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

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

NOA BEN-ASHER*

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. More importantly, it poses a serious puzzle for family law. Now that the fight for marriage equality is seemingly over, and same-sex couples are marrying in
large numbers, 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. Divorcing couples in the United States “bargain in the shadow of the law,” meaning that the private ordering for divorce takes place against the backdrop of legal dissolution rules. These rules—regarding property, spousal and child support, and custody and visitation—govern in the absence of an agreement between the divorcing parties. 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. 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).


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

Id. at 969.

Id. at 959.

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. 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, and with at least some background attitudes of protecting vulnerable parties (typically women). This Article argues that, by contrast, many same-sex couples today negotiate under a false presumption of egalitarianism. 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.” To clarify, the term “myth” does not imply that same-sex couples never want or achieve egalitarianism. Data shows that many same-sex couples indeed strive for egalitarian relationships. True equality, however, is hard to achieve.

9I 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.
10Bargaining in the Shadow, supra note 4, at 959–62.
11Id.
12See 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).
13For 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 . . .”).
14See 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.”).
15See CARRINGTON, supra note 14, at 177.
16See infra Part II.B.
In *Bargaining in the Shadow of the Law*, 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. The main legal consequences of divorce involve distribution of marital property, spousal support, child support, child custody, and visitation. Mnookin and Kornhauser observed that marital property, spousal support, and child support “are all basically problems of money,” and “money and custody issues are inextricably linked.” They argued that “over some range of alternatives, each parent may be willing to exchange custodial rights and obligations for income or wealth.” The gist of the divorce bargain, in their view, is that parties will typically exchange parenting time for money and vice versa.

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. The Article calls this type of claim “divorce exceptionalism,” and argues that it harms effective bargaining for divorce. 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. 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://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,
are absent in same-sex couples. Without the traditional sex-based division of labor, same-sex couples allegedly create egalitarian unions. The myth of same-sex egalitarianism first appeared in academic literature in the 1980s when researchers sought to educate the public about homosexuality. 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.” The author argued that most “contemporary homosexual relationships... are relationships patterned after friendship,” 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.” Other studies repeated such findings of egalitarianism in same-sex relationships.


33 Peplau, supra note 32, at 184. Others, however, argue that the “friendship” argument does little to support the marriage quality argument. See Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J.L. & GENDER 37, 59–60 (2011) (“FRIENDSHIP 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.”). 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. 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.” 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.” Same-sex couples, in other words, would not necessarily assimilate into the gendered institution of marriage. 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.” 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, and after the Supreme Court’s decisions in *Windsor* and *Obergefell*, 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).

38 Id. at 29.
39 Id. at 30.
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).
Obergefell, the media also perpetuated and celebrated this myth. It was even suggested that same-sex couples are happier and better at fighting than their different-sex counterparts. 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.


44 See, e.g., John Ersing, Applying Gender Roles to Same-Sex Couples, THOUGHT CATALOG (Mar. 2, 2015), http://tcat.te/1vUp6Dv (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://abnews.go.com/Health/sx-marriage-gender-disappears-happiness-blooms/story?id=19560588 (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 (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 (“Gay relationships tend to be more egalitarian, in part because same-sex couples don’t divide work along traditional gender lines.”).

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. They indicate, for instance, that same-sex couples are statistically more egalitarian coparents than different-sex couples, that they value equality in nonlabor market activities, and that they are more likely to have dual-income households.

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 BADDERT 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. 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, 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. The invisibility of much domestic labor, according to Carrington, causes confusion and resentment, and only “[a] minority of lesbigay families do achieve a rough equivalence in the distribution of domestic work.” Carrington concludes that “[t]rue equality . . . eludes many of these families,” and this is mostly due to material economic circumstances. More recent studies have also found no real differences in egalitarianism between same-sex and different-sex couples.
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.\textsuperscript{57} A recent study reveals that lower earners in same-sex couples tend to cook while higher earners tend to make financial decisions.\textsuperscript{58} In addition, in a recent population poll,\textsuperscript{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.”\textsuperscript{60} Similar results were reported regarding childcare.\textsuperscript{61} In sum, reality has not cooperated


\textsuperscript{57} E.g., Goldberg et al., \textit{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, \textit{supra} note 56, at 409 (dominance in same-sex couples is likely linked to income status); Weisshaar, \textit{supra} note 49, at 96.

\textsuperscript{58} MATOS, \textit{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.”); \textit{see also} Maree Burns et al., \textit{Financial Affairs? Money Management in Same-Sex Relationships}, 37 \textit{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).


\textsuperscript{60} McCauley, \textit{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.”).

\textsuperscript{61} Females in different-sex relationships “were also expected to handle the majority of childcare tasks.” \textit{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."\(^{70}\)
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.

