

In the Shadow of a Myth: Bargaining for Same-Sex Divorce

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This Article explores a relatively new phenomenon in family law: same-sex divorce. The Article's central claim is that parties to the first wave of same-sex divorces are not effectively bargaining against the backdrop of legal dissolution rules that would govern in the absence of an agreement. In other words, to use Robert Mnookin and Lewis Kornhauser's terminology, they are not "bargaining in the shadow of the law." Instead, the Article argues, many same-sex couples today bargain in the shadow of a myth that same-sex couples are egalitarian—that there are no vulnerable parties or power differentials in same-sex divorce.

The Article shows how a myth of egalitarianism undermines current bargaining for same-sex divorce. First, the myth leads to what the Article calls "divorce exceptionalism," that is, when a party claims that existing marriage dissolution rules do not apply in same-sex divorce because they were designed to remedy the nonegalitarian conditions of different-sex marriages. Divorce exceptionalism disables effective bargaining because without default legal rules there is nothing to guide the bargaining process. Second, the myth of egalitarianism eliminates key bargaining chips: under a presumption of formal equality neither party really has anything to "give" or "get" in the bargain for divorce. Finally, the myth, combined with the general fog of uncertainty regarding how courts will treat same-sex divorces, may lead to increased strategic behavior. The Article proposes a realistic solution, arguing that the legal actors who participate in same-sex divorce, including lawyers, mediators, courts, and the parties themselves, should reject divorce exceptionalism and apply ordinary divorce rules. It also proposes to protect vulnerable parties by extending to same-sex divorce the current trend toward joint-custody presumptions.

The myth of egalitarianism in same-sex couples, which was quite helpful in achieving marriage equality, is now haunting the first wave of same-sex divorces and harming vulnerable parties. It is time to let it go and address the reality of same-sex relationships.

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I. INTRODUCTION

Same-sex divorce is often perceived as a shattering of a civil-rights dream.¹ More importantly, it poses a serious puzzle for family law. Now that the fight for marriage equality is seemingly over,² and same-sex couples are marrying in

¹ See, e.g., Frederick Hertz et al., *Integrated Approaches To Resolving Same-Sex Dissolutions*, 27 CONFLICT RESOL. Q. 123, 125 (“[A] break-up may expose a previously unacknowledged disconnect between one partner’s motivation for registering and the legal consequences of a dissolution, especially in light of the extent to which marriage was viewed as a civil rights fight by gay couples”); Jesse Green, *From “I Do” to “I’m Done,”* N.Y. MAG. (Feb. 24, 2013), <http://nymag.com/news/features/gay-divorce-2013-3/> [<https://perma.cc/M3W4-UCL9>] (“One of the things—besides the law—that may make divorce especially difficult for gay people is the way it seems to prove . . . old slurs about their relative inability to maintain stable bonds.”); Meredith Maran, *I Got Gay Married. I Got Gay Divorced. I Regret Both.*, N.Y. TIMES (Jan. 7, 2017), <https://www.nytimes.com/2017/01/07/opinion/sunday/i-got-gay-married-i-got-gay-divorced-i-regret-both.html?mcubz=1> [<https://perma.cc/X6SJ-H8LB>] (“Divorce felt like more than a betrayal of my wedding vows. It was a betrayal of my people and our cause.”).

² Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015) (holding that the Due Process and Equal Protection Clauses of the Fourteenth Amendment guarantee same-sex couples the right to marry); United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013) (holding that

large numbers,³ it is time to address same-sex divorce. This Article identifies a puzzle that stems from a legal reality in which divorces are subject to court-approved private ordering.⁴ Divorcing couples in the United States “bargain in the shadow of the law,”⁵ meaning that the private ordering for divorce takes place against the backdrop of legal dissolution rules.⁶ These rules—regarding property, spousal and child support, and custody and visitation—govern in the absence of an agreement between the divorcing parties.⁷ This Article argues that many same-sex couples today are poorly positioned to bargain effectively in the shadow of the law because a myth blurs their vision.⁸ They view their

Section 3 of the Defense of Marriage Act violates the Fifth Amendment). *But see* First Amendment Defense Act, H.R. 2802, 114th Cong. § 3 (2017) (“[T]he Federal Government shall not take any discriminatory action against a person . . . on the basis that such person believes . . . that marriage is or should be recognized as the union of one man and one woman”); Mark Joseph Stern, *Is Same-Sex Marriage Safe?*, SLATE (Mar. 1, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/03/will_the_texas_supreme_court_roll_back_marriage_equality.html [<https://perma.cc/9GLE-EH69>] (discussing a pending case in Texas where petitioners argue that the constitutional amendment banning same-sex marriage is valid).

³ Jeffrey M. Jones, *Same-Sex Marriages Up One Year After Supreme Court Verdict*, GALLUP NEWS (June 22, 2016), http://news.gallup.com/poll/193055/sex-marriages-one-year-supreme-court-verdict.aspx?g_source=Social%20Issues&g_medium=newsfeed&g_medium=newsfeed&g_campaign=tiles [<https://perma.cc/2YRS-SDJT>] (finding the number of same-sex couples that are married jumped from 38% pre-*Obergefell* to 49% post-*Obergefell*).

⁴ *See, e.g.*, Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979) [hereinafter *Bargaining in the Shadow*] (arguing in favor of a framework that provides divorcing couples the ability to determine their postdissolution rights and responsibilities in the form of private order instead of a system that favors a top-down approach); *see also* Erez Aloni, *The Puzzle of Family Law Pluralism*, 39 HARV. J.L. & GENDER 317, 320 (2016) (examining the relationships between structural pluralism and private ordering); Brian H. Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIM. LAW. 249, 249 (2010) (providing an overview of the changes and limits to private ordering in American family law); Serena Mayeri, *Foundling Fathers: (Non-) Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2331 (2016) (describing the bargaining calculus that has come with the rise of no-fault divorce); Deborah A. Widiss, *Legal Recognition of Same-Sex Relationships: New Possibilities for Research on the Role of Marriage Law in Household Labor Allocation*, 8 J. FAM. THEORY & REV. 10, 14 (2016) (finding that liberalization of divorce law has affected household labor allocation).

⁵ *Bargaining in the Shadow*, *supra* note 4, at 968.

⁶ *Id.* at 969.

⁷ *Id.* at 959.

⁸ *But see* Jeremy Feigenbaum, Note, *Bargaining in the Shadow of the “Law?”—The Case of Same-Sex Divorce*, 20 HARV. NEGOT. L. REV. 245, 263 (2015) (“If the [Supreme] Court [legalizes same-sex marriage], then a divorcing same-sex couple would be able to ‘Bargain in the Shadow of the Law’ exactly as Mnookin and Kornhauser described thirty-five years ago.”).

relationships as egalitarian even when in reality they are not.⁹ They consequently bargain for divorce in the shadow of a myth of egalitarianism—not in the shadow of legal dissolution rules.

Scholars have long observed that different-sex couples in the United States negotiate for divorce mostly based on the reality of their finances, childcare preferences,¹⁰ and with at least some background attitudes of protecting vulnerable parties (typically women).¹¹ This Article argues that, by contrast, many same-sex couples today negotiate under a false presumption of egalitarianism.¹² That is, a presumption that there are no vulnerable parties or power differentials in same-sex marriages. The Article refers to this phenomenon as the “Myth of Egalitarianism.”¹³ To clarify, the term “myth” does not imply that same-sex couples never want or achieve egalitarianism.¹⁴ Data shows that many same-sex couples indeed strive for egalitarian relationships.¹⁵ True equality, however, is hard to achieve.¹⁶

⁹ I use the term “egalitarian” in this Article broadly to represent perceptions of equality between spouses in matters of household, children, financial, and general decision-making.

¹⁰ *Bargaining in the Shadow*, *supra* note 4, at 959–62.

¹¹ *Id.*

¹² See *infra* Part II; see also Suzanne A. Kim & Edward Stein, *Gender in the Context of Same-Sex Divorce and Relationship Dissolution*, 56 FAM. CT. REV. (forthcoming 2018) (on file with the author) (discussing how gender may continue to play a role in dissolution of same-sex unions, especially in grounds for dissolution, finances, custody, and the social experience of divorce).

¹³ For a definition of myth, see for example, ROLAND BARTHES, MYTHOLOGIES 109 (Annette Lavers trans., Hill and Wang 1984) (1957) (“*Myth is a type of speech*. Of course, it is not *any* type: language needs special conditions in order to become myth . . . at the start is that myth is a system of communication . . . since myth is a type of speech, everything can be a myth provided it is conveyed by a discourse. . . . Every object in the world can pass from a closed, silent existence to an oral state, open to appropriation by society . . .”).

¹⁴ See CHRISTOPHER CARRINGTON, NO PLACE LIKE HOME 176–77 (1999); see also Lawrence A. Kurdek, *The Allocation of Household Labor by Partners in Gay and Lesbian Couples*, 28 J. FAM. ISSUES 132, 132–33 (2007) (finding that same-sex couples distribute household chores more equitably based on interest in household labor and that satisfaction with the equitable distribution of labor provided more satisfaction and stability “through perceived equality in the relationship”); Sondra E. Solomon et al., *Money, Housework, Sex, and Conflict: Same-Sex Couples in Civil Unions, Those Not in Civil Unions, and Heterosexual Married Siblings*, 52 SEX ROLES 561, 572 (2005) (“[W]e found lesbian and gay male couples to be more egalitarian than heterosexual couples.”); Interview by Lourdes Garcia-Navarro, NPR, with Robert-Jay Green, Founder & Senior Researcher, Rockway Inst. for LGBT Psychology & Pub. Policy (Dec. 29, 2014) [hereinafter *Same-Sex Couples*], <https://www.npr.org/2014/12/29/373835114/same-sex-couples-may-have-more-egalitarian-relationships> [<https://perma.cc/FP88-FCW8>] (“[S]ame-sex couples tend to be much more egalitarian in their relationships. They share decision-making more equally, finances more equally, housework more equally, childcare more equally. . . . [S]ame-sex couples are dramatically more equal in the way they function together as a couple compared to heterosexual couples.”).

¹⁵ See CARRINGTON, *supra* note 14, at 177.

¹⁶ See *infra* Part II.B.

In *Bargaining in the Shadow of the Law*,¹⁷ Robert Mnookin and Lewis Kornhauser convincingly argued that private bargaining for divorce is desirable because it reduces time, costs of litigation, acrimony, and legal uncertainty.¹⁸ The main legal consequences of divorce involve distribution of marital property, spousal support, child support, child custody, and visitation.¹⁹ Mnookin and Kornhauser observed that marital property, spousal support, and child support “are all basically problems of money,”²⁰ and “money and custody issues are inextricably linked.”²¹ They argued that “over some range of alternatives, each parent may be willing to exchange custodial rights and obligations for income or wealth.”²² The gist of the divorce bargain, in their view, is that parties will typically exchange parenting time for money and vice versa.²³

This Article argues that bargaining in the shadow of a myth of egalitarianism may cause three adverse effects in same-sex divorces. First, the myth may lead one party (typically the financially stronger one) to claim that marriage dissolution rules do not apply to same-sex divorces because these rules were designed for different-sex marriages.²⁴ The Article calls this type of claim “divorce exceptionalism,” and argues that it harms effective bargaining for divorce.²⁵ Second, the myth of egalitarianism skews the “money for kids” exchange described above because under a presumption of overall equality between the ex-spouses, neither party has anything to “give” or “get” in the bargaining process.²⁶ Finally, the myth, combined with the general fog of

¹⁷ *Bargaining in the Shadow*, *supra* note 4, at 950.

¹⁸ *Id.* at 974.

¹⁹ *Id.*

²⁰ *Id.* at 959; *see also id.* at 960 (“From the economic perspective of bargaining spouses, alimony and child support seem fungible: both involve periodic money payments and, indeed, will often be paid by a single check from the noncustodial parent. . . . Consequently, child-support payments that are used for housing and feeding the child will inevitably inure to the benefit of the custodial spouse.”).

²¹ *Id.* at 960.

²² *Id.* at 964 (“[A]nd parents may tie support duties to custodial prerogatives as a means of enforcing their rights without resort to court.”).

²³ *Bargaining in the Shadow*, *supra* note 4, at 964.

²⁴ *See*, for example, NANCY F. COTT, *THE BONDS OF WOMANHOOD: “WOMAN’S SPHERE” IN NEW ENGLAND 1780–1835*, at 197 (1977) for a discussion of the idea of separate spheres of men and women.

