1 Marriage, culture and law

Marriage: Personal commitment. Pillar of civilization. Spiritual coven-
ant. Legal bond. Political football. Source of social status. Site of gender
inequality. Tool of sexual regulation. Dying institution. Partnership for
reproduction and childrearing. Path to material gain. Reflection of
divine love. Legalized prostitution.

One of the most central institutions in modern social life, marriage is
currently a site of contestation rather than consensus. In contemporary
American society, the meaning and boundaries of the marriage insti-
tution are up for grabs, in both cultural and legal terms. Fierce and
sometimes ugly battles are being waged over who is allowed to marry,
what marriage signifies and where marriage is headed. Marriage has
never been a static institution, but it is hardly an exaggeration to assert
that at the start of the twenty-first century, marriage potentially faces one
of its most significant transformations in history. In the United States
and around the world, the demands of gay and lesbian couples for social
and legal recognition of their relationships represent a dramatic chal-
lenge to the marriage status quo. In their families, their friendships, their
churches and synagogues, and in courts of law, many same-sex couples
are pursuing inclusion in the institution of marriage by defining and
celebrating their relationships as marriages and asking friends, families,
religious authorities and the state to do the same. And many people
who oppose the idea of expanding marriage to include these couples
regard same-sex marriage as a profound threat to the institution of
marriage and the stability and well-being of society in general.

This book examines the phenomenon of same-sex marriage in the
contemporary US context. Recent legal developments have brought
increased attention to the question of same-sex marriage and greater
visibility for same-sex relationships. But in the raging public debates
over same-sex marriage, the voices of ordinary same-sex couples are
sometimes difficult to hear. Despite extensive media coverage of the
same-sex marriage issue, we know relatively little about what marriage
means to ordinary gays and lesbians in the United States. Why do some

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gay and lesbian couples aspire to marriage as a way of organizing their intimate life? What can be learned from their efforts to construct an identity as "married" for themselves through cultural practices such as public commitment rituals? Why do other gay and lesbian couples reject marriage as a model for their own intimate life? Why do same-sex couples want legal recognition for their relationships, and how important is legal marriage to these couples? The perspectives of ordinary same-sex couples are the primary focus of this book, but I also explore recent public debates over legal same-sex marriage and compare the terms of these debates to the perspectives of same-sex couples.[1]

A theme that runs throughout this book is the mutual implication of law and culture in the institution of marriage. The legal and cultural dimensions of marriage can be teased apart for analytic purposes, but they are often closely connected in how gay and straight people alike think and talk about marriage. Same-sex marriage provides a unique vantage point for considering the relationship between the legal and cultural aspects of marriage. Marriage is increasingly available to American gay and lesbian couples in *cultural* terms, but remains mostly inaccessible in *legal* terms. Same-sex couples can use a range of cultural practices to define their relationships as marriages: public or private commitment rituals (which sometimes include the participation of religious officials), exchange of rings, use of marriage-related terminology to refer to their partners and their relationships. But same-sex couples are much more limited in their ability to access the legal dimension of marriage. Massachusetts is the only US state that currently issues marriage licenses to same-sex couples, and most other states explicitly refuse to honor same-sex marriages performed in other states or countries. My in-depth interviewing of committed same-sex couples reveals that the cultural and legal dimensions of marriage are deeply intertwined in the lives of gay and lesbian couples, and my analysis of public debates over same-sex marriage demonstrates that many non-gay Americans conflate the legal and cultural dimensions of marriage in their thinking about same-sex marriage.

This book makes two broad arguments about the relationship between the legal and the cultural dimensions of same-sex marriage. First, close examination of same-sex couples' cultural practices of marriage suggests that marriage is an extremely powerful cultural model of relationship, one that often attracts couples even in the absence of legal rights and benefits. Many (but not all) same-sex couples embrace marriage as a cultural form even when they cannot obtain it as a legal status. Lack of access to the legal dimension of marriage does not cause all same-sex couples to reject marriage. Instead, many use cultural practices to

celebrate their relationships as marriages outside the law of the state, in a sense creating an alternative or parallel legality for their commitments outside the framework of official (state) law. And the meanings that such couples attach to their cultural enactment of marriage are partly colored by the denial of state recognition. In this sense, the meaning of some same-sex couples choosing to embrace the cultural dimension of marriage must be interpreted in relation to the denial of legal marriage to these couples. I argue that this cultural enactment of marriage outside of official law represents a form of political action, even though the couples usually do not describe their actions in political terms. It is a form of politics that targets cultural values and beliefs rather than the policies of the state. Important symbolic resources are at stake in this kind of cultural politics: recognition, identity, inclusion and social support.

