

MULTIDIMENSIONAL ADVOCACY AS APPLIED: MARRIAGE EQUALITY AND REPRODUCTIVE RIGHTS

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Talking about marriage equality and reproductive rights advocacy¹ together presents an interesting, and sometimes puzzling, assortment of challenges and opportunities. Both involve efforts to secure legal protections and social recognition that are fundamentally important to those who need them yet also deeply provocative to their opponents. For both, too, advocacy takes place on a shifting terrain shaped by competing views of sexuality, autonomy, equality, personhood, and more.

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1 By reproductive rights advocacy, I mean to encompass efforts to secure meaningful access to contraception and abortion. Though access to assisted reproduction is often included in reproductive rights and justice advocacy efforts, I do not focus on those issues here. More generally, the essay's discussion of advocacy centers on those who make claims *for* marriage equality and reproductive rights rather than against.

Because of space limitations and the focus on advocacy *surrounding* litigation, the essay does not extensively address the broader reproductive justice movement, which has been defined as “the complete physical, mental, spiritual, political, economic, and social well-being of women and girls [that] will be achieved when women and girls have the economic, social and political power and resources to make healthy decisions about our bodies, sexuality and reproduction for ourselves, our families and our communities in all areas of our lives.” ASIAN COMMUNITIES FOR REPROD. JUSTICE, A NEW VISION FOR ADVANCING OUR MOVEMENT FOR REPRODUCTIVE HEALTH, REPRODUCTIVE RIGHTS AND REPRODUCTIVE JUSTICE 1 (2005) (emphasis in original), *available at* <http://forwardtogether.org/assets/docs/ACRJ-A-New-Vision.pdf> [<http://perma.cc/AN5Z-VPB6>]. For discussions of reproductive justice in legal scholarship, see, e.g., DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997) (examining the intersection of race and reproductive rights and addressing the racialized consequences of a narrow focus on reproductive rights and freedom); Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 *YALE L.J.* 1394, 1403 (2009) (“To be a meaningful support for women’s equality or liberty, a right to legal abortion must mean much more than a right to be free of moralistic legislation that interferes with a contractual right to purchase one. It must guarantee access to one.”); Cynthia Soohoo, *Hyde-Care For All: The Expansion of Abortion-Funding Restrictions Under Health Care Reform*, 15 *CUNY L. REV.* 391, 397–99 (2012) (describing the reproductive justice movement as one that looks beyond the negative-rights approach generally adopted by courts).

Yet the two advocacy efforts have experienced very different receptions over time. Just over two decades ago, the Supreme Court expressly affirmed that women have a constitutional right to seek an abortion and rejected an effort by abortion adversaries to have the Court overturn *Roe v. Wade*.² Marriage equality, by contrast, seemed almost like a pipe dream. Although the Hawaii Supreme Court's recognition of same-sex couples' marriage rights claim the following year³ seemed to hold promise, the federal government and many states rushed to pass "defense of marriage" acts (DOMAs) to short-circuit similar claims throughout the country.⁴

During the 1980s, the pattern was similar, with the prospects for reproductive rights seeming far more secure than the hopes for marriage equality. In the same term that the Supreme Court invalidated another Pennsylvania law restricting access to abortion,⁵ the Court also rejected a gay man's constitutional claim against Georgia's sodomy law, observing that it was "at best, facetious."⁶ Popular views about homosexuality generally, and marriage rights for same-sex couples in particular, were also overwhelmingly negative, while roughly half of Americans supported a woman's right to choose an abortion.⁷

More recently, though, the trajectories appear to have crossed. Public opinion and legal

2 *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). To be sure, the Court sustained some restrictions and announced a new, more lenient "undue burden" standard by which it would evaluate abortion restrictions, but it did not overturn *Roe* as the state, and many amici, had asked. *Id.* at 853.

3 *See Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (rejecting the state's motion to dismiss the couples' sex discrimination claim, which had been brought under the Hawaii Constitution's Equal Rights Amendment in a suit seeking the right to marry).

4 *See* Steve Sanders, *Mini-DOMAs As Political Process Failures: The Case for Heightened Scrutiny of State Anti-Gay Marriage Amendments*, 109 NW. U. L. REV. ONLINE 12, 14–16 (2014) (providing a brief history of so-called mini-DOMAs passed by states); *see also* Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2165–94 (2005) (collecting state laws banning marriage and marriage recognition for same-sex couples).

5 *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

6 *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

7 Views on abortion have stayed at roughly 50% support/opposition for many years while the numbers on gay issues until the past decade, or even more recently, were well below that. *Compare Gay and Lesbian Rights*, GALLUP (2014), <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx> [<http://perma.cc/GK7X-2W97>] (showing support for "homosexual relations" around 35% in the 1980s (before 1989)) *with Abortion*, GALLUP (2014), <http://www.gallup.com/poll/1576/abortion.aspx> [<http://perma.cc/PTC8-SJWC>] (showing support for abortion rights just above 50% in the 1980s).

developments have moved sharply in favor of marriage equality.⁸ By contrast, during the same period, both case law and legislation have increasingly rejected advocates' claims and circumscribed access to abortion.⁹

This Essay aims to understand how advocacy strategies—particularly advocacy that is outside the courtroom but linked to litigation on a related issue—have contributed to these shifts in trajectories and helped to shape the environment in which courts are deciding cases.¹⁰ In particular, my focus is on the role of lawyers in contributing to and guiding that environment-shaping process.

I examine these efforts through the lens of what I call multidimensional advocacy.¹¹

8 See *Gay and Lesbian Rights*, GALLUP (2014), <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx> [<http://perma.cc/GK7X-2W97>] (showing increasing support for legal recognition of same-sex couples' relationships); Adam Liptak, *Supreme Court Delivers Tacit Win to Gay Marriage*, N.Y. TIMES (Oct. 7, 2014), <http://www.nytimes.com/2014/10/07/us/denying-review-justices-clear-way-for-gay-marriage-in-5-states.html> [<http://perma.cc/V8TD-X4XV>] (indicating in early October 2014 that thirty states were likely to recognize same-sex couples' marriages, up from nineteen, after the Supreme Court denied review of petitions from several circuits).

9 According to the Guttmacher Institute, between 2011 and 2013, more abortion restrictions were enacted than in any previous decade. At the very same time, marriage for same-sex couples enjoyed a rise in positive public opinion. See *More State Abortion Restrictions Were Enacted in 2011-2013 Than in the Entire Previous Decade*, GUTTMACHER INST. (Jan. 2, 2014), <http://www.guttmacher.org/media/inthenews/2014/01/02/index.html> [<http://perma.cc/8T8K-REHC>].

10 At the same time, advocacy related to education and legislative change has also been an important feature of both movements. See, e.g., Brigitte Amiri, *The Hobby Lobby Amicus Effort*, 29 COLUM. J. GENDER & L. 104 (2015); Jessica González-Rojas, *Bold, Brave, and Proactive: Advocacy and Organizing at the Intersection of Reproductive Justice and LGBTQ Liberation*, 29 COLUM. J. GENDER & L. 156 (2015); Evan Wolfson, *Freedom to Marry's Ladder of Clarity: Lessons from a Winning Campaign (That is Not Yet Won)*, 29 COLUM. J. GENDER & L. 236 (2015). Numerous organizations focus their efforts on non-litigation advocacy as well. See, e.g., NAT'L LATINA INST. FOR REPROD. HEALTH, <http://latinainstitute.org/> [<http://perma.cc/E5VF-W94B>] (last visited Aug. 3, 2014); NARAL PRO-CHOICE AM., <http://www.naral.org/> [<http://perma.cc/Z896-JBUN>] (last visited Aug. 3, 2014); FREEDOM TO MARRY, <http://www.freetomarry.org/> [<http://perma.cc/TN6B-EL64>] (last visited Aug. 3, 2014).

11 I have been working with this framework formally since 2006 in the Columbia Law School Sexuality and Gender Law Clinic, which I founded and direct, and have presented about the framework in numerous forums since that time. Cf. Suzanne B. Goldberg, *Multidimensional Advocacy: A Clinical Teaching and Strategic Lawyering Framework* (Sept. 15, 2010) (unpublished manuscript) (on file with the *Columbia Journal of Gender and Law*). I also developed aspects of this framework while directing the Women's Rights Clinic at Rutgers School of Law-Newark from 2001–06. My observations about and commitment to a multidimensional advocacy framework derive from nearly a decade spent as a Lambda Legal staff attorney (1991–2000) working on LGBT/HIV advocacy, supplemented by years of working on sexuality and gender law advocacy with

This framework, which is at once theoretical and strategic, calls attention to the multiple and often mutually-reinforcing strategies that can be implemented to change perceptions, conversations, and ultimately, outcomes related to particular laws or policies.¹² It calls attention, too, to the central role that public perceptions can play in the likelihood of litigation success: when the end goal of a social change lawsuit seems plausible in the surrounding society, the legal claims are likely to be better received by judges.¹³

The multidimensional advocacy framework thus highlights both the responsibility of advocates to generate that social and judicial receptivity as well as the practices—including community engagement and media outreach, among others—advocates use for that purpose. With respect to responsibility, one might even say that it is advocacy malpractice not to work in a multidimensional fashion on most issues. In both public and private law settings, the best lawyers routinely advocate on many fronts, understanding that engaging with perceptions of their claims and their clients can be critical to success. As George Washington put the point, in an admittedly different context, “the truth is, the people must *feel* before they will *see*.”¹⁴ When advocates engender feelings receptive to their claims outside of court, they enhance the likelihood that decisionmakers will similarly feel—and see—their way to the desired outcome.

The Essay’s first part elaborates the multidimensional advocacy framework, particularly in the context of advocacy related to litigation aimed at changing extant laws and policies.¹⁵ Part II turns to marriage equality and reproductive rights advocacy and considers some of the similarities and differences in doctrine and popular reactions that shape the landscape in which advocates do their work. Part III uses the multidimensional advocacy

Columbia Law students through the Clinic. For more on the Clinic’s multidimensional advocacy methodology, see *SEXUALITY AND GENDER CLINIC*, <http://web.law.columbia.edu/sexuality-gender-clinic/> [<http://perma.cc/RDD8-4QTQ>] (last visited Oct. 17, 2014).

12 Multidimensional advocacy has been described elsewhere as “advocacy across different domains (courts, legislatures, media), spanning different levels (federal, state, local), and deploying different tactics (litigation, legislative advocacy, public education).” Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 *UCLA L. REV.* 1235, 1242 (2010).

13 For elaboration of this point in the context of marriage equality arguments for same-sex couples, see Suzanne B. Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 *COLUM. L. REV.* 2087 (2014).

14 JOHN MARSHALL, *THE LIFE OF GEORGE WASHINGTON* 79 (1807) (emphasis in original).

15 Again, multidimensional advocacy strategies are also important for achieving non-law-related change, but extended discussion of this point is beyond the scope here.

framework to identify several strategies deployed in connection with litigation that have helped shift perceptions in each area. Part IV then discusses an additional strategy that generated support for litigation and other efforts amidst great hostility in the early days of marriage equality advocacy and considers whether it might be adjusted to serve the aims of reproductive rights advocates today. Part V concludes.

One caveat is essential before going further. The literatures on both abortion and marriage are rich and extensive,¹⁶ and they engage many important issues that cannot be ad-

16 See, e.g., WILLIAM ESKRIDGE & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE?: WHAT WE'VE LEARNED FROM THE EVIDENCE* (2006) (examining data regarding the effects of marriage recognition on society); LINDA GREENHOUSE & REVA B. SIEGEL, *BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING* (2012) (discussing the history of abortion's politicization prior to *Roe v. Wade*); KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984) (examining data about individuals' beliefs regarding abortion); MARK PHILIP STRASSER, *LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION* (1997) (examining and refuting legal arguments against marriage equality); ANDREW SULLIVAN, *SAME-SEX MARRIAGE: PRO AND CON* (2009) (offering multiple perspectives on marriage for same-sex couples); LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1992) (examining the national struggle over abortion rights); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2008) (arguing for abortion rights based on the Constitution's original meaning); Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 15 GEO. L.J. 1871 (1997) (developing a theoretical defense of marriage equality for same-sex couples); Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745 (1995) (examining advantages to states that recognize same-sex couples' marriages); Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033 (1995) (addressing cross-border recognition for same-sex couples' marriages); David B. Cruz, *"Just Don't Call it Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925 (2001) (evaluating marriage as a First Amendment-protected expressive resource); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985) (considering whether *Roe v. Wade* prompted increase in abortion restrictions); Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1 (1997) (advancing arguments against the federal Defense of Marriage Act); 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 (1993) (arguing against the position that same-sex couples marrying is likely to undermine traditional marital gender roles); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007) (revisiting the fear of backlash related to *Roe v. Wade*); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992) (considering contemporary restrictions in light of 19th century initiatives to criminal abortion).