²⁵ Legal exceptionalism in this context has some conceptual resemblance to exceptionalist claims in other legal domains such as national security or current claims for religious exemptions from women’s reproductive health or gay rights. In all of these contexts, a legal actor claims that general legal norms do not apply to them because of a special condition. *See generally* Noa Ben-Asher, *Faith-Based Emergency Powers*, 41 *HARV. J.L. & GENDER* (forthcoming 2018), <https://ssrn.com/abstract=3040902> [<https://perma.cc/AV7U-TP3L>].

²⁶ *See Bargaining in the Shadow*, *supra* note 4, at 967 (“Some parents with limited child-rearing responsibilities may be willing to sacrifice money for additional custody up to a certain point; but once they have ‘enough’ custody, they may be willing to give up money

uncertainty regarding how courts will treat same-sex divorces, may lead to increased strategic or aggressive behavior of one or both parties.²⁷

The Article proceeds in three parts. Part II contrasts the myth of egalitarianism with data regarding the real lives of same-sex couples. Part II.A introduces the myth, which has proliferated since the 1980s through academic discussions, studies, news media, LGBT activism, and other such domains. It shows how prevalent and celebrated the myth has become, especially after the Supreme Court's rulings on marriage equality.²⁸ Part II.B examines empirical data that shows that egalitarianism in same-sex couples is rarely achieved.

Part III explores some effects of the myth of egalitarianism on current same-sex divorces. It begins with a discussion of Mnookin and Kornhauser's theory of bargaining in the shadow of the law (Part III.A),²⁹ and proceeds to examine how the myth impacts current bargaining for same-sex divorces (Part III.B). Part III.B.1 examines the new phenomenon of divorce exceptionalism, and argues that it jeopardizes the entire bargaining process for same-sex divorce. Part III.B.2 analyzes how the myth may skew the bargaining chips of "children for money" in negotiations for divorce. Part III.B.3 argues that these two effects, combined with legal uncertainty around this new area of law, may increase strategic or aggressive behavior in same-sex divorces.

Part IV proposes a pragmatic and realistic approach to same-sex divorces that does not rely on myth. Part IV.A argues that once the myth of egalitarianism is debunked, the range of legal actors who participate in same-sex divorces—lawyers, mediators, courts, and the parties themselves—must reject divorce exceptionalism and instead apply ordinary divorce rules. Part IV.B proposes extending the current shift toward joint-custody presumptions to same-sex divorces in order to reduce bluffs and threats regarding parenting rights. A brief conclusion follows.

II. A MYTH OF EGALITARIANISM IN SAME-SEX HOUSEHOLDS

A. *Myth*

There is a myth that same-sex households are egalitarian.³⁰ The gendered power dynamics often present in different-sex couples, according to this myth,

to avoid additional responsibility. For other parents, no amount of money can adequately compensate for a reduction in custody below a certain minimum level. Above that point, however, trade-offs between money and custody would be consistent with their tastes.”)

²⁷ See, e.g., Julie Compton, *For Same-Sex Couples, Divorce Is a Legal Nightmare*, NBCNEWS: NBC OUT (Sept. 7, 2016), <http://www.nbcnews.com/feature/nbc-out/some-same-sex-couples-divorce-legal-nightmare-n643891> [<https://perma.cc/879C-NNAJ>].

²⁸ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015); *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013).

²⁹ See *Bargaining in the Shadow*, *supra* note 4, at 959.

³⁰ Christopher Carrington identified this myth as early as 1999. See CARRINGTON, *supra* note 14, at 177.

are absent in same-sex couples. Without the traditional sex-based division of labor, same-sex couples allegedly create egalitarian unions.³¹ The myth of same-sex egalitarianism first appeared in academic literature in the 1980s when researchers sought to educate the public about homosexuality.³² In a representative study in 1991, one researcher introduced “another pattern [that] is based on *friendship* or peer relations, with partners being similar in age and emphasizing companionship, sharing, and equality in the relationship.”³³ The author argued that most “contemporary homosexual relationships . . . are relationships patterned after friendship,”³⁴ and concluded that “[t]he fact that many lesbians and gay men are able to create satisfying love relationships that are not based on complementary, gender-linked role differentiation challenges the popular view that such masculine-feminine differences are essential to adult love relationships.”³⁵ Other studies repeated such findings of egalitarianism in same-sex relationships.³⁶

³¹ Rebecca Solnit, *More Equal than Others*, FIN. TIMES (May 24, 2013), <https://www.ft.com/content/99659a2a-c349-11e2-9bcb-00144feab7de> [<https://perma.cc/HZN8-QHD5>] (“Gay men and lesbians have already opened up the question of what qualities and roles are male and female in ways that can be liberating for straight people. When they marry, the meaning of marriage is likewise opened up. No hierarchical tradition underlies their union.”). For examples of early researchers who took this position, see PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES* (1983); Jean M. Lynch & Mary Ellen Reilly, *Role Relationships: Lesbian Perspectives*, 12 J. HOMOSEXUALITY 53, 53–69 (1986); Letitia Anne Peplau & Susan D. Cochran, *Value Orientations in the Relationships of Gay Men*, in GAY RELATIONSHIPS 195, 195–216 (John P. DeCecco ed., 1988).

³² BLUMSTEIN & SCHWARTZ, *supra* note 31, at 14; Lynch & Reilly, *supra* note 31; Letitia Anne Peplau, *Lesbian and Gay Relationships*, in HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 177, 177–96 (John C. Gonsiorek & James D. Weinrich eds., 1991); Peplau & Cochran, *supra* note 31, at 195–216.

³³ Peplau, *supra* note 32, at 184.

³⁴ *Id.* at 184–85. Others, however, argue that the “friendship” argument does little to support the marriage equality argument. See Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J.L. & GENDER 37, 59–60 (2011) (“[F]riendship does little to join the marriage critique with the marriage equality case. Instead, it pursues only the marriage critique by proposing a relational paradigm that stands separate and apart from marriage. . . . [T]he move to friendship does nothing to further the marriage equality cause.”).

³⁵ Peplau, *supra* note 32, at 185.

³⁶ *E.g.*, Kurdek, *supra* note 14, at 132 (finding that same-sex couples distribute household chores more equitably based on interest in household labor and that satisfaction with the equitable distribution of labor provided more satisfaction and stability “through perceived equality in the relationship”); Solomon et al., *supra* note 14, at 572 (“[W]e found lesbian and gay male couples to be more egalitarian than heterosexual couples.”); *Same-Sex Couples*, *supra* note 14 (“[W]hat we found consistently in our research is that same-sex couples tend to be much more egalitarian in their relationships. They share decision-making more equally, finances more equally, housework more equally, childcare more equally. Basically, [in] every dimension we looked at, same-sex couples are dramatically more equal in the way they function together as a couple compared to heterosexual couples.”). *But see* Nicole Civettini, *Housework As Non-Normative Gender Display Among Lesbians and Gay Men*, 74 SEX ROLES 206, 215 (2015) (“[T]here are important differences in the way that gay

Some even hoped that same-sex egalitarianism would improve the institution of marriage altogether. In 1991, Nan Hunter argued that marriage-equality could potentially challenge traditional gender norms in different-sex marriages.³⁷ Hunter reassured that a desire for same-sex marriage is not “a desire merely to become accepted on the same terms within an unchallenged structure of marriage.”³⁸ Instead, “it conveys an active intent to disconnect power from gender and an adversary relationship to dominance . . . [and] transform both the law and the reality of personal relationships.”³⁹ Same-sex couples, in other words, would not necessarily assimilate into the gendered institution of marriage.⁴⁰ Hunter and others aspired that “[t]he most widely felt impact of legalization of lesbian and gay marriage would derive from its potential to remove gender from the definition of marriage.”⁴¹ The hope was that same-sex marriages would make different-sex marriages more egalitarian.

Later advocates for marriage equality further utilized the myth of egalitarianism,⁴² and after the Supreme Court’s decisions in *Windsor* and

men and lesbians divide housework, specifically that stereotypical, gendered traits were a factor for both men and women, but in divergent ways. Although both avoided the housework patterns expected of their sex, gay men used housework as a way to display stereotypical femininity, and lesbians used housework avoidance as a way to display stereotypical masculinity.”); Abbie E. Goldberg, “*Doing*” and “*Undoing*” Gender: The Meaning and Division of Housework in Same-Sex Couples, 5 J. FAM. THEORY & REV. 85, 100 (2013) (stating “egalitarianism is not the equivalent of undoing gender, and nor is a segregated division of labor necessarily the equivalent of inequality,” rather, same-sex couples may view their arrangements as pragmatic and chosen within the context of their relationship).

³⁷ Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 12 (1991).

³⁸ *Id.* at 29.

³⁹ *Id.* at 30.

⁴⁰ *Id.* at 19–20. *But see* Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in LESBIANS, GAY MEN, AND THE LAW 401, 401–06 (William B. Rubenstein ed., 1993) (characterizing the movement to marriage-equality as assimilationist).

⁴¹ Hunter, *supra* note 37, at 30. *But see* Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 VA. L. REV. 1535, 1538 (1993) (“[H]istorical and anthropological evidence contradicts any assumption that ‘gender dissent’ is inherent in marriage between two men or two women. . . . Although both partners were biologically of the same sex, one partner tended to assume the characteristics and responsibilities of the opposite gender, with both partners then acting out their traditional gender roles.”). Indeed, the rhetoric of *Windsor* and *Obergefell* support, at the very least, Polikoff’s prediction that marriage equality would elevate (rather than critique) the gendered institution of marriage. *See, e.g.*, Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J.L. & GENDER 243, 243–44 (2014).

⁴² *See, e.g.*, William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1487–88 (1993); William N. Eskridge, Jr., *A Social Constructionist Critique of Posner’s Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333, 356–57 (1992) (reviewing RICHARD A. POSNER, *SEX AND REASON* (1992)) (“[S]ame-sex marriage would contribute to the erosion of gender-based hierarchy within the family, because in a

Obergefell,⁴³ the media also perpetuated and celebrated this myth.⁴⁴ It was even suggested that same-sex couples are happier and better at fighting than their different-sex counterparts.⁴⁵ Overall, in the United States, the myth of egalitarianism in same-sex couples has played a key role in the gradual acceptance of same-sex couples into the mainstream of society.

same-sex marriage there can be no division of labor according to gender. Partly for this reason, accounts of contemporary same-sex homes and families suggest that, generally, they enjoy greater freedom from hierarchy than do different-sex homes and families.”). *Contra* Kim, *supra* note 34, at 75 (“Same-sex marriage holds the potential not only to transform marriage internally but also to alter marriage’s ‘place in law and society.’”).

⁴³ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015) (finding that the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution guarantee same-sex couples the right to marry); *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013) (holding that Section 3 of the Federal Defense of Marriage Act violates “the liberty of the . . . Fifth Amendment of the Constitution”).

⁴⁴ See, e.g., John Ersing, *Applying Gender Roles to Same-Sex Couples*, THOUGHT CATALOG (Mar. 2, 2015), <http://tcat.tc/1vUp6Dv> [<https://perma.cc/WYX9-LG2Z>] (gay men are “hyperaware of traditional gender roles and the bearing that they have on public recognition of their own sexuality,” but because there are no preconceived notions about how same-sex couples should act, they enjoy a clean slate to set their own traditions); Susan Donaldson James, *When Gender Goes, Happiness Blooms in Marriage*, ABC NEWS (July 3, 2013), <http://abcnews.go.com/Health/sex-marriage-gender-disappears-happiness-blooms/story?id=19560588> [<https://perma.cc/SWQ2-T4PT>] (using the experience of two same-sex couples to demonstrate non-gendered labor division); Tara Parker-Pope, *Gay Unions Shed Light on Gender in Marriage*, N.Y. TIMES (June 10, 2008), <http://www.nytimes.com/2008/06/10/health/10well.html> [<https://perma.cc/Ry3J-PNwG>] (observing that gay couples enjoy more happiness due to a more egalitarian structure between the partners than heterosexual couples, and that this could provide insight for heterosexual couples); Solnit, *supra* note 31; see also Tara Parker-Pope, *Gay Marriage: Same, but Different*, N.Y. TIMES (July 1, 2013), <http://www.nytimes.com/2008/06/10/health/10well.html> [<https://perma.cc/Ry3J-PNwG>] (“Gay relationships tend to be more egalitarian, in part because same-sex couples don’t divide work along traditional gender lines.”).