The second main argument of the book concerns the cultural power of law. In the case of marriage, the law of the state has a unique cultural force that paradoxically both transcends and connects with the specific rights, benefits and protections afforded by legal marriage. The cultural power of law is evident in the way many members of same-sex couples describe and explain their desire for legal recognition of their relationships. Almost all of the gays and lesbians interviewed in this study expressed an interest in accessing the practical rights and benefits of marriage, things like tax benefits, access to health insurance, and having one's partner designated as next of kin in emergency situations. But many also spoke of the social legitimacy that legal marriage would bring to same-sex relationships, the sense that legal recognition would render same-sex couples socially normal and culturally equal to heterosexual married people. This legitimacy is part of law's perceived cultural power. It is more abstract than the specific tangible legal benefits of marriage but also rooted in those more tangible provisions. By treating all relationships equally in legal terms, the law has the perceived power to render all relationships culturally similar. The desire to capture the cultural power of law is most transparent among those gays and lesbians who insist that nothing short of marriage itself is acceptable; they assume that receiving the specific rights and benefits of marriage under another name would not have the same cultural impact.

The cultural power of law is also reflected in the words of a very different set of actors, the opponents of legal same-sex marriage. Many of the most impassioned objections to state recognition of same-sex marriage either assume or articulate the tremendous cultural influence of law. In public debates over same-sex marriage, opponents frequently offer moral and religious arguments for reserving the institution of marriage to opposite-sex couples, revealing the close interconnection

of the legal and the cultural in the way that many people think about marriage. Many opponents of same-sex marriage also ground their objections to same-sex marriage in the broader cultural messages that legal recognition might send, that is, that homosexuality is normal or at least acceptable, and that committed same-sex relationships deserve the same treatment as heterosexual marriages. In other words, some of the objections to legal recognition of same-sex marriage are based less on a desire to withhold the specific legal benefits of marriage from same-sex couples than on a concern with the broader cultural significance of treating same-sex relationships as the legal equivalents of heterosexual marriages.

The cultural politics of marriage, family and sexuality

The current conflicts over same-sex marriage both reflect and contribute to broader cultural anxiety about the meaning and future of marriage. The changes in marriage and family in the United States over the past several decades have been remarkable in their scope and speed. Increases in divorce, cohabitation, single parenting and female labor-force participation, along with declines in the marriage rate, have challenged assumptions and beliefs about "normal" families and relationships in a way that is disturbing to some and liberating to others.

The divorce rate accelerated sharply starting in the mid-1960s and more than doubled over a twenty-year period (DaVanzo and Rahman 1993). Although the divorce rate stabilized during the 1980s and 1990s, recent estimates suggest that roughly half of all marriages forming today will eventually dissolve (Cherlin 1992). Meanwhile, the marriage rate has been falling since the early 1970s as a result of increases in cohabitation, people marrying later and possible increases in permanent singlehood. Unmarried cohabitation is an increasingly common practice and has lost much of its social stigma. Only one in ten marriages was preceded by cohabitation in the late 1960s and early 1970s, but now the majority of marriages start as cohabitations (Smock 2000), and about one in twenty American households are now headed by cohabitors (US Census Bureau 2001, Table 49). The number of households headed by single parents has risen substantially in recent years, the combined result of the high divorce rate and increasing numbers of births to single mothers. Today one-third of all births are to unmarried mothers and almost one-quarter of all family households are headed by single parents (US Census Bureau 2001, Tables 50 and 74). Changes in gender roles within families have paralleled the changes in family forms. Mothers are now more likely than ever to be employed in the paid labor market, and the increase has been especially dramatic among

mothers of young children; more than half of all married women with children under age 6 now work full time, year round (Cohen and Bianchi 1999). In response to these trends, more families are making arrangements for child care outside the home and more parents are squeezed by what sociologist Arlie Hochschild (1997) calls a "time bind" as they attempt to combine work and family roles.