There is also an important body of literature that addresses advocacy for marriage rights and abortion access. See, e.g., Cummings & NeJaime, *supra* note 12, at 1235 (challenging the backlash thesis and reviewing the work of legal advocates for marriage equality in California); William N. Eskridge, Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275 (2013) [hereinafter Eskridge, Jr., *Backlash Politics*] (rejecting claims that marriage equality advocacy automatically produces backlash and reviewing ways in which movement advocates have countered potential challenges);

dressed in an essay of this scope. My ambition, instead, is to add to the discussion in the spirit of the Marriage Equality and Reproductive Rights Symposium of Columbia Law School's Center for Gender & Sexuality Law, where the idea for this Essay was first conceived during a strategy meeting of advocates. There, lawyers and others who work on lesbian, gay, bisexual, and transgender (LGBT) and reproductive rights issues debated the reasons why marriage equality and reproductive rights access—particularly including abortion—seemed to be heading in such different directions, with successes on the marriage front piling up at the same time as reproductive rights advocates faced an onslaught of hostile courts and legislatures and a group of advocates against them that seemed far more effective than the adversaries of marriage equality.¹⁷

By pairing the issues and considering advocacy strategies of both groups as multidimensional efforts to change national and local perceptions of these issues, I hope to illuminate some additional factors that either constrain or enable the doctrinal, conceptual, and theoretical shifts that are the legal literature's primary focus.

One other preliminary point—the law and public opinion discussed here are in the

Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028 (2011) (suggesting that conflicts regarding abortion rights had escalated before *Roe v. Wade* and were not caused by that litigation); Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153 (2009) (considering the backlash prompted by earlier decisions favorable to marriage equality and contrasting that response with the lack of backlash toward the California Supreme Court's invalidation of an anti-miscegenation law); Priscilla J. Smith, *Give Justice Ginsburg What She Wants: Using Sex Equality Arguments to Demand Examination of the Legitimacy of State Interests in Abortion Regulation*, 34 HARV. J.L. & GENDER 377 (2011) (urging the use of sex equality arguments in abortion rights advocacy) [hereinafter Smith, *Using Sex Equality Arguments*]; Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 464–75 (2007) (considering the use of sex discrimination arguments in marriage litigation). For additional articles, see the annual bibliography published by the *Cardozo Journal of Law & Gender*. See, e.g., *Annotated Legal Bibliography on Gender*, 19 CARDOZO J.L. & GENDER 301–24, 659–82, 1019–41 (2013).

17 See, e.g., Bebe Anderson, *Litigating Abortion Access Cases in the Post-Windsor World*, 29 COLUM. J. GENDER & L. 143 (2015); Jay Michaelson, *Ten Reasons Women Are Losing While Gays Keep Winning*, DAILY BEAST (July 6, 2014), <http://www.thedailybeast.com/articles/2014/07/06/ten-reason-women-are-losing-while-gays-keep-winning.html> [<http://perma.cc/CR4W-VGGR>] (comparing “anti-gay zealots,” with “[t]heir cartoonish exaggerations of LGBT people” that “play well to the base, but alienate moderates” and “the inability of all but a few conservatives to articulate a non-religious, non-bigoted-seeming objection to homosexuality” to the “sophisticated” and “smart and methodical” adversaries of abortion who “are winning incremental battles under the pretense of health regulations and parental consent”); Mark Joseph Stern, *Why are Women Losing While Gays Win? It's All About Sex*, SLATE (July 7, 2014), http://www.slate.com/blogs/outward/2014/07/07/feminism_loses_while_gay_equality_wins_and_it_s_all_about_sex.html [<http://perma.cc/7W6E-46SX>].

midst of serious contestation, and I do not intend to characterize the trajectories just described as either fixed or absolute. Indeed, the Supreme Court's broad exemption of faith-based, closely held corporations from the Affordable Care Act's contraception provisions in *Burwell v. Hobby Lobby*,¹⁸ as well as the rapidly changing landscape on marriage,¹⁹ is a signal reminder that the road ahead for both marriage equality and reproductive rights is hardly predictable. Instead, the Essay's aim is to learn from advocacy strategies that have been engaged thus far and to consider how they might be used to anticipate and respond to some of the challenges ahead.

I. The Multidimensional Advocacy Framework

The point of a multidimensional advocacy framework is to focus attention on the array of strategies available to advocates seeking to create change, the possible interaction among those strategies, and the choices advocates make at different points in time.²⁰ Critical to this analysis is the understanding that when litigation is pursued, advocates must think strategically not only about the litigation itself but also about how engagement with the surrounding environment might facilitate success or, at least, minimize the consequences of a loss. This commitment to a capacious view of advocacy surrounding litigation is particularly important for those seeking to address a traditionally sticky problem, such as restrictions on marriage for same-sex couples or reproductive rights that implicate abortion.²¹

Thus, relative to political opportunity theory, which suggests that social movements

18 134 S. Ct. 2751 (2014).

19 Within just the first year after the Supreme Court struck down the federal DOMA's prohibition against federal recognition of same-sex couples' marriages, courts decided more than twenty cases in favor of marriage equality. See James Esseks, *Op-ed: In the Wake of Windsor*, ADVOCATE (June 26, 2014, 4:00 AM), <http://www.advocate.com/commentary/2014/06/26/op-ed-wake-windsor> [<http://perma.cc/6AXQ-9L77>].

20 Put more simply, a multidimensional advocacy strategy will take a problem in the world and ask what might be done about it. In my Sexuality and Gender Law Clinic, for example, I often ask students whether, if their focus is on reducing harassment of lesbian, gay, bisexual, and transgender youth, they should file a lawsuit or try to have their client featured by a major media source. The point of the exercise is that lawyers, in particular, should not get caught up in thinking that conventional legal strategies are the only, or the best, means of achieving a goal. For extended discussion of the role of lawyers as problem solvers, see generally, e.g., Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L. & POL'Y 119 (1997) (developing an analysis of lawyers as problem-solvers as distinct from an aggressively adversarial model of lawyering).

21 This is particularly the case when a legal challenge is unlikely to succeed unless deeply held or longstanding frames of a problem are destabilized. I have written elsewhere on this point. See Suzanne B. Goldberg, *Sticky Intuitions and the Future of Sexual Orientation Discrimination*, 57 UCLA L. REV. 1375 (2010).

are shaped by the political opportunities available to them at a given time,²² one might say that multidimensional advocacy's focus is on identifying and then changing those opportunities as needed to achieve a particular goal.

There is nothing necessarily law-focused about the framework; any type of change effort can be examined through this lens. Still, for purposes of this Essay, and its focus on marriage and abortion-related advocacy, I will develop the framework primarily as applied to efforts to invalidate or otherwise oppose statutes and constitutional amendments.²³ Even in this law-focused context, though, multidimensional advocacy is not the exclusive province of lawyers. While legal training is required for litigation,²⁴ it is hardly essential for developing expertise in communications, politics, organizing, arts and culture, corporate relations, event planning, and more, all of which are arguably necessary for fully multidimensional

22 See, e.g., DOUG McADAM, SIDNEY TARROW & CHARLES TILLEY, *DYNAMICS OF CONTENTION* (2001) (identifying dynamics in contentious political environments and exploring political opportunity theory); SIDNEY TARROW, *POWER IN MOVEMENT* 71–90 (1998) (same); Peter K. Eisinger, *The Conditions of Protest Behavior in American Cities*, 67 *AM. POL. SCI. REV.* 11 (1973) (exploring the political environments in which protests take place); David S. Meyer, *Protest and Political Opportunities*, 30 *ANN. REV. SOC.* 125 (2004) (examining and applying political opportunity theory). Ellen Anderson introduced the idea of legal opportunity structure in connection with legal advocacy work related to sexual orientation discrimination. ELLEN ANN ANDERSON, *OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* (2004) [hereinafter ANDERSON, *OUT OF THE CLOSETS*].

23 In light of my own experience doing LGBT-related work, more of the illustrations in the discussion to come arise from the marriage equality context, though many are from the reproductive rights contexts as well. For related discussions that focus primarily on reproductive rights, see, e.g., Bebe Anderson's essay in this volume, *supra* note 17. See also Sarah London, *Reproductive Justice: Developing a Lawyering Model*, 13 *BERKELEY J. AFR.-AM. L. & POL'Y* 71 (2011) (elaborating a "lawyering model" for reproductive justice advocacy); Lynn M. Paltrow, *Missed Opportunities in McCorvey v. Hill: The Limits of Pro-Choice Lawyering*, 35 *N.Y.U. REV. L. & SOC. CHANGE* 194 (2011) (developing and recommending strategies to broaden arguments related to abortion and reproductive rights); Rachel Rebouché, *Parental Involvement Laws and New Governance*, 34 *HARV. J.L. & GENDER* 175 (2011) (urging strategic intervention related to laws mandating parental involvement in their minor children's decisions regarding abortion).

24 Notwithstanding the need for legal training, many have offered support for client control of strategic choices even within litigation. See, e.g., Nancy D. Polikoff, *Am I My Client? The Role Confusion of the Lawyer-Activist*, 31 *HARV. C.R.-C.L. L. REV.* 443 (1996) (exploring ideas of client-centered lawyering); William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 *MD. L. REV.* 213 (1991) (same); Lucie E. White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *BUFF. L. REV.* 1 (1990) (same). For discussion of the role that members of an organization's constituent community should play in connection with litigation priorities, see, e.g., Gabriel Arkles, Pooja Gehi & Elana Redfield, *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 *SEATTLE J. FOR SOC. JUST.* 579 (2010).

mensional advocacy.²⁵ At the same time, because litigation has been so important to securing marriage equality and reproductive rights, strategies aimed at shaping the environment in which cases are litigated have been, and are likely to continue to be, central to work on both issues, with lawyers continuing to play a significant role in their development and implementation.

A. Basic Considerations

Indeed, notwithstanding the substantial scholarship devoted to questioning the value of litigation as a social change strategy,²⁶ impact litigators have long advocated outside as well as within the courtroom, informed by the conviction that achieving litigation success involves not only developing legal theories, but also learning and responding to the socio-political landscape in which the case will be decided.²⁷ Consequently, public education and community outreach tend to be standard practices, either by legal organizations themselves

25 For discussion of some of these skills as used in legislative advocacy campaigns, see Chai Rachel Feldblum, *The Art of Legislative Lawyering and the Six Circles Theory of Advocacy*, 34 McGEORGE L. REV. 785 (2003). For a more practical, skills-oriented guide to legislative advocacy, see MATTHEW A. COLES, *TRY THIS AT HOME: A DO-IT-YOURSELF GUIDE TO WINNING LESBIAN AND GAY CIVIL RIGHTS* (1996).

Some have observed that legal training can also interfere with effective advocacy. One lawyer, reflecting on her advocacy for immigrant laborers who were confined in a factory then detained by immigration authorities after they escaped, wrote, “I am convinced that we succeeded in getting the workers released [from Immigration and Naturalization Services detention] in just over a week in part because we did not know the rules It was an important lesson that our formal education might, at times, actually make us less effective advocates for the causes we believe in and for the people we care about.” Julie A. Su, *Making the Invisible Visible: The Garment Industry’s Dirty Laundry*, 1 J. GENDER RACE & JUST. 405, 408 (1998) (footnote omitted).

26 The classic in this field is Gerald Rosenberg’s book, *The Hollow Hope: Can Courts Bring About Social Change?* (1991). More recently, Michael Klarman has argued that marriage litigation has likewise caused a backlash that outweighs the benefits it has brought. MICHAEL KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2012). For literature discussing advocacy strategies in the contexts at issue here, see *supra* note 16.

27 See, e.g., Mary Bonauto & James Esseks, *Marriage Equality Advocacy from the Trenches*, 29 COLUM. J. GENDER & L. 117 (2015). While the challenge to California’s Proposition 8, which barred same-sex couples from marrying, was brought by a private firm rather than an impact litigation organization, it was conceived by a non-lawyer advocate and a multidimensional advocacy strategy was in place throughout the case. For an extended discussion of the case, see JO BECKER, *FORCING THE SPRING: INSIDE THE FIGHT FOR MARRIAGE EQUALITY* (2014). For sharp criticism of Becker’s rendering of the litigation and related advocacy, see, e.g., Adam Goodheart, *A Fight for Marriage Equality, and Over History*, N.Y. TIMES (Apr. 30, 2014), <http://www.nytimes.com/2014/05/01/books/forcing-the-spring-by-jo-becker.html> [<http://perma.cc/44R5-GN9T>].

and/or in collaboration with other movement organizations.²⁸

In Iowa, for example, before filing suit in 2005 seeking marriage rights for same-sex couples, Lambda Legal’s lawyers spent their time “crisscross[ing] Iowa meeting gay and lesbian couples and organizing workshops and panels on issues that concerned them.”²⁹ In addition to networking with the organization’s constituents and community-based ally organizations, the lawyers spent time developing relationships with members of the Iowa bar, including with the lawyer who agreed to become their co-counsel, a former state solicitor general and partner in a prominent law firm who ultimately argued the case to the Iowa Supreme Court.³⁰ Lawyers and public education staff also worked directly with the local media, including reporters and editorial boards, to introduce them to key issues in the legal case and the communities affected by the exclusion of same-sex couples from marriage.³¹

As this illustration suggests, multidimensional advocacy requires attention to as many aspects of the landscape surrounding an issue as advocates can manage. As a result, once a problem has been identified—say, a state’s restrictive abortion law or a statewide ban on marriage for same-sex couples—myriad questions arise.

