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WILL THE COURTS SET US FREE?

REFLECTIONS ON THE CAMPAIGN FOR SAME-SEX MARRIAGE

John D'Emilio

Sex laws are notoriously easy to pass. . . . Once they are on the books, they are extremely difficult to dislodge.

GAYLE S. RUBIN, "THINKING SEX"

In May 1993 the Hawaii State Supreme Court instructed one of its trial judges to reconsider a case involving same-sex marriage. Calling marriage "a basