HOPE AND MISGIVING ABOUT LAWYERS, CONSENSUS-BUILDING, AND SOCIAL PROBLEM-SOLVING

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In *The Lawyer's Role(s) in Deliberative Democracy*,[1] Carrie Menkel-Meadow outlines the political-philosophical foundation for greater use of consensus building in large-scale, public conflicts. She also suggests an enhanced role for lawyers in these forms of deliberative democracy, both as representatives of partisans and as neutral facilitators of the processes. In these brief remarks, I will reiterate some of the points I found most helpful in her article and explain their connection to an area of law I follow closely: marriage rights for same-sex couples.

Same-sex marriage, a large-scale public controversy implicating fundamental values, demonstrates the truth of Professor Menkel-Meadow's claims about the nature of conflict and our need for new processes to manage it. The controversy about same-sex marriage suggests that Professor Menkel-Meadow's blueprint for social problem-solving has real promise: the processes she describes make room for complex, multi-dimensional descriptions of a problem and then permit nuanced, integrative, or incremental plans for dealing with it. Such an approach is critically needed with respect to same-sex marriage, where partisans and popular media tend to polarize debate and hastily demand that people choose a "side."[2] Public conversations, study circles, or consensus building could allow for much deeper and more productive discussion of such issues—*before* people identify as "pro" or "con."

But the marriage example also raises some cautionary points that give me pause. It highlights another important aspect of Professor Menkel-Meadow's argument: ideally, formal and informal, centralized and decentralized processes work *in tandem* to create sound public policy. Thus, even as I appreciate the potential in new forms of deliberative democracy and share Professor Menkel-Meadow's hope for the roles that lawyers might play in them, I would argue that lawyers should continue to consider it their primary role to insure access to

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[1] Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L. J. 347 (2004/05).

[2] *See* Jennifer Gerarda Brown, *Afterword: Debate and Decision-Making about Marriage Rights in Connecticut: Envisioning a Third Way*, 23 QUINNIPIAC L. REV 597 (2004).

courts and legislatures as central destinations for most public disputes, particularly those involving civil rights.[3]

I. MENKEL-MEADOW'S CLAIMS ABOUT CONFLICT

Several aspects of Professor Menkel-Meadow's description of conflict are both accurate and profound. First, she observes that "modern day legal and social problems. . . . may require input from a multiplicity of constituencies and coordinated action by a multiplicity of legal and political institutions."[4] For this reason, she argues, "older conceptions and institutions of dualisms and binary thinking"[5] will be ineffective for resolving or managing these conflicts. "Not all processes are dyadic," she says, "not all issues have only 'two sides,' arguments can have many parts and any group of people can agree on some issues (wholly or partially) and disagree about others."[6] She thus suggests that "democratic discourse theory needs to learn from dispute resolution theory, that positions and parties may be multiple, that processes of deliberation may range from principled argument to interest-based bargaining and coalitional behavior, to appeals based on emotion, faith and belief, as well as fact."[7] Therefore, she concludes:

> where modern social and legal problems no longer lend themselves to easy two-sided contested positions for resolution either by votes in partisan legislatures or binary judgments in courts of law, new forms of public (and private) decision-making may be necessary not only to resolve social and political conflicts, but to find policy solutions to problems of resource allocation, institution building and social and human welfare.[8]

II. "EXHIBIT A" FOR MENKEL-MEADOW'S CLAIMS ABOUT CONFLICT: MARRIAGE RIGHTS FOR SAME-SEX COUPLES

When I first encountered Professor Menkel-Meadow's article, I was helping to plan a conference on same-sex marriage, jointly sponsored by the gay-straight alliance at Quinnipiac University School of Law and our state bar association. Much of Professor Menkel-Meadow's article reflected my experience with this highly controversial issue. For weeks, my frustration had been growing because the conference planning was (sometimes explicitly, always implicitly) based upon the assumption that we were facilitating a debate between *the two sides* to the issue. We might take a multi-disciplinary approach, inviting authorities to speak on psychology, history, law, sociology, or theology, but with respect to each discipline there were assumed to be two sides. Presenters were expected to marshal their points to speak for or against equal marriage rights for same-sex couples.

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[3] *See* Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).
[4] Menkel-Meadow, *supra* note 1, at 348.
[5] *Id.* at 348-49.
[6] *Id.* at 358.
[7] *Id.* at 359.
[8] *Id.* at 352.

