landmark case *Goodridge v. Department of Public Health* (2003) offer one illustration of the kinds of harms marriage advocates have sought to bring to the attention of courts. They ran into trouble during childbirth. Julie Goodridge had a complicated delivery, resulting in a caesarean section; their daughter was rushed to the neonatal intensive care unit. Even though Hillary Goodridge possessed a health care proxy naming her as the medical decision maker for her partner and their daughter, hospital personnel tried to prevent her from seeing either Julie or their newborn daughter.

The legal-harms argument has also been central to the advocacy of groups operating beyond the judicial arena. The Human Rights Campaign, for example, developed a "Top Ten Reasons for Marriage Equality" list of talking points for marriage activists. The GAO-identified federal rights and benefits of marriage occupy the number one spot, and three other talking points also invoke the legal disabilities faced by same-sex couples.[3] Talking points and persuasive essays authored by other advocacy organizations such as the National Gay and Lesbian Task Force (NGLTF) and Freedom to Marry likewise emphasize the legal rights, benefits, and privileges that are dependent on marital status.

But, for all their emphasis on the legal harms suffered by same-sex couples who cannot marry, advocates have largely ignored one of the most significant and commonly invoked legal consequences of marriage: access to the courts to determine the rights and responsibilities of each spouse after a relationship's dissolution. In a word, divorce. Advocates of marriage equality are all but silent on the subject, and, when they do discuss it, it is largely in a defensive posture as they seek to rebut opposition claims that permitting same-sex couples to marry will increase divorce rates.

It may seem unremarkable to you that proponents of marriage equality ignore or minimize the issue of divorce. After all, who argues that people should have the right to marry so that they can get divorced? Divorce is, after all, the symbolic opposite of marriage, marking its failure, with all the attendant social stigma such failure implies. My aim in this chapter, however, is to convince you that the deployment (or lack thereof) of divorce talk in the struggle over same-sex marriage is actually quite notable because it illustrates the constraints social movements face when they frame their arguments for sociolegal change. More specifically, the deployment of divorce talk speaks to the relationship between legal and cultural frames and the limits of legal arguments as a tool for advancing social movement aims.

I should note here that my interest is not in probing the capacity of the courts to effect progressive change, as important as that question is (see Andersen 2005; Horowitz 1977; McCann 1994; Rosenberg 1991; Scheingold 2004 [1974]). Rather I am interested in the *value of legal arguments as tools for effecting change.*

I proceed in several steps. I begin by briefly reviewing the social movement literature on frames and framing process and by discussing the relationship between legal and cultural frames. I turn then to an examination of the legal frames that construct divorce, showing how divorce is treated as a benefit of marriage and how same-sex couples—and their children—are harmed by their inability to employ divorce law when relationships end. Next, I examine the cultural frames that construct divorce, showing how divorce is treated as a threat to marriage and how opponents of same-sex marriage mobilize that frame to attack the concept of marriage equality. My core argument is that, while legal arguments can be a valuable resource for social movements, legal arguments that diverge too radically from prevailing cultural understandings are ineffective and perhaps even dangerous for movements to employ.

Cultural and Legal Frames

A frame, as Erving Goffman defined the term, is composed of the implicit rules that, by defining the situation, shape the meanings generated by that situation. It is an interpretive schematic permitting people to "to locate, perceive, identify and label" aspects of an event in ways that make them meaningful (Goffman 1974, 21).

In recent years, scholars have made extensive use of frames to explain the progress and outcomes of social movement claims. They have shown that the amalgam of preexisting images, beliefs, interpretive schemas, and values held by a society, that is, a society's *cultural* frames,[4] sets the parameters for the kinds of claims social movements can sensibly make. To be successful, movements must package their claims in a manner that resonates with extant cultural frames. David Snow and his colleagues (Snow et al. 1986) refer to the packaging of claims as the process of frame alignment. The contours of a society's cultural frames necessarily shape the kinds of claims that movements can make persuasively (Benford and Snow 2000; Jasper 1997; Swidler 1995). Mayer Zald (1996), for example, discusses how the feminist claim of a woman's right to her own body makes sense only in a cultural context that embodies notions of individual autonomy and citizen equality.

A central problem facing social movements as they engage in the frame alignment process is that they are not the only actors on the field. As Robert Benford and David Snow have noted (2000, 626), the very existence of a social movement indicates a dispute within society over some aspect of reality. Those who mobilize in opposition to a movement also engage in frame alignment processes, this time with the specific goal of undermining the original movement's claims. Charlotte Ryan (1991) refers to these interactions as framing contests.

I have argued elsewhere that *legal* frames exist alongside cultural frames and may offer movements an alternative touchstone for persuasive claims-making (Andersen 2005). Legal frames are like cultural frames in that they both shape the meanings generated by a particular act or situation. But the meanings generated by legal and cultural frames may well differ because the categories established by the amalgam of existing constitutional, statutory, administrative, common, and case law (a.k.a. "the law") may differ from the categories established by the amalgam of existing images, beliefs, interpretive schemas, and values (a.k.a. "culture"). The case of Colorado's Amendment 2 is illustrative of the different meanings that may be generated by cultural and legal frames, even when the conversation in both instances is about the "same" thing, namely civil rights.

In 1992, Colorado voters approved an amendment to their state constitution that repealed all existing gay rights laws and policies in the state and barred any government entity from enacting such laws or policies in the future.[5] Gay rights advocates immediately challenged the amendment in court, and the case made its way up to the U.S. Supreme Court, which struck the law down, finding that it violated the equal protection clause of the Fourteenth Amendment. The difference between the electoral and the judicial outcomes had much to do with the framing of Amendment 2's meaning. During the campaign, opponents of Amendment 2 argued that existing antidiscrimination laws that provided protection from discrimination based on sexual orientation conferred "special rights" on homosexuals on the basis of their "lifestyle choice," as opposed to giving rights to a "legitimate minority" such as African Americans. Phrases such as "protected class status" and "quota preferences" were tossed around liberally, invoking popular confusion about whether existing antidiscrimination laws require preferential hiring and promotion.

The crux of pro-Amendment 2 arguments was that some groups in society receive rights that are unavailable to others and are therefore "special." Jane Schacter (1994) refers to this framing as the "discourse of equivalents." This approach fell on fertile ground because it tapped into antipathy toward civil rights laws, an antipathy largely based on the popular conflation of laws that prohibit discrimination and laws that mandate affirmative action in the context of race.[6] Amendment 2's opponents found themselves unable to defuse the cultural

punch of the "special rights" frame within the confines of thirty-second television and radio spots.

When the forum switched from the ballot box to the courtroom, however, much of the persuasive power of the special rights framing dissipated. Although phrases like "special rights" and "protected class status" sound as though they are legal terms, they are legally meaningless—the legal equivalent of psychobabble. Instead, the courts variously examined Amendment 2 in light of equal protection and fundamental rights jurisprudence, requiring Colorado to articulate a rational basis—and at points a compelling purpose—for the law. Moreover, unlike the citizenry, the courts were not confused about the distinction between civil rights protections and affirmative action requirements. Civil rights protections have been used to stop state-sanctioned discrimination against disfavored groups. Affirmative action has been used to ameliorate the effects of past discrimination. From a legal perspective, the concepts are distinct, and the former does not imply the latter. Turning to the courts, then, permitted gay rights advocates to use the legal frames surrounding civil rights law as a way of trumping cultural frames surrounding civil rights law.

The strategy employed by gay rights advocates in the Colorado case is typical. Social change movements commonly turn to legal frames in an attempt to escape, or at least loosen, the straitjacket of cultural frames. Their success in doing so, however, depends on the relationship between cultural and legal frames. The two do not exist in isolation from each other, nor is there a clear hierarchy among them. Judges do not divest themselves of their cultural sensibilities when they don their robes, nor does the existence of those cultural sensibilities make legal doctrine irrelevant. Legal and cultural frames are mutually constitutive: cultural symbols and discourses influence legal understandings just as legal discourses and symbols influence cultural understandings (Andersen 2005, 13–14).