A variety of alternative family forms are taking shape as a result of these recent trends. Households headed by single parents are now a commonplace and expected feature of American life. Divorce and re-marriage have produced a variety of "blended" families that integrate stepparents, stepchildren and stepsiblings to form new family units. And gay and lesbian couples increasingly seek to form viable family units of their own, either by acting as co-parents to children from previous marriages or by becoming parents together through artificial insemination, surrogacy, adoption or foster parenting.

These relatively swift and highly visible changes in family forms and roles have sparked debate over both the causes and the consequences of change, making family structure and "family values" central concerns in American cultural politics. The alleged problem of fatherlessness in American families has become a major rallying cry of religious and cultural conservatives (Blankenhorn 1995; Popenoe 1996; cf. Stacey 1996). A self-proclaimed "marriage movement" has emerged to declare a marriage crisis and promote efforts to replace the existing "divorce culture" with a renewed "marriage culture" (CMFCE, IAV and RCFP 2000). These marriage advocates support a range of policy proposals intended to combat the erosion of marital stability. Specific proposals, some already being implemented in parts of the United States, include mandatory marriage education for high-school students, mandatory marriage counseling for couples seeking a divorce, and reform of state divorce laws to reintroduce fault-based divorce. A few states have passed laws that require marrying couples to choose between a standard mar-riage and a more restrictive "covenant marriage" designed to reduce divorce.

New beliefs about sexuality have accompanied the rapid changes in family forms. The linkages between sex, reproduction and marriage that were once taken for granted have loosened as a result of changing attitudes, trends toward greater gender equality and rapid technological developments. Improvements in contraceptive technology, especially the advent of the birth-control pill, facilitated the separation of sex and reproduction, thereby reducing the risks associated with "casual" or non-marital sex. The sexual liberation movement that emerged in the 1960s gradually eroded the social stigma attached to premarital sex

and cohabitation, and recent developments in reproductive technologies and practices – such as in vitro fertilization, artificial insemination, surrogate pregnancies and the prospect of human cloning – have weakened the association between heterosexual sex acts and biological reproduction.

Partly inspired by the sexual revolution and the women's movement, a visible and vocal gay liberation movement burst onto the national scene in the late 1960s and early 1970s. While the birth of the modern gay and lesbian movement is often pegged to the Stonewall riots in New York City in 1969, homophile organizations such as the Mattachine Society and the Daughters of Bilitis laid the groundwork for the movement in earlier decades by forging gay and lesbian social networks in urban areas and advocating for greater social acceptance of sexual minorities (Adam 1987; D'Emilio 1983). After the Stonewall riots, in which patrons of New York gay bars took to the streets to protest police raids on gay establishments, the gay and lesbian movement blossomed into a larger, more visible and more confrontational force. The various gay liberationist groups that dominated the movement at the start of the 1970s eschewed the cautious conformism of earlier homophile groups and favored more radical goals and tactics. However, more reform-oriented groups that focused on accomplishing change through existing political channels soon emerged alongside the liberationist groups and evolved into today's mainstream gay and lesbian rights movement. Many commentators on American gay and lesbian politics have noted the ongoing tensions between those espousing a more radical and confrontational approach (liberationists and queers) and those preferring more moderate, assimilationist, rights-oriented goals and tactics, that is, the mainstream gay rights movement (Bernstein 2001; Gamson 1995; Rimmerman 2002; Seidman 2002; Vaid 1995; Warner 1999). As I discuss in Chapter 3, this tension emerged quite prominently in debates within gay and lesbian communities and movements over the issue of same-sex marriage.

The gay and lesbian rights movement has achieved considerable success over the past several decades, in areas ranging from family law to workplace protections to hate-crimes prevention. The movement faces a large and well-organized opposition, mainly led by Christian conservatives (Herman 1997), but a recent study of gay rights battles from the early 1970s to the early 1990s found that the policy successes of gay rights supporters far outnumbered those of gay rights opponents, and the relative success of gay rights advocates has increased over time (Werum and Winders 2001). Particularly dramatic successes came in 1996 and 2003, with two momentous decisions by the US Supreme