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
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
(“It 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.

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." 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." 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. Fathers will therefore bargain for more parenting time, while mothers may trade parenting in exchange for money. Both will benefit from private ordering. Given the still-existing gendered division of labor in many U.S. households, 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. The birth of the child dramatically changed the division of labor in our sample. Women 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...")
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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.

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 Mfnookin 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!’’”).


94 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).

patriarchal, subordinating, and exploitative to women. An ethos of female autonomy now predominates feminist literature and popular culture. 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. Admitting financial dependency on an ex-spouse may feel like a painful moral failure.

Under the myth of egalitarianism, one or both parties, in denial of their material reality, may view themselves as financial equals and as autonomous. This may lead to divorce exceptionalism, 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.

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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 financials 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." If these factors, the most significant is that legal norms always hover in the background of divorce negotiations. 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," 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." 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. One parent will trade custodial rights for income and the other will do

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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). 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. As the authors observe, “[i]nformed bargaining requires a parent to assess accurately his or her own preferences concerning custodial alternatives.” How parents divided parenting during the marriage does not necessarily reflect the desires of one or both parties upon dissolution. In addition, spite or altruism could affect the bargaining process. 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. A spiteful parent may do the opposite. In this first stage, each party assesses how much parenting time they desire postdissolution.

The 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.”).

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.

This 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)).

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. 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. 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. 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. By contrast, although the maternal presumption has been abolished, and fathers’ rights awareness has grown, equal parenting is not yet the leading norm in most different-sex

118 It 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.

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

120 See 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.").

121 See, 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.").


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Women typically aspire to, and get more, parenting time in divorce settlements.\(^\text{124}\) In many same-sex divorces, both parties are (or view themselves as) equal parents.\(^\text{125}\) 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.\(^\text{126}\)

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.

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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. The effect of this uncertainty will depend on the attitudes of the parties toward risk—or what economists call "risk preferences." For example, because it is often unclear how a judge would apply the "best interest" standard, 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. Financial costs include professional fees, filing fees, and court costs. Emotional costs can also be immense. 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. 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. Many of us grew up believing that we will never be able to marry. 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.

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. The divorce they experienced in childhood may also influence a party’s strategic behavior in divorce. Children with divorced parents may, consciously or not, repeat
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.” 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. Without guiding principles, divorce negotiations may devolve to speculation, intuition, threats, and bluffs. 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
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. 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" and the "mystery of human life." 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. They hardly knew each other and were probably not even having sex that night the police arrested them for allegedly committing sodomy. 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.

Relatedly, in extending marriage equality to same-sex couples, in Windsor and Obergefell, 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

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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.

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. By contrast, courts recognizing same-sex marriages have had to dismiss negative myths about sexual promiscuity, about inability to commit to relationships, and about same-sex households providing a less promising upbringing to children.

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

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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 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. Some may have felt dignified by the right to marry. Others did not. Some aspire to egalitarian relationships. 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.

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. The standard of “equitable distribution” of marital

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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. 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. 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. 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. 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.” Because marital dissolution rules presume inequality between men and women, 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.


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.”

Discussing an anecdotal same-sex couple’s dispute upon separation, 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.”

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.

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, and activists and organizations now lobby for a presumption of joint custody.

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.”.

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).

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, and that a joint-custody presumption is an “essential element of the new ‘divorce bargain.’” 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. 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.” In the last few years, a number of states, to varying degrees, have codified a shared-parenting presumption into law.

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, it is even more complicated in same-sex divorces where typically one of the spouses is a biological parent and the other is not. 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%2010-2014.pdf (using four factors to determine if “best interest of the child” has actually resulted in equitable custody rights between fathers and mothers).


Jones, supra note 123 (“[A]bout 20 states are considering measurers 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.

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.\textsuperscript{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.

\section*{V. CONCLUSIONS}

The legal homosexual has travelled a long way from \textit{Bowers v. Hardwick}\textsuperscript{186} to \textit{Obergefell v. Hodges}.\textsuperscript{187} From a moral bad actor—a sodomite—in \textit{Bowers},\textsuperscript{188} the legal homosexual is now the subject of "confferred dignity" when he or she marries.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\begin{enumerate}
\item\textsuperscript{187} \textit{Obergefell}, 135 S. Ct. at 2608; Ben-Asher, \textit{supra} note 41, at 283.
\item\textsuperscript{188} \textit{Bowers}, 478 U.S. at 196.
\item\textsuperscript{189} Ben-Asher, \textit{supra} note 41, at 283.
\item\textsuperscript{190} \textit{Id}.
\item\textsuperscript{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).
\end{enumerate}
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.