⁴⁵ E.g., Amanda Chatel, *Same-Sex Couples Communicate Better and Share Chore Duties Better, New Survey Says, Plus More Things Straight Couples Can Learn from Gay Couples*, BUSTLE (June 5, 2015), <https://www.bustle.com/articles/88248-same-sex-couples-communicate-better-and-share-chore-duties-better-new-survey-says-plus-more-things-straight> [<https://perma.cc/XG6K-V7MV>] (encouraging different-sex couples to adopt traits found in same-sex couples to stabilize their relationships); Liza Mundy, *The Gay Guide to Wedded Bliss*, ATLANTIC (June 2013), <https://www.theatlantic.com/magazine/archive/2013/06/the-gay-guide-to-wedded-bliss/309317/> [<https://perma.cc/EH23-EM5X>] (“Gay marriage can function as a controlled experiment, helping us see which aspects of marital difficulty are truly rooted in gender and which are not.”); Emily Esfahani Smith, *Are Gay Marriages Healthier than Straight Marriages?*, POLITICO MAG. (June 26, 2015), <http://www.politico.com/magazine/story/2015/06/gay-marriages-better-than-straight-marriages-119465> [<https://perma.cc/4YJG-VM9A>] (citing a study that found that gay couples argue better than straight couples because they are of the same gender).

B. Reality

The reality of same-sex households is more complicated. Several studies indeed conclude that same-sex couples divide labor in more egalitarian ways.⁴⁶ They indicate, for instance, that same-sex couples are statistically more egalitarian coparents than different-sex couples,⁴⁷ that they value equality in nonlabor market activities,⁴⁸ and that they are more likely to have dual-income households.⁴⁹

⁴⁶ E.g., Kurdek, *supra* note 14, at 146–47; Mally Shechory & Riva Ziv, *Relationships Between Gender Role Attitudes, Role Division, and Perception of Equity Among Heterosexual, Gay and Lesbian Couples*, 56 SEX ROLES 629, 632–37 (2007) (finding that same-sex couples divide up household labor more equitably than different-sex couples); Solomon et al., *supra* note 14, at 565–74.

⁴⁷ See, e.g., KENNETH MATOS, FAMILIES & WORK INST., MODERN FAMILIES: SAME- AND DIFFERENT-SEX COUPLES NEGOTIATION AT HOME 7–19 (2015) (a survey conducted by the Families and Work Institute that found that same-sex couples are more likely than different-sex couples to share labor related to childcare and revealed that 74% of the same-sex couples share routine childcare responsibilities, while only 38% of different-sex couples do, and 62% of same-sex couples share responsibilities for a sick child, compared to 32% of different-sex couples); Abbie E. Goldberg et al., *The Division of Labor in Lesbian, Gay, and Heterosexual New Adoptive Parents*, 74 J. MARRIAGE & FAM. 812, 813 (2012) (in female couples who use donor insemination the partner who carries the child tends to perform more of the childcare responsibilities, but when adopting a non-biologically related child, same-sex couples tend to divide up childcare based on the preferences and strengths of the individual); Samantha L. Tornello et al., *Division of Labor Among Gay Fathers: Associations with Parent, Couple and Child Adjustment*, 2 PSYCHOL. SEXUAL ORIENTATION & GENDER DIVERSITY 365, 365–66 (2015) (finding that “[g]ay fathers reported having and desiring egalitarian divisions of [unpaid] labor. . . . [D]iscrepancies between actual and ideal division of [household and childcare] labor were associated with” fathers’ satisfaction with life and couples’ relationship functioning).

⁴⁸ Shechory & Ziv, *supra* note 46, at 635–36. See generally Lisa K. Jepsen & Christopher A. Jepsen, *An Empirical Analysis of the Matching Patterns of Same-Sex and Opposite-Sex Couples*, 39 DEMOGRAPHY 435, 435–36 (2002) (“[E]vidence of positive assortative mating for all traits and across all types of couples. The positive assortative mating, however, is stronger for non-labor-market traits (e.g., age and education) than for labor-market traits (e.g. hourly earnings).”); BLUMSTEIN & SCHWARTZ, *supra* note 31, at 13.

⁴⁹ Dan A. Black et al., *The Economics of Lesbian and Gay Families*, 21 J. ECON. PERSP. 53, 62 (2007) (data pulled from 2000 census). In addition, despite a widespread myth that same-sex couples enjoy more income than different-sex couples, same-sex couples experience more vulnerability to poverty than different-sex couples. M.V. LEE BADGETT ET AL., THE WILLIAMS INST., NEW PATTERNS OF POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY 9 (June 2013). In fact, the stability of same-sex relationships increases as economic equality increases, and they are also more likely to form long-term relationships with economic equals. Katherine Weisshaar, *Earnings Equality and Relationship Stability for Same-Sex and Heterosexual Couples*, 93 SOC. FORCES 93, 107 (2014) (“Equality of earnings reduces the likelihood of breakup for same-sex couples, while it increases the likelihood of breakup for heterosexual couples.”).

Since the 1990s, however, researchers have scrutinized the validity of the myth of egalitarianism.⁵⁰ In a sociological study of fifty-two same-sex households, sociologist Christopher Carrington observed that while “lesbigay” families seem committed to viewing all “lesbigay” families as egalitarian,⁵¹ “they, like all other families, struggle with real world concerns about how to balance work and family obligations, [...] the dynamics that produce inequality in heterosexual families also produce inequality within lesbigay families.”⁵² The invisibility of much domestic labor, according to Carrington, causes confusion and resentment,⁵³ and only “[a] minority of lesbigay families do achieve a rough equivalence in the distribution of domestic work.”⁵⁴ Carrington concludes that “[t]rue equality . . . eludes many of these families,” and this is mostly due to material economic circumstances.⁵⁵ More recent studies have also found no real differences in egalitarianism between same-sex and different-sex couples.⁵⁶

⁵⁰ CARRINGTON, *supra* note 14, at 176–77; *see also* Widiss, *supra* note 4, at 14 (arguing that egalitarianism in same-sex couples comes from the inability to marry, and that specialization in same-sex couples will increase with marriage equality).

⁵¹ CARRINGTON, *supra* note 14, at 177 (“Typical responses included: ‘Oh I would say it’s fifty-fifty around here,’ or ‘we pretty much share all of the responsibilities,’ . . .”). Carrington observed that “[m]any lesbigay family members fail to make much of a distinction between what they consider equal and what they consider fair,” and that “[t]he blurring of these quite distinct matters is necessary to maintaining the myth of egalitarianism.” *Id.* He speculated that “lesbigay families portray themselves using the ideals put forward by American culture, ideals propagating the myth of the egalitarian middle-class family.” *Id.* at 178.

⁵² CARRINGTON, *supra* note 14, at 178.

⁵³ *Id.* at 180 (“Monitoring the house for cleanliness, monitoring the calendar for birthdays, monitoring the catalog for appropriate gifts, monitoring the cupboard for low supplies, monitoring the mood of one’s spouse, and monitoring the family finances all are expressions of domesticity, and all are mostly invisible.”).

⁵⁴ *Id.* at 184 (“Roughly 25 percent (thirteen) of the families I studied approach this rough parity. The participants in these families appear to take responsibility for, as well as spend similar amounts of time on domestic matters.”). Wealthier couples can purchase domesticity “in the marketplace” and outsource it, thus enhancing egalitarianism in the relationship. *Id.* at 185 (“A very clear picture emerges here. Some lesbigay families achieve partial equity in their relationships through reliance on the labors of mostly working-poor people.”). Carrington also noticed an egalitarian pattern in families “where both individuals, regardless of gender, work in traditionally female-identified professional occupations . . .” *Id.*

⁵⁵ *Id.* at 206 (“If the reality is that only one member of the family can make money in a fulfilling way, then lesbigay families adjust to that reality.”).

⁵⁶ *See, e.g.*, ABBIE E. GOLDBERG, LESBIAN AND GAY PARENTS AND THEIR CHILDREN 99–101 (2010); Lawrence A. Kurdek, *Are Gay and Lesbian Cohabiting Couples Really Different from Heterosexual Married Couples?*, 66 J. MARRIAGE & FAM. 880, 890–93 (2004) (concluding that overall patterns do not indicate substantive differences between same-sex couples and different-sex couples in a way that increases risk for distress for either group or in ways that will increase partnership instability); Mignon R. Moore, *Gendered Power Relations Among Women: A Study of Household Decision Making in Black, Lesbian Stepfamilies*, 73 AM. SOC. REV. 335, 352 (2008) (finding that “[d]espite being in a same-sex

Several studies found that income disparity and gender stereotyping lead higher earners in same-sex couples to traditionally masculine chores, and lower earners to traditionally feminine chores.⁵⁷ A recent study reveals that lower earners in same-sex couples tend to cook while higher earners tend to make financial decisions.⁵⁸ In addition, in a recent population poll,⁵⁹ when asked about division of labor in same-sex households, subjects (from the general public) assigned “traditionally female chores . . . to the more feminine partner, and traditionally male tasks were typically assigned to the more masculine partner.”⁶⁰ Similar results were reported regarding childcare.⁶¹ In sum, reality has not cooperated

union, gender continues to profoundly influence the construction of family life”); Letitia Anne Peplau & Adam W. Fingerhut, *The Close Relationships of Lesbians and Gay Men*, 58 ANN. REV. PSYCHOL. 405, 409, 415 (2007) (finding that traditional extrafamilial gendered roles influence the distribution of labor and assignment of tasks within the family).

⁵⁷ E.g., Goldberg et al., *supra* note 47, at 813 (“both lesbian and gay male nonparent couples share housework more equally than heterosexual couples, although ethnographic research . . . provided evidence that same-sex couples may be invested in portraying the division of housework as more egalitarian than it actually is.” (citations omitted)); Peplau & Fingerhut, *supra* note 56, at 409 (dominance in same-sex couples is likely linked to income status); Weisshaar, *supra* note 49, at 96.

⁵⁸ MATOS, *supra* note 47, at 20 (“[S]ame-sex couples did not have an overabundance of shared responsibilities that would suggest that equal divisions are a consistent norm for them.”); see also Maree Burns et al., *Financial Affairs? Money Management in Same-Sex Relationships*, 37 J. SOCIO-ECONOMICS 481, 481 (2008) (examining how twenty-two cohabiting same-sex couples manage and think about their finances and concluding that while there is an underlying norm of equality, that attempt resulted in higher earner maintaining status and control; nevertheless, lesbian and gay couples favored “co-independence” rather than merging finances).

⁵⁹ Press Release, Elizabeth McCauley, Am. Sociological Ass’n, Americans Think Sex Should Determine Chores for Straight Couples, Masculinity and Femininity for Same-Sex Couples (Aug. 21, 2016), <http://www.asanet.org/press-center/press-releases/americans-think-sex-should-determine-chores-straight-couples-masculinity-and-femininity-same-sex> [https://perma.cc/Y6R3-393T]. But see Arwa Mahdawi, ‘Who’s the Man?’ Why the Gender Divide in Same-Sex Relationships Is a Farce, GUARDIAN (Aug. 23, 2016), <https://www.theguardian.com/lifeandstyle/2016/aug/23/same-sex-relationship-gender-roles-chores> [https://perma.cc/Q8LP-4GLV] (arguing that the American Sociological Association’s study presented unrealistic questions that perpetuated conventional stereotypes and did not yield legitimate results).

⁶⁰ McCauley, *supra* note 59 (“According to the researchers, 66 percent of respondents believed the more feminine partner should be responsible for buying groceries, 61 percent felt that partner should cook, and 58 percent thought that partner should clean the house and do the laundry. On the other hand, 67 percent of respondents believed that the more masculine partner should handle automobile maintenance and outdoor chores.”).

⁶¹ Females in different-sex relationships “were also expected to handle the majority of childcare tasks.” *Id.* (“Eighty-two percent of respondents said the female partner should be responsible for the children’s physical needs, 72 percent thought she should take care of the children’s emotional needs, and 62 percent believed the woman should be the stay-at-home parent. Male partners were assigned only one childcare task by a majority of respondents: 55 percent felt the man should be in charge of discipline. . . . The findings for whether the more masculine or feminine partner should be the stay-at-home parent and be in charge of

with myth. There is much striving for egalitarianism in same-sex couples, and some data to support success, but real equality is rarely achieved.