Court. In the 1996 decision, *Romer v. Evans*, the Court ruled unconstitutional a Colorado amendment that repealed existing gay rights laws and prohibited the future passage of such laws in the state. The 2003 decision in *Lawrence v. Texas* repealed the anti-sodomy laws that remained on the books in thirteen US states, making homosexual sex legal throughout the country for the first time in history. Many observers viewed the *Lawrence* decision as especially significant, because it undermined the legal basis for the differential treatment of gays and lesbians; after *Lawrence*, discriminatory laws and practices can no longer be justified by arguing that the behavior that defines the class of people receiving different treatment is criminal. The *Lawrence* ruling also represented an important symbolic victory for gay rights advocates because it overturned the Supreme Court's own 1986 ruling in *Bowers v. Hardwick*, in which the majority opinion had dismissed as "facetious" the idea that the Constitution might afford protection for homosexual conduct. Only seventeen years later, finding in favor of two men challenging their conviction under the Texas anti-sodomy law, the majority in *Lawrence* stated that the "petitioners are entitled to respect for their private lives" and complained that the *Bowers* ruling "demean[ed] the lives of homosexual persons."

The mounting policy successes of the gay rights movement have been paralleled by a veritable explosion in the cultural visibility of gays and lesbians. From television sitcoms to the silver screen, from daytime talk shows to the covers of news magazines, gay and lesbian lives, real and fictional, had become ubiquitous in American culture by the close of the twentieth century (Gamson 1998; Walters 2001a). Large corporate advertisers are more often willing to risk alienating some potential customers to include gay images and themes in their marketing, in order to target a newly discovered and supposedly wealthy gay niche market (Chasin 2000; Gluckman and Reed 1997). These trends toward greater cultural openness have likely made it easier than ever for gays and lesbians to come out.

But some are skeptical about the meaning and extent of this new cultural acceptance of gays and lesbians. Prominent gay rights activist Urvashi Vaid (1995) warns that the political and cultural mainstreaming of gays delivers only "virtual equality": without deeper cultural transformations, recent trends toward cultural visibility and political inclusion fall short of making gays and lesbians fully equal citizens and participants in American life. Likewise, Steven Seidman (2002) argues that gays and lesbians are increasingly free to live "beyond the closet," but this freedom is exercised within a world of continuing heterosexual dominance, in which sexual minorities are tolerated but denied full

equality in key social institutions such as the family and the workplace. Despite high-profile policy victories and trends toward cultural assimilation, gays and lesbians continue to face significant religious and social disapproval and ongoing legal disadvantage. In short, the cultural and political status of gays and lesbians remains a site of struggle in the American culture wars.

Mainstream society's continuing ambivalence toward sexual minorities is perhaps nowhere more evident than in the controversies raging around the recognition of same-sex relationships. These controversies make the most sense when viewed in the context of a climate of heightened awareness and anxiety about the meaning and consequences of transformations in family forms as well as sexual identities and practices. Conservative rhetoric links changes in the meaning and stability of marriage relationships, the range of what are considered "normal" family structures, and the legitimacy of various sexual identities and practices to social problems such as crime and poverty and to a more general concern about the threat of social breakdown. The specific issue of recognizing same-sex relationships has now emerged as a major battleground, and it is a battle that is being waged on several fronts. From religion to popular culture to workplaces to the law, same-sex marriage and related forms of recognition are testing the limits of mainstream society's tolerance and acceptance of gays and lesbians.

Major religious denominations are struggling with the question of whether and how to recognize same-sex commitments without abandoning centuries of religious tradition. Some major denominations – including Roman Catholicism, the Southern Baptist Convention, Orthodox Judaism and the Church of Jesus Christ of Latter-Day Saints (Mormons) – have been unwavering in their official opposition to blessing or recognizing same-sex unions. The Catholic Church has been perhaps the most vociferous opponent, extending its opposition beyond the realm of religious practice to address civil acknowledgement of same-sex relationships. In 2003, the Vatican released a pronouncement urging Catholic bishops and politicians to fight any attempts to grant legal recognition to gay relationships, calling same-sex marriage the "legalization of evil" (Congregation for the Doctrine of the Faith 2003). Several mainline Protestant denominations are mired in ongoing debates on the question of blessing or recognizing same-sex couples, finding it difficult to reach a resolution that will satisfy a broad majority of their adherents. In 1996 the United Methodist Church instituted a rule prohibiting its clergy from performing same-sex union ceremonies, a position that was reaffirmed at its General Conference in 2000 despite a well-organized campaign to overturn it. In other Protestant denominations, debates

over same-sex union ceremonies rage on, but clergy have the option to decide whether to perform the rituals. Only a few major religious denominations have given their full support to same-sex union ceremonies, including the Unitarian Universalist Association, the United Church of Christ, Reconstructionist Judaism and Reform Judaism. Debates over recognizing same-sex relationships will persist in the religious sphere for years to come.[2]