The mutually constitutive nature of legal and cultural frames means that social movements contemplating a turn to the courts must engage in a tricky calculus. When legal and cultural frames overlap completely, the invocation of law offers no comparative advantage to social movements seeking to destabilize cultural frames. But, when legal frames and cultural frames diverge too much, legal arguments may be either ineffective or unwise. Legal decisions are not immune to electoral and legislative backlash directed at reversing or undercutting their impact, a point amply illustrated by the passage of state-level constitutional bans on same-sex marriage in response to judicial rulings supporting marriage equality.

Legal arguments "work" for social movements only when there is a significant but incomplete overlap between legal and cultural frames. At those times, as with the Amendment 2 example, movements may be able to invoke useful legal frames that resonate sufficiently strongly with cultural frames to bring both judges and

the general public along. The tricky part, of course, is figuring out where the "sweet spot" of frame overlap is and aligning one's arguments so as to hit that sweet spot. This task is made even more difficult by the ongoing counterframing efforts of opposing groups.

The Legal Context of Divorce

No one marries in order to get divorced, but many couples eventually come to the conclusion that they are unable or unwilling to continue their marriages. Accurate statistics are hard to come by for a variety of reasons, but one good guess is that 41 percent of first marriages in the United States end within the first fifteen years (Census Bureau 2002, 18).[7] The legal mechanism of divorce is designed to ensure that married couples dissolve their relationship in a manner that is reasonably equitable for both partners and in the best interest of any children.[8] It is accomplished through what is known as a separation agreement, which details the relative rights, roles, and responsibilities of each of the divorcing spouses vis-à-vis each other, third parties, and any children.

The great majority of separation agreements are arrived at through what Robert Mnookin and Tony Kornhouser (1979) call private bargaining, where the spouses and their lawyers come to a mutually satisfactory solution to the many issues raised by the dissolution of the relationship and turn to the court only to ratify the agreement. This bargaining is influenced by the prevailing statutory schemes that surround divorce in a given state. When couples are unable to reach a mutually acceptable agreement, the courts step in and set the terms of the divorce in matters ranging from child custody, visitation, and support, to property division, to allocation of other assets and debts, to spousal support, including continuation of spousal health care coverage.

Divorce laws vary widely from state to state, and so it is best to be cautious in summarizing them. That said, state laws can generally be divided into two camps for the purposes of determining what counts as a marital asset and three camps for the purposes of determining how those assets should be divided among the parties.

In the nine "community property" states, all assets accumulated by the couple during the course of the marriage are assumed to be jointly owned in the absence of specific evidence to the contrary and therefore subject to division during divorce.[9] Assets accumulated prior to the marriage are considered to be individually owned and not subject to division. In the forty-one "separate property" states, assets titled solely in one person's name are generally considered to be individual assets rather than marital assets no matter when they were acquired. However, individual assets are sometimes subject to division even if they were acquired

prior to the marriage. The marital asset pool subject to division is thus heavily dependent on the state in which a divorcing couple resides.

If states differ in how marital assets are determined, they also differ with respect to the formula for distributing those assets between the parties. In three states, judges are required to divide marital assets equally between the divorcing spouses.[10] In eighteen states, equal division is the default presumption, but judges may deviate from a fifty-fifty split when sufficient equitable considerations warrant it.[11] In the remaining twenty-nine states, judges are given significant discretion to determine how to divide assets equitably. All states list specific factors that judges are to take into account when dividing assets. These factors commonly include the length of the marriage and the standard of living established within it, the relative earning powers, age, and health of the divorcing spouses, the standard of living established during the marriage, and the tangible and intangible contributions of each spouse to the accumulation of marital assets.

While states thus vary widely in the rules they employ to calculate and divide marital assets, all states share the same general goal: to ensure a *normatively just* division of assets that takes into account the myriad ways that each individual spouse contributed to the generation of marital assets, as well as the likely economic impact of the divorce on each spouse.

Generalizing about custody, visitation, and child support laws is as tricky as generalizing about asset allocation procedures, because every state has its own set of laws setting out the appropriate legal standards mediating outcomes in parenting cases. Moreover, because neither parent has a greater right to the care and custody of the children, judges have wide discretion in deciding how to allocate physical custody.[12] The emerging default is to award custody jointly, but judges often divide custodial time unevenly between parents and may even choose to grant one parent sole physical custody. Parents who do not receive physical custody have a fundamental constitutional right to visitation with their children, barring a showing of parental unfitness.

As with issues of asset allocation, judges across all states do share a common goal in custody, visitation, and support determinations, notwithstanding the variety of approaches to achieving that goal: to further the best interests of the child. The idea is that judges are supposed to take into consideration all the relevant circumstances of the particular case at hand and decide that case in the manner best calculated to secure the proper care, attention, and education for the children involved.

There have been many critiques of how divorce laws work in the United States. A number of scholars, for example, have argued that the current system systematically disadvantages women with children (see, e.g., Fineman 1991; Glendon 1987). Others have conversely lamented that the current system disadvantages fathers

with children (Adams and Coltrane 2007; Coltrane and Hickman 1992). It takes nothing away from either of those claims to point out that the only system worse than getting divorced is breaking up *without* the ability to get divorced. Same-sex couples who decide to dissolve their relationships are generally not entitled to an equitable judicial determination of their rights and responsibilities under a state's divorce statutes, unless they live in one of the few states where they can marry or enter into a quasi-parallel relationship such as a civil union (Weinrib 2002, 228). Instead, they must turn to what Susan Hassan (2005) calls "piecemeal ways to untangle their lives." This is a difficult process, even for the most well-intentioned of couples. And, unfortunately, breaking up often brings out the worst in people, a phenomenon that is particularly problematic when there is a significant legal or economic asymmetry in the relationship: if only one of them has a legally recognized relationship to their children, for example, or if one partner has put his or her career on hold to raise the children, or one partner has put the other through school, or one partner holds most of the couple's assets in sole title. Under such circumstances, the "weaker" partner generally has little capacity to secure even a remotely equitable settlement in the absence of formal divorce. We turn now to an exploration of the problems of dissolving relationships without benefit of divorce.

Dissolution Without Divorce: On the Question of Property Division

While states have developed detailed statutory schemes for regulating property division at divorce, the rules that govern the dissolution of nonmarital relationships are considerably more ad hoc, varying widely across states and even across jurisdictions within a state. Ann Laquer Estin places the states on a spectrum (2001, 1383), and her categorization is useful here.[13]

Washington, Oregon, and Nevada anchor one end of the spectrum, taking the most equitable approach to allocating property in nonmarital dissolution proceedings. The three states will allocate property *as if* a divorce were occurring so long as the couple's relationship is sufficiently marriage-like.[14] On the other end of Estin's spectrum lie Illinois and Louisiana, whose courts have refused to enforce even written relationship contracts between unmarried couples, holding that to do so would contravene public policy favoring marriage and disfavoring cohabitation.[15]

The rest of the states fall somewhere between the two extremes. All enforce at least some written cohabitation contracts so long as the contract is based on something other than the provision of sexual services.[16] Courts in many states have also enforced oral or implied contracts, although the record here is spottier. In Texas and Minnesota, courts are statutorily prohibited from enforcing them.[17] Courts in at least seven other states have consistently refused to enforce them even though they are not statutorily prohibited from doing so.[18] Courts in twenty-two states have a clear record of enforcing oral contracts, and, of these, the few courts that have considered oral contracts in the context of same-sex relationship dissolutions have upheld them, as well.[19] The record in the remaining nineteen states is mixed or unknown.[20]

One obvious problem with the system as it stands is that the equitable remedies available to the "weaker" partner in nonmarital relationships vary enormously. In several states, couples without the foresight or financial wherewithal to draft written relationship contracts will discover that cohabitation creates no legal obligations regardless of the original intent or verbal agreement of the partners. In these instances, the dependent partner has no capacity to turn to the courts to secure even a remotely equitable division of property and must rely on the good will of the partner in the more secure financial position. Sadly, breaking up often brings out the worst in people. Divorce laws exist in part to ameliorate this tendency and to mitigate the financial losses suffered by the spouse less able to absorb them.