IV. THE MYTH'S EFFECT ON BARGAINING FOR SAME-SEX DIVORCE

In 1979, in *Bargaining in the Shadow of the Law*, Robert Mnookin and Lewis Kornhauser articulated the eminent argument for private ordering in divorce.⁶² “[T]he primary function of contemporary divorce law,” they argued, “[is] not . . . imposing order from above, but rather . . . providing a framework within which divorcing couples can themselves determine their postdissolution rights and responsibilities.”⁶³ Private ordering in divorce is, and should be, encouraged by courts,⁶⁴ they argued. When individuals can resolve the terms of divorce outside the courtroom, the costs of litigation are minimized, painful adversarial proceedings and uncertainties are avoided,⁶⁵ kids benefit,⁶⁶ time is saved, and agreements are more likely to reflect the preferences of those involved.⁶⁷ Although courts ultimately decide custody and visitation of children,⁶⁸ “parents actually have broad powers to make their own deals [and these are largely] rubber stamped even in cases involving children.”⁶⁹ It is best for children, they argue, that parents are “given considerable freedom to decide custody matters—subject only to the same minimum standards for protecting the child from neglect and abuse.”⁷⁰

discipline were not statistically significant for same-sex couples.”). In same-sex couples, “62 percent of respondents expected the more feminine partner to attend to the physical needs of the children, and 60 percent believed the more feminine spouse should handle the emotional needs of the children, the researchers said.” *Id.* The researchers concluded that “[biological sex] was by far the strongest determinant of which tasks people assigned to each spouse in heterosexual couples.” *Id.*

⁶² *Bargaining in the Shadow*, *supra* note 4, at 950.

⁶³ *Id.* at 950.

⁶⁴ *Id.* at 951.

⁶⁵ *Id.* at 974.

⁶⁶ *Id.* at 958.

⁶⁷ *Id.* at 974.

⁶⁸ *Bargaining in the Shadow*, *supra* note 4, at 954–55 (“In families with minor children, existing law imposes substantial doctrinal constraints. For those allocational decisions that directly affect children—that is, child support, custody, and visitation—parents lack the formal power to make their own law. Judges, exercising the state’s *parens patriae* power, are said to have responsibility to determine who should have custody and on what conditions.”).

⁶⁹ *Id.* at 955.

⁷⁰ *Id.* at 957. First, “[a] child’s future relationship with each of his parents is better ensured and his existing relationship less damaged by a negotiated settlement than by one imposed by a court after an adversary proceeding.” *Id.* at 958. “Second, the parents will know more about the child than will the judge, since they have better access to information about the child’s circumstances and desires.” *Id.* Parents, like judges, may make mistakes, but “the

This Part examines Mnookin and Kornhauser's theory and demonstrates how the myth of egalitarianism skews current bargaining conditions in contemporary same-sex divorces.

A. "*Bargaining in the Shadow of the Law*"

There are four legal consequences to divorce: (1) distribution of marital property; (2) spousal support; (3) child support; and (4) child custody and visitation.⁷¹ The authors observe that marital property, spousal support, and child support "are all basically problems of money, and the distinctions among them become very blurred. Each can be translated into present dollar values."⁷² Furthermore, "money and custody issues are inextricably linked"⁷³ such that "to a considerable degree, it is possible to reduce the concerns of divorce bargaining into two elements: money and custody."⁷⁴ This means that "over some range of alternatives, each parent may be willing to exchange custodial rights and obligations for income or wealth."⁷⁵ Under this realist view, "most parents would prefer to see the child a bit less and be able to give the child better housing, more food, more education, better health care, and some luxuries."⁷⁶ Here is the crux: divorcing parties typically exchange parenting time for money and vice versa.

possibility that negotiated agreements may not be optimal for the child hardly can be a sufficient argument against a preference for private ordering." *Id.*

⁷¹ *Id.*

⁷² *Id.* at 959; see also *id.* at 960 ("From the economic perspective of bargaining spouses, alimony and child support seem fungible: both involve periodic money payments and, indeed, will often be paid by a single check from the noncustodial parent. . . . Consequently, child-support payments that are used for housing and feeding the child will inevitably inure to the benefit of the custodial spouse.").

⁷³ *Id.* at 960.

⁷⁴ *Bargaining in the Shadow*, *supra* note 4, at 963.

⁷⁵ *Id.* at 964. Additionally, "parents may tie support duties to custodial prerogatives as a means of enforcing their rights without resort to court." *Id.*

⁷⁶ *Id.*

This “money for custody” formula, as some have noticed, often presumes a gendered division of labor between mothers and fathers.⁷⁷ The idea that a mother will trade custodial rights for money presumes that she *has* custodial rights to trade. *Bargaining in the Shadow of the Law* assumes a binary family structure consisting of (1) a primary caregiver, and (2) a higher income wage provider. Each party allegedly has an incentive to give custody or money in order to get custody or money.⁷⁸ The nature of this exchange, according to the authors, is nurtured by “important cultural values.”⁷⁹ Parenting, in their view, is embedded in support obligations for fathers and custody rights for mothers.⁸⁰ A breadwinner should hold his end of the deal if he is to enjoy parenting privileges, and “a mother who purposely prevents a father from maintaining his relationship with his children . . . may be viewed as no longer entitled to his support.”⁸¹

⁷⁷ See Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism, and the Dependency Dilemma*, 2 BERKELEY WOMEN’S L.J. 9, 19 (1986) (arguing that the Mnookin and Kornhauser framework assumes women value custody of their children more than men); Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 546–47 (1998) (“Women, notoriously, also do less well by divorce. . . . Their preference for the custody of children imposes additional financial burdens. Men, in contrast, customarily make a greater investment in labor market capital, which is portable in the event of divorce.” (footnotes omitted)). See generally Deborah Dinner, *The Divorce Bargain: The Fathers’ Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 143 (2016) (feminists have extended Mnookin and Kornhauser’s critique by arguing that a sex-neutral custody standard heavily favors fathers because judges reward men’s greater earning power, while viewing mothers with greater earning power as potentially shirking their parental responsibilities). Mnookin and Kornhauser, to some degree, acknowledge that husbands will generally have the financial bargaining chip. *Bargaining in the Shadow*, *supra* note 4, at 993 (“There may well be cases in which one spouse (stereotypically the husband) is highly sophisticated in business matters, while the other spouse is an innocent lamb being led to the slaughter.”). Barbara Stark lends support for this proposition, stating that marital gender roles will present themselves in divorce proceedings. Barbara Stark, *Divorce Law, Feminism, and Psychoanalysis: In Dreams Begin Responsibilities*, 38 UCLA L. REV. 1483, 1517 (1991) (“Gendered dynamics of domination and submission are almost inevitable at divorce, when the context reinforces gendered identities such as ‘wife/husband’ and ‘mother/father.’”).

⁷⁸ This presumption of traditional division of labor is also reflected in the author’s argument that the trade-off between money and custody may help keep the parties away from courts at the later postdivorce stages. *Bargaining in the Shadow*, *supra* note 4, at 964–65 (“[I]t is often time-consuming and expensive to enforce promises in court. . . . If a father who values visitation fails to make support payments, then, quite apart from the mother’s ability to enforce his promise in court . . . the mother may believe that she can retaliate by informally cutting off the father’s visitation or making it more difficult. . . . Similarly, a father may believe that his ability to cut off support will ensure that the mother will keep her word concerning visitation.”).

⁷⁹ *Id.* at 966.

⁸⁰ *Id.* (“A father who fails to support his children, at least when he has the financial capacity to do so, may in popular perception no longer be entitled to maintain a relationship with his minor children if the custodial mother objects.”).

⁸¹ *Id.*

With this traditional family structure in mind, the authors offer five factors that will typically influence the bargaining for divorce:

- (1) the preferences of the divorcing parents; (2) the bargaining endowments created by legal rules that indicate the particular allocation a court will impose if the parties fail to reach agreement; (3) the degree of uncertainty concerning the legal outcome if the parties go to court, which is linked to the parties' attitudes towards risk; (4) transaction costs and the parties' respective abilities to bear them; and (5) strategic behavior.⁸²

Most of these factors are self-explanatory. Regarding the second factor, the authors explain that “[d]ivorcing parents do not bargain over the division of family wealth and custodial prerogatives in a vacuum The legal rules . . . give each parent certain claims based on what each would get if the case went to trial.”⁸³ This means that “the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips—an endowment of sorts.”⁸⁴ That is the essence of bargaining in the shadow of the law.

The bargaining chips as envisioned by the authors, as we have seen, are not gender neutral: they reflect a traditional division of labor in which the legal rules assign mothers the primary parent position and fathers the primary breadwinner position.⁸⁵ Fathers will therefore bargain for more parenting time, while mothers may trade parenting in exchange for money.⁸⁶ Both will benefit from private ordering. Given the still-existing gendered division of labor in many U.S. households,⁸⁷ these insights are not necessarily dated. They capture how divorce

⁸² *Id.*

⁸³ *Id.* at 968.

⁸⁴ *Bargaining in the Shadow*, *supra* note 4, at 968–69 (“Assume that in disputed custody cases the law flatly provided that all mothers had the right to custody of minor children and that all fathers only had the right to visitation two weekends a month. . . . Assume further that the legal rules relating to [money] gave the mother some determinate share of the family’s economic resources.”).

⁸⁵ *Id.* at 968–69 (“The range of negotiated outcomes would be limited to those that leave both parents as well off as they would be in the absence of a bargain.”).

⁸⁶ *Id.* at 969.

⁸⁷ This gendered division of labor for different-sex marriages has changed since 1979, when *Bargaining in the Shadow of the Law* was published. However, recent studies reveal that different-sex couples with a more egalitarian division of labor revert into traditional gender roles when transitioning to parenthood. Sabra L. Katz-Wise et al., *Gender-Role Attitudes and Behavior Across the Transition to Parenthood*, 46 DEVELOPMENTAL PSYCHOL. 18, 27 (2010) (“Overall, parents become more traditional in their attitudes and behavior from pregnancy through the first year postpartum.”); Jill E. Yavorsky et al., *The Production of Inequality: The Gender Division of Labor Across the Transition to Parenthood*, 77 J. MARRIAGE & FAM. 662, 674 (2015) (“Prebirth, the women in our sample were not disadvantaged in terms of work and had achieved largely equitable workloads. . . . [T]he birth of the child dramatically changed the division of labor in our sample. . . . [W]omen shouldered the majority of physical and engagement child care, and the gender housework gap emerged such that women performed more housework than men; men actually significantly declined in housework by 5 hours across the transition to

actually works in many marriages that follow scripted gender norms.⁸⁸ Same-sex divorces, as we will see, complicate this formula.

B. *Ineffective Bargaining for Same-Sex Divorce*

The main claim of this Article is that a myth of egalitarianism in same-sex relationships obstructs effective bargaining for same-sex divorces in three ways. First, it is extrinsically linked to what this Article calls “divorce exceptionalism.” Second, it skews the bargaining chips of “children for money” described above. Third, the combination of the first two elements encourages strategic and aggressive behavior in same-sex divorces. I will address each of these in turn.

1. *Divorce Exceptionalism*

No state has enacted separate marital dissolution rules for same-sex couples. Nor will any state do so.⁸⁹ The same rules apply to all divorcing individuals in the United States.⁹⁰ Yet evidence from the first wave of same-sex divorces suggests that it not uncommon for one party—usually the higher income spouse—to claim that general marital dissolution rules do not apply in same-sex

parenthood.”); see also Alexandra Killewald, *Money, Work, and Marital Stability: Assessing Change in the Gendered Determinants of Divorce*, 81 AM. SOC. REV. 696, 717 (2016) (“The determinants of marital stability for modern marriages are thus [not] post-gender. . . . [M]arriage remains a gendered institution, embedded in the larger gender structure, with the division of labor, not financial resources, the primary lens through which this gendered nature is reflected.” (citation omitted)); Jaime L. Marks et al., *Family Patterns of Gender Role Attitudes*, 61 SEX ROLES 221, 224 (2009) (“[W]hen couples disagree with respect to gender role attitudes (i.e., housework division), both wives and husbands report higher levels of marital tension and conflict.”); Brigid Schulte, *Once the Baby Comes, Moms Do More, Dads Do Less Around the House*, WASH. POST (May 7, 2015), https://www.washingtonpost.com/news/parenting/wp/2015/05/07/once-the-baby-comes-moms-do-more-dads-do-less-around-the-house/?utm_term=.41873045e99c [<https://perma.cc/E2M4-UVHM>] (“And before we knew it, instead of being the egalitarian couple for the new millennium, as we intended to be, we had unintentionally slid into pretty traditional gender roles. Except that I still worked full-time.”).

⁸⁸ See Yavorsky et al., *supra* note 87, at 675; see also Katz-Wise et al., *supra* note 87, at 18.

⁸⁹ Sex- or sexuality-based classification of this sort would be unconstitutional. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013).