28 Among groups focused on legal advocacy for marriage equality and reproductive rights, for example, one need only glance at leading organizations’ websites to see how litigation is situated amidst broader outreach efforts. *See, e.g.*, ACLU HIV/AIDS PROJECT, <https://www.aclu.org/hiv-aids> (last visited Aug. 3, 2014); ACLU LGBT PROJECT, <https://www.aclu.org/lgbt-rights> (last visited Aug. 3, 2014); ACLU REPROD. FREEDOM PROJECT, <https://www.aclu.org/reproductive-freedom> (last visited Aug. 3, 2014); CTR. FOR REPROD. RTS., <http://www.reproductiverights.org/> (last visited Aug. 3, 2014); GAY AND LESBIAN ADVOCATES AND DEFENDERS, <http://www.glad.org/> (last visited Aug. 3, 2014); LAMBDA LEGAL, <http://www.lambdalegal.org/> (last visited Aug. 3, 2014); NAT’L CTR. FOR LESBIAN RTS., <http://www.nclrights.org/> (last visited Aug. 3, 2014); PLANNED PARENTHOOD, <http://www.plannedparenthood.org/> (last visited Aug. 3, 2014). *See also* Amiri, *supra* note 10; González-Rojas, *supra* note 10.

29 Keith B. Richburg, *How Gays Won a Marriage Victory*, WASH. POST, Apr. 15, 2009, at A01, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/14/AR2009041403455.html> [<http://perma.cc/7PBD-K53X>]. As lead lawyer Camilla Taylor recalled, “Sometimes it was lonely in those early days,” including events where just a handful of people turned out to discuss the issues. *Id.*

30 *Id.*

31 Interview with Lisa Hardaway, Lambda Legal Deputy Dir. of Educ. & Pub. Affairs-Commc’ns, in New York, NY (Apr. 15, 2014). Media advocacy, while often highly effective, can also be challenging to advocates seeking to portray complex social conditions or legal issues. *See* Su, *supra* note 25, at 414 (discussing the value of the media and “the struggle . . . [to] keep [] stories from becoming distorted”); *see also* Bonauto & Esseks, *supra* note 27 (noting importance of conveying messages about marriage equality through non-gay people). For discussion of media advocacy when a case reaches the Supreme Court, see Hilary Rosen, *Tactics, Strategy, and Marriage Equality*, 29 COLUM. J. GENDER & L. 160 (2015).

For starters, assume that litigation is an option, at least in theory, because there are plausible legal claims. There are, then, the standard lawyerly questions that one must think about in any case of this sort. But while the academic literature devotes most attention to doctrinal choices related to the merits—chiefly, which among privacy, liberty, and equality theories might be most effective or desirable³²—those turn out to be a small subset of the decisions to be made.

Many more questions are procedural and deeply strategic: which plaintiffs will have standing; who should be sued; whether a suit should be filed in state or federal court, and in which part of a state; what relief should be sought. Still others concern the formation of the litigation team, including how best to integrate local counsel and whether multiple organizations interested in the same issue should bring the suit together.³³

B. External Engagement/Outreach Strategies

As the multidimensional advocacy framework makes clear, even if a lawsuit is feasible, one needs to know more than legal doctrine to answer these questions thoughtfully.³⁴ As a result, legal advocates who are deciding whether, when, and how best to bring suit will likely engage with a range of communities in different settings, and then develop and implement context-sensitive strategies either on their own or through a range of messengers. This engagement might include:

Directly-affected communities: Legal advocates will typically reach out to local organizations whose members may already be active in non-litigation settings on the issue at hand. These organizations will usually be a crucial source of support for the lawsuit, and their members' individual stories and experiences can be included in a communications strategy to help make real for others the harm caused by the challenged law. As one commentary on the Iowa marriage case observed, “[p]erhaps most important,” lawyers

32 See, e.g., Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. 715, 729–31 (2010) (contending that the right to privacy has been subsumed by a right to liberty); Smith, *Using Sex Equality Arguments*, *supra* note 16, at 389–403 (encouraging addition of sex equality arguments to traditional liberty arguments in abortion context); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011) (discussing the interaction between liberty and equality claims).

33 On the relationship between out-of-state lawyers and local advocates more generally, see, e.g., William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997).

34 It bears noting that many of these considerations are relevant to litigation and other forms of advocacy in non-governmental settings (e.g., workplaces and educational institutions) as well.

planning the litigation “found six gay couples willing to go public with personal stories of discrimination, including being denied hospital visits and getting fired for attending a loved one’s funeral.”³⁵

While some of these communities may be organized geographically, in a particular town or part of the state, others are likely to come together based on another cross-cutting aspect of identity, perhaps faith or race or age. To reach these groups, legal organizations might hire non-legal staff to help establish connections and additional support for the litigation. Lambda Legal, for example, hired an organizer to work with faith-based and other communities in advance of its New Jersey marriage lawsuit to help raise awareness and gather support from congregations across the state.³⁶ In addition to finding allies, advocates may become aware of intracommunity differences regarding the desirability of litigation and try to address them before they flare up publicly in ways that could negatively affect the lawsuit.³⁷

Understanding the local landscape will also aid advocates in determining how best to allocate their resources, particularly in situations where there are more hostile measures than can be challenged at once.³⁸ For example, the impact of particular restrictions on repro-

35 Lisa Bertagnoli, *Focus on Camilla Taylor*, CRAIN’S CHICAGO BUS. (Oct. 31, 2009), <http://www.chicagobusiness.com/article/20091031/ISSUE02/100032607/camilla-taylor#> [<http://perma.cc/2URK-Z9PZ>].

36 Interview with Jon Davidson, Lambda Legal Legal Dir., in New York, NY (Oct. 19, 2014).

37 Derrick Bell’s iconic article, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976), sets out the challenges of intracommunity disputes regarding legal strategy in the context of school desegregation efforts. For an elaboration of these challenges in the context of marriage equality advocacy, see generally Rubenstein, *supra* note 33.

In my own experience as a staff attorney with Lambda Legal planning litigation in Florida in the early 1990s, talking with people throughout the state created an opportunity to address concerns within the community that a pre-election challenge to a proposed ballot measure, which sought to ban antidiscrimination protections based on sexual orientation and other characteristics, would take away momentum from on-the-ground organizing for the election campaign. The point is not that legal advocates can assuage all concerns but rather that they at least be aware and, where possible, respond to them. *Cf. In re Advisory Opinion to the Atty Gen.—Restricts Laws Related to Discrimination*, 632 So.2d 1018 (Fla. 1994) (rejecting proposed ballot measure on single-subject grounds where the measure sought to bar the state and local governments from enacting “any law regarding discrimination against persons which creates, establishes or recognizes any right, privilege or protection for any person based upon any characteristic, trait, status, or condition other than race, color, religion, sex, national origin, age, handicap, ethnic background, marital status, or familial status”).

38 Resource allocation is not the only constraint on litigation, as just noted. In jurisdictions where there is little likelihood of success, advocates might also choose to delay a challenge to a hostile measure. This was

ductive rights, including abortion access, can vary widely. Some restrictions, such as those that require all clinics where abortions are performed to meet ambulatory-surgery center standards, will substantially eliminate access to abortion if enforced while others, which regulate certain procedures for late-term abortions, may be more limited or cabinable in their impact.³⁹ Indeed, even when facing statewide marriage restrictions, advocates in some states debated strenuously about whether litigation or legislation might be best in light of the local political and judicial landscape.⁴⁰ Knowing the surrounding communities' sense of how these measures will affect them, which ones seem most vulnerable to challenge, and whether challenges are more likely to succeed in court or in political forums can be a critical part of the case-vetting and litigation-strategy development processes.⁴¹

Legislatures: Determining how a state legislature will react to a lawsuit is also critical. If the plaintiffs prevail, will there be a risk of further negative legislative action? If there is a win in state court, how difficult, or easy, will it be to amend the state's constitution? In addition to background legal research regarding amendment processes,⁴² these questions require localized knowledge of individual legislators, including committee chairs who might prove critical to controlling hostile proposals.⁴³ They also require advocates to make

certainly the case for LGBT legal advocacy organizations, which faced marriage restrictions in all fifty states in the late 1990s and initially chose from among them those where the political and legal climates suggested the greatest likelihood of success. *See, e.g.,* Mary L. Bonauto, Goodridge *in Context*, 40 HARV. C.R.-C.L. L. REV. 1 (2005) (discussing the process of developing marriage litigation in Massachusetts); Eskridge, Jr. *Backlash Politics*, *supra* note 16, at 285 (elaborating the reasons for early marriage litigation in Vermont).

39 *See* Anderson, *supra* note 17.

40 *Cf.* Cummings & NeJaime, *supra* note 12, at 1312–16 (discussing the multidimensional litigation-and-legislation approach adopted by marriage equality advocates in California in the face of internal disagreement over how to proceed).

41 On this point, Lynn Paltrow offers an extended argument on a divergent but also important point: that advocates ought to take a broad view in their case selection, with attention to the ways in which certain cases offer opportunities for organizing, alliance-building, and extra-litigation advocacy even when their precedential impact may be limited. *See* Paltrow, *supra* note 23, at 221–25.

42 For marriage, considerable research was also devoted early on to evaluating cross-border recognition questions, which implicated both legislative and litigation strategies. *See, e.g.,* Cox, *supra* note 16.

43 *See also* Abby Goodnough, *Challenge to Gay Marriage Fails in New Hampshire*, N.Y. TIMES (Mar. 22, 2012), <http://www.nytimes.com/2012/03/22/us/politics/new-hampshire-refuses-to-repeal-gay-marriage-right.html> [<http://perma.cc/V9TS-MTER>] (reporting that Republican-dominated chamber voted to “kill” anti-marriage bill); Stephanie Samuel, *Same-Sex Marriage Ban Fails in Iowa Senate*, THE CHRISTIAN POST (Jan. 7, 2011, 5:30 PM), <http://www.christianpost.com/news/same-sex-marriage-ban-fails-in-iowa-senate-48699/> [<http://perma.cc/JY5Z-GCUF>] (reporting that state senate blocked debate on anti-marriage amendment).

a concerted bipartisan effort to reach leaders across the political spectrum.⁴⁴ These kinds of questions drew considerable attention from marriage equality advocates after numerous states banned marriage rights for same-sex couples not only legislatively but also through state constitutional amendment.⁴⁵

The bar: To the extent advocates are based out of state, it is also important not only to find local counsel but also to find other local lawyers who can file amicus briefs, offer moots and background information about the court, and provide other support for the litigation effort. In my own experience in other gay rights cases, including those related to sodomy laws and anti-gay amendments, working with lawyers who knew the courts in their jurisdiction helped significantly with procedural and strategic questions related to framing and filing lawsuits.⁴⁶ Having prominent local counsel join a case and sit at counsel table during an argument also surely added to the credibility of the plaintiffs' claims in various cases.⁴⁷

* * *

In addition to the groups just discussed, advocates contemplating litigation also benefit from engaging other sectors that may help aid the reception of a lawsuit in a given community. While lawyers are not always the obvious candidates to do this outreach, their participation can help link the general request for support on an issue to the urgency of a

44 See Bonauto & Esseks, *supra* note 27 (discussing the importance of a bipartisan legislative advocacy effort). For a thorough discussion of the successful bipartisan legislative effort after litigation for marriage equality did not succeed in New York, see Michael Barbaro, *Behind Gay Marriage, An Unlikely Mix of Forces*, N.Y. TIMES (June 25, 2011), <http://www.nytimes.com/2011/06/26/nyregion/the-road-to-gay-marriage-in-new-york.html?pagewanted=all> [<http://perma.cc/6R2K-7L6V>]; see also MARK SOLOMON, *WINNING MARRIAGE: THE INSIDE STORY OF HOW SAME-SEX COUPLES TOOK ON THE POLITICIANS AND PUNDITS—AND WON 149–220* (2014) (presenting in-depth analysis of bipartisan marriage advocacy strategy in New York).

45 See *supra* note 4 and accompanying text (discussing passage of DOMAs following the Hawaii Supreme Court's *Baehr v. Lewin* ruling).

46 Here, among others, I think of David Jones of the Houston law firm Williams, Birnberg & Anderson, who along with Mitchell Katine, served as local counsel for Lambda Legal in *Lawrence v. Texas*. It was Jones who provided essential criminal defense expertise as the case proceeded first in the state's Justice of the Peace Court and then into the Harris County Criminal Court. For extended discussion of the early development of the *Lawrence* case through to the Supreme Court's ruling, see DALE CARPENTER, *FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS* (2012).

47 Judge Gerald Bruce Lee of the Eastern District of Virginia has noted that local counsel should be utilized for their credibility and knowledge of local rules, and not left on the sidelines. Lloyd Smith, *An Interview with Judge Gerald Bruce Lee, United States District Court, Eastern District of Virginia*, 6 LANDSLIDE 7, 10 (2013).

particular case. Among these sectors are:

Likely allies: Support from within the state by others than those directly affected is vital to shaping the landscape surrounding a lawsuit. Civil rights groups may be likely allies and are unquestionably important voices to buttress the validity of a reproductive rights or marriage equality claim by showing how that claim is part of a broader fabric of protection for the state's residents.