In the states where courts at least in principle recognize implied contracts between cohabitating partners, only Washington, Oregon, and Nevada presume their existence. In all other states, the burden of proof is on the party seeking the assistance of the court to prove that promises of mutual care and support existed. The default presumption is that the individual members of the couple remain independent economic units who may have pooled their resources for purposes of convenience and mutual gain but who did not intend to assume obligations of mutual care and support. Proving the contrary can be very difficult, especially when the respondent has every incentive to argue that an implied contract did not exist.[21] The default presumption about married couples, in contrast, is that they have become an interdependent economic unit; divorce law attempts to divide assets and impose support obligations in a manner that is fair and reasonable to both parties and is solicitous of the need of the more economically dependent of the two.

It is also worth noting that there are limits to the equitable remedies courts can order in the absence of a written contract, even in "good" states such as Washington, Oregon, and Nevada. For instance, judges are not permitted to award alimony to unmarried couples in the absence of a written agreement authorizing it, even though both states permit alimony awards in divorce proceedings.[22]

Couples who have drafted relationship contracts can avoid some of the problems of dissolution without divorce, but contracts, while useful, are no panacea. Like premarital agreements, they require that couples anticipate the possibility

of relationship failure at a time when the relationship is strong, something that most couples, no matter what their sexuality, appear unwilling to do (Bowman 2004). They require a moderately high degree of sophistication about the legal consequences of cohabitation. They cost hundreds and sometimes thousands of dollars to draft. They may be radically incomplete, failing to anticipate changes in the couple's assets or economic roles after the arrival of children. They may be drafted sloppily and invalidated by the courts.

An even more significant problem, however, at least from the perspective of a dependent partner, is that contractual agreements are not subject to substantive fairness analysis in the way that separation agreements are. Suzanne Goldberg captures this difference between a contract law-based approach and a divorce law-based approach:

> At best the law treats a same-sex breakup as a business deal between two people about property. It's highly dependent on whatever separation agreement the couple may have. It's done without the complex background rules of divorce, which take into account the context of sacrifices and decisions two people make as a family unit. Divorce rules have evolved to ensure the partner in the weaker financial position is not left penniless. But when gay and lesbian couples separate, it boils down to who holds the purse strings. (quoted in Dahir 2001)

Relationship agreements do not even receive the same level of substantive fairness analysis as antenuptial (also known as premarital) agreements. When courts examine the latter, they generally look to whether the agreement is substantially fair at two distinct points at time: the time of drafting and the time of enforcement. If underlying circumstances have changed dramatically in the interim, judges may set aside certain provisions. Circumstances likely to trigger a court's concern about the substantive fairness of the agreement include unanticipated changes in the economic standing between the spouses (e.g., when one spouse leaves the workforce to care for children). The Minnesota Supreme Court's opinion in *McKee-Johnson v. Johnson* (1989) encapsulates the principle of time-of-enforcement review. Said the court, antenuptial agreements are not valid "if the premises upon which they were originally based have so drastically changed that enforcement would not comport with the reasonable expectation of the parties at the inception" and if enforcement of the agreement would therefore be "oppressive and unconscionable." Courts may also refuse to honor antenuptial agreements waiving spousal support if doing so would cause one party to become eligible for public assistance or otherwise cause substantial financial hardship to one party.

When courts examine cohabitation contracts, in contrast, they generally examine whether the contract is substantively fair at only one point in time: the time of the contract's creation. Changes in the interim are irrelevant. Even then, contracts do not need to be fair, except in the most rudimentary sense: there must

be some consideration for both partners, and the contract must not be marred by fraud, misrepresentation, or other forms of dishonesty.

The breakup of Jennifer and Kathy Levinson illustrates the limitations of utilizing contracts to secure relationship rights. The California couple drafted a relationship contract in 1989 that articulated the financial responsibilities of each partner should the relationship end. At the time, the women were both working full time, had similar incomes, and had no children. By the time the couple split, in 2001, much had changed. The couple had two children. Jennifer had given up her job to run the household and raise the children. And Kathy had struck it rich in the dot-com boom. When she retired as the head of E*TRADE in 2000, her estimated net worth approached $40 million (Dahir 2001).

Had Kathy and Jennifer been able to marry or enter into a registered domestic partnership, Jennifer would have been entitled to half the assets acquired during the course of their legally recognized relationship.[23] Had the two drafted an antenuptial contract rather than a cohabitation contract, a judge might well have set aside its financial provisions given the substantial and unforeseen changes in the couple's circumstances. Under the terms of the cohabitation agreement, however, Jennifer had no claim to the lion's share of assets the couple had accumulated in the years between the agreement and the split.

In sum, to the extent that same-sex couples are precluded from marrying or entering into a quasi-parallel legal relationship, they cannot access a legal forum that married couples take for granted: divorce court. This inability to access divorce courts to resolve disputed claims arising from a relationship's dissolution causes precisely the kind of harms that modern divorce law attempts to avoid, allowing one partner to walk away substantially enriched from the relationship and leaving the other financially ruined. The extent of the damage depends on a number of factors, including the actions of the partners themselves, the nature of the economic relationship between them, and the extent to which alternative legal mechanisms such as contract law are available. But, even in the most progressive states vis-à-vis the recognition of nonmarital relationships, same-sex couples are systematically disadvantaged because of their inability to marry.

Dissolution Without Divorce: On the Question of Custody and Visitation

As a matter of long-standing law, a child born during a marriage is presumed to be the child of the mother's husband, whether or not he is the biological father. If the couple subsequently divorces, the ex-husband stands on equal legal footing with the child's mother with respect to all of the legal rights and responsibilities of parenthood, including custody, visitation, and child support. This presump-

tion of legal fatherhood is so strong that even a DNA test establishing the impossibility of an (ex)husband's biological fatherhood does not necessarily release a man from the legal responsibility for child support or remove from him rights to custody and visitation.[24] As Rosato (2006, 83) has noted, justifications for the presumption have included a desire to promote family stability, give children two legal parents, and keep children off welfare.

States that permit same-sex couples to marry or to enter into quasi-parallel legal relationships have universally extended the parentage presumption to encompass the nonbiological parent of children born into the relationship.[25] These states also permit same-sex couples to adopt jointly so that both parents can establish a legal relationship to the child. Couples who subsequently divorce must agree to an equitable arrangement for visitation, custody, and child support or have one imposed on them by the courts.

In the absence of the parentage presumption imposed by marriage or its functional equivalent, same-sex couples who break up often face an entirely different set of legal presumptions when it comes to the care and custody of children born into the relationship. Same-sex couples form families in many different ways, but a common marker of these families is legal asymmetry with respect to children because only one parent has a legally recognized relationship with a given child. Female couples seeking to have children have two basic options: pregnancy or adoption. Male couples may choose adoption or surrogacy. In the context of pregnancy or surrogacy, only one parent will have a biological connection to the child.[26] In the context of adoption, generally one member of the couple formally adopts the child.[27]

The nonbiological/nonadoptive parent (co-parent, for short) may or may not be able to subsequently adopt the child, depending on the state in which the family resides. Eleven states plus the District of Columbia currently permit both members of a same-sex couple to establish parental ties as a matter of statute or authoritative judicial interpretation.[28] (This number includes the states that also permit same-sex couples to marry or form quasi-parallel legal relationships.) Individual judges have granted second-parent adoptions in at least sixteen other states.[29] But such adoptions are essentially prohibited as a matter of statute in four states[30] and have been ruled impermissible by appellate courts in another four.[31] Courts in other states have yet to issue rulings one way or the other.