The members of my planning committee who pushed this binary approach were merely reflecting the way they had seen the issue framed generally: in everything from court pleadings,[9] to advocacy group web sites,[10] to Presidential announcements,[11] the issue of same-sex marriage is often assumed to have two sides—"pro" and "con"—and no more. Actually, this is not completely true. In the past several years, a third position in the debate has emerged. This third side is represented by people who promote civil union as an option, often described as a "compromise,"[12] and it has gained adherents in the wake of the Massachusetts Supreme Judicial Court decision in *Goodridge v. Department of Public Health.* Proponents of civil union are heterogeneous. Some feminist scholars and "queer" theorists oppose marriage generally as a sexist institution and promote civil union as an alternative form of legal recognition for same-sex and different-sex couples alike.[13] Other proponents of civil union oppose equal marriage rights for same-sex couples on religious grounds but want to treat gay and lesbian couples fairly; they see civil union as a way toward greater equality. A third group opposes legal recognition of any sort for same sex couples, but in the face of judicial opinions and shifting public opinion, they are willing to support civil union or domestic partnership precisely because it creates a second, non-marital status for same-sex couples (and thus in their view "pro-

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[9] Kerrigan v. Dep't of Pub. Health, CV-04-4001813-S (Conn. Super. Ct. filed Aug. 25, 2004); Baehr *v.* Lewin, 852 P.2d 44 (Haw. 1993); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Lewis v. Harris, No. MER-L-15-03, 2003 WL 23191114 (N.J. Super. Ct. Law Div. Nov. 5, 2003).

[10] *Compare* Robert H. Knight, *Talking Points on Marriage*, *at* http://www.nogaymarriage.com/talkingpoints.html (last visited Jan. 30, 2005) (arguing that legitimizing civil unions or domestic partnerships "does not expand the definition of marriage; it destroys it"); and http://www.protectmarriagerally.com/purpose.asp (last visited Aug. 28, 2004) (pitting the desires and efforts of 3% of America (presumably LGBT Americans) against the 97% of Americans who are nongay and therefore assumed to be against same-sex marriage); *with* GayCivilUnions.com, http://www.gay-civil-unions.com/HTML/opposition.htm (last visited Jan. 30, 2005) (pro civil union website and providing links to "The Opposition" – anti Lesbian and Gay Civil Rights).

[11] George W. Bush, President's Radio Announcement (White House July 10, 2004) (endorsing a Federal Marriage Amendment to "protect" the cultural, religious, and natural roots of marriage from "a few activist judges and local officials" who have "taken it on themselves to change the meaning of marriage"), *at* http://www.whitehouse.gov /news/releases/2004/07/20040710.html (last visited Jan. 30, 2005).

[12] *See* John Fountain, *Civil Unions Good Compromise*, THE BOSTON GLOBE, July 8, 2004, *at* 2004 WL 59796234; Vermont Freedom to Marry, at http://www.vtfreetomarry.org/ (last visited Jan. 30, 2005) (characterizing Vermont's Civil Union Law as a "difficult compromise for advocates of full and genuine equality for same-sex couples.")

[13] *See* Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Structure Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV.1535, 1536-37 (1993) (part of the Symposium on Sexual Orientation and the Law) (identifying marriage as an "inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism," but arguing that marriage between same-sex couples "would inherently transform the institution of marriage for all people."); Mary Anne Case, *Reflections on Constitutionalizing Women's Equality*, 90 CAL. L. REV. 765, 788 & n.146 (2002) (recognizing the progressiveness of Vermont's civil union for same-sex couples, but also advancing the legitimacy of civil union as a liberating institution for women in relationships with men).

tects" marriage as a specifically heterosexual institution).[14] The diversity of views within the civil union camp is often obscured in discussions and news reports, however, and in the public view it can appear to be merely a compromise between pro and con positions rather than an affirmative stance.[15]