Faith-based organizations often also play a critical role because of their ability to do outreach within their communities. In addition, faith-based leaders and communities are uniquely able to counter adversaries' arguments that litigants' claims defy foundational morality.⁴⁸

Unlikely allies: While advocates will typically have a good sense of their likely allies before bringing suit, a multidimensional strategist will also be on the lookout for individuals and organizations that have not previously been supporters on the issue but might be open to joining in some fashion. This outreach can include those who have changed their minds on the issue as well as other individuals and entities, such as business leaders, corporations, and well-known personalities in sports, the arts, and other domains who avoided staking out a position on a potentially controversial issue in the past but are now ready to do so.

In marriage equality advocacy, this outreach began on a relatively small scale, with a limited set of unlikely allies offering their support, often motivated by their regard for a gay or lesbian family member.⁴⁹ Over time, the set of unlikely allies on marriage grew exponentially, to the point that amicus briefs in the *Windsor* and *Perry* cases overflowed with business leaders and many others who might not typically take a position in a civil rights case.⁵⁰

48 See *infra* Part III.

49 *Non-Gay and Gay Groups Across Country Observe First National Freedom to Marry Day*, LAMBDA LEGAL (Feb. 6, 1998), http://www.lambdalegal.org/news/ny_19980206_groups-across-country-observe-first-freedom-to-marry-day [<http://perma.cc/XX9Z-RFYJ>]; ANDERSON, *OUT OF THE CLOSETS*, *supra* note 22, at 55 (noting that Lambda garnered signatures for its Marriage Resolution from "a wide range of non-gay actors and organizations" with one purpose of mobilizing potential adherents). For contemporary outreach along these lines, see, e.g., *See Why Marriage Matters to Non-Gay Allies*, FREEDOM TO MARRY, http://archive-freedomtomarry.org/get_informed/communities/non-gay_allies.php [<http://perma.cc/FPP2-MW73>] (last visited Aug. 4, 2014).

50 See Brief for Am. Fed'n of Labor and Cong. of Indus. Orgs., et al. as Amici Curiae Supporting Respondents, *United States v. Windsor*, 133 S.Ct. 2675 (2013) (No. 12-307), 2013 WL 860461 (national labor union

Outside of litigation, popular figures also generated conversations and support in unlikely domains. Professional football player Chris Kluwe, for example, drew significant attention when he publicly opposed laws that ban gay couples from marrying and from receiving recognition for their marriages.⁵¹ So, too, did Beyoncé and Jay Z, among many other pop stars.⁵² Indeed, when Beyoncé posted her support for marriage equality on Facebook, the New York Daily News noted that the 45 million people who “like” her there is a group larger than the entire population of Poland.⁵³

Expert allies: Experts have long played a particular and important role in American

federations and organizations); Brief for Bill Bradley, et al. as Amici Curiae Supporting Respondents, *United States v. Windsor*, 133 S.Ct. 2675 (2013) (No. 12-307), 2013 WL 840019 (former United States Senators who voted in favor of DOMA in 1996); Brief for Bishops of the Episcopal Church, et al. as Amici Curiae Supporting Respondents, *United States v. Windsor*, 133 S.Ct. 2675 (2013) (No. 12-307), 2013 WL 840023 (broad range of religious groups, organizations, and leaders); Brief for Dr. Donna E. Shalala, et al. as Amici Curiae Supporting Respondents, *United States v. Windsor*, 133 S.Ct. 2675 (2013) (No. 12-307), 2013 WL 840018 (former Cabinet secretaries, commissioners, and other senior administrative agency officials); Brief for Hon. Lawrence J. Korb, et al. as Amici Curiae Supporting Respondents, *United States v. Windsor*, 133 S.Ct. 2675 (2013) (No. 12-307), 2013 WL 860462 (former national defense leaders); Brief for the P’ship of N.Y.C., as Amicus Curiae Supporting Respondents, *United States v. Windsor*, 133 S.Ct. 2675 (2013) (No. 12-307), 2013 WL 840020 (nonprofit membership organization comprised of 200 chief executive officers from many of City’s leading businesses); Brief for 278 Emp’rs and Orgs. Representing Emp’rs as Amici Curiae Supporting Respondents, *United States v. Windsor*, 133 S.Ct. 2675(2013) (No. 12-307), 2013 WL 823227 (national employers).

On this point, consider, too, the substantial number of business leaders that, after the *Perry* and *Windsor* rulings, voiced their opposition to a proposed Arizona law that was widely understood to enable antigay discrimination. Laurie Merrill & Russ Wiles, *Ariz. Business Leaders Urge Veto of Religion Bill*, USA TODAY (Feb. 22, 2014, 9:00 AM), <http://www.usatoday.com/story/news/nation/2014/02/21/ariz-business-leaders-urge-veto-of-religion-bill/5719235/> [<http://perma.cc/N5LX-TXWE>].

51 See, e.g., Tony Gervino, *The Punter Makes His Point*, N.Y. TIMES (Oct. 19, 2012), <http://www.nytimes.com/2012/10/20/sports/football/punter-chris-kluwe-voice-is-heard-in-same-sex-marriage-debate.html> [<http://perma.cc/5EH2-PGDR>]. Kluwe later left the Vikings and ultimately reached a settlement with them that included the Vikings making ongoing contributions to LGBT organizations and enhanced sensitivity training. See Ben Goessling, *Chris Kluwe, Vikings Avoid Lawsuit*, ESPN (Aug. 19, 2014, 12:15 PM), http://espn.go.com/nfl/story/_/id/11375100/chris-kluwe-minnesota-vikings-reach-settlement-avert-lawsuit [<http://perma.cc/SVZ9-FBUR>].

52 See, e.g., Corky Siemaszko, *Beyonce Shows Her Support for Marriage Equality: ‘If You Like It You Should Be Able to Put A Ring on It’*, N.Y. DAILY NEWS (Mar. 27, 2013, 12:20 PM), <http://www.nydailynews.com/entertainment/gossip/beyonce-shows-support-marriage-equality-article-1.1300312> [<http://perma.cc/TEN3-3LMH>] (listing a group of well-known performers and others who support marriage equality, also including Clint Eastwood and Howard Stern).

53 *Id.*

litigation, including in marriage equality and reproductive rights cases, through direct testimony and submission of amicus briefs.⁵⁴ The key from a multidimensional advocacy perspective is to make use of these experts outside the litigation context as well so that their views can play a role in shaping popular discourse in addition to informing the record in a given case.

Reproductive rights advocates have done this in part by marshaling doctors and service providers as messengers in media settings and elsewhere because of their distinct medical expertise that can be used to counter flawed assertions made by supporters of the restrictions being challenged.⁵⁵

Local media: Media is in somewhat of a different category from the other groups just discussed in that the aim of outreach is not to bring the media into the lawsuit itself. But there are at least two other significant goals related to the landscape in which a lawsuit will proceed. First is to familiarize media with information and analysis that will aid in fair coverage. Second, where possible, advocates will often seek favorable editorial support or, at a minimum, attempt to discourage hostile editorials. Given the enormous number of media outlets, especially if bloggers are counted in, and the diversity among them and their target audiences, full-fledged advocacy efforts related to media require significant resources and careful planning.⁵⁶

* * *

54 In reproductive rights litigation, expert service providers are sometimes litigants as well. *See, e.g.,* *Gonzales v. Carhart*, 550 U.S. 124 (2007) (including four physician-plaintiffs, with Carhart among them); *Jackson Women's Health Org. v. Currier*, 13-60599, 2014 WL 3730467 (5th Cir. July 29, 2014) (including as plaintiffs three physicians who provided reproductive health services). In the reproductive rights cases, organizations that provide medical services as well as engage in advocacy are also litigants at times. *See, e.g.,* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

55 *See, e.g.,* *Texas Health Care Providers Take Fight for Abortion Access to U.S. Supreme Court*, CTR FOR REPROD. RIGHTS (Oct. 6, 2014), <http://www.reproductiverights.org/en/press-room/texas-health-care-providers-take-fight-for-abortion-access-to-us-supreme-court> [<http://perma.cc/8ZYY-SGWA>].

56 A full discussion of the range of ways that lawyers can advance their advocacy goals through a careful media strategy is beyond the scope here. For more discussion of media advocacy at the United States Supreme Court in the context of marriage litigation, see, e.g., Rosen, *supra* note 31. For discussion of media advocacy at the state and local level in marriage cases, see Bonauto & Esseks, *supra* note 27. For analysis of lawyers' media advocacy outside the contexts here, see, e.g., Janell Smith & Rachel Spector, *Environmental Justice, Community Empowerment, and the Role of Lawyers in Post-Katrina New Orleans*, 10 N.Y. CITY L. REV. 277, 295–96 (2006) (discussing role of media strategy in environmental litigation following Hurricane Katrina).

Each of these sectors, apart from the media, will likely also be the source of spokespeople for the advocates' message, both in and outside of court. In litigation, an array of amicus briefs will expose the court to the diverse groups that have a stake in the case and to the particular information and other expertise those groups can bring forward. Outside of the case itself, these diverse amici can serve as messengers to their communities, each bringing a message tailored to reach a distinct community within a state.⁵⁷

Given that social movements are never static, advocates on one side of an issue are likely to be working on a landscape that is also being shaped by their adversaries' similar efforts.⁵⁸ Consequently, the outreach and intervention just described will also take place in a dynamic environment, requiring advocates to be especially aware of and responsive to ever-shifting perceptions and alliances.

In short, for the multidimensional advocate interested in doing as much as possible to facilitate a positive court decision, there is much to do. And for theorists seeking to understand the role of litigation in shaping social and cultural change, there is much to consider as well.

II. Marriage Equality and Abortion Rights Advocacy—Some Similarities and Differences

Just as litigation does not happen in a vacuum, background understandings and framings of the issue at hand will also influence the reception of outreach and other strategies discussed above. Along these lines, this Part identifies some of the most significant similarities and differences in the popular and jurisprudential treatment of marriage and reproductive rights, primarily including abortion. These points, in turn, help illustrate some of the framing challenges facing advocates who seek, through alliance-building and messaging strategies, to influence the environment in which litigation is taking place.

A. Conceptual and Jurisprudential Similarities

Autonomy: When considered conceptually and jurisprudentially, the issues of marriage equality and reproductive rights are arguably quite similar. Both implicate individual

⁵⁷ On the multiple uses of amicus briefs, see *infra* notes 117–119 and accompanying text.

⁵⁸ Reva Siegel has explored the synergies between movements and countermovements at length related to efforts to pass (or oppose) the Equal Rights Amendment. See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323 (2006).

autonomy in ways that are central to personhood⁵⁹ and both have, at times, had constitutional protection as fundamental rights.⁶⁰ In response, adversaries similarly argue that fundamental rights doctrine cannot possibly reach either reproductive decisions or marriage for same-sex couples because neither falls within the deeply rooted traditions protected by rights deemed fundamental.⁶¹

Equality: Both issues arguably implicate equality as well. As reproductive rights advocates have long observed, women's control over their reproductive lives, including by access to abortion, is an essential element of sex equality.⁶² Likewise, the denial of mar-

59 See *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (“[C]hoices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. 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.”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”); *Latta v. Otter*, 14-35420, 2014 WL 4977682 at *11 (9th Cir. Oct. 7, 2014) (Reinhardt, J., concurring) (“[T]he fundamental right to marriage . . . is properly understood as including the right to marry an individual of one’s choice. That right applies to same-sex marriage just as it does to opposite-sex marriage.”). Cf. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”).

60 While access to abortion was originally deemed a fundamental right in *Roe v. Wade*, 410 U.S. 113, 155 (1973), the Court has since replaced strict scrutiny with a standard that asks whether challenged restrictions impose an “undue burden” on access to abortion. See *Planned Parenthood v. Casey*, 505 U.S. 833, 876 (1992) (joint op. of O’Connor, Kennedy, and Souter, J.J.). Marriage, by contrast, has been consistently deemed a fundamental right. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (highlighting the “right of the individual . . . to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men”). Recently, courts have deemed that this right also covers same-sex couples seeking to marry. See, e.g., *Bishop v. Smith*, 760 F.3d 1070, 1080 (10th Cir. 2014), *stay lifted*, 2014 WL 4960523 (10th Cir. 2014), *cert. denied*, 760 F.3d 1070 (2014) (“State bans on the licensing of same-sex marriage significantly burden the fundamental right to marry . . .”).

61 *Casey*, 505 U.S. at 952 (Rehnquist, C.J., dissenting in part) (“Nor do the historical traditions of the American people support the view that the right to terminate one’s pregnancy is ‘fundamental.’”); *Windsor*, 133 S. Ct. at 2706–07 (Scalia, J., dissenting) (“[T]he [majority] opinion does not argue that same-sex marriage is ‘deeply rooted in this Nation’s history and tradition,’ (citation omitted), a claim that would of course be quite absurd.”).