Second-parent adoptions operate as a sort of surrogate for marriage in the context of relationship dissolution. Because both members of the couple have legal relationships to the child, courts will impose visitation, custody, and child support arrangements on those parents who are unable to reach and maintain a private agreement. But, when only one parent has a legally recognized relationship to the child, the traditional rules governing the care and custody of children break down. Parents have a constitutional right to the care and custody of their

children.[32] Third parties do not. Parents have a legal responsibility to financially support their children. Third parties do not.

The only recourse co-parents have if their ex-partners refuse to allow them to share custody or even visit with children they may have raised from birth is to convince a court that they should be accorded "parental status" notwithstanding the absence of legal ties. Their lawyers have advanced a number of different legal theories to support this claim, including psychological, de facto, and equitable parenthood. Lawyers have also raised in loco parentis and equitable estoppel arguments. Each of these legal theories has unique features, but the commonality among them is the idea that if it walks like a duck, looks like a duck, and quacks like a duck, it's probably a duck. Likewise, if it *doesn't* walk/look/quack like a duck, it's probably not a duck. In other words, those who perform the functional role of parents ought to be treated by the courts as parents, because it is in the best interests of the child to do so.

Judicial reactions to these arguments have led to a patchwork quilt of outcomes (Rosato 2006, 76; see generally Miller 2005; Sherman 2005). Courts in Arizona, Florida, Illinois, New York, Ohio, Tennessee, and Utah have generally treated co-parents as legal strangers to their children, permitting the legally recognized parent to shut their ex-partners out.[33] Courts in a few other states, such as Missouri and Wisconsin, have granted co-parents visitation but not custody.[34] Courts in still other states, such as California, Colorado, Pennsylvania, and New Mexico, have held that co-parents have standing to pursue joint custody.[35] The Massachusetts Supreme Judicial Court has established *both* that co-parents without legal ties to children may receive visitation over the objections of their ex-partners *and* that co-parents without legal ties have no duty to support their children, even when they intentionally and purposefully work to bring a child into the world.[36]

In sum, the absence of the parentage presumption provided by marriage can create chaos if same-sex couples split up: chaos felt most acutely by the children but also by co-parents who find themselves shut out of parenting roles and by legally recognized parents who may be unable to secure child support from their ex-partners. Second-parent adoptions can immunize couples from these potential harms, but they are available only in scattered states. Moreover, they can be expensive, costing several thousand dollars to procure. Written parenting agreements are a secondary fallback option, but these too can be expensive and may not be enforceable. Litigation to establish parental rights and obligations in the absence of the parentage presumption is a third possibility in some states, but the costs, both financial and emotional, are tremendous and the outcome uncertain. These are precisely the sort of outcomes the parentage presumption is intended to avoid. And marriage is the mechanism through which the parentage presumption is vested.

Dissolution With Divorce: On the Problems With DOMA

It is worth noting that even in those few states that permit same-sex couples to marry or enter into quasi-parallel relationships, same-sex couples are legally disadvantaged when it comes to divorce. The culprit in this instance is the Defense of Marriage Act (DOMA). Passed in 1996, DOMA limits marriage to different-sex couples for all federal purposes.

Divorces proceed in state court, but they are intertwined with federal regulations. Federal law permits heterosexual couples who are divorcing to sell or transfer assets (such as title to a house) without incurring taxes but does not extend the same courtesy to same-sex couples, a disadvantage that can cost same-sex couples tens of thousands of dollars in additional taxes. Alimony is also treated differently. Payments are tax deductible only when they arise from the dissolution of a heterosexual marriage. Alimony income is taxed at different rates depending on whether the person receiving it left a same- or different-sex marriage.

DOMA also interferes with a couple's ability to divide what is often their largest asset: their retirement plans. Most retirement savings—IRAs, 401k's, 403b's, qualified pension plans, and the like—are regulated by the Employee Retirement and Income Security Act (ERISA). Under ERISA, these savings can be divided between divorcing heterosexual spouses without incurring a tax penalty.[37] Same-sex spouses face a 10 percent tax penalty for early withdrawal and lose the tax-deferred status of all the money that is reallocated. Same-sex couples with sufficient nonretirement assets may be able to trade off to avoid this hit (e.g., Mary gives Mona the house but keeps her retirement fund intact), but, for many couples, retirement savings are the sole form of savings accumulated.

DOMA harms same-sex couples in still other ways. Heterosexual couples can craft separation agreements that require one ex-spouse to continue coverage of the other in an employer-sponsored health care policy. Same-sex couples cannot. Heterosexual couples married for ten or more years prior to divorce are eligible to receive survivorship benefits from Social Security when their ex-spouse dies. Same-sex couples are not.[38]

DOMA can also cause harm in the context of children. *Miller-Jenkins v. Miller-Jenkins* illustrates this harm vividly. Lisa and Janet Miller-Jenkins entered into a civil union in Vermont in 2000, although they were then living in Virginia. In 2002, Lisa gave birth to their daughter in Virginia, and the couple relocated to Vermont. About a year after the couple moved, the relationship ended. Lisa moved back to Virginia with their daughter and petitioned for a dissolution of the civil union in Vermont family court. The court dissolved the union, awarding temporary custody to Lisa and giving Janet visitation rights.

Shortly thereafter, however, Lisa filed a petition in the Virginia legal system seeking a declaration that she was their daughter's only legal parent.[39] Virginia law limits marriage to different-sex couples and prohibits any legal contracts or partnerships that bestow marital rights on same-sex couples.[40] Relying on this law and on DOMA, which permits states to deny recognition of same-sex marriages and civil unions contracted in other states, a Virginia trial court declared Lisa to be their daughter's only legal parent and denied Janet visitation.

The situation then devolved into a series of competing court rulings. Lisa filed a motion with the Vermont court asking it to recognize the Virginia court ruling under the full faith and credit clause of the U.S. Constitution. The Vermont court refused. When Lisa continued to deny Janet visitation, the Vermont court held her in contempt. The Vermont Supreme Court upheld the lower court's ruling, holding that DOMA did not permit Virginia to ignore Vermont's custody determination and did not require Vermont to bow to Virginia's determination. Janet then filed an appeal of the Virginia lower court's decision, arguing that Virginia was required to uphold Vermont's custody determination under a federal law known as the Parental Kidnapping Prevention Act.[41] In November 2006, the Virginia Appeals Court agreed that the Vermont courts properly had jurisdiction in the case, vacating the lower court's ruling (*Miller-Jenkins v. Miller-Jenkins* 2006). The Virginia Supreme Court subsequently declined Lisa's appeal, as did the U.S. Supreme Court, ending the case.

Although Janet's access to her child was ultimately upheld by the courts of both Vermont and Virginia, the case took more than three years to work its way through two court systems, years in which Janet had little contact with her daughter. While *Miller-Jenkins v. Miller-Jenkins* is the first DOMA-based custody dispute to work its way through the courts, it will not be the last time a relationship ends badly and one parent attempts to use the law to shut the other out.