One of the flaws in public discussion regarding civil marriage is that we paint positions as monoliths, and deny the diversity of views that might exist within groups of people who generally oppose or support same-sex marriage. A second flaw in these public discussions—particularly from a dispute resolution perspective—is that we have done little, if anything, to develop and highlight the *common concerns and interests* of people who find themselves on opposites "sides" of the question. For example, the welfare of children is often cited as a reason to prevent same-sex couples from marrying;[16] it is also cited as a reason to grant full marriage rights to such couples.[17] At least some portion of this controversy is empirical. Social science yields a diversity of results on this question (some finding deleterious effects for children raised by gay couples, others finding no significant differences based on the gender of the two parents raising the children). Partisans disagree about which of the studies should be believed.[18] It seems possible that we could make progress in resolving at least this empirical question through social science. Influential people

[14] Jennifer Peter, Massachusetts Lawmakers Reject Effort to Reach Compromise on Gay Marriage, Associated Press, Feb. 11, 2004, *at* http://www.boston.com/news/local/massachusetts/articles/2004/02/11/lobbying_heats_up_as_mass_prepares_to_take_up_gay_marriage_ban/ (last visited Jan. 30, 2005); *Massachusetts Constitutional Amendment to Re-define Marriage Debate "Filibustered"*, LIFESITENEWS.COM, Feb. 13, 2004, *at* http://www.lifesite.net/ldn/2004/feb/04021305.html (characterizing a "civil-union amendment" as a compromise) (last visited Jan. 30, 2005).

[15] *But see* Susan Milligan, *Senate Rejects Gay Marriage Amendment*, THE BOSTON GLOBE, July 15, 2004, at A1 (reporting positions of Senators John F. Kerry of Massachusetts and John Edwards of North Carolina as "both hav[ing] said that they oppose gay marriage.")

[16] *See* Goodridge v. Dep't of Pub.Health, 798 N.E.2d 941, 962 (Mass. 2003) (recognizing that "protecting the welfare of children is a paramount State policy," but holding that restricting marriage to opposite-sex couples does not further this policy); *contra* http://www.heritage.org/research/features/issues2004/Same-Sex-Marriage.cfm ("Research indicates that the intact family – a married man and woman who conceive and raise their children together – best ensures the welfare of children and society.") (last visited Jan. 30, 2005).

[17] Gay & Lesbian Advocates and Defenders, *Why Marriage Matters, at* http://www.glad.org/rights/OP1-whymarriagematters.shtml ("Married couples can take for granted rights of hospital visitation, security for their children, and rights of inheritance. This security has long been unavailable to same-sex couples.") (last visited Jan. 30, 2005). *See also* Charlotte J. Patterson, *Lesbian and Gay Parenting*, APA PUBLIC INTEREST DIRECTORATE (1995) (concluding that "there is no evidence to suggest that lesbians and gay men are unfit to be parents or that psychosocial development among children of gay men or lesbians is compromised in any respect relative to that among offspring of heterosexual parents"), http://www.apa.org/pi/parent.html.

[18] Increasingly, some opponents of equal marriage rights seem to base their position less on empirical results and more on theory, arguing from Natural Law that children fare better with a mother and a father than they do with two parents who are of the same sex because this is nature's plan. *See* Charles J. Reid, Jr., *The Augustinian Goods of Marriage: The Disappearing Cornerstone of the American Law of Marriage*, 18 BYU J. PUB. L. 449 (2004); Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 225, 232 (2004) ("Marriage arises in every known society out of the need to manage the biological reality

who oppose same-sex marriage on this ground could negotiate with same-sex marriage advocates to find mutually acceptable, unbiased social scientists (assuming such creatures exist) and then enlist those designated researchers to study and compare outcomes for children raised by same-sex and different-sex couples. This route is fraught with danger, given the small number of same-sex couples raising children and the fact that a controlled experiment is not really possible (researchers would have to adjust for the fact that the different-sex couples enjoy the protections and benefits of marriage, while the same-sex couples must raise their children without those protections and benefits). Methodological flaws might doom the studies to rejection by the losing-side. Still, the concept of the respected third party and the attempt to agree upon process even when disputants cannot agree on substance is fundamental—right out of *Getting to Yes*.[19] Pro-marriage groups such as the *Institute for American Values* place great weight not only on the welfare of children, but also on the value of social scientific research evaluating families and their outcomes.[20] Surely this search for common ground among thoughtful opponents would not be quixotic.