62 See, e.g., Brief for National Women’s Law Center et al. as Amici Curiae Supporting the Government at 18–26, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356), 2014 WL 333895; *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2787–88 (2014) (Ginsburg, J., dissenting) (“Congress acted on [the understanding that women’s equality in the social and economic spheres has been made possible by their ability to control their reproductive rights] when, as part of a nationwide insurance program intended to be comprehensive, it called for coverage of preventive care responsive to women’s

riage and of marriage recognition to same-sex couples is patently unequal, as numerous courts have now observed.⁶³ Not surprisingly, those on the other side of both marriage equality and reproductive rights maintain that an equality claim is inapplicable because there is no unequal treatment of similarly-situated parties.⁶⁴

Sexuality: Stepping away from legal doctrine, both marriage and reproductive rights claims also implicate human sexuality, with all of the attendant ways in which Americans both embrace and shrink from discussing the topic.⁶⁵

To be sure, their relationships to sex are different. Being gay does not indicate anything specific about a person's sex life or relationship status. Seeking an abortion most often indicates that a woman has had sexual intercourse with a man, but says nothing more about that experience, including whether it came in the context of a marriage or committed relationship or whether it was consensual. Yet the response to each is undoubtedly affected by the

needs."); *Casey*, 505 U.S. at 856 ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.").

63 See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2679 (2013) (invalidating the federal DOMA provision that banned recognition of same-sex couples' marriages); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 431 (M.D. Pa. 2014) (striking down state restrictions on same-sex couples' marriages); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1146–48 (D. Or. 2014) (same); *Lee v. Orr*, 13-CV-8719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014) (same).

64 See, e.g., *Kitchen v. Herbert*, 755 F.3d 1193, 1237–38 (10th Cir. 2014) (Kelley, J., concurring in part and dissenting in part) ("It is biologically undeniable that opposite-gender marriage has a procreative potential that same-gender marriage lacks. The inherent differences between the biological sexes are permissible legislative considerations . . ."); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1072 (D. Haw. 2012) ("It is undisputed opposite-sex couples can naturally procreate and same-sex couples cannot. Thus, allowing opposite-sex couples to marry furthers this interest and allowing same-sex couples to marry would not do so."); Brief for Respondents at 47–48, *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 546899 (arguing that the government's assertion that "women have different health needs than men" is "boilerplate" and then stating, "[t]he government has thus failed even to argue, much less demonstrate, that [Hobby Lobby's refusal to cover certain contraceptives] triggers any gender equality interest at all, much less a compelling one").

65 See, e.g., Maggie Fox, *Sex Infections Still Growing in U.S., Says CDC*, REUTERS (Nov. 16, 2009, 9:39 AM), <http://www.reuters.com/article/2009/11/16/us-sex-diseases-usa-idUSTRE5AF14A20091116> [<http://perma.cc/VE8M-8JDN>] ("American squeamishness about talking about sex has helped keep common sexually transmitted infections far too common, especially among vulnerable teens . . ."); Lara Salahi, *HPV Vaccine Does Not Increase Signs of Sexual Activity, Study Finds*, ABC NEWS (Oct. 15, 2012), <http://abcnews.go.com/Health/WomensHealth/hpv-vaccine-raise-risk-sexual-activity-study-finds/story?id=17467576> [<http://perma.cc/MNU7-7YV7>] (noting that a new study should assuage some parents' concerns that a cancer-preventing vaccine could make their daughters more promiscuous).

fraught nature of sex within American political and social life,⁶⁶ which in turn poses some similar challenges as advocates navigate around inclinations toward treating both issues as “private” and not appropriate for general discussion.

Government non-interference: Ideas of autonomy resonate in popular culture as well as legal doctrine and can also provide support for government non-interference both with women’s reproductive decisions and with individuals’ choices about whom to marry.⁶⁷ Indeed, stepping away from the particular issues of abortion and marriage for same-sex couples, there is a strong American legislative tradition to safeguard individuals’ broad freedom to choose a spouse and make personal medical decisions.⁶⁸

B. Commonalities in Opposition to Reproductive Rights and Marriage Equality

Both marriage equality and reproductive rights advocates also face common theoretical and organizational opposition.

Constitutional limitations and tradition: As a doctrinal matter, both encounter

66 See Stevie Feliciano, *Banned Books Week: A Book List*, N.Y. PUB. LIBR. (Sept. 9, 2013), <http://www.nypl.org/blog/2013/09/09/banned-book-list> [<http://perma.cc/WU8D-FMJ2>] (detailing challenges around the United States to, *inter alia*, books with gay and lesbian characters and sexual education books); *Facts on American Teens’ Sources of Information About Sex*, GUTTMACHER INST. (Feb. 2012), <http://www.guttmacher.org/pubs/FB-Teen-Sex-Ed.html> [<http://perma.cc/DAN5-QQMA>] (noting that 46% of males and 33% of females “do not receive formal instruction about contraception” before having sex).

67 On individuals’ freedom of choice in marriage, see, e.g., Brief of Amicus Curiae Columbia Law School Sexuality and Gender Law Clinic in Support of Plaintiffs-Appellees, *DeBoer v. Snyder*, 772 F.3d 388 (2014) (No. 14-1341), available at http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=623186 [<http://perma.cc/8JL9-N59M>].

68 This claim is consistent with a more general ideal, long part of American political and cultural life, that individuals should be free to pursue happiness for themselves, on their own terms, with only minimal limits from the state. “[T]he regulation of constitutionally protected decisions, such as . . . whom [a person] shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made.” *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990); see also *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) (“[T]he Constitution undoubtedly imposes constraints on the State’s power to control the selection of one’s spouse”); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 287 (1990) (O’Connor, J., concurring) (“[T]he liberty interest in refusing medical treatment flows from decisions involving the State’s invasions into the body Our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination”).

arguments that no clause of the Constitution provides protection for either claim.⁶⁹

There are arguments from tradition as well, including that embracing individual choice, particularly without majoritarian support, can undermine the well-being of civilized society.⁷⁰

Faith-based objections: There are, too, arguments that invoke biblical doctrine to oppose women's reproductive freedom and gay people's freedom to marry in equal measure. While these will not be made directly in litigation, they surely infuse the surrounding environment.

The Manhattan Declaration, a relatively recent incarnation of this sort,⁷¹ embodies these linked objections, maintaining that "the sanctity of human life, the dignity of marriage as a union of husband and wife, and the freedom of religion are foundational principles of justice and the common good."⁷² With those baseline commitments in place, the Declaration's numerous signatories, who identify as Orthodox, Catholic, and Evangelical Christians, affirm, among other principles, "the profound, inherent, and equal dignity of every human being," "marriage as a conjugal union of one man and one woman, ordained by God from the creation, and historically understood by believers and non-believers alike, to be the most basic institution in society," and religious liberty.⁷³ They also commit to pursuing these beliefs not only in church but also in politics:

69 See *United States v. Windsor*, 133 S. Ct. 2675, 2707 (2013) (Scalia, J., dissenting) ("[T]he Constitution does not forbid the government to enforce traditional moral and sexual norms."); *Planned Parenthood v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (claiming that abortion is not constitutionally protected because "(1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed"). Cf. *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) ("Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on [sodomy]").

70 Cf. LORD PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1959).

71 Other similar organizing efforts from previous decades have been led by the Birch Society, the Moral Majority, and various self-styled "family values" coalitions, among many others. For extended discussion of these and other conservative social movement efforts, see generally SARA DIAMOND, *ROADS TO DOMINION: RIGHT-WING MOVEMENTS AND POLITICAL POWER IN THE UNITED STATES* (1995).

72 Manhattan Declaration: A Call of Christian Conscience, Manhattan Declaration (Nov. 20, 2009), at 2, available at http://manhattandeclaration.org/man_dec_resources/Manhattan_Declaration_full_text.pdf [<http://perma.cc/43XM-4ZW4>].

73 *Id.*

Because we honor justice and the common good, we will not comply with any edict that purports to compel our institutions to participate in abortions, embryo-destructive research . . . ; nor will we bend to any rule purporting to force us to bless immoral sexual partnerships, treat them as marriages or the equivalent, or refrain from proclaiming the truth, as we know it, about morality and immorality and marriage and the family. We will fully and ungrudgingly render to Caesar what is Caesar's. But under no circumstances will we render to Caesar what is God's.⁷⁴

One additional claim, which is likely to draw marriage equality and reproductive rights advocacy more closely together in the future, is that even if the state permits same-sex couples to marry and women to have abortions, private actors should not have to recognize those marriages or provide services or insurance related to reproductive care, including access to contraception and abortion, if they object on faith-based grounds. As noted earlier, the Supreme Court recently endorsed this argument in a limited way in the context of large employers invoking the Religious Freedom Restoration Act and refusing to provide or permit employees to obtain contraception through their insurance plans.⁷⁵ There is much to suggest that the argument will be advanced with increasing frequency as a justification for businesses that want to refuse service to same-sex couples.⁷⁶

C. Differences in Framing the Issues

Yet, not surprisingly, marriage and reproductive rights—particularly abortion—are also framed as distinct in ways that affect advocates' choices among multidimensional strategies. The discussion here, while again not comprehensive, aims to flag some of the distinctions most frequently cited in public discourse and reflected in major cases.

Before going further, it bears repeating that these distinctions shift over time and that

74 *Id.* at 9.

75 *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014).

76 *See, e.g.*, Merrill & Wiles, *supra* note 50 (discussing Arizona bill that would have allowed business owners to discriminate against gay and lesbian customers on religious grounds); Reid Wilson, *Mississippi Passes Arizona-Style Religious Freedom Bill*, WASH. POST (Apr. 1, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/04/01/mississippi-passes-arizona-style-religious-freedom-bill/> [<http://perma.cc/XS9W-QMWL>] (discussing a similar law enacted in Mississippi); *Supreme Court Victory for Hobby Lobby and Religious Freedom*, BECKET FUND FOR RELIGIOUS LIBERTY (June 30, 2014), <http://www.becketfund.org/hobbylobbyscotusvictory/> [<http://perma.cc/M3TG-4SN8>] (touting the “landmark” success of the faith-based argument in *Hobby Lobby*).

the facts on which they purport to rest are not fixed in their social or legal salience. As a reminder of this mutability, think back, for example, to 1973. That January, the Supreme Court concluded that the Constitution protected a woman's right to terminate her pregnancy, pre-viability, free from state interference.⁷⁷ To reach that decision, the Court conducted an extended review of ancient history, the Hippocratic oath, the common law, expert medical opinion, and more to support its ruling, as if intending to render a definitive determination of the question.⁷⁸ Yet at that point, the American Psychiatric Association's Diagnostic and Statistical Manual still classified homosexuality as a mental disorder,⁷⁹ and nearly every state criminalized sexual intimacy between consenting adults of the same sex.⁸⁰

Thus, although the nation's growing embrace of gay people and marriage equality and the increasingly hostile environment surrounding women's reproductive rights at present might seem inevitable, an observer just a few decades ago could reasonably have made a very different prediction.⁸¹ Put simply, issues are framed in ever-changing ways and those changes influence both the available options and likely effectiveness of advocacy strategies.

Among the ways in which reproductive rights and marriage equality are differentiated today in public and judicial discourse are these:

Love v. Endangerment: As one blogger observed, “[y]ou can support gay marriage because you believe in the dignity and equality of all human life—and oppose abortion for

77 *Roe v. Wade*, 410 U.S. 113 (1973). In reaching that result, the Court made clear that “we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.” *Id.* at 162.

78 *Id.* at 129–47.

79 The American Psychiatric Association's declassification of homosexuality as a mental illness came in December of that year. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (2d ed. 1968 & 7th prt. 1974); see also Richard Pillard, *From Disorder to Dystonia: DSM-II and DSM-III*, 13 J. GAY & LESBIAN MENTAL HEALTH 82 (2009) (chronicling the events that led to the American Psychiatric Association's declassification of homosexuality in December 1973).

80 *Bowers v. Hardwick*, 478 U.S. 186, 193–94 (1986) (“[U]ntil 1961, all 50 states outlawed sodomy, and today [in 1986], 24 States and the District of Columbia continue to provide criminal penalties for sodomy” (citing *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521 (1986) (internal citations omitted))).

81 Cf. Thomas B. Edsall, Op-Ed., *Abortion Endures as a Political Tripwire*, N.Y. TIMES (Apr. 15, 2014), <http://www.nytimes.com/2014/04/16/opinion/why-does-abortion-endure-as-a-political-tripwire.html> [<http://perma.cc/6T5W-EUCT>] (reviewing reasons why abortion has remained such a difficult political issue while views are shifting relatively quickly on marriage equality).

the same stated reasons.”⁸² This view that marriage equality concerns the right to choose a loving partner and that abortion disrespects and endangers the sanctity of human life remains deeply salient in some circles.⁸³ Yet the distinction is not inevitable. Others argue that access to reproductive care, including abortion, is also about love and respect for the sanctity of a woman’s life, and that abortion does not harm a viable human being but denial of abortion does.⁸⁴

Happiness v. Regret and Depression: One need only look at the many popular depictions of same-sex couples marrying—or waiting on line to get married after a court has invalidated a state’s ban—to see a vision of joy and, for some, great relief at having government recognition and protection for their relationship. Indeed, the *Windsor* majority recognized this, citing the “urgency” of same-sex couples for marriage and touting the way in which marriage would enable these couples to “live with pride in themselves and their union.”⁸⁵ Of course, it was not always this way, and indeed, not terribly long ago that Chief Justice Burger invoked Blackstone’s depiction of sexual relations between same-sex partners as “the infamous *crime against nature*” and “a heinous act ‘the very mention of which is a disgrace to human nature.’”⁸⁶

By contrast, while no popular discourse celebrates abortion, even the Supreme Court once understood that to not allow abortion and require women to give birth “may force upon the woman a distressful life and future.”⁸⁷ Yet that recognition has given way to a

82 Mark Joseph Stern, *It’s Perfectly Logical to Oppose Abortion and Support Gay Marriage*, SLATE (May 15, 2014), http://www.slate.com/blogs/outward/2014/05/15/it_s_logical_to_oppose_abortion_and_support_gay_marriage.html [<http://perma.cc/E4FB-3TPH>].