The Case of the Missing Argument

As the proceeding discussion has illustrated, same-sex couples—and their children—are seriously harmed by their inability to deploy divorce law to mitigate the financial and familial damage caused as they disentangle their lives. The American Law Institute (ALI) has recognized the severity of the problems facing same-sex and other unmarried couples who seek to dissolve their relationships. In 2002, it published the *Principles of Family Dissolution*, the product of a decade-long project to offer a unified vision for how states should approach the problems arising from relationship dissolutions. Among the *Principles'* recommendations are that states should accord unmarried couples in committed relationships the

same rights as married couples with respect to property distribution, spousal support, and the care and custody of children.[42]

The ALI is an organization of some 1,500 legal scholars and practitioners whose work in drafting model laws has influenced the development of many different legal areas. Its publication of the *Principles* indicates widespread recognition within the legal community that the ability to divorce is a valuable legal consequence of marriage. From this perspective, the "problem" of divorce is not that it occurs too frequently but that only married people have access to it.

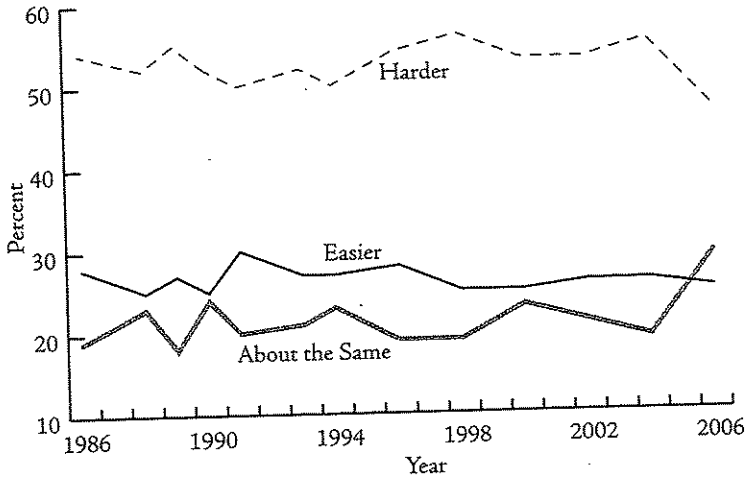
Yet, notwithstanding widespread legal recognition of the divorce problem, proponents of marriage equality are all but silent on the subject as they press their arguments for marriage reform. Why? Part of the answer has to do with the legal requirements of standing. As a rule, in order to obtain standing to challenge the legality of a law, would-be plaintiffs must show that they have suffered an actual or threatened injury large enough to give them a real and personal stake in the outcome. Couples who have been harmed because of their inability to divorce (that is, who have already broken up) simply do not have standing in a case seeking the right to marry (that is, the right to bind themselves together in a web of legal rights and responsibilities). However, the fact that the divorce problem cannot be embodied by the lived experiences of the actual plaintiffs does not preclude it from being raised during the course of a lawsuit. To the extent that same-sex couples mirror different-sex couples, some significant proportion will eventually split up, after all, and so face a threatened legal injury. Amici curiae also commonly raise legal issues that are not mentioned by the parties themselves.

The divorce problem could thus easily be raised in right-to-marry cases. And it could certainly be raised in advocacy materials aimed at legislative and popular audiences, such as the Human Rights Campaign's "Top Ten Reasons for Marriage Equality" list of talking points for marriage activists. It is not, however, because the cultural frames surrounding divorce diverge quite radically from the legal frames surrounding divorce. Raising the issue of divorce in such a circumstance would be akin to waving a red flag at a bull, because it would provide opponents with an opportunity to invoke cultural frames as a way of delegitimizing legal claims.

The Cultural Context of Divorce

The evolving cultural meaning of divorce in the United States has been contemplated by a broad array of scholars, pundits, pollsters, and activists (e.g., Basch 1999; Hackstaff 1999; Popenoe 1996; Whitehead 1997). My intent here is not to undertake a comprehensive examination of the cultural frames shaping the symbolic meaning of divorce. Instead, my more modest goal is to illuminate a central paradox in contemporary cultural understandings of divorce: its dual construc-

FIGURE 14.1
Should Divorce in This Country Be Easier or Harder?



tion as a morally acceptable individual choice and a pathological behavior that endangers children, the nuclear family, and perhaps even society itself.

Survey data illustrate this complicated cultural reaction to divorce. It is clear that Americans see divorce as an acceptable and sometimes preferable option. For example, two-thirds (67 percent) of adults surveyed in a 2006 Gallup Poll agreed that divorce was "morally acceptable."[43] A 2007 Pew Research Center survey similarly found that 58 percent of adults agreed with the following statement: divorce is painful but preferable to maintaining an unhappy marriage. A much lower percentage (38 percent) chose the alternate option: divorce should be avoided except in an extreme situation. The Pew survey respondents agreed by even more lopsided margins (67 percent to 19) that children are better off if parents who are very unhappy with each other get divorced rather than stay married.[44]

At the same time, Americans are clearly concerned about the prevalence of divorce. The General Social Survey has asked the following question periodically since 1974: "Should divorce in this country be easier or more difficult?" In 2006, 47 percent of respondents opted for "more difficult," while 25 percent chose "easier." An additional 29 percent stepped outside the format of the question to volunteer the response that divorce should remain about the same in terms of its difficulty. This ratio of responses has remained roughly stable over the past two decades (see Figure 14.1).[45]

A 1999 survey by the Pew Research Center revealed similar concerns about divorce. Respondents were read a list of "some changes that have taken place

over the last 100 years" and asked to say whether "each one has been a change for the better, a change for the worse, or hasn't made much difference." Fifty-three percent indicated that increased acceptance of divorce was a change for the worse, while only 30 percent saw it as a change for the better.[46]

Contemporary concerns about divorce appear to stem from three premises: that lifelong marriage is both morally desirable and a core societal institution; that divorce is the antithesis of marriage, marking its failure; and that divorce harms children. The first two are long-standing cultural beliefs; the third a more recent phenomenon that draws on social science data indicating that children often experience long-term negative effects when their parents divorce, including increased rates of poverty, the loss or diminution of ties with one parent (usually the father), and an increased likelihood of psychological problems (see, e.g., Blankenhorn 1995; Popenoe 1996; Wallerstein, Lewis, and Blakeslee 2000; Whitehead 1997).

Whether or not these premises are correct is irrelevant. They are central to contemporary cultural conversations about marriage and divorce. Michele Adams and Scott Coltrane (2007) document this centrality in their study of media framing of divorce policy in recent years. They uncover the presence of three distinctive media frames. The first, which they title the *divorce reform* frame, discusses divorce in the context of making it easier or better for the participants, meaning divorcing couples and their children. The implicit assumption is that "access to divorce itself is good or at least preferable to not having such access" (26). This frame was predominant from the late 1960s through 1995 but was then supplanted by two other frames. The transitional *divorce repeal* frame casts divorce as a bad and/or morally evil institution, with the implication that it should be made more difficult to obtain, if not eliminated. The *marriage reform* frame incorporates the divorce repeal frame and adds a solution: "strengthening" marriage through government-sponsored programs offering premarital counseling, marriage education classes, and so on. The marriage reform frame became the predominant frame guiding discussions of divorce policy at the turn of the century, paralleling the Bush administration's efforts to promote two-parent, married, heterosexual families (26–28).

In this cultural context, the danger of linking the need for access to divorce to arguments for the right to marry is illustrated by the eagerness of those who oppose marriage equality to discuss the two concepts in the same breath. A significant strand of oppositional rhetoric expressly links same-sex marriage and divorce. This rhetorical strategy comes in two flavors.

The first is that permitting same-sex couples to marry will undermine marital stability by increasing divorce rates among heterosexuals. Stanley Kurtz is generally considered to be the standardbearer for this proposition. In a series of articles

published in the *Weekly Standard* and the *National Review Online*, Kurtz drew on emerging data from the Netherlands, Denmark, Norway, and Sweden to argue that permitting same-sex couples to marry reinforces and accelerates the delinking of marriage and procreation because heterosexual couples in those nations are now less likely to marry and quicker to divorce, even when children are present (Kurtz 2004a–d). This, he argues, is particularly harmful to children but also damaging to familial and social stability in general (see also Fagan and Smith 2004).