A second shared concern or interest is the health and durability of marriage as an institution. Clearly, same-sex couples who seek the right to marry see marriage as a good and honorable estate—otherwise the right to marry would not mean so much.[21] Many who oppose same-sex marriage also esteem marriage highly, and are deeply concerned with the health and durability of the institution in the United States. With this shared interest in mind, perhaps more could be done with workshops on communication, financial decision-making, and parenting skills, cosponsored by marriage and family organizations on both sides of this debate (e.g., the Institute for American Values, Focus on the Family, and Parents and Friends of Lesbians and Gays (PFLAG)). Such relationship-strengthening workshops could be open to both same-sex and different-sex couples. The result would be pro-marriage and pro-family, and at the same time it would reveal the common concerns of couples and families regardless of gender.

Besides the obvious resistance to "consorting with the enemy" likely to greet such proposals, we face a deeper problem. The problem is that these common concerns and possible steps to explore or resolve them have not been developed; we lack processes that would reveal our common ground and permit us to brainstorm next steps *together*. Too often, the only people talking about same-sex marriage are the ones who have already made up their minds about the issue, and they only talk to people who agree with them. Little dialogue occurs across ideological lines[22] or among people who feel competing loyalties

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that sex between men and women produces children, the twin social realities that societies need babies in order to survive, and babies need mothers and fathers.").

[19] ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (2d ed. 1991).

[20] http://www.americanvalues.org (last visited Jan. 30, 2005).

[21] Admittedly, one could coherently reject marriage as an outmoded or sexist institution, but believe that same-sex couples should have the same rights as different-sex couples to enter into marriage.

[22] Again I overstate the facts. At some web sites, people with differing views and those who are undecided can share their opinions about same-sex marriage. *See* http://www.belief

(e.g., a father who loves his gay son but attends a church that condemns homosexuality as sick or sinful). In pursuit of more open and constructive conversations, I turn in the next section to discuss the potential for collaborative processes in the area of marriage rights.

III. THE POTENTIAL FOR DELIBERATIVE DEMOCRACY WITH RESPECT TO SAME-SEX MARRIAGE[23]

We need simple conversation between human beings that permits the airing of experiences, fears, and hopes. This may be our most difficult, but most direct, route past polarization and prejudice.

Numerous NGOs regularly hold workshops or facilitate processes designed to tackle controversial or divisive issues on which progress must be made for the public good. *Public Conversations Project* (PCP), for example, assists groups in convening constructive dialogues about difficult issues among people with fundamental differences in values and worldview. PCP helps participants develop more productive ways of communicating and stating their perspectives so they can be heard by others. PCP has begun to convene groups to discuss same-sex marriage, and will be an important resource for communities interested in bridging the gap between people on different "sides" of this issue. Equally important, PCP will allow people who fall into the vast middle to participate in the discussion and share their multiple perspectives.[24]

Visioning processes convene groups of people to brainstorm and build consensus on preferred futures for their community – "the set of conditions they want to see realized over time."[25] These processes come in many forms, several of which could prove useful in the context of same-sex marriage. "Study circles"[26] allow groups of invited citizens to take part in highly participatory, small-group discussions of the issues. *Study Circles* (the organization) creates and disseminates dialogue materials at no cost to the users. They have already convened specialized groups to discuss gay marriage and are poised to expand these efforts.[27]

In "community-wide visioning," an entire community is invited to participate in facilitated meetings directed toward envisioning a desired future. This could be used productively at the smaller community or neighborhood level, building toward a broader consensus of communities in a region. "Search con-

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net.com/story/136/story_13601_1.html (last visited Jan. 30, 2005); http://www.gayquestions.com/resources/index.shtml (last visited Jan. 30, 2005); http://www.familyscholars.org/ (last visited Jan. 30, 2005).

[23] For the ideas in this section, I am particularly indebted to Marcia Caton Campbell, Jane Seminare Docherty, and Nancy Welsh, my coauthors on an earlier essay exploring the potential for deliberative democracy. Much of the following text is lifted from that piece. *See* Jennifer Gerarda Brown, et al., *Negotiation as One Among Many Tools*, 87 MARQ. L. REV. 853 (2004).

[24] *See Same-Sex Marriage: Resources for Dialogue*, *at* http://www.publicconversations.org/pcp/index.asp?catid=68&page_id=257 (last visited Sept. 5, 2004).

[25] Christopher W. Moore & Peter Woodrow, *Visioning*, *in* THE CONSENSUS BUILDING HANDBOOK 558 (Lawrence Susskind et al. eds., 1999).