83 Caitlin Borgmann has written thoughtfully about the challenges related to “pro-life” claims for reproductive rights advocates as well as adversaries. See Caitlin E. Borgmann, *The Meaning of “Life”: Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551 (2009).

84 See, e.g., Joshua Lang, *What Happens to Women Who Are Denied Abortions?*, N.Y. TIMES (June 12, 2013), <http://www.nytimes.com/2013/06/16/magazine/study-women-denied-abortion.html> (detailing studies on the psychological impact on women of being denied an abortion).

85 *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013).

86 *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (quoting 4 W. Blackstone, *Commentaries* *215), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

87 The full context of the Court’s observations in *Roe* about the impact of unwanted pregnancy bear repeating:

Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child

social commentary and jurisprudence that more often links abortion, rather than unwanted childbirth, to depression and regret.⁸⁸ Per Justice Kennedy, “some women come to regret their choice to abort the infant life they once created and sustained.”⁸⁹

Community v. Isolation: Marriage, as typically celebrated in the United States, is understood to be a communal affirmation, while abortion, as performed in the United States, is widely characterized as a private medical decision. With respect to marriage, for example, Justice Kennedy observed that same-sex couples “wanted to affirm their commitment to one another before their children, their family, their friends, and their community.”⁹⁰ Ebullient LGBT Pride parades celebrating newly established marriage rights likewise convey the sense that the joy of individual couples is shared and celebrated across communities.

Reproductive health procedures, by their nature, are more private than public. Yet it would be mistaken to view abortion, in particular, as necessarily a private and isolating experience. Indeed, anyone who has gone to a Planned Parenthood office on a weekend in a location where abortion is contested has faced sidewalk “counselors” who view the

care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

Roe v. Wade, 410 U.S. 113, 153 (1973).

88 Cf. J.F., *A Hard Roe to Hoe*, *ECONOMIST* (Mar. 22, 2013), <http://www.economist.com/blogs/democracyinamerica/2013/03/gay-marriage-and-abortion> [<http://perma.cc/UG2A-PY47>] (describing the “fundamental difference between same-sex marriage and abortion. Everybody loves a wedding; nobody likes an abortion”).

89 *Gonzalez v. Carhart*, 550 U.S. 124, 159 (2007). Again, the full context of this observation warrants attention:

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained Severe depression and loss of esteem can follow.

Id. (citations omitted).

90 *Windsor*, 133 S. Ct. at 2689.

procedure as a community event.⁹¹ Advocates, escorts and supporters are also part of the community that enables a woman to pass safely by these “counselors” and protesters to obtain reproductive health care, possibly including an abortion, and to depart safely as well. There are also burgeoning online discussion groups of women sharing their stories about abortion and generating a sense of community in seeking and sharing affirmation, comfort, and support from others.⁹²

Morality: Not terribly long ago in the United States, the Chief Justice of the Supreme Court had little difficulty condemning sexual relations between same-sex couples as highly immoral and worthy of state intervention for that reason. “Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards,” Chief Justice Burger wrote in *Bowers v. Hardwick*.⁹³ More recently, some members of the Court have reiterated essentially that same position.⁹⁴

By contrast, abortion has not always been treated as morally fraught, and the majority opinion in *Roe* never once considered that moral opposition to abortion might be an adequate basis on which to forbid it. Instead, the Court situated its analysis of abortion historically and observed that “[a]t least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century.”⁹⁵

Yet, as the moralizing language around homosexuality has largely dissipated, even in judicial opinions,⁹⁶ it has gained force in the reproductive rights context, with abortion be-

91 Cf. *McCullen v. Coakley*, 134 S. Ct. 2518, 2549 (2014) (Scalia, J., concurring in the judgment) (describing “sidewalk counselors”).

92 See, e.g., 1 IN 3 CAMPAIGN, <http://www.1in3campaign.org/en/> [<http://perma.cc/EX5N-N9BF>] (last visited Jan. 21, 2015); 45 MILLION VOICES, <http://www.45millionvoices.org> [<http://perma.cc/27VX-HRAW>] (last visited Jan. 21, 2015); EXHALE, <https://exhaleprovoice.org/> [<https://perma.cc/W7MH-QQDV>] (last visited Jan. 21, 2015); PROJECT VOICE <http://www.projectvoice.org/> [<http://perma.cc/Q3JJ-R76D>] (last visited Jan. 21, 2015).

93 *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring).

94 *Lawrence v. Texas*, 539 U.S. 558 at 589 (Scalia, J., dissenting) (“Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority’s belief that certain sexual behavior is ‘immoral and unacceptable’ constitutes a rational basis for regulation.”).

95 *Roe v. Wade*, 410 U.S. 113, 140–41 (1973).

96 *Lawrence* rejected reliance on moral disapproval as a legitimate basis for government action. See *Lawrence*, 539 U.S. at 577 (holding that “the fact that the governing majority in a State has traditionally viewed

ing characterized not as a positive means for women to respond to the morally challenging position of forced maternity but instead, as noted earlier, as a “difficult and painful moral decision” in itself.⁹⁷

* * *

Advocates also often cite several additional points growing out of these distinctions that may make advocacy related to reproductive health and abortion more challenging today than most advocacy related to marriage equality.

Coming out/Pride: While coming out as lesbian, gay, bisexual or transgender remains challenging for many, it is also celebrated, and there are communities ready to let LGBT people know that “it gets better” if it is not already good and that there is pride in coming and being out.⁹⁸

By contrast, for any number of reasons, including some of those mentioned above, coming out as having had an abortion, or even as using particular types of birth control, is much rarer. Perhaps more akin to the experience of people who were identified as gay in earlier decades, those who come out as having had an abortion are often denounced as shameful, selfish, and sinners, in addition to being condemned as murderers. In other words, coming out is rarely seen as a point of pride. Indeed, some women come out about their ambivalence or regret⁹⁹ (as is true for some gay people¹⁰⁰), and the risks associated with coming out can be high, usually with little payoff, unlike for many LGBT people, for

a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice” (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

97 *Gonzales v. Carhart*, 550 U.S. 124, 128 (2007) (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 852–53 (1992)).

98 The It Gets Better Project is dedicated to “communicat[ing] to lesbian, gay, bisexual and transgender youth around the world that it gets better, and to create and inspire the changes needed to make it better for them.” See *What is the It Gets Better Project?*, IT GETS BETTER PROJECT, <http://www.itgetsbetter.org/pages/about-it-gets-better-project/> [<http://perma.cc/RA7C-8RNV>] (last visited Oct. 21, 2014).

99 See Brief of Sandra Cano et al. as Amici Curiae in Support of Petitioner, *Gonzalez v. Carhart*, 550 U.S. 124 (2007) (No. 05-380), 2006 WL 1436684 (presenting views of “women injured by abortion”); Brief of The Nurturing Network et al. as Amici Curiae Supporting Petition, *Cano v. Baker*, 549 U.S. 972 (2006) (No. 06-162), 2006 WL 2569800 (arguing that women experience physical and psychological harms as a result of having an abortion).

100 See, e.g., Zoë Schlanger & Elijah Wolfson, *Ex-Ex-Gay Pride*, NEWSWEEK (May 1, 2014, 11:36 AM), <http://www.newsweek.com/ex-ex-gay-pride-249282> [<http://perma.cc/A6SH-CGXM>].

whom coming out makes possible a new and typically more fulfilling way of life.

Gaining rights vs. losing rights/Organized opposition: As the contrasting positions of reproductive rights and gay rights in 1973 show, LGBT advocates had nowhere to go but up in their advocacy, while reproductive rights advocates had much to lose. One result was that reproductive rights, and in particular abortion access, became a concentrated target for opposition during a time when few paid much attention to gay rights claims, let alone took them seriously.¹⁰¹ Thus, today, reproductive rights advocates face an opposition movement that has been cultivating its strategies for nearly forty years,¹⁰² while the major national organization dedicated to fighting marriage equality was not founded until 2007.¹⁰³

Social movements as ongoing social experiences: Social change movements often grow out of a community already linked by some shared experience or interest. In many instances, this shared experience or interest engenders or reflects enough commonality among people that group members enjoy working and socializing together on their common goals.¹⁰⁴

This is certainly true among LGBT people, where activism has often mixed with socializing and, for many, has been a place to find friends, dates, potential partners, and

101 See Dale M. Schowengerdt, *Defending Marriage: A Litigation Strategy to Oppose Same-Sex "Marriage"*, 14 REGENT U. L. REV. 487 (2001–02) (expressing concern that advocacy against marriage equality had not been sufficiently vigorous and setting out a litigation strategy to counter the successes of advocates for same-sex couples).

102 See Andrea D. Friedman, *Bad Medicine: Abortion and the Battle Over Who Speaks for Women's Health*, 20 WM. & MARY J. WOMEN & L. 45, 52–59 (2013) (discussing abortion opponents' long-term legal and political strategy). For discussion of contemporary efforts to restrict abortion access, see Rachel Sussman, *The Landscape of State Anti-Abortion Legislation*, 29 COLUM. J. GENDER & L. 229 (2015).

103 The National Organization for Marriage (NOM) describes its founding as "in response to the growing need for an organized opposition to same-sex marriage in state legislatures." *About NOM*, NAT'L ORG. FOR MARRIAGE, <https://nationformarriage.org/about> [<http://perma.cc/KH45-UYME>] (last visited Jan. 13, 2015). The organization's website observes that "[f]or decades, pro-family organizations have educated the public about the importance of marriage and the family, but have lacked the organized, national presence needed to impact state and local politics in a coordinated and sustained fashion" and that NOM "seeks to fill that void." *Id.*

104 See Melissa R. Gotlieb & Chris Wells, *From Concerned Shopper to Dutiful Citizen: Implications of Individual and Collective Orientations Toward Political Consumerism*, 644 ANNALS AM. ACAD. POL. & SOC. SCI. 207, 211 (2012) (discussing the power of "identification with a community of likeminded others" as a motivator of collective action).

other families headed by LGBT parents as a means of creating community for children.¹⁰⁵ While the same is true in some measure around reproductive rights advocacy and activism, there does not seem to be the same sustained desire for social community relative to the marriage equality movement.

The distinction may also result from abortion being a relatively rare experience. Even though many women will have an abortion at least once during their reproductive years, the reproductive health care involved does not require sustained interaction or attention over time.¹⁰⁶

Community market power and activism: In the United States, many corporations that would not have dared support gay equality claims, much less marriage rights, have become strong supporters in recent years.¹⁰⁷ While this is surely for purposes of reaching gay consumers and attracting and retaining qualified employees, LGBT organizations have leveraged this interest by setting standards and publicizing those companies that do, or do not, adopt fair practices vis-à-vis LGBT consumers and employees. The Human Rights Campaign's Corporate Equality Index, for example, has become an important and effective tool in this way.¹⁰⁸ Activists have also played an influential role, at times, by organizing

105 See LINDA HIRSHMAN, *VICTORY: THE TRIUMPHANT GAY REVOLUTION* (2012) (presenting, in a popular history format, an extended discussion of the social movement for LGBT rights); RANDY SHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC* (1987) (detailing the intertwined social and political strands of LGBT activism during the AIDS crisis).

106 By contrast, those who have sustained interactions with medical providers or related to a serious or chronic condition may be motivated to come together to share information and socialize in ways that grow out of their shared experience, making clear that the medical nature of the abortion procedure is not, in itself, preclusive of community. There are, for example, numerous walks and other events aimed to end breast cancer that celebrate the solidarity among those who have or have had breast cancer diagnoses. See, e.g., AVON WALK TO END BREAST CANCER, <http://www.avonwalk.org/new-york/> [<http://perma.cc/97JE-AUDH>] (last visited Jan. 13, 2015); *Making Strides Against Breast Cancer*, AM. CANCER SOC'Y, <http://makingstrides.acsevents.org/> [<http://perma.cc/QW2F-LE6E>] (last visited Jan. 13, 2015); see also GILDA'S CLUB NY, <http://www.gildasclubnyc.org/> [<http://perma.cc/A3AZ-94C2>] (last visited Jan. 13, 2015) (offering "welcoming communities of free support for everyone living with cancer").

107 See Brief for 278 Emp'rs and Orgs. Representing Emp'rs as Amici Curiae Supporting Respondents, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 823227 (national employers); Brief for the P'ship of N.Y.C., as Amicus Curiae Supporting Respondents, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 840020 (nonprofit membership organization comprised of 200 chief executive officers from many of City's leading businesses).