The second flavor is that same-sex couples who marry will be much more likely to divorce than their heterosexual counterparts, an outcome that will also harm children, family, and social stability. Arguments about the perils of same-sex divorce appear in many different contexts. For example, opponents of marriage equality regularly file amicus briefs in right-to-marry cases that (mis)use social science data to claim that lesbians and gay men are inherently promiscuous people incapable of sustaining long-term relationships and thus likely to divorce at high rates.[47] Maggie Gallagher and Joshua Baker (2004) have argued that same-sex couples in Sweden divorce at rates far in excess of those of different-sex couples, as has Stanley Kurtz (2004a).[48] Most notoriously, the Reverend Louis P. Sheldon of the Traditional Values Coalition jumped all over Hillary and Julie Goodridge's announcement that they were separating after two years of marriage (and nineteen years as a couple prior to marrying). Here is what Sheldon had to say:

> It comes as no surprise to me that the two lesbians who were at the center of the gay marriage controversy in Massachusetts have now separated after only two years. Homosexual relationships are notoriously unstable—and many male homosexual activists openly admit they don't want monogamous marriages. . . .
>
> The separation of Julie and Hillary Goodridge is tragic not only for their daughter, but for our entire culture, which has been undermined by their successful lobbying efforts to have homosexual marriage legalized in Massachusetts. They have clearly shown just how little they value the institution of marriage and provide a chilling look into what our nation faces if homosexual marriage is legalized elsewhere.
>
> How many two-year-old homosexual marriage break ups will clog our courts and damage children who are caught in the crossfire of warring gay men and women who cannot remain faithful to each other? The institution of marriage is already fragile in America; it is likely that there will be an epidemic of homosexual divorces if widely sanctioned and children will be the primary victims of this dangerous social experiment. (Traditional Values Coalition)

The irony here is that from a legal perspective, the possibility that same-sex couples may split up is an argument *for* permitting them to marry rather than an argument *against* it, if only to give them access to the mechanism of divorce.

From a cultural perspective, however, the prospect that a couple may split up is an argument for preventing them from marrying in the first place. Divorce, from this perspective, symbolizes individual failure and societal degeneration.

As a result, to the extent that proponents of marriage equality have reacted to the divorce framing of their opponents, they have done so from a defensive posture. Several scholars, for example, have taken on Kurtz's analysis of Scandinavian divorce statistics, arguing that heterosexual divorce rates have declined or remained stable in the aftermath of partnership recognition laws and that heterosexual marriage rates have remained stable or increased (Badgett 2004; Eskridge and Spedale 2006; Eskridge, Spedale, and Yttering 2004). Eskridge, Spedale, and Yttering (2004) have also revisited claims about the rate of same-sex divorce, arguing that rates of partnership dissolution among same-sex couples have been relatively similar to, albeit higher than, those for heterosexual couples. Right-to-marry cases have likewise been the site of dueling amici as psychological associations submit briefs attesting to the desire and ability of same-sex couples to form enduring and committed relationships.[49]

Conclusion

The claim that same-sex couples are harmed by their inability to divorce makes good legal sense, and, were legal frames independent of cultural ones, we would expect marriage equality advocates to make it, in court if not more broadly. That this argument is missing reflects the fact that, for all its legal merits, linking marriage and divorce cuts completely against dominant cultural frames constructing divorce as a danger to marriage rather than a benefit of it. Indeed, the disjoint between the legal and the cultural framing of divorce is so large that opponents of marriage equality have been the ones to link marriage to divorce, invoking the specter of same-sex divorce as a reason to deny same-sex couples the right to marry.

The deployment of divorce talk in the battle over same-sex marriage illuminates two central constraints social movements face when they frame their arguments for sociolegal change. First, they must use the master's tools to disassemble (and rebuild) the master's house. How (and whether) they succeed in doing so is necessarily constrained by the nature of the tools in that toolkit (Swidler 1986). Legal frames exist alongside cultural frames in the toolkit and can sometimes offer an alternative touchstone for persuasive claims making. Their utility, however, is dependent on the relationship between the two frames. When legal frames mirror cultural frames perfectly, litigation is unlikely. To the extent that these mirror-image frames are aligned with social movement claims, there is little need to turn to the courts to work around political disadvantages. To the extent

these mirror-image frames run counter to social movement claims, litigation is unlikely to be any more successful than other form of social movement activism.

But, when legal frames and cultural frames diverge too sharply, litigation may also be of minimal value because of the *second* constraint facing movements when they frame their arguments for sociolegal change: they do not operate in isolation. Instead, they share the field with opposing forces intent on undermining their claims. These opposing forces draw from the same toolkit. Movements engaged in frame alignment must therefore take into account the likely use opponents will make of specific claims.

In the case at hand, discussing the value of divorce in the context of marriage equality claims is legally sound but tactically foolish because of the distance between the legal and the cultural framing of divorce. I have probably persuaded you that access to divorce is indeed an important benefit of marriage, but I have had the luxury of making my case before an attentive and probably sympathetic audience willing to stick with me through a number of pages. Marriage equality advocates might well have similar success making the divorce-as-valuable claim in a court of law, where there is time to make complicated arguments and the immediate audience—judges—is schooled in the value of legal frames.

But, once an argument is made, anyone may draw on it. And, if legal and cultural frames are far enough apart, an argument that seems sensible in one context may seem outrageous in the other. Opponents would certainly jump all over any "divorce is good" claim by marriage equality advocates, if not in a court of law, then in the court of public opinion. There it would be used to reinforce stereotypes that lesbians and gay men are inherently promiscuous and have little interest in treating marriage as a lifelong commitment.

The danger here arises from the relationship among judicial, legislative, and electoral outcomes. Court cases do not proceed in a vacuum, and courtroom victories do not translate simplistically into more favorable public policies. Judicial decisions can be elided—and even subverted—by legislative and/or electoral responses. The history of right-to-marry litigation provides rich evidence of this process, as opposition forces have drawn on favorable right-to-marry decisions (and sometimes the mere possibility of such decisions) to foment electoral and legislative backlashes. For example, the initial success of an early right-to-marry case in Hawai'i, *Baehr v. Lewin*, was deployed by opposition forces as an argument for the necessity of state and federal statutes to mitigate *Baehr*'s potential impact. Results were impressive. During the course of *Baehr*'s litigation, Congress enacted DOMA, which (a) limited marriage to different-sex couples for all federal purposes and (b) permitted states to refuse recognition to same-sex marriages performed in other states. Thirty states enacted mini-DOMAs during the same time period.

Massachusetts's landmark right-to-marry case, *Goodridge v. Department of Public Health* offered similar ammunition for forces opposed to marriage equality. Within a year of the 2003 decision, thirteen states had amended their constitutions to limit marriage to opposite-sex couples. By the close of 2007, ten additional states had done so.[50]

Marriage equality advocates know that to win—and retain—the right to marry, they must craft legally persuasive arguments that are also culturally resonant, and so they largely ignore the subject of divorce in their discussion of the legal harms facing same-sex couples. They prefer to highlight instead the ways committed same-sex couples are forced to battle legal obstacles as they attempt to fulfill the cultural imperatives of marriage, including caring for each other in times of sickness and health and providing stable and nurturing homes for their children. This is entirely sensible from a pragmatic political perspective. The result, however, is that marriage equality advocates end up eliding the very real problems faced by same-sex couples whose relationships have ended.

There is a romantic view that holds that even the most politically disadvantaged people in society can bring a strong legal claim to court and prevail. The case of the missing divorce argument cuts directly against this notion. It suggests instead that the ability of disadvantaged groups to use the law to effect sociolegal change is subject to a condition we might refer to as the Goldilocks constraint. Sometimes legal and cultural frames are too close, so that litigation is unlikely to produce substantively better outcomes than any other form of social movement activism. Sometimes legal and cultural frames are too far apart, increasing the likelihood that legal "wins" will be undone by legislative and/or electoral responses. Only occasionally is the distance between legal and cultural frames ju-u-s-st right, creating a space for social movements to use legal arguments to advance their aims.