⁹⁰ See also Feigenbaum, *supra* note 8, at 263 (“If the [Supreme] Court [legalizes same-sex marriage], then a divorcing same-sex couple would be able to ‘Bargain in the Shadow of the Law’ exactly as Mnookin and Kornhauser described thirty-five years ago.”).

divorces.⁹¹ This is divorce exceptionalism.⁹² The basic claim of the divorce exceptionalist—“general marriage dissolution rules do not apply to me”—is clearly incorrect as a matter of law.⁹³ It nonetheless warrants attention because the ex-spouse may need litigation to enforce the law. If the divorce exceptionalist’s ex-spouse is passive, heartbroken, or lacking financial means, they may concede to the absence of law. Divorce exceptionalism, although legally flawed, could be outcome determinative—much like “fake news.”⁹⁴

The myth of egalitarianism is dangerous because it enables and supports divorce exceptionalism. The divorce exceptionalist may rely on the myth to argue that general divorce rules are meant only for different-sex couples.⁹⁵ Worse, the ex-spouse of the divorce exceptionalist may also internalize the myth or its derivative myth of individual autonomy in same-sex relationships. Since the 1960s, feminists have rejected an ideology of “separate spheres”⁹⁶ as sexist,

⁹¹ KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY 207–13 (2015) (providing an example where one partner in a same-sex dissolution does not feel aspects of divorce rules should apply to her relationship); Hertz et al., *supra* note 1, at 127–28 (observing that the long history of legal-sponsored oppression has led some to feel distrustful of the legal system and “underlying distrust can cause parties in same-sex dispute to overreact and feel wronged by the dissolution process, with no direct parallel in heterosexual dissolution where the parties typically have greater trust in the legitimacy of the legal system”); Mellissa Holtzman, *GLBT Parents’ Rights During Custody Decision Making: The Influence of Doctrine, Statute, and Societal Factors in the United States*, 9 J. GLBT FAM. STUDIES 364, 379–81 (2013) (providing examples of where biological parents of children in same-sex marriages used nonrecognition of marriage to defeat the marital presumption that favors the non-birth parent’s custodial claim to a child); *see also* Green, *supra* note 1 (“‘Gay folks are not prepared to deal with what comes with marriage’ . . . ‘Not a clue what they’re getting into. When I tell people I’m getting divorced, most say, ‘I had no idea you even had to do that! Oh my god!’””).

⁹² *See* Michael Ignatieff, *Introduction to AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 3 (Michael Ignatieff ed., 2005). For further analysis of legal exceptionalism, *see* Ben-Asher, *supra* note 25 and Noa Ben-Asher, *Legalism and Decisionism in Crisis*, 71 OHIO ST. L.J. 699, 701 (2010).

⁹³ *See* FRANKE, *supra* note 91, at 211 (standard rules of equitable distribution apply despite a couple’s oral premarital financial agreement because such agreements must be in writing under New Jersey law).

⁹⁴ For recent discussion of the significance of fake news, *see All in with Chris Hayes: Fake News Breaks Through* (MSNBC television broadcast Dec. 6, 2016), <http://www.msnbc.com/all-in/watch/fake-news-breaks-through-826526275708> [<https://perma.cc/6VD5-ZYDB>] (discussing poll that indicates that many believe fake news); *Morning Joe: The Real-Life Implications of Fake News* (MSNBC television broadcast Dec. 6, 2016), <http://www.msnbc.com/morning-joe/watch/the-real-life-implications-of-fake-news-825925699506> [<https://perma.cc/2AX7-PJQG>] (discussing real consequences of fake news).

⁹⁵ *See* FRANKE, *supra* note 91, at 213–14; Hertz et al., *supra* note 1, at 128–29; Green, *supra* note 1; Compton, *supra* note 27 (describing the dissolution of a same-sex female couple where the biological mother relied on the lack of the marital presumption in an attempt to deny the parental rights of her ex-partner).

⁹⁶ Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187, 1198 (2016).

patriarchal, subordinating, and exploitative to women.⁹⁷ An ethos of female autonomy now predominates feminist literature⁹⁸ and popular culture.⁹⁹ In a female same-sex couple, this ethos can lead the ex-spouse of the divorce exceptionalist to dissonance. She had viewed her marriage as egalitarian and herself as autonomous, but now finds herself in a reality of financial dependence often exacerbated by children to support. In male same-sex couples as well, anecdotal evidence suggests that the lower income spouse often finds it effeminizing to request money in marital dissolution.¹⁰⁰ Admitting financial dependency on an ex-spouse may feel like a painful moral failure.¹⁰¹

Under the myth of egalitarianism, one or both parties, in denial of their material reality, may view themselves as financial equals and as autonomous.¹⁰² This may lead to divorce exceptionalism,¹⁰³ which is today a major obstacle to effective divorce negotiations. It is impossible to bargain in the shadow of the law when the law is absent. Without legal rules as bargaining chips, ex-spouses may replicate the bargaining strategies of their failed marriages and possibly even those of their parents' divorces.¹⁰⁴

⁹⁷ See *id.* at 1198–1209 (demonstrating how the traditional division of labor was confronted by legal feminists and courts since the 1970s).

⁹⁸ See, e.g., Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982).

⁹⁹ See, e.g., *Sex and the City* (HBO 1998–2004); *The L Word* (Showtime Networks 2004–2009).

¹⁰⁰ See FRANKE, *supra* note 91, at 213 (“Where the two men in the couple have different earning power or assets, the less affluent spouse is declining to demand his half share at the time of divorce because it genders him *as a wife* to do so. He would rather leave the marriage with his masculinity intact than be turned into an ex-wife receiving alimony.”).

¹⁰¹ *Id.* at 212–13 (“Ruth looks a lot like a ‘lesbian wife’—going in and out of the wage-labor market, earning less money, and contributing less financially to the family’s joint support. The judge even understood her to be a ‘housewife’ for part of their marriage, performing unpaid domestic labor as is customary for wives/mothers.”).

¹⁰² See *id.* at 212 (describing the attitude of a higher wage earner in a female same-sex couple, “the lesbian husband position”: “She feels she earned her own money fair and square, not due to any gender-based advantage that a male husband married to a female wife might have. Ruth should not have any legal entitlement to her money”); see also Hertz et al., *supra* note 1, at 135 (“A couple may be largely unaware of any difficulties associated with these imbalances during their relationship, though they may come into play surprisingly and upsettingly when the relationship fails and financial disputes arise.”).

¹⁰³ Notably, divorce exceptionalism could sometimes lead to just results. Katherine Franke gives an example of a situations in which it is unfair for one man to claim access to the wealth of the other. See FRANKE, *supra* note 91, at 216–17 (“If Rob freely chose to live for eight years with [the] understanding of what Steve owed him before they got married, why can’t he freely choose to waive any rights to support after they marry?”).

¹⁰⁴ Paul R. Amato & Danielle D. DeBoer, *The Transmission of Marital Instability Across Generations: Relationship Skills or Commitment to Marriage?*, 63 J. MARRIAGE & FAM. 1038, 1038 (2001) (finding that married persons whose parents were divorced were much more likely to have thought about divorce than persons whose parents were continuously married because they were more likely to think that marital problems could not

2. Legal Rules as Bargaining Chips

As mentioned above, five parameters will affect divorce settlements: “(1) the preferences of the divorcing parents; (2) the bargaining endowments created by legal rules . . . ; (3) the degree of uncertainty concerning the legal outcome if the parties go to court . . . ; (4) transaction costs and the parties’ respective abilities to bear them; and (5) strategic behavior.”¹⁰⁵ Of these factors, the most significant is that legal norms always hover in the background of divorce negotiations.¹⁰⁶ The myth of egalitarianism complicates the “children for money” exchange elaborated in *Bargaining in the Shadow of the Law* in two ways: (1) misaligned bargaining chips; and (2) legal uncertainty.

a. Obstacle #1: Misaligned Bargaining Chips

In same-sex divorces, the “money for kids” formula offered in *Bargaining in the Shadow of the Law* will often play out differently. One effect of the myth on same-sex divorces is that bargaining chips for money and children are often misaligned. As we have seen, the main claim in *Bargaining in the Shadow of the Law* is that money and custody are linked in that “each parent may be willing to exchange custodial rights and obligations for income or wealth,”¹⁰⁷ namely “most parents would prefer to see the child a bit less and be able to give the child better housing, more food, more education, better health care, and some luxuries.”¹⁰⁸ Bargaining is effective when parents want to exchange parenting time for money and vice versa without judicial interference. As discussed above, for Mnookin and Kornhauser, money and custody are linked in a gendered way.¹⁰⁹ One parent will trade custodial rights for income and the other will do

be fixed and were more pessimistic about the chances of improving their relationships); Ming Cui et al., *The Effect of Parental Divorce on Young Adults’ Romantic Relationship Dissolution: What Makes a Difference?*, 18 PERS. RELATIONSHIPS 410, 420–21 (2011) (concluding that children of divorced parents held a more favorable attitude toward divorce, which was associated with lower commitment to their romantic relationship and that young adults’ perception of parental divorce varied depending on interparental conflict and parents’ marital quality before the divorce).

¹⁰⁵ *Bargaining in the Shadow*, *supra* note 4, at 966; *see also id.* at 968 (“Divorcing parents . . . bargain in the shadow of the law. The legal rules governing alimony, child support, marital property, and custody give each parent certain claims based on what each would get if the case went to trial. . . . [T]he outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips—an endowment of sorts.” (emphasis added)).

¹⁰⁶ *Id.* at 985–86.

¹⁰⁷ *Id.* at 964; *see also id.* (“[P]arents may tie support duties to custodial prerogatives as a means of enforcing their rights without resort to court.”).

¹⁰⁸ *Id.*

¹⁰⁹ *See* Bartlett & Stack, *supra* note 77, at 19 (“[W]omen take more responsibility for their children than do men, love their children more than men do, and are more willing than

the opposite. They posit a family organized around a primary caregiver (typically female) and a higher wage provider (typically male), in which each has an incentive to “give” what they have (wealth or custody) in order to get what they do not (custody or wealth).¹¹⁰ The myth of egalitarianism and the realities of many same-sex households, as Part II shows, do not fit this formula.

The first parameter that will affect the bargaining for divorce is parenting time preferences.¹¹¹ As the authors observe, “[i]nformed bargaining requires a parent to assess accurately his or her own preferences concerning custodial alternatives.”¹¹² How parents divided parenting during the marriage does not necessarily reflect the desires of one or both parties upon dissolution.¹¹³ In addition, spite or altruism could affect the bargaining process.¹¹⁴ An altruistic parent may commit to a “lesser” agreement than she or he would get in court if they think it would benefit the child or former spouse.¹¹⁵ A spiteful parent may do the opposite.¹¹⁶ In this first stage, each party assesses how much parenting time they desire postdissolution.¹¹⁷

men to sacrifice in order to retain custody of their children.”); Dinner, *supra* note 77, at 143–44; *see also* Wax, *supra* note 77, at 89.

¹¹⁰ This presumption of traditional division of labor is also reflected in the author’s argument that the trade-off between money and custody may help keep the parties away from courts at the later postdivorce stages. *Bargaining in the Shadow*, *supra* note 4, at 964–65 (“[I]t is often time-consuming and expensive to enforce promises in court. . . . If a father who values visitation fails to make support payments, then, quite apart from the mother’s ability to enforce his promise in court . . . the mother may believe that she can retaliate by informally cutting off the father’s visitation or making it more difficult. . . . Similarly, a father may believe that his ability to cut off support will ensure that the mother will keep her word concerning visitation.”).

¹¹¹ There are many possible variations to a parenting agreement—ranging from one parent getting primary physical and legal custody and the other only visitation rights—to joint physical and legal custody. *See id.* at 963.

¹¹² *Id.* at 967.

¹¹³ *Id.* (“The information each parent has relates to the actual division of child-rearing tasks in an ongoing family. Dissolution or divorce inevitably alters this division, and the parent may discover new advantages or disadvantages to child-rearing responsibilities. Moreover, the parents’ own needs may alter drastically after divorce.” (citation omitted)).

¹¹⁴ *Id.* at 968.

¹¹⁵ *Id.* (“For example, a father may commit himself to child-support payments beyond what he predicts a court would require, simply because he does not want his children to suffer economic detriment from a divorce. A mother may agree to substantial visitation for the father because she thinks this is good for the children, even though she personally despises the father and wants nothing more to do with him. Similarly, either or both spouses may have preferences that attach great weight to the happiness and desires of their former spouse.”).

¹¹⁶ *Bargaining in the Shadow*, *supra* note 4, at 968.

¹¹⁷ Notably, the information each party conveys to the other side on this point may or may not be accurate, depending on levels of trust and the bargaining style of the parties and their attorneys. *See id.* at 972.