108 See *Corporate Equality Index and Report*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/campaigns/corporate-equality-index> [<http://perma.cc/WQP2-GKPX>] (last visited Jan. 13, 2015).

demonstrations and otherwise disrupting business to challenge discrimination in the private sector and by government actors.¹⁰⁹

Imagine if companies thought of the market of women who need reproductive health care, including access to abortions, and wanted to make themselves attractive to those consumers and potential employees. Or imagine a movement of the sort that every person who uses or cares for someone who uses contraception stopped shopping at Hobby Lobby, or opted for a demonstration and scattered contraceptives and related health care information at the company's stores.¹¹⁰ Yet while large marches have periodically been held in Washington, D.C., and smaller-scale activism elsewhere,¹¹¹ there has been relatively little organizing to urge private sector accountability related to reproductive rights protections.

Movement heroes: Social movements often claim appealing figures as heroes or sources of inspiration because of their courage and leadership. This is certainly true in the marriage equality movement, where Edie Windsor, whose case led to the invalidation of the key provision of the federal DOMA, has become something of a global celebrity among

109 In recent years, Get Equal has been a leading national organization with a mission “to empower the lesbian, gay, bisexual, transgender, and queer (LGBTQ) community and our allies to take bold action to demand full legal and social equality, and to hold accountable those who stand in the way.” See GET EQUAL, <http://www.getequal.org> [<http://perma.cc/PHC6-SDPR>] (last visited Jan. 13, 2015). Earlier organizations that played a significant role in organizing direct action and other confrontational challenges to discrimination and inequality included Queer Nation and Boycott Colorado. See generally Lisa C. Bower, *Queer Acts and the Politics of “Direct Address”*: Rethinking Law, Culture, and Community, 28 LAW & SOC’Y REV. 1009, 1015–20 (1994) (discussing Queer Nation); Dirk Johnson, *Colorado Faces Boycott Over Its Gay-Bias Vote*, N.Y. TIMES, Dec. 3, 1992, at A16, available at <http://www.nytimes.com/1992/12/03/us/colorado-faces-boycott-over-its-gay-bias-vote.html> [<http://perma.cc/3LK7-XLZQ>]. The success of ACT UP in bringing attention to HIV/AIDS also helped lay the foundation for LGBT activism on other issues. Cf. E.J. Graff, *How the Gay-Rights Movement Won*, THE AMERICAN PROSPECT (June 7, 2012), <http://prospect.org/article/how-gay-rights-movement-won> [<http://perma.cc/9H7E-85LG>] (observing, in book review, that HIV/AIDS activism showed “how powerful white gay men, discovering that being despised meant you could be left to die, put their Rolodexes and insider skills to work”).

110 Among the organizing challenges would be the ambivalence that some have about their contraceptive use or the abortion they had or might need some day, see *supra* note 99, as well as the reluctance of many to associate their shopping choices with their contraceptive use.

111 See, e.g., *Abortion Activists on the March*, BBC NEWS (Apr. 26, 2004, 09:16 GMT), <http://news.bbc.co.uk/2/hi/americas/3657527.stm> [<http://perma.cc/H4QH-LU6D>] (reporting on the March for Women’s Lives in Washington, D.C.); Tara Culp-Ressler, *How Pro-Choice Activists Are Fighting Back Against Texas’ Abortion Restrictions*, THINK PROGRESS (July 17, 2013, 10:05 AM), <http://thinkprogress.org/health/2013/07/17/2313201/pro-choice-activists-fighting-back-texas/> [<http://perma.cc/E2HW-E87U>] (describing pro-choice protests in Texas).

many gay people, and many others as well.¹¹² Other individuals, including advocates, have also received substantial recognition both in connection with marriage equality work and, more broadly, advocacy for LGBT rights.¹¹³

It is difficult to find the same for the reproductive rights movement. Contrast, for example, the number of celebrities who have come out as LGBT or as supporters of marriage equality and allies of the LGBT movement relative to the numbers that have taken a prominent stance in support of women's reproductive rights, much less talked about having an abortion or having a partner who had an abortion.

Gender dynamics: Integrally related to the points just discussed is the scope of who feels affected by marriage inequality and by restrictions on reproductive rights and abortion access. On marriage, there is no question but that the issue reaches men and women, and that men tend, on the whole, to have greater access to power and to financial resources to support advocacy efforts than women.¹¹⁴ To the extent the reproductive rights movement is seen as one primarily of interest to women (despite its obvious importance for men), the gender dynamic will result in relatively fewer resources being available to support the sorts of advocacy discussed above.

112 Ms. Windsor describes some of her experiences in the Conversation that is part of this volume on marriage equality and reproductive rights. Edie Windsor, Suzanne B. Goldberg, Madeline Gomez, & Andrew Chesley, *A Conversation with Edie Windsor*, 29 COLUM. J. GENDER & L. 243 (2015).

113 See, e.g., Evan Wolfson, *Founder and President of Freedom to Marry*, FREEDOM TO MARRY, http://freemarry.3cdn.net/67ff06328c7b6f6788_29m6bhebz.pdf [<http://perma.cc/M9N6-WYKE>] (last visited October 12, 2014) (“In 2000, the *National Law Journal* honored Wolfson’s civil rights leadership by naming him one of the ‘100 most influential attorneys in America.’”); Mary L. Bonauto, MACARTHUR FOUNDATION (Sept. 17, 2014), <http://www.macfound.org/fellows/909/> [<http://perma.cc/TN5L-73S5>] (“Mary L. Bonauto is a civil rights lawyer whose powerful arguments and long-term legal strategies have led to historic strides in the effort to achieve marriage equality for same-sex couples across the United States.”).

114 See *The Wage Gap Over Time*, NAT’L WOMEN’S LAW CTR (Oct. 2013), http://www.nwlc.org/sites/default/files/pdfs/wage_gap_over_time_overall.pdf [<http://perma.cc/JM5Z-V8SM>] (showing that women’s salaries were between 60–80% of men’s over the past three decades). On the national level, women hold fewer than one in five seats in Congress and hold 16.9% of seats on Fortune 500 company boards of directors. See CTR. FOR AM. WOMEN AND POLITICS, WOMEN IN THE U.S. CONGRESS 2014 FACT SHEET (Nov. 2014), available at http://www.cawp.rutgers.edu/fast_facts/levels_of_office/documents/cong.pdf [<http://perma.cc/M9Q7-C7BN>]; JUDITH WARNER, FACT SHEET: THE WOMEN’S LEADERSHIP GAP (2014), available at <http://cdn.americanprogress.org/wp-content/uploads/2014/03/WomenLeadership.pdf> [<http://perma.cc/4NYF-HCW3>].

III. Leveraging Litigation to Shape the Surrounding Environment

As the points just discussed suggest, there is much that advocates have to confront when strategizing about how to try to prepare the environment so that litigation has the greatest chance of success. In this Part, I will focus particularly on three ways in which advocacy related to litigation can be leveraged in public domains to help shift the surrounding discourse and push back against unhelpful frames.

A. Plaintiff Selection

First, chronologically, is the selection of plaintiffs. The account of injury imposed by a challenged law will be told through their experiences, both in and outside of court. In marriage litigation, sensitivity to this point has typically led advocates to choose a group of married couples who can, both individually and together, demonstrate the injuries caused by the denial of marriage.¹¹⁵ In reproductive rights cases, including abortion access cases, advocates often select service providers who likewise can show how a particular restriction limits their rights and the rights of women they seek to serve.¹¹⁶

While the plaintiffs' experiences are important from a litigation standpoint to establish the injury required by standing doctrine, they are also important for telling the "story" publicly about why their injuries are compelling and warrant urgent redress. Social science research reinforces the value of narrative as a persuasive tool,¹¹⁷ and advocates in mar-

115 Edie Windsor's challenge to the federal DOMA was distinctive in that the case involved just one couple and that Windsor became the sole "face" of the case because her spouse had died. Most other cases have involved multiple plaintiff couples for several litigation-specific reasons, including that advocates typically want to be sure their challenge is not treated as an "as applied" challenge that will address only the issues related to that couple and to avoid the risk that the litigation could become moot midstream should a couple break up during the several year process. *See* Bonauto & Esseks, *supra* note 27.

An additional reason, which was important to me when I was involved with putting together groups of plaintiffs to challenge other types of laws, including a sodomy law in Arkansas, is to enable the plaintiffs to support each other through the general rigors of litigation and the particular challenges when a lawsuit receives a hostile public reception. Having a group of plaintiffs also enables advocates to offer a more expansive and varied range of couples, each of whom might appeal to a different community within the state.

116 In her symposium submission, Bebe Anderson explains why it is often difficult to have women seeking abortions serve as plaintiffs. *See* Anderson, *supra* note 17, at 150–51.

117 *See, e.g.*, Jennifer Sheppard, *What If the Big Bad Wolf in All Those Fairy Tales Was Just Misunderstood?: Techniques for Maintaining Narrative Rationality While Altering Stock Stories That Are Harmful to Your Client's Case*, 34 HASTINGS COMM. & ENT. L.J. 187, 190–94 (2012). *See generally* Kim Lane Scheppelle,

riage cases have worked to feature individuals' stories prominently.¹¹⁸ By participating as spokespeople at events and press conferences, members of couples help the surrounding community (and the reporters covering cases) relate to what might otherwise seem to be an abstract legal problem.¹¹⁹

Yet in the reproductive rights context, storytelling can be more challenging for many of the reasons discussed in the previous part. In addition, for similar reasons, it can sometimes pose heightened risks for individual plaintiffs.¹²⁰

Foreword: Telling Stories, 87 MICH. L. REV. 2073 (1989); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991).

118 See *The Plaintiffs*: Gill v. O.P.M., GLAD, <http://www.glad.org/doma/plaintiffs-gill/> [<http://perma.cc/TE85-KR53>] (last visited Aug. 4, 2014); *Plaintiffs in Sevcik v. Sandoval*, LAMBDA LEGAL, http://www.lambdalegal.org/publications/fs_plaintiffs-in-sevcik-v-sandoval [<http://perma.cc/4V29-TA7E>] (last visited Aug. 4, 2014); *Wolf and Schumacher v. Walker—Freedom to Marry in Wisconsin*, ACLU, <https://www.aclu.org/lgbt-rights/wolf-and-schumacher-v-walker> [<https://perma.cc/M6BE-NVRP>] (last visited Aug. 4, 2014); *Meet the Plaintiffs in Bishop v. Smith*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/oklahoma-plaintiffs> [<http://perma.cc/5WJ3-KL75>] (last visited Aug. 4, 2014); see also Shaun McKinnon, *When They Stopped Waiting*, ARIZ. REPUBLIC (July 26, 2014), <http://www.azcentral.com/longform/life/az-narratives/2014/07/26/gay-marriage-lawsuit-in-arizona-when-they-stopped-waiting/13183861/> [<http://perma.cc/9FD4-SW32>] (providing vivid multimedia account of plaintiffs in Arizona).

119 This strategy has also been used effectively by adversaries of reproductive health care that includes contraception and abortion in a range of ways. Two strong illustrations come from recent cases. In one, *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Sebelius*, 134 S. Ct. 1022 (2014), the group of Colorado nuns was arguably an effective plaintiff for challenging a contraception-related provision of the Affordable Care Act to represent the religious not-for-profit entities to which the ACA's mandate applied. In another, a challenger to Massachusetts' buffer zone to protect women entering reproductive health care clinics was able to offer an account of how the buffer zone interfered with her desire to converse quietly as a "sidewalk counselor" with women entering the clinic; presumably the advocates chose her, rather than someone who could be portrayed as an aggressive, loud protestor to convey the harm they claimed to suffer from the law. McCullen v. Coakley, 134 S. Ct. 2518 (2014). See Adam Liptak, *Where Free Speech Collides with Abortion Rights*, N.Y. TIMES, Jan. 13, 2014, at A1, available at <http://www.nytimes.com/2014/01/13/us/where-free-speech-collides-with-abortion-rights.html> [<http://perma.cc/R3PW-GHS5>].

120 In earlier times, the same was true for openly gay and lesbian plaintiffs in certain cases. I remember distinctly having conversations about safety concerns with a group of lesbians and gay men in Arkansas who were contemplating becoming plaintiffs in Lambda Legal's challenge to the sodomy law there. Although no one suffered injury in connection with their participation, concerns about possible risk led some individuals to decide against participating and prompted the formation of a support team for members of the plaintiff group. The plaintiffs eventually won their case in the Arkansas Supreme Court. See *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002).

B. Amicus Briefs

A second feature of litigation that can also play an important advocacy role outside the courtroom is amicus briefs. While the briefs' most obvious function is to bring additional information and analysis to the court's attention, they can play a perception-changing role in multiple ways.

First, even the request to file a brief constitutes a form of outreach. By making the request, advocates can prompt conversations about the issue at hand that might not otherwise take place. Then, if the individual or group agrees to sign on, they in turn communicate that decision to their communities, membership, or constituents—and that process brings still new participants into the conversation and, ideally, has positive ripple effects by encouraging further discussions.¹²¹

To the extent some of the amici are not likely allies, they also may be able to draw additional attention to the issue and encourage others also to rethink their views.¹²² And, of course, the litigators can invoke the briefs as additional messengers when communicating about the case to various sectors of the community and the media.