Notes

CHAPTER 1

1. We would like to thank Nancy Naples for comments on earlier drafts of this chapter. The California Supreme Court legalized same-sex marriages in *In re Marriage Cases* in 2008. However, later that year, the voters of California passed Proposition 8, a referendum that attempted to deny same-sex couples the right to marry. Proposition 8's passage throws *In re Marriage*'s effect into doubt. As of this writing, LGBT groups have mounted a legal challenge to Proposition 8.
2. Even today, while de jure segregation has been ruled unconstitutional, children in the United States still attend largely segregated schools (Kozol 2005), and the Supreme Court has recently drastically limited the availability of race-based plans to ameliorate those conditions.
3. As of this writing, same-sex couples are allowed to marry only in the states of Massachusetts, Connecticut, Iowa, Vermont, and Maine. New York has decided to recognize same-sex marriages performed in other states. So as far as state law is concerned, same-sex couples and different-sex couples are treated equivalently in these five states. However, the federal Defense of Marriage Act (DOMA) prohibits the federal government from recognizing same-sex marriages and thus same-sex couples are not treated as married couples for the purposes of the more than one thousand federal laws relating to marriage (Chambers 2001). In addition, DOMA allows other states not to recognize same-sex marriages performed in other states. Thus, a same-sex marriage that is recognized by law will not be considered valid by states other than New Yorkand these five states.

CHAPTER 2

1. Ashley Currier (ashley.currier@gmail.com) is Assistant Professor of Sociology and Women's Studies at the Texas A&M University. This material is based on work supported by grants from the National Science Foundation under Sociology Program Doctoral Dissertation Improvement Grant No. 0601767, the Society for the Scientific Study of Sexuality Student Research Fund, and the University of Pittsburgh International Studies Fund. I would like to thank Scott Barclay, Mary Bernstein, and Kathleen M. Blee for their helpful revision suggestions.
2. I use the more inclusive terms "biracial" and "multiracial" instead of "coloured," though I recognize that the former terms are social constructions. "Coloured" is a "colonially created category for mixed race people" that still retains currency for Namibians (Hubbard and Solomon 1995, 165). Some members and staff of The Rainbow Project I interviewed stated that they did not like to define themselves in terms of racial and ethnic identities because it reminded them of how the apartheid regime structured social, political, and economic relations among Namibians. Despite members' and staff's statements, racial and ethnic differences erupted within the organization and contributed to the creation of schisms among members, leading to the exit of some members from the organization, which I analyze later.
3. In 2004, the Namibian Parliament replaced the Labour Act of 1992 with legislation that omitted the clause prohibiting discrimination on the basis of sexual orientation, which The Rainbow Project (TRP) did not publicly challenge (Fenwick 2005; *The Namibian*, May 7, 2004). I do not elaborate on TRP's lack

ballot initiative that amended Article 7.5 of the state constitution to make only "marriage between a man or woman" valid or recognized. Litigation is currently under way to challenge Proposition 8.

9. The film includes parts of the audiotaped confession. A complete transcript is available in Weiss's *Double Play*, 262–70. Mann excerpts it under a banner called "The Confession" (181–87).

10. Mann includes the jury instruction in her play. "In the crime of murder of the first degree, the necessary concurrent mental states are: malice aforethought, premeditation and deliberation. In the crime of murder of the second degree, the necessary concurrent mental state is: malice aforethought. In the crime of voluntary manslaughter, the necessary mental state is: an intent to kill. . . . There is no malice aforethought if the evidence shows that due to diminished capacity caused by illness, mental defect, or intoxication, the defendant did not have the capacity to form the mental state constituting malice aforethought, even though the killing was intentional, voluntary, premeditated and unprovoked" (1997, 240). Though a vexed term, malice is often understood as *knowledge* of an intention to commit an unlawful act. The jurors decided that White's diminished capacity due to mental illness (depression and diet) vitiated his malice.

11. *Anatomy of a Murder* was an immediate success, spending sixty-one consecutive weeks on the bestseller list after St. Martin's published it in 1957. Judge Voelker based the novel he called "pure fiction" on the real-life slaying at the Lumberjack Tavern in Big Bay, Michigan, north of Marquette, in 1952. After Otto Preminger bought the rights, his film opened in 1959, grossing $5.5 million and garnering seven Academy Award nominations. Preminger hired the famed Boston attorney Joseph N. Welch—who had come to fame in the McCarthy hearings—to play the judge in the film.

CHAPTER 14

1. Revised Code of Washington §§ 77.65–77.70 (2004).

2. Under the Defense of Marriage Act (1996), married same-sex couples do not qualify for any of the 1,142 federal benefits. Pub. L. 104–199, 100 Stat. 2419 (Sep. 21, 1996), codified at 1 U.S.C. § 7 (1997).

3. Item #4 expounds on the "hundreds of ways in which state laws take marital status into account, including some of the most basic of human rights." Item #5 discusses the ways in which children with only one legally-recognized parent are legally disadvantaged. Item #8 argues that civil unions are not the legal equivalent of marriages for purposes of the federal rights and responsibilities described in item #1. The entire list is available online at http://www.hrc.org/.

4. The construct I title a society's cultural frames has been referred to by other scholars variously as its myths (Campbell 1988), domain assumptions (Gouldner 1970), or cultural stock (Zald 1996).

5. Colorado's Amendment 2 states: "NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing."

6. For extended discussions of attitudes toward civil rights laws in the context of gay rights see Andersen (2005), Button, Wald, and Rienzo (1997), and Schacter (1994). Similar framing battles over the meaning of civil rights laws in the context of gay rights occurred in several other states and localities during the same time period. See Herman (1996), Wiethoff (2003),and Witt and McCorkle (1997).

7. For an accessible explanation of the difficulty of calculating divorce rates, see Dan Hurley's article "Divorce Rate: It's Not as High as You Think," *New York Times*, April 19, 2005, p. F7.

8. The process also provides therapeutic benefits, including a legally created and culturally accepted forum for closure as well as a standard nomenclature (DiFonzo 2003, 54–55).

9. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.

10. California, Louisiana, and New Mexico.

11. Alaska, Arizona, Arkansas, Florida, Hawai'i, Idaho, Illinois, Indiana, Michigan, Nevada, New Hampshire, North Carolina, Ohio, Oregon, Texas, Washington, West Virginia, and Wisconsin.

12. There used to be a tender-years doctrine that favored the mother over the father where young children were involved, but that doctrine has fallen out of legal favor in recent years. See Benkov (1994) and Hitchens (1996).

13. In most jurisdictions that have decided cases, courts now treat same-sex relationships as though they are analogous to unmarried heterosexual relationships for purposes of property division, and so much of the following discussion is applicable to different-sex as well as same-sex couples. It is worth noting, though, that heterosexual couples have the choice whether or not to marry, while same-sex couples usually do not. Moreover, a number of states still recognize common-law marriages, allowing different-sex couples—but not same-sex couples—to divorce even when they never formally married.

14. Among the factors judges utilize to determine the status of the relationship in both states are the intent of the parties, the duration of the relationship, and the pooling of resources and services for joint projects. Joint assets of couples who meet the criteria are divided equitably upon the relationship's dissolution. Nevada has not yet dealt specifically with the issue of same-sex couples, while Washington and Oregon have.

15. See *Hewitt v. Hewitt* (Illinois 1979) and *Schwegman v. Schwegman* (Louisiana 1983). Several analysts include Georgia in this category although in at least one instance a Georgia court upheld a written contract between cohabitants for the joint ownership and division of property (*Crooke v. Gilden* 1992). Note that all states allow unmarried partners to file petition for partition to divide property held in joint title.