Parenting-time preferences could differ significantly in divorcing same-sex and different-sex couples.¹¹⁸ Existing data discussed in Part II indicates that during the course of the relationship, same-sex couples tend to prefer and aspire to equal parenting arrangements.¹¹⁹ Even when de facto parenting time was not equal during a same-sex marriage, neither party is likely to view itself as a “secondary” parent.¹²⁰ This data and the myth of egalitarianism, which is often internalized by the divorcing spouses, leads individuals in same-sex divorces to seek *at least* equal-time parenting arrangements.¹²¹ By contrast, although the maternal presumption has been abolished,¹²² and fathers’ rights awareness has grown,¹²³ equal parenting is not yet the leading norm in most different-sex

¹¹⁸It is obviously risky to generalize regarding such personal circumstances that may vary across class, ethnicity, and race, and we do not have enough data on outcomes of bargains for same-sex divorces.

¹¹⁹See, e.g., MATOS, *supra* note 47, at 2; GOLDBERG, *supra* note 56, at 99–101; Tornello et al., *supra* note 47, at 365–66.

¹²⁰See generally Hertz et al., *supra* note 1, at 130–31 (“Although custody disputes can arise in all types of dissolutions, disputes over legal parentage are far more common in same-sex dissolutions.”); *id.* at 133 (“Even in disputes when both partners are legal parents, the issues in same-sex custody disputes are unlike those generally encountered in heterosexual custody cases, simply because the psychological dynamics can be so different. . . . It is common for the underlying inequality between a biological and a nonbiological parent to surface in a custody dispute, with one partner claiming to be the ‘real’ parent and seeking preferential custody or decision-making authority or automatic entitlement to a greater percentage of the child’s time. Even where the nonbiological parent has been the primary caretaker, in a break-up the biological parent is likely to have a particular sense of entitlement based on her or his genetic connection to the child.”).

¹²¹See, e.g., Abbie E. Goldberg et al., *Lesbian and Heterosexual Adoptive Mothers’ Experiences of Relationship Dissolution*, 73 SEX ROLES 141, 150 (2015) (“Notably, participants whose children spent a similar amount of time in both households unanimously described the arrangement as working well.”).

¹²²Many courts have found that the maternal presumption violates the Equal Protection Clause of the Fourteenth Amendment. See, e.g., *Ex Parte Devine*, 398 So. 2d 686, 695 (Ala. 1981); *Garrett v. Garrett*, 464 S.W.2d 740, 742 (Mo. Ct. App. 1971); *State ex rel. Watts v. Watts*, 77 Misc. 2d 178, 183 (N.Y. Fam. Ct. 1973); *Commonwealth ex rel. Spriggs v. Carson*, 368 A.2d 635, 639 (Pa. 1977) (finding that the Tender Years Doctrine is offensive to the concept of equality of the sexes); *Pusey v. Pusey*, 728 P.2d 117, 119–20 (Utah 1986). All states (as well as the District of Columbia) have statutes that require the best interests of the child be considered in divorce proceedings. Children’s Bureau, *Determining the Best Interests of the Child: State Statutes*, CHILD WELFARE GATEWAY (Mar. 2016), https://www.childwelfare.gov/pubpdfs/best_interest.pdf [<https://perma.cc/R34S-JL7B>].

¹²³Groups such as the Fathers’ Rights Movement and National Parents Organization formed to advocate against perceived inequality in family law. About, FATHERS’ RTS. MOVEMENT, <http://fathersrightsmovement.us/about/> [<https://perma.cc/75C7-W8EZ>]; Our Mission, NAT’L PARENTS ORG., <https://nationalparentsorganization.org/about-npo/our-mission> [<https://perma.cc/ZY6A-F7VH>]. These organizations have had some success in getting states to act. Ashby Jones, *Big Shift Pushed in Custody Disputes*, WALL ST. J. (Apr. 16, 2015), <https://www.wsj.com/articles/big-shift-pushed-in-custody-disputes-1429204977> [<https://perma.cc/ZB2P-KTKD>]. But while fathers’ rights awareness has increased, others

couples.¹²⁴ Women typically aspire to, and get more, parenting time in divorce settlements.¹²⁵

In many same-sex divorces, both parties are (or view themselves as) equal parents.¹²⁶ Parenting time is therefore not a strong bargaining chip for either party; it may obviously be used as a strategic threat (“I will seek primary custody if you do x!”) but it is not a *predictable* bargaining chip for either side. The parenting preferences in same-sex divorces are likely to be closer to joint custody.¹²⁷

With a vague “best interest” standard as the background rule, and with no parent having any predictable advantage over the other, the less moneyed spouse does not have parenting time as a bargaining chip. The more moneyed spouse, by contrast, has comparable bargaining chips to what they would have in a different-sex divorce (money). The myth of egalitarianism may therefore be utilized to pressure the less moneyed party to exit the marriage “as an equal” without seeking any sort of support.

have suggested that class is more determinative in custody disputes than gender. Hanna Rosin, *Dad's Day in Court*, SLATE (May 13, 2014), http://www.slate.com/articles/double_x/doublex/2014/05/men_s_rights_recognized_the_pro_father_evolution_of_divorce_and_paternity.html [<https://perma.cc/9BDN-LRN7>].

¹²⁴ TIMOTHY GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2013, at 1, 4–5, 9 (Jan. 2016) (finding that 17.5% of custodial parents were fathers; that custodial mothers were more than likely to have legal or informal child support agreements than custodial fathers; that 52.3% of custodial mothers had child support agreements while only 31.4% of custodial fathers do; and that of custodial parents due child support, 88.6% of them were custodial mothers); *see also* JUDITH AREEN ET AL., FAMILY LAW 899 (6th ed. 2012) (“A study of 238 randomly selected cases in urban Ohio found that approximately 13 percent of sole and joint custody awards went to men. The study found that the age of the child still plays a significant role in custody determinations; only 23 percent of custodial fathers were awarded custody of a child under the age of five.” (citing Wendy Reiboldt & Sharon Seiling, *Factors Related to Men's Award of Custody*, 15 FAM. ADVOC. 42 (1993))).

¹²⁵ GRALL, *supra* note 124, at 4.

¹²⁶ Nanette Gartrell et al., *Family Characteristics, Custody Arrangements, and Adolescent Psychological Well-Being After Lesbian Mothers Break Up*, 60 FAM. REL. 572, 581 (2011) (“[N]early three quarters of separated [lesbian] mothers are sharing custody, in contrast to a majority of divorced heterosexual American mothers who have sole physical and legal custody of their children.”).

¹²⁷ *Id.*; Goldberg et al., *supra* note 121, at 152.

b. *Obstacle #2: A Backdrop of Uncertainty*

A further complication in bargaining for any divorce settlement is that it is often uncertain how a court will apply a default rule.¹²⁸ The effect of this uncertainty will depend on the attitudes of the parties toward risk—or what economists call “risk preferences.”¹²⁹ For example, because it is often unclear how a judge would apply the “best interest” standard,¹³⁰ individual attitudes toward risk will affect the bargaining for divorce. A risk-averse parent may wish to avoid having a court decide such an important life issue. For that party, a feared mistake of a court is too great to bear, and this will affect their bargaining behavior. A risk lover, on the other hand, may be more willing to litigate custody.

This fog of uncertainty applies to all divorcing couples, but is currently thicker in same-sex divorces for two reasons. First, in most or all jurisdictions there is not enough judicial experience with same-sex divorces. Judges therefore have to decide how to interpret and apply rules and standards from different-sex divorces. A given judge’s views on homosexuality may tilt outcomes in unpredictable ways. Second and relatedly, courts are less likely to rely on traditional sex stereotypes when deciding same-sex divorces. Therefore, the outcomes are even less predictable than they would be in different-sex divorces. Divorcing same-sex couples today are bargaining in the shadow of marital dissolution laws that are more uncertain than they are for different-sex couples.

3. *Transaction Costs and Strategic Behavior*

Financial and emotional transaction costs can influence outcomes of all divorce negotiations.¹³¹ Financial costs include professional fees, filing fees, and court costs.¹³² Emotional costs can also be immense.¹³³ Parties can affect the magnitude of the transactional costs such that the party better able to bear these costs will have an advantage in divorce bargaining.¹³⁴ For same-sex couples, there is a second emotional dagger. Marriage for most different-sex couples has nothing to do with civil rights, self-affirmation, or equal citizenship.

¹²⁸ *Bargaining in the Shadow*, *supra* note 4, at 969 (“Often, the outcome in court is far from certain, with any number of outcomes possible. Indeed, existing legal standards governing custody, alimony, child support, and marital property are all striking for their lack of precision and thus provide a bargaining backdrop clouded by uncertainty.”).

¹²⁹ *Id.* at 970.

¹³⁰ *Id.* at 969–70 (“Except in situations when one parent poses a substantial threat to the child’s well-being, predicting who will get custody under this standard is difficult indeed, especially given the increasing pressure to reject any presumption in favor of maternal custody.” (footnotes omitted)).

¹³¹ *Id.* at 972.

¹³² *Id.* at 971–72.

¹³³ *Id.* at 972.

¹³⁴ *Bargaining in the Shadow*, *supra* note 4, at 972.

This is not so for members of the LGBT community. Marriage equality was only recently litigated, decided, and celebrated as a major civil-rights victory.¹³⁵ Many of us grew up believing that we will never be able to marry.¹³⁶ For many, the civil right to marry has been transformative. Divorce is no civil-rights victory. It is often experienced as bitter failure. The emotional injury of failing in marriage—a civil right fought so hard for—is unique to LGBT individuals.¹³⁷

Strategic behavior also deserves special attention here. In all divorces, throughout the negotiation process the parties and their attorneys transmit information about their own preferences to each other. They typically appeal to legal and social norms, but also to threats and bluffs.¹³⁸ The divorce they experienced in childhood may also influence a party's strategic behavior in divorce.¹³⁹ Children with divorced parents may, consciously or not, repeat

¹³⁵ See, e.g., President Barack Obama, Remarks by the President on the Supreme Court Decision on Marriage Equality (June 26, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/06/26/remarks-president-supreme-court-decision-marriage-equality> [<https://perma.cc/VZ4L-YWUFU>] (characterizing *Obergefell v. Hodges* as a “victory for America,” and commenting that “we’ve made our union a little more perfect”); *Victory for Equal Rights*, N.Y. TIMES (June 26, 2013), <http://www.nytimes.com/2013/06/27/opinion/the-same-sex-marriage-rulings.html> [<https://perma.cc/4UNE-HPZE>] (“Today’s two Supreme Court rulings involving same-sex marriage were a huge and gratifying victory in the long struggle to end government-sanctioned discrimination against gay and lesbian Americans.”); see also MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR 209 (2013).

¹³⁶ Notably, there have been strong objections to marriage within the LGBT movement. See, e.g., Lisa Duggan, *Beyond Same-Sex Marriage*, 9 STUD. GENDER & SEXUALITY 155, 157 (2008) [hereinafter Duggan, *Beyond Same-Sex Marriage*] (“[Marriage] has been glorified as the best way to exert social control generally and to stem the ‘decline’ in social discipline since the 1960s. Why then would lesbian and gay organizations mobilize so strenuously for the right to marry?”); Eitelbrick, *supra* note 40, at 402–03 (arguing that the price for same-sex marriage is to sacrifice gay and lesbian identity in favor of simulating gendered, heterosexual couples); Lisa Duggan, *Holy Matrimony!*, NATION (Feb. 26, 2004), <https://www.thenation.com/article/holy-matrimony/> [<https://perma.cc/4R9K-HS5K>] (arguing that the LGBT movement should not use the then-growing movement for equal marriage to ignore other issues facing gender inequality and the LGBT movement).

¹³⁷ Hertz et al., *supra* note 1, at 125.

¹³⁸ *Bargaining in the Shadow*, *supra* note 4, at 972–3. The authors discuss two models of negotiating behavior: a “Strategic Model,” in which the process is “a relatively norm-free process centered on the transmutation of underlying bargaining strength into agreement by the exercise of power, horse-trading, threat, and bluff;” and a “Norm-Centered Model,” which involves “elements normally associated with adjudication—the parties and their representatives would invoke rules, cite precedents, and engage in reasoned elaboration.” *Id.* (quoting Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 637–38 (1976)).