This has long been an important strategy in LGBT rights cases, and it has played a particularly important role in marriage cases as clusters of individuals and groups with shared interests began to sign on to briefs in lower court cases in ways that brought on many others. Ultimately, this outreach produced an enormous array of amici at the Supreme Court for *Windsor* and *Perry*, including numerous prominent Republicans, major corporations, a broad swath of civil rights and faith-based groups, and experts in psychology, children's welfare, and much more.¹²³

While this is an important strategy in reproductive rights cases as well, and briefing often includes faith-based, civil rights, and public health organizations, bipartisan and cor-

121 See, e.g., Heather Sawyer, *The Role of Congress in Advancing Civil Rights: Lessons from Two Movements*, 29 COLUM. J. GENDER & L. 165 (2015).

122 See Brief of Kenneth B. Mehlman, et al. as Amici Curiae Supporting Respondents, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) (arguing on behalf of prominent Republicans, of whom many had previously not supported marriage equality).

123 See *Amici Briefs Filed in Windsor and Perry Marriage Cases*, RESPECT FOR MARRIAGE COALITION, <http://www.respectformarriage.org/news/entry/amici-briefs-filed-in-windsor-and-perry-marriage-cases/> [<http://perma.cc/6EFT-C9Y8>] (last visited July 28, 2014) (collecting of each amicus brief filed in support of the plaintiffs in *Windsor* and *Perry*).

porate supporters of contraception access have not played much of a role in cases. Indeed, these groups, as well as some of the others that signed on in the marriage cases and might have a shared interest in reproductive rights, too, were notably absent from the *Hobby Lobby* amici.¹²⁴

C. Framing Results

A third way in which litigators can play a crucial role in shaping public perceptions is by situating courts' decisions in terms of the protections they provide or the suffering they cause. By urging opposition, claiming victory, or marginalizing a negative result, advocates' communications with constituents, policy makers, and the surrounding communities about a decision can help expand the power of a win or cabin the consequences of a loss.

Given that many more people will learn about a judicial ruling from the media than from reading the court's opinion,¹²⁵ advocates' attention to framing the decision plays a vital role in public discourse. Notably, effective communication with community members is critical not only for informing individuals about how their lives may be affected by a ruling but also for encouraging them to show their reaction publicly and, in some instances, to exercise their new rights. The line-ups at marriage clerks' offices around the country, for example, were meaningful not only for the individuals who married in those moments but also for their public message about the value of and felt need for the court's ruling. Taking a longer view, advocates' commentary about a ruling may also shape the environment in which legislators debate whether to support or override the court's decision.¹²⁶

124 See Docket No. 13-354, SUP. CT. U.S., (last visited Aug. 3, 2014), <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13-354.htm> [<http://perma.cc/5LLY-67RP>] (listing amicus briefs filed in *Hobby Lobby*).

125 See Deborah J. Cantrell, *Sensational Reports: The Ethical Duty of Cause Lawyers to Be Competent in Public Advocacy*, 30 *HAMLIN L. REV.* 567, 576 (2007) ("When a cause lawyer walks out of the courtroom after winning a case or legal argument, and the media is waiting, it is the cause lawyer who must be prepared and competent to answer the media's questions."). See generally Jana M. Kemp, *The Media, Attorneys and the Lawmaking Process*, 48 *ADVOC.* 14 (2005) (discussing ways lawyers spread messages through media).

126 Communication around the inevitability of ultimate victory after a win at the district court may also occasionally translate into a government's decision not to appeal a law's invalidation. This type of effort may have played a role, along with the growing number of decisions invalidating marriage bans, in Pennsylvania's decision not to appeal when the state's marriage ban was invalidated by a federal district court there. Press Release, Governor Tom Corbett, Statement Regarding the Opinion of Judge Jones in the Whitewood Case (May 21, 2014), available at <http://www.pa.gov/Pages/NewsDetails.aspx?agency=Governors%20Office&item=15643#.VFMwvYt4rvA> [<http://perma.cc/4A2A-QPHZ>] ("Given the high legal threshold set forth by Judge [John E. Jones III] in this case, the case is extremely unlikely to succeed on appeal. Therefore,

Even losses can be turned to productive use with an effective communications strategy. If litigation is understood as one piece of an advocacy effort to achieve change, then a negative outcome can be used to motivate supporters, highlight a problem that needs redress, even if not from a court, and generate outrage.¹²⁷

Advocates working on both marriage and reproductive rights issues regularly do substantial framing work in these ways, trying to capitalize on wins while limiting the effect of losses. Yet these efforts tend to play out differently. For reproductive rights advocates, as noted earlier, a win typically means the invalidation of a restrictive law so that what is gained is a return to the status quo of access to contraception or abortion. The enthusiasm that can be generated from that sort of victory across the various sectors just mentioned is likely to be limited. For marriage equality advocates, on the other hand, the status quo has been the absence of rights so that a victory actually generates new rights that are quickly celebrated and exercised.¹²⁸

IV. Multidimensional Advocacy As Applied—An Additional Strategy for Expanding Reproductive Rights Allies In and Outside Litigation

While more attention can always be given to plaintiff selection, leveraging amicus briefs, and effective case framing, in this final part I turn to one additional strategy that proved effective for marriage equality advocates, and consider its utility for shaping the environment in which reproductive rights litigation proceeds.

I have decided not to appeal Judge Jones' decision.”).

127 See, e.g., Evan Wolfson, *Marriage Equality and Some Lessons for the Scary Work of Winning*, 14 *LAW & SEXUALITY* 135, 141 (2005) (arguing that losses in the fight for marriage equality create “the opportunity to enlist more support, build more coalitions, and make it possible for more candidates and nongay opinion leaders to move toward fairness”); Douglas NeJaime, *Winning Through Losing*, 96 *IOWA L. REV.* 941, 947 (2011) (explaining how advocates can use litigation loss to “construct organizational identity[,] . . . mobilize outraged constituents [,] . . . appeal to other state actors [, and] . . . to appeal to the public through images of an antimajoritarian judiciary”).

128 See *supra* notes 101–03 (discussing the ways in which the different positions of marriage equality and reproductive rights advocates have resulted in the reproductive rights movement doing more defensive work relative to the LGBT rights movement at this point in time). Interestingly, the victory in *Lawrence v. Texas*, 539 U.S. 558 (2003), also led not only to the removal of a restrictive sodomy law, but to the Court’s overturning of its 1986 *Bowers v. Hardwick* ruling, 478 U.S. 186 (1986), which directly endorsed antigay moralizing, meaning that, in context, the *Lawrence* ruling was far more than a return to the status quo. Cf. Mary C. Dunlap, *Gay Men and Lesbians Down by Law in the 1990’s USA: The Continuing Toll of Bowers v. Hardwick*, 24 *GOLDEN GATE U. L. REV.* 1 (1994) (detailing the harms caused by *Bowers v. Hardwick* and sodomy laws).

The marriage equality strategy was simple—to have people sign a pledge to support the freedom to marry.¹²⁹ Underlying this strategy was a recognition that the request itself has value, much like the value in asking individuals and groups to join amicus briefs: at the least, the invitation gets people thinking and talking about the issue.¹³⁰ The pledge, in other words, served as a vehicle for starting conversations, educating others, and, for some, prompting a public commitment and eventual participation as amici in litigation. As a strategy within a multidimensional framework, it was, over time, an effective means of nudging the landscape to become more favorable for ongoing litigation.

Notably, the pledge was first deployed in the early years of the marriage equality movement, when public approval numbers were extremely low and anti-gay hostility was high. Given the significant contestation over reproductive rights today, I consider here, briefly, whether a similar strategy might be useful as a way of broadening and solidifying support and destabilizing some of the framing that has made advocacy in this area particularly challenging in recent years.

To be sure, the pledge strategy sounds more in organizing than litigation. But as I set out here, when conceived as a means for shaping the litigation environment, a pledge can be tailored in ways that might generate new sources of support while sidestepping some of the challenges associated with finding a common, clear theme. After all, the question of one's stand regarding reproductive rights, or even abortion access, raises issues significantly more complex than the marriage equality pledge. Would a pledge commit the signer to resisting the hyperregulation of abortion clinics; demanding an end to faith-based exceptions for contraceptive coverage by for-profit employers and provision of contraceptives by pharmacists; supporting buffer zones to insure women's safe access to reproductive health facilities; or any number of other issues? Or could a general pledge to support women's reproductive health and rights, including safe and meaningful abortion access, be enough?

129 See ANDERSON, *supra* note 22, at 55 (describing how Lambda garnered signatures for its Marriage Resolution from “a wide range of non-gay actors and organizations” with an aim to mobilize potential supporters); *Take the Pledge*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/page/s/pledge> [<http://perma.cc/K3KZ-S3UV>] (last visited Aug. 4, 2014); see also *Position Paper on Gay Marriage*, AM. PSYCHOANALYTIC ASS'N, <http://www.apsa.org/sites/default/files/2013%20Position%20Statement%20on%20Civil%20Marriage%20and%20Civil%20Rights.pdf> (last visited Aug. 4, 2014) (discussing APsAA endorsement of Lambda Legal's Marriage Resolution in 1997).

130 For a different illustration of petitions' effectiveness as a multidimensional advocacy strategy, see Maura J. Casey, Editorial, *Challenging the Mullahs, One Signature at a Time*, N.Y. TIMES (Feb. 7, 2007), <http://www.nytimes.com/2007/02/07/opinion/07observer.html> [<http://perma.cc/7TEP-T23J>] (discussing Nobel Prize-winner Shirin Ebadi's use of petitions as means of sparking conversation and educating women in Iran about their rights).

Here, perhaps, is where the multidimensional advocacy frame linked to litigation might be helpful. If a general pledge proves difficult to settle on, advocates might develop an initial pledge that derives from a set of laws under challenge—perhaps a commitment to a core right that is being threatened from among the list above.

The pledge could then become a starting point for seeking support and commitment from a wider array of individuals and organizations than might typically be invited to sign an amicus brief. Included in this group might be current and/or former elected officials, businesses, labor unions, faith leaders, congregations, educators, artists, and performers, as well as allied civil rights organizations.

Drawing from a basic fundraising principle that a lead gift will help inspire others, a few lead signatories might well do the same from among any of the groups just mentioned. On the business front, for example, when I think back to my own work advocating for domestic partner benefits long before the marriage equality movement came into force, we had a very short list of employers that offered the benefits—a small computer software company (Lotus Development Corporation, later purchased by IBM), a non-mainstream newspaper (the Village Voice), and a committedly progressive ice cream company (Ben and Jerry's).¹³¹ But it was a list nonetheless, and that list enabled us to go to others and ask them to do the same. Even if they declined, they had to understand that providing the benefits was at least possible.

Likewise, even if private sector signers at first are a small collection of progressive companies or companies that believe their customer base will respond positively (or neutrally) to the commitment, it will be a start. The same is true for signatories in every other category. And indeed, it may be that other population segments will need to lay the signatory groundwork before businesses sign on in significant numbers given fears of provoking commercial backlash.

The point is not about which segments sign on first but instead about gaining a core of signers, and using that core to bring in others. While many may be reluctant to sign based on concerns about negative reactions, if the pledge is written in a way that allows signers to resonate with the majority of Americans who support access to abortion and reproductive health care, at least under some circumstances, signatories themselves may be able to help

131 Cf. Renee M. Scire & Christopher A. Raimondi, *Employment Benefits: Will Your Significant Other Be Covered*, 17 HOFSTRA LAB. & EMP. L.J. 357 (2000) (discussing early public and private providers of domestic partner benefits and analyzing domestic partner benefit programs).

shift perceptions and open more room for others to commit themselves as well.¹³² And by tying the pledge to a particular type of restriction, advocates may be able to generate new levels of engagement and support.

V. Conclusion

While comparisons between marriage equality and reproductive rights advocacy can be fraught, a multidimensional advocacy framework helps to highlight the shared and distinct features of each. It illuminates, too, the ways in which advocacy strategies might reshape the landscape in which litigation is pursued.

This recognition that the litigation landscape is subject to change also reinforces the value for each movement in learning from the other. Just decades ago, reproductive rights, including abortion, enjoyed a level of protection that marriage equality advocates could only dream about. Yet marriage equality likely would not have achieved its current momentum if reproductive rights had never been secured.

It may be, just as marriage equality has drawn strength from the strategies and successes of reproductive rights advocates and has sidestepped some difficulties by learning from that experience, so too can reproductive rights advocates now consider whether some of marriage equality's multidimensional strategies might be useful in reshaping the landscape further still.

132 A group of mayors that signed the Freedom to Marry pledge, for example, extended an invitation to mayors across the United States to sign on as well. See *Mayors for the Freedom to Marry*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/mayors-for-the-freedom-to-marry> [<http://perma.cc/DNA5-MADG>] (last visited Jan. 13, 2015). Although mayors cannot directly affect a state's marriage laws, they—like so many others—can have a crucial influence on the environment in which advocacy efforts proceed.