[26] Study circles can refer to a process, but it is also the name of an organization.

[27] *See* http://www.studycircles.org (last visited Jan. 30, 2005).

ference" bring a group of stakeholders together for a concentrated period of time (typically two to three days) to discuss an issue exhaustively, envision an ideal future scenario, and develop action steps to realize that future. For example, a neutral civic organization such as the YMCA or a Chamber of Commerce could host a search conference for lawyers, legislators, clergy people, policy makers, and gay rights groups to develop a process for attempting legal change. Documenting the results of processes such as these also makes excellent fodder for a civic journalism project, resulting in coverage of same-sex marriage that is less polarizing than the norm.

Too much of our public conversation regarding marriage rights for same sex couples assumes and then exacerbates the polarization of the issue into pro and con. This not only heightens divisiveness in our communities, but also makes the hope of any resolution of the conflict less likely. A crucial move in this situation—one that not only works for peace but also builds a more democratic society—is to promote and enhance the capacity of our "radical center"—those citizens who want a reasonable, fair, and just outcome to the problem. Helping this radical center find a voice, develop leadership skills, and craft clear statements that contrast with extreme rhetoric can be the key to preventing the conflict over marriage rights from becoming intractable. Sometimes the radical center needs to organize itself rather than just work within existing organizations. While partisans may control (and therefore polarize) the terms of the *debate*, ordinary citizens should be able to control the terms of the *conversations* that lead to social and legal change.

IV. The Need for Adjudication and Legislation with Respect to Same-Sex Marriage

Sometimes legal change occurs through the processes of deliberative democracy discussed here and in Professor Menkel-Meadow's article. At other times, our government acts as a "norm entrepreneur," deciding to change the law before consensus for that change can form in the populace. This has been particularly common in the area of civil rights. Surely it was no accident that the *Goodridge* decision of the Massachusetts Supreme Judicial Court requiring equal marriage rights for same sex couples became effective on May 18, 2004, the day we celebrated the 50th anniversary of *Brown v. Topeka Board of Education*. Like *Brown* before it, the *Goodridge* decision has been assailed in some quarters as the product of "activist judges" imposing a new social agenda on an unwilling populace. And yet, as we look back on *Brown*, we see leadership in the Court's unequivocal message: "separate but equal" will not stand; this nation will not invidiously discriminate; it will not subordinate a class of people to second class citizenship. Usually, judicial or legislative change in the law follows social change in attitudes; in some cases, however, the law must lead.

The trick is knowing which case we are in. I suspect that the evolution of gay rights in the United States will be a dynamic, interactive process: slow but steady change in social attitudes will be punctuated by judicial and legislative changes, and those governmental pronouncements will spur further discussion

and social change. In this way, the people conduct a kind of dialogue with their government.

Informal, decentralized social change is spurred when gay men, lesbians, and bisexual people "come out" to family, friends, neighbors and coworkers. Social change also occurs when non-gay "allies" – those people who know and care for Lesbian, Gay, Bi-sexual and Transgender (LGBT) people, or who simply care about gay rights – also make their voices heard in schools, houses of worship, and work places. But it is important to recognize that such gradual, decentralized social change can occur only when LGBT people know that they can depend upon some civil rights protections. Courageous LGBT people have come out in unfriendly times and places; they have declared their identity even when the law has not protected their right to do so. Many more are empowered to come out when they know that the law will protect their jobs, homes, families, and liberty afterward. In this way, legal change *fosters* social change. And the sorts of conversations Professor Menkel-Meadow envisions in her article become more feasible.

The strength of Professor Menkel-Meadow's vision for deliberative democracy, then, is in its "two track" nature. In her view, "public discourse in associational and deliberative settings creates, identifies and debates problems while more formal institutions approve solutions to and resolve those problems."[28] Deliberative fora are not the end of the process; nor, for some legal problems, are they the beginning. In the case of marriage rights for same-sex couples, for example, the formal action of courts in Hawaii, Vermont, and Massachusetts—followed by reactive legislation and referenda—has jump-started the public conversation. Without the expert opinion of justices in Hawaii, Vermont, and Massachusetts suggesting to us that our denial of marriage rights to same-sex couples is fundamentally inconsistent with our commitment to fairness and equality, many Americans would simply not recognize the importance of this issue. Without these court cases, a historically closeted and marginalized minority such as LGBT persons would lack the platform to bring their concerns to the larger populace.