¹³⁹ See Amato & DeBoer, *supra* note 104, at 1038 (finding that married persons whose parents were divorced were much more likely to have thought about divorce than persons whose parents were continuously married, were more likely to think that marital problems could not be fixed, and were more pessimistic about the chances of improving their relationships); see also Cui et al., *supra* note 104, at 420–21 (concluding that children of divorced parents held a more favorable attitude toward divorce, which was associated with

strategic or aggressive behavior that they were exposed to in childhood.¹⁴⁰ The negotiation process involves many opportunities for strategic behavior “because the parties often will not know with certainty (1) the other side’s true preferences with regard to the allocational outcomes; (2) the other spouse’s preferences or attitudes towards risk; and (3) what the outcome in court will be, or even what the actual odds in court are.”¹⁴¹ In the first wave of same-sex divorces, the myth of egalitarianism provides an additional tool with which parties may engage in increased and manipulative strategic behavior.

In sum, the myth of egalitarianism in same-sex relationships can obstruct effective bargaining for same-sex divorces in three main ways. First, it enables and enhances the disruptive phenomenon of divorce exceptionalism. Second, it skews the “money for children” bargaining chips for divorce. Consequently, it invites strategic and aggressive behavior by some parties in same-sex divorces.

IV. A REALIST APPROACH TO SAME-SEX DIVORCE

Parties need clear default rules to bargain effectively for divorce.¹⁴² Without guiding principles, divorce negotiations may devolve to speculation, intuition, threats, and bluffs.¹⁴³ As Parts II and III demonstrate, a pervasive myth of egalitarianism operates today as a disruptive force in many negotiations for same-sex divorces. It boosts divorce exceptionalism and blurs the material realities of parties to same-sex divorces. This final Part offers two pragmatic solutions. First, all legal actors who participate in same-sex divorces, including mediators, attorneys, judges, and the parties themselves, must recognize that marriage equality comes with divorce equality. That is, there are no special marriage laws or divorce laws for gay people. Second, there are very good reasons to extend the current shift towards joint-custody presumptions to same-sex divorces.

A. *Applying Ordinary Dissolution Rules to Same-Sex Divorces*

1. *Avoiding Mythology*

Debunking the myth of egalitarianism is the first step to making bargains for same-sex divorce more effective. Myths and mythical figures can sway and stir human emotion and instigate legal change. Constitutional historians, scholars and jurists have observed that the American Revolution, the Founding

lower commitment to their romantic relationship and that young adults’ perception of parental divorce varied depending on interparental conflict and parents’ marital quality before the divorce).

¹⁴⁰ Cui et al., *supra* note 104, at 411–12.

¹⁴¹ *Bargaining in the Shadow*, *supra* note 4, at 973.

¹⁴² *Id.* at 996–97.

¹⁴³ *See id.* (concluding that guiding principles are in the best interest of both parents and children impacted by divorce to mitigate harsh ramifications from divorce negotiations).

Fathers, the Declaration of Independence, and the Constitution have all generated elaborate myths about American democracy and the rule of law that are effective to this day.¹⁴⁴ It is no surprise that myths and generalizations about gay sexuality and relationships have shaped the civil-rights struggle of lesbians, gays, bisexuals, and trans people in the United States.

In *Lawrence v. Texas*, for example, the Supreme Court grounded the right to liberty from government intrusion in rhetoric such as “personal bond that is more enduring”¹⁴⁵ and the “mystery of human life.”¹⁴⁶ As the vast literature on *Lawrence* has shown, however, the actual relationship of the plaintiffs, Lawrence and Garner, could not be further from these idealized portrayals.¹⁴⁷ They hardly knew each other and were probably not even having sex that night the police arrested them for allegedly committing sodomy.¹⁴⁸ However, the Supreme Court and the public needed redeeming myths about homosexuality in order to extend Constitutional protections involving sexual freedom in the private sphere.¹⁴⁹

Relatedly, in extending marriage equality to same-sex couples, in *Windsor* and *Obergefell*,¹⁵⁰ the Supreme Court also endorsed some myths about same-sex couples while rejecting others. As I have argued elsewhere, the ideas that the state can “confer dignity” through marriage licenses, and that same-sex

¹⁴⁴ See generally BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS* (2007) (chronicling the rise of the two-party system, and exploring its effect on the Constitution and United States’ rule of law); AKHIL REED AMAR, *AMERICA’S CONSTITUTION* (2005) (interpreting the Constitution, and exploring its underlying history and theoretical principles).

¹⁴⁵ *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”).

¹⁴⁶ *Id.* at 574 (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992))); see also Katherine M. Franke, Comment, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1402–04 (2004).

¹⁴⁷ See, e.g., DALE CARPENTER, *FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS* xi–xii (2012) (“When Harris County sheriff’s deputies arrived minutes later, they did not find a crazy gunman, but they did report that they caught John Lawrence and Tyron Garner *in flagrante delicto* having anal sex inside Lawrence’s bedroom. . . . The pancaked conventional tale remains—years after the landmark Supreme Court decision in *Lawrence v. Texas*—a stubborn myth.”).

¹⁴⁸ *Id.* at xii–xiii (“Based on my research, including interviews with most of the important participants in the events and their immediate aftermath, I come to a surprising, but only probabilistic, conclusion: it is unlikely that sheriff’s deputies actually witnessed Lawrence and Garner having sex. . . . John Lawrence himself now flatly denies that Garner and he were having sex.”).

¹⁴⁹ *Id.*

¹⁵⁰ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2585 (2015); *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

couples and their children had been degraded, shamed, and humiliated by the Defense of Marriage Act (DOMA), do not necessarily reflect the real-life experience of many sexual minorities.¹⁵¹ By contrast, courts recognizing same-sex marriages have had to dismiss negative myths about sexual promiscuity,¹⁵² about inability to commit to relationships,¹⁵³ and about same-sex households providing a less promising upbringing to children.¹⁵⁴

These myths and generalizations have also come with costs for many LGBT.¹⁵⁵ Concepts such as dignity, stigma, shame, and egalitarianism can energize lawmakers and the broader population.¹⁵⁶ They underscore the importance of equal citizenship and the depth of injuries. They make good headlines for news media.¹⁵⁷ But sometimes they are not true. Some gay people

¹⁵¹ Ben-Asher, *supra* note 41, at 284 (“The State grants marriage licenses, and it should grant them equally to all couples. In so doing, the State does not distribute dignity; it acknowledges dignity equally across citizens. . . . [A]dvocates should be careful not to imply that human dignity is enhanced by marriage. If dignity inheres in the individual, then neither the state where one resides nor the state of matrimony increases that dignity.”); *see also* Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 YALE J.L. & HUMAN. 1, 75–76 (2015) (concluding that contemporary marriage advocates have glorified traditional marriage as the ultimate political goal to achieve equality between gays and lesbians and straight individuals and, in so doing, have forgotten or even outright ignored the individuals in the LGBT community-at-large who will not (or do not) benefit from marriage; marriage, in that sense, became a way to measure a gay person’s virtue, that it provides an “indicia of bourgeois respectability”).

¹⁵² Ben-Asher, *supra* note 41, at 272 (“*Lawrence* reasoned that the problem with sodomy laws was that they ‘seek to control a *personal relationship* that . . . is within the liberty of persons to choose without being punished as criminals.’ . . . Homosexual sex was now recast by the Court as intimate private acts. Finally, in *Windsor*, we find the legal homosexual, this time two married women, stripped of their sexuality and sex acts altogether. . . . The [Supreme] Court’s decision [in *Windsor*] centers on the couple’s 2007 marriage ceremony and lifelong commitment to each other.”).

¹⁵³ *Obergefell*, 135 S. Ct. at 2600 (“The right to marry thus dignifies couples who ‘wish to define themselves by their commitment to each other.’” (quoting *Windsor*, 133 S. Ct. at 2689)).

¹⁵⁴ *Id.* (“[M]any same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. Most states have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.” (citation omitted)).

¹⁵⁵ *See, e.g.*, FRANKE, *supra* note 91, at 209–13; Boucai, *supra* note 151, at 75–76. *See generally* Ben-Asher, *supra* note 41, at 282 (examining the impact of the Court’s moral recognition and validation of a specific type of legal homosexual and the dignity granted accordingly).

¹⁵⁶ *See* Adam J. Hirsh, *Cognitive Jurisprudence*, 76 S. CAL. L. REV. 1331, 1361 (2003) (“The observation that emotion can move lawmakers is as old as Aristotle, but the notion that it affects *attention* to rules has been sounded on occasion.”).

¹⁵⁷ *See, e.g.*, Chatel, *supra* note 45; James, *supra* note 44; Parker-Pope, *supra* note 44; Smith, *supra* note 45; Solnit, *supra* note 31.

may have felt shame without marriage equality.¹⁵⁸ Others did not.¹⁵⁹ Some may have felt dignified by the right to marry.¹⁶⁰ Others did not.¹⁶¹ Some aspire to egalitarian relationships.¹⁶² Others do not.

Today, the myth of egalitarianism in same-sex couples is harming many individuals in the first wave of same-sex divorces. As Parts I and II argue, the myth obstructs effective bargaining for same-sex divorce by legitimizing divorce exceptionalism, skewing the bargaining chips for money and children that typically drive the divorce settlement, and consequently inviting strategic or aggressive behavior in same-sex divorces. The first step in addressing these harms is to increase the awareness of legal actors involved in the divorce process, including attorneys, mediators, judges, and the parties themselves, as they may be biased in their assessment of the dissolving relationship. Bargaining for same-sex divorces will become more effective if every relationship is assessed on its own merits. Same-sex couples who are aptly characterized as egalitarian will end up negotiating under that presumption. The many same-sex couples for whom power imbalances exist, will not. All legal actors in same-sex divorces must shift the framework from mythical egalitarianism to real-life power imbalances.¹⁶³

2. *Rejecting Divorce Exceptionalism*

Without the myth on which it stands, the claim that marital dissolution laws should not apply to same-sex couples collapses. Modern marriage dissolution rules represent the attempts of lawmakers, guided by feminist and liberal law reformers, to achieve just distribution of marital assets, rights, and obligations when marriages end.¹⁶⁴ The standard of “equitable distribution” of marital

¹⁵⁸ *Obergefell*, 135 S. Ct. at 2608 (“It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”).

¹⁵⁹ FRANKE, *supra* note 91, at 214.

¹⁶⁰ *Obergefell*, 135 S. Ct. at 2600 (“The right to marry thus dignifies couples who ‘wish to define themselves by their commitment to each other.’” (quoting *Windsor*, 133 S. Ct. at 2689)).

¹⁶¹ FRANKE, *supra* note 91, at 214; *see also* Duggan, *Beyond Same-Sex Marriage*, *supra* note 136, at 157.

¹⁶² *See* CARRINGTON, *supra* note 14, at 176–77; *supra* Part II.B.

¹⁶³ *See generally* Hertz et al., *supra* note 1, at 142 (legal actors must recognize the challenge of mediating same-sex divorces and the underlying social realities involved in these relationships); *supra* Part I.

¹⁶⁴ *See* O’Brien v. O’Brien, 489 N.E.2d 712, 716 (N.Y. 1985) (identifying alimony as a concept that originally served as a “means of lifetime support and dependence” from one spouse to another but that was replaced with a concept of maintenance that encouraged the recipient an opportunity of independence); *see also* Hodge v. Hodge, 520 A.2d 15, 18 (Pa. 1986) (“Although the Divorce Code was adopted with the intent to ‘effectuate economic

property, for example, followed by most states today, stems from the idea that the labor of one party to a marriage (in or outside the home) enables the efforts of the other.¹⁶⁵ Likewise, modern child-support standards are based on a fairness principle that both parents have a legal duty to support their children in proportion to their wage-earning capacity.¹⁶⁶ The exceptionalist claim that same-sex couples do not need such rules reflects mythical thinking that power imbalances of traditional marriages are absent in same-sex couples.

Since the 1980s, activists and scholars have warned that the marriage-equality movement may perpetuate assimilationist ideas about gays and lesbians.¹⁶⁷ They have rightly argued that marriage-equality litigation has underplayed the unique aspects of gay culture (such as sexual freedom and extended units of mutual care) and instead underscored the likeness of same-sex couples to heteronormative marriages.¹⁶⁸ This type of critique is now appearing in the context of same-sex divorces. Katherine Franke, for example, has claimed that “the law of marriage and divorce risk imposing—if not imprinting—status-based gendered identities on the parties in ways that clearly change how they might have seen themselves had marriage law not been on the scene.”¹⁶⁹ Because marital dissolution rules presume inequality between men and women,¹⁷⁰ Franke suggests focusing on “the traditions and norms of gay and

justice,’ we cannot ignore that alimony was intended to be based on ‘actual need and ability to pay.’ . . . [T]he purpose of alimony under our statute is rehabilitation not reimbursement.” (internal citations omitted); Mary Kay Kisthardt, *Re-Thinking Alimony: The AAML’s Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. AM. ACAD. MATRIM. L. 61, 65–69 (2008) (describing three different eras of alimony: (1) the traditional theory of alimony that was prevalent pre-1970s; (2) the beginning of the “Modern Era” in the 1970s; and (3) the reforms of the 1990s).