16. Only a handful of states have dealt with written agreements involving same-sex couples, but those have been enforced, as well. See *Estate of Reaves v. Owen* (Mississippi 1999); *Silver v. Starrett* (New York 1998); *Posik v. Layton* (Florida 1997); *Crooke v. Gilden* (Georgia 1992).

17. Tex. Bus. & Com. Code Ann. 26.01(b)(3) and Minn. Stat. Ann. 513.075.

18. Kentucky, Massachusetts, New Hampshire, New Mexico, New York, and North Dakota. Because same-sex couples can now marry in Massachusetts, that state's refusal to enforce implied contracts is less problematic for same-sex couples.

19. See, e.g., Anderson v. Anderson (Indiana 1992), holding that a lesbian couple who had totally commingled their property and otherwise evidenced an intent to function as a single economic unit should be treated in the same fashion as a married heterosexual couple with respect to the equitable division of property. See also Ireland v. Flanagan (Oregon 1981) and Whorton v. Dillingham (California 1988).

20. It may seem odd that a state's policy about enforcing oral contracts could be unknown. However, unless a case is heard at the appellate level, it is usually invisible to researchers, because trial court judgments are not reported in any regular format. In states there is no appellate record concerning the enforceability of oral agreements.

21. See, e.g., *Boone v. Howard* (1989), where a Delaware court rejected a lesbian woman's claim that she and her partner had entered into an oral agreement to live together for business, social, and personal purposes and to pool all of their assets and earnings together.
22. Awards of alimony have declined throughout the United States in recent years, although such awards are still granted in proceedings where one spouse is caring for young children, has limited employment possibilities, or will otherwise suffer severe financial hardship postdivorce.
23. Registered domestic partnerships did not become available in California until 2001 and did not contain a divorce provision until 2005. In 2008, California became the second state to permit same-sex couples to marry. California voters, however, quickly passed a constitutional amendment that restricted marriage to opposite-sex couples. The constitutionality of that vote has been challenged in court.
24. See, e.g., *Love v. Love* (Nevada 1998), finding a husband liable for child support notwithstanding a DNA test establishing that he was not the child's father.
25. For example, 15 Vt. Stat. Ann. tit. 15, § 1204 (2004) states: "The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage."
26. It is possible for one woman to donate an egg and the other to carry the child to term. In these instances, the child will have both a biological mother and a gestational mother.
27. In eleven states plus the District of Columbia, the couple may adopt the child jointly. The states currently permitting joint adoption are listed in the following footnote.
28. The states are California, Connecticut, Illinois, Indiana, Massachusetts, Maine, New Jersey, New York, Oregon, Pennsylvania and Vermont.
29. Alabama, Alaska, Delaware, Georgia, Hawai'i, Iowa, Maryland, Michigan, Missouri, Minnesota, Nevada, New Hampshire, New Mexico, Rhode Island, Texas and Washington. It is possible that trial courts in other states have also granted such second-parent adoptions. Records of family court proceedings are sometimes sealed. For regularly updated information about adoption laws, see the Lambda Legal Defense and Education Fund (www.lldef.org) or the Human Rights Campaign (www.hrc.org).
30. Arkansas and Utah prohibit all cohabitating couples who are unmarried from adopting. Mississippi specifically prohibits same-sex couples from adopting. Florida prohibits all lesbians and gay men from adopting. The legal status of Florida's law, however, is unclear. In late November 2008, as this book was going to press, a Miami-Dade Circuit Court judge ruled that the law violated the Florida constitution's guarantee of equal protection. The state has announced its attention to appeal the ruling. See Almanzar (2008).
31. In *re Adoption of T.K.J. and K.A.K*, 931 P.2d 488 (Colorado 1996); *In re Adoption of Luke* (Nebraska 2002); *In re Adoption of Doe* (Ohio 1998); *Interest of Angel Lace M.* (Wisconsin 1994).
32. See *Stanley v. Illinois* (1972), in which the Supreme Court held that the right to raise one's children was an essential and basic civil right. See also *Santosky v. Kramer* (1982), finding a fundamental liberty interest of parents in the care, custody, and management of their children.
33. See *Janis C. v. Christine T.* (New York 2002); *In re Cheyenne Madison Jones* (Ohio 2002); *In re the Matter of Visitation with C.B.L.* (Illinois 1999); *Kazmierazak v. Query* (Florida 1999); *Thomas v. Thomas* (Arizona 2002).
34. *Matter of T.L.* (Missouri 1996); *In re Custody of HSH-K* (Wisconsin 1995).
35. For example, a Colorado appellate court recently held that the former same-sex partner of an adoptive parent had standing to seek custody and visitation rights as a psychological parent given the duration, closeness, and continuation of her relationship with the child and evidence that emotional harm to the child would accrue if the relationship was terminated (*In re E.L.M.C.*, 2004).
36. See *E.N.O. v. L.M.M.* (Massachusetts 1999) and *T.F. v. B.L.* (Massachusetts 2004).
37. 29 U.S.C. 1001 et seq.; 26 U.S.C. 401(a)(11), 414(p) (qualified plans); 5 U.S.C. 8339(j),(i) (Federal Civil Service).
38. Wyatt Buchanan (*San Francisco Chronicle*, September 25, 2006, p. B1, provides a useful summary of the many problems faced by divorcing same-sex couples because of the federal government's refusal to recognize same-sex marriages.
39. Apparently, Lisa had renounced her homosexuality by this point. She was represented by the American Center for Law and Justice.
40. Va. Code § 20-45.3.
41. 28 U.S.C. § 1738A.
42. For an extended discussion of the *Principles of Family Dissolution*, see the *Duke Journal of Family Law*'s special edition on the subject (2001). No state has adopted the ALI's *Principles* as of this writing.
43. Gallup Poll, May 8–11, 2006. N = 1,002 nationwide. Margin of error ±3%.
44. Pew Research Center for the People and the Press survey. February 16–March 14, 2007. N = 2,020 adults nationwide. Margin of error±3%.
45. Teenagers report even higher levels of discomfort with the incidence of divorce. The Gallup Youth Survey has asked the following question since 1977: "Generally speaking, do you think it is too easy or not easy enough for people in this country to get divorced?" In recent years, the percentage of teens who think that it is too easy to get divorced has hovered around 75 percent.
46. Pew Research Center for the People and the Press survey conducted by Princeton Survey Research Associates. April 6–May 6, 1999. N = 1,546 adults nationwide. Margin of error ±3%. Each question in the "better or worse" battery was asked of half the respondents.
47. See, e.g., Brief of the Family Research Council as Amicus Curiae in Support of Defendants-Appellants, *Conaway v. Deane* (2006, 35–37) and Brief of the Family Research Council as Amicus Curiae in Support of Defendants-Respondents, *Lewis v. Harris* (14–19).
48. The data employed by these authors come from an academic paper prepared by the demographer Gunnar Andersson and his colleagues for presentation at the 2004 Annual Meeting of the Population Association of America. See Noack, Seierstad, and Weedon-Fekjær (2005) for an analysis of divorce rates in Norway.
49. See, e.g., Friend-of-the-Court Brief of the American Psychological Association, the American Psychiatric Association and Other Mental Health Organizations in Support of Equal Treatment for Same-Sex Couples and their Children, *Deane & Polyak v. Conaway*, Maryland Court of Appeals, September 2006 Term, Docket No. 44, 14–17. See also Brief of American Psychological Association and New Jersey Psychological Association as Amici Curiae in Support of Plaintiffs-Appellants, *Lewis v. Harris*, Superior Court of New Jersey, Docket No. A-2244-03T5, 16–19.
50. These states joined the four that had amended their constitutions prior to the *Goodridge* decision.