The growing visibility of gays, lesbians and their relationships in popular culture and in the workplace has sometimes stirred controversy and provoked backlash. To cite just a few prominent examples from recent years: protests greeted the 1994 episode of the television sitcom *Roseanne* in which the title character engages in a same-sex kiss. Three years later, the coming-out of Ellen DeGeneres – both as herself and as the lead character in her eponymous sitcom – mushroomed into a major media event. The Rev. Jerry Falwell called the comedian "Ellen Degenerate" and the network affiliate in Birmingham, Alabama refused to broadcast the coming-out episode of the show. (ABC cancelled the sitcom the following year, prompting DeGeneres to accuse the network of homophobia.) In 1996, the Southern Baptist Convention launched a high-profile boycott against the Disney Corporation to protest its extension of domestic partner benefits to its gay and lesbian employees. In 2005, the Public Broadcasting Service cancelled an episode of a popular children's show because it featured a Vermont family headed by a female couple. (In one of her first public pronouncements, the newly appointed Secretary of Education had expressed concerns about the episode.) Religious conservatives have even mounted campaigns to protest non-human fictional characters they perceive as gay or gay-friendly, such as Tinky-Winky the Teletubby and cartoon character SpongeBob SquarePants. For some cultural conservatives, apparently no battles over positive representations of sexual difference are too trivial to fight.

In summary, rapid changes in marriage, family structure, sexual identities and sexual practices characterized the final decades of twentieth-century American life. These changes prompted the emergence of heated cultural battles over family values, the future of marriage and the propriety of various forms of sexual identity and sexual practice. In the case of homosexuality, the focus of the culture wars has largely shifted from the question of the treatment of gays and lesbians as individuals to recognition of same-sex relationships. The halting movement toward legal same-sex marriage, sketched in the next section, takes place in this broader context of conflict and concern about changes in marriage, family and sexuality.

Legal same-sex marriage in the United States and abroad

The 2003 decision by the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*, finding a right to marriage for same-sex couples in the Massachusetts constitution, is the most recent and dramatic development toward legal recognition of same-sex marriage in the United States. Massachusetts' high court ruled that "[l]imiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution." The state had attempted to defend its refusal to grant marriage licenses to same-sex couples based on three rationales: creating a favorable setting for procreation, fostering optimal conditions for childrearing and preserving scarce resources. The court ruled that none of these goals constituted a rational basis for excluding same-sex couples from marriage. "The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason," the court concluded, ordering the state to begin issuing marriage licenses to same-sex couples on May 17, 2004.

The *Goodridge* decision brought a flood of renewed attention to the issue of same-sex marriage in the media and the political sphere. President George W. Bush announced his support for a federal constitutional amendment to block same-sex marriage nationwide. The Massachusetts legislature began the process of amending the state constitution to overturn the decision, although the earliest such an amendment could take effect would be November 2006. The *Goodridge* ruling and the backlash against it also inspired a new form of civil disobedience among local officials around the country, spearheaded by San Francisco Mayor Gavin Newsom's decision to issue marriage licenses to same-sex couples in early 2004. Newsom's action prompted similar actions in other local jurisdictions around the country, including Multnomah County, Oregon, which includes the city of Portland. (The California Supreme Court and the Oregon Supreme Court later ruled that the licenses issued in their respective states were invalid.)

Efforts to establish recognition for same-sex relationships actually date back to the 1970s, but only attracted widespread attention starting in the 1990s, when developments in the state of Hawaii made legal same-sex marriage in the United States a serious possibility (see p. xiii for a timeline of same-sex marriage developments). A lawsuit brought by three same-sex couples seeking the right to marry garnered a favorable initial ruling from the Hawaii Supreme Court. The state high court had found that denial of marriage licenses to same-sex couples appeared to