¹⁶⁵ See, e.g., *Innerbichler v. Innerbichler*, 752 A.2d 291, 301–02 (Md. Ct. Spec. App. 2000) (“Marital Property means the property, however titled, acquired by one or both parties during the marriage.”); *Elkus v. Elkus*, 169 A.D.2d 134, 136 (N.Y. App. Div. 1991) (defining New York’s marital property as property “acquired during the marriage ‘regardless of the form in which title is held’”). See generally The Am. Law Inst., *Principles of the Law of Family Dissolution: Analysis and Recommendations*, 8 DUKE J. GENDER L. & POL’Y 1, 20 (2001) (“[A]ll earnings from spousal labor during the marriage are the property of the marital ‘community’ in which each spouse has an undivided one-half interest. Property acquired with spousal earnings is therefore also owned equally by the spouses, regardless of whether purchased with funds earned by the husband, the wife, or both . . .”).

¹⁶⁶ AREEN ET AL., *supra* note 124, at 1117.

¹⁶⁷ FRANKE, *supra* note 91, at 215; Judith Butler, *Is Kinship Always Already Heterosexual?*, 13 DIFFERENCES 14, 18 (2002). See generally NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE* 99–109 (2008) (discussing the shortcomings of same-sex marriage advocacy as it excludes other family issues that may not directly seem like “gay rights” issues); MICHAEL WARNER, *THE TROUBLE WITH NORMAL* (2000) (analyzing the theme of politics of sexual shame and the impact of local activism on assimilation).

¹⁶⁸ FRANKE, *supra* note 91, at 215; Butler, *supra* note 167, at 15–16.

¹⁶⁹ FRANKE, *supra* note 91, at 214.

¹⁷⁰ *Id.* at 215 (“[T]he reform of divorce laws to allow for the distribution of assets at the end of a marriage in a way that is sensitive to wives’ economic vulnerability post-marriage

lesbian relationships.”¹⁷¹ Discussing an anecdotal same-sex couple’s dispute upon separation,¹⁷² Franke concludes that it “does [not] make sense to render these parties legible through a heteronormative lens, translating them into the more familiar stock characters that populate family court.”¹⁷³ This feminist-queer approach, while sensible and compelling in some situations, could end up hurting vulnerable parties in divorce who depend on marital dissolution rules for protection. Divorce exceptionalism should be treated with caution in the first wave of same-sex divorces because it is harmful to many vulnerable LGBT individuals.¹⁷⁴

B. *A Preference for Joint Custody*

A presumption, or at least strong judicial preference, for joint custody should guide the negotiation for same-sex divorce. In the United States, the maternal presumption has mostly given way to the pure best interest standard,¹⁷⁵ and activists and organizations now lobby for a presumption of joint custody.¹⁷⁶

ironically reinforces the heterosexist structure of marriage more generally since the problems of inequality *within* marriage are to be ‘taken care of’ when marriages end. The feminist reforms to divorce law, in essence, take status inequalities within marriage as a given and, as a result, target reforms at the consequences of those entrenched inequities rather than at their source.”).

¹⁷¹ *Id.* at 215–16.

¹⁷² *Id.* at 212–13 (describing the perspective of a lesbian couple going through a divorce—Beth, the higher earner and whom Franke describes as the “lesbian husband,” and Ruth, the lower earner who went in and out of the labor market, described as the “lesbian wife”). Beth felt that because she earned her money on her own, without the benefit of being a man, she should not have to share those assets with Ruth. *Id.* Ultimately, the judge understood the difference between the two women to still fall within the parameters of traditional gender, with Ruth entitled to receiving substantial assets from Beth during the marriage dissolution. *Id.*

¹⁷³ *Id.* at 213 (adding that “this act of translation does violence to [the parties]” and “to lesbian relationships more generally”).

¹⁷⁴ Notably, parties today in all types of marriages can arrange many of their issues through private ordering. They can enter prenuptial agreements and marital agreements that will typically be enforced by courts. *See* *Edwardson v. Edwardson*, 798 S.W.2d 941, 945 (Ky. 1990) (demonstrating court’s willingness to enforce wife’s antenuptial agreement against her husband); *Simeone v. Simeone*, 581 A.2d 162, 166 (Pa. 1990) (finding prenuptial agreement was not void on grounds that the wife did not consult legal counsel prior to executing agreement).

¹⁷⁵ Children’s Bureau, *supra* note 122.

¹⁷⁶ For an American Psychological Association paper endorsed by approximately 110 researchers and practitioners in favor of the shared-parenting presumption, see Richard A. Warshak, *Social Science and Parenting Plans for Young Children: A Consensus Report*, 20 PSYCHOL. PUB. POL’Y & L. 46, 59 (2014) (arguing that children receive the most benefit from joint-custody situations and concluding that, when suitable, shared-parenting should be the norm). In 2014, the National Parents Organization, which advocates for the shared-parenting presumption across the United States, put together a comprehensive report card that analyzed the status of child custody statutes in all fifty states, concluding that many states discriminate

Fathers' rights activists argue that men suffer discrimination in divorce settings,¹⁷⁷ and that a joint-custody presumption is an "essential element of the new 'divorce bargain.'"¹⁷⁸ Feminists have taken different positions on this issue. Many have expressed concern that a joint-custody presumption would reduce women's bargaining power at divorce.¹⁷⁹ Others support the presumption, focusing on its potential to relieve "divorced mothers of sole responsibility for childcare, undermining stereotypes about motherhood as women's primary destiny, and, ideally, creating incentives for fathers to spend more time caring for children during marriage."¹⁸⁰ In the last few years, a number of states, to varying degrees, have codified a shared-parenting presumption into law.¹⁸¹ More states may follow suit.¹⁸²

Two aspects of same-sex divorces make them especially compelling for a joint-custody preference. First, as data discussed in Part II shows, the one area in which behavioral patterns are clearly more egalitarian in same-sex couples is child-rearing. Second, while it is tough for anyone to bargain with the vague "best interest" standard,¹⁸³ it is even more complicated in same-sex divorces where typically one of the spouses is a biological parent and the other is not.¹⁸⁴ While biological connection to the child should not matter, as a matter of law,

against fathers in child custody. 2014 SHARED PARENTING REPORT CARD: A NEW LOOK AT CHILD WELFARE: A STATE-BY-STATE RANKING, NAT'L PARENTS ORG. (2014), https://nationalparentsorganization.org/docs/2014_Shared_Parenting_Report_Card%2011-10-2014.pdf [<https://perma.cc/SJ3L-QSCS>] (using four factors to determine if "best interest of the child" has actually resulted in equitable custody rights between fathers and mothers).

¹⁷⁷ Mayeri, *supra* note 4, at 2331.

¹⁷⁸ *Id.* at 2351–53 (describing the shared-parenting presumption as where "fathers receive[] custodial rights in exchange for fulfilling child support obligations").

¹⁷⁹ *Id.* at 2352.

¹⁸⁰ *Id.* at 2351.

¹⁸¹ *See, e.g.*, ALASKA STAT. § 25.20.070 (2016); ARIZ. REV. STAT. ANN. § 25-403.02(B) (2017); FLA. STAT. ANN. § 61.13(2)(C)(2) (West Supp. 2017); IDAHO CODE § 32-717B(4) (2006); IOWA CODE ANN. § 598.41(a) (West Supp. 2015); LA. CIV. CODE ANN. art. 132 (2013); MINN. STAT. ANN. § 518.17(b)(9) (West Supp. 2016); MO ANN. STAT. § 452.340(7) (2003 & West Supp. 2017); S.D. CODIFIED LAWS § 25-4A-21 (2013); UTAH CODE ANN. § 30-3-10(1)(b) (2013 & LexisNexis Supp. 2016).

¹⁸² Jones, *supra* note 123 ("[A]bout 20 states are considering measures that would change the laws governing which parent gets legal and physical control of a child after a divorce or separation."). New York continues to debate this issue and has pending legislation to create a shared-parenting presumption. S. 2267, 238th Leg., Reg. Sess. (N.Y. 2017); S. 2577, 238th Leg., Reg. Sess. (N.Y. 2017). Notably, some suggest that it is socioeconomic status (not gender) that explains the failure of some courts to grant joint custody. Rosin, *supra* note 123. Fathers who have access to more capital, and in turn, can afford continued legal representation, are in a better position to ask the court for custody than fathers who lack the financial capability. *Id.* Because asking for joint custody is cost-prohibitive, fathers tend to do it less, and that results in courts awarding custody to mothers more often. *Id.*

¹⁸³ *Bargaining in the Shadow*, *supra* note 4, at 969–71.

¹⁸⁴ *See* Goldberg et al., *supra* note 121, at 143–44; *see also* Gartrell et al., *supra* note 126, at 581; Hertz et al., *supra* note 1, at 133.

for custody or visitation determinations, recent legal conflicts have shown that this issue can lead to manipulative behavior in same-sex divorces.¹⁸⁵ It is quite possible that a presumption or strong judicial preference for joint custody could deter such strategic behavior and improve the bargaining conditions for a vulnerable nonbiological parent in divorce.

V. CONCLUSIONS

The legal homosexual has travelled a long way from *Bowers v. Hardwick*¹⁸⁶ to *Obergefell v. Hodges*.¹⁸⁷ From a moral bad actor—a sodomite—in *Bowers*,¹⁸⁸ the legal homosexual is now the subject of “conferred dignity” when he or she marries.¹⁸⁹ In this journey toward dignity, lesbians, gays, and bisexuals have taken on difficult legal struggles in which homosexuality has gradually, step-by-step, been presented to courts and to the general public as less sexual, more monogamous, domestic, procreative, and finally dignified.¹⁹⁰ Gays, lesbians, bisexuals, and transgender individuals have had to contest ugly stereotypes and convince the public and lawmakers that they are morally good people, and not moral deviants as they were once perceived.¹⁹¹ One of the good things we wanted everyone (ourselves included) to believe was that we model egalitarianism and can move the entire society towards this ideal. In so doing, we manufactured a myth about the inherent nature of our relationships.

¹⁸⁵ The media is replete with situations where upon dissolution of a female same-sex relationship, the biological mother attempts to obtain full custody of a child on the basis that the child and nonbiological mom are not genetically related. *See, e.g.*, Becca Habegger, *Same-Sex Divorce, Custody Battle Could Set Precedent in TN*, WUSA 9 (June 24, 2016), <http://www.wusa9.com/news/local/same-sex-divorce-custody-battle-could-set-precedent-in-tn/255508803> [<https://perma.cc/ACX7-82K3>]; Joanne Kimberlin, *Judge in Same-Sex Divorce Custody Case Rules Nonbiological Parent Has Parental Rights*, VIRGINIAN-PILOT (Jan. 8, 2016), http://pilotonline.com/news/local/judge-in-same-sex-divorce-custody-case-rules-nonbiological-parent/article_6270ec2c-b01a-5693-b312-7f67ce666ed9.html [<https://perma.cc/9KUB-VPGE>]; John Leland, *Parenthood Denied by the Law*, N.Y. TIMES (Sept. 12, 2014), <https://www.nytimes.com/2014/09/14/nyregion/after-a-same-sex-couples-breakup-a-custody-battle.html> [<https://perma.cc/E3SS-AWKT>]. The New York State Court of Appeals recently overturned over two decades of legal precedent when it held that nonbiological and non-adoptive parents can seek visitation and custody when a couple separates. *In re Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 502–03 (N.Y. 2016).

¹⁸⁶ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (finding that sodomy laws do not violate the Due Process Clause), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

¹⁸⁷ *Obergefell*, 135 S. Ct. at 2608; Ben-Asher, *supra* note 41, at 283.

¹⁸⁸ *Bowers*, 478 U.S. at 196.

¹⁸⁹ Ben-Asher, *supra* note 41, at 283.

¹⁹⁰ *Id.*

¹⁹¹ *See, e.g.*, *Boutilier v. Immigration & Naturalization Servs.*, 387 U.S. 118, 118–19 (1967) (affirming deportation of a homosexual immigrant because federal law barred individuals “afflicted with psychopathic personality,” which the INS classified homosexuals as having).

Myths can energize nations, social movements, and individuals. Sometimes they come back to bite. This is happening now with the prevalent myth of egalitarianism in same-sex couples. This myth is haunting the first wave of same-sex divorces and harming vulnerable parties. Now that marriage equality is here, it is time to let go of myths about our moral goodness and focus on the real lives of LGBT people.