Without the lawyers—Mary Bonauto,[29] Dan Foley,[30] Beth Robinson,[31] Evan Wolfson,[32] and Bill Woods,[33] to name just a few in this most recent round of marriage litigation[34]—the judicial experts might not have perceived

[28] Menkel-Meadow, *supra* note 1, at 355.

[29] Argued *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), in Massachusetts Supreme Judicial Court.

[30] Represented plaintiffs at trial and appellate levels in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

[31] Represented plaintiffs in *Baker v. State*, 744 A.2d 864 (Vt. 1999), then lobbied legislature following court decision.

[32] Director of Lambda Legal's Marriage Project for many years, now heads FreedomtoMarry.org; argued Hawaii case and has coordinated national strategy for marriage litigation. *See* http://www.geocities.com/freedomtomarry/ (last visited Jan. 30, 2005).

[33] Bill Woods is credited with having "initiated the idea of a legal challenge to [Hawaii's] marriage laws . . . and sought the assistance of the American Civil Liberties Union and the Lamda Legal Defense and Education Fund." PETER LANG, SAME-SEX MARRIAGE, LEGAL MOBILIZATION, AND THE POLITICS OF RIGHTS 49 (Peter Lang ed. 2002).

[34] Earlier rounds were less successful but nonetheless laid a foundation for recent litigation. McConnell v. Nooner, 547 F.2d 54 (8th Cir. 1976); Jones v. Hallahan, 501 S.W.2d 588, 589

the validity of same-sex couples' claims to equality. The fundamental role of lawyers, at least in the area of civil rights, remains focused on the formal institutions: the lawyers serve as gatekeepers, translators, and framers to enable their clients to "name, blame, and claim."[35] And when those claims are recognized in a more public or formalized way, the real conversations can begin.

V. CONCLUSION: A TRILOGUE BETWEEN COURTS, LEGISLATURES, AND THE PEOPLE THEY SERVE

It is for this reason that lawyers must continue to stress their role as advocates and champions in civil rights litigation even as they take on more conciliatory and problem solving roles in other fora. I agree with Professor Menkel-Meadow that lawyers may be uniquely endowed with the combined expertise in substance and procedure to facilitate the sorts of public conversations aimed at addressing large scale public disputes, perhaps even in the arena of civil rights, such as marriage rights for same-sex couples. The marriage example shows, however, the importance of preserving the role of lawyers in such disputes as advocates, for without their efforts the issues might never come to the attention of the wider public. Once the lawyers have framed the controversy in legally cognizable terms and courts have recognized the legitimacy of those claims, the public may be better primed to discuss the issues that led to the lawsuit and the consequences that might flow from the court's decision. The legislature can serve as a sort of mediator between the public and the courts, facilitating some discussion before the court has ruled and then working with the public to decide how the court's ruling will be implemented. In Connecticut, for example, seven couples recently filed suit challenging the constitutionality of the state's marriage law limiting marriage to different-sex couples.[36] When the Connecticut courts rule in this case, surely the public response will be influenced by the fact that the Connecticut General Assembly has been working on bills related to same-sex couples for the past four years. This fact alone may distinguish the Connecticut case from earlier litigation in Hawaii, Vermont, or Indiana, where the legislatures had paid little attention to same-sex couples until forced to do so by the courts. Because the Connecticut legislature has already considered the issue from almost every conceivable angle, read thousands of pages, and heard hundreds of hours of public testimony, the public dialogue about marriage rights for same-sex couples is already underway. When the courts rule, their opinions may strike the public much less as a non sequitur and more as a sensible exchange of views in a system of checks and balances. And with the promise (or threat) of a judicial ruling now on the horizon, the legislature might just decide to moot the case by extending marriage rights to same-sex couples. Imagine the conversations we'd have then.

(Ky. Ct. App. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974); McConnell v. Anderson, 451 F.2d 193, 196 (8th Cir. 1971).

[35] William Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW. & SOC'Y REV. 631 (1980 - 81).

[36] Kerrigan v. Dep't of Pub. Health, CV-04-4001813-S (Conn. Super. Ct. filed Aug. 25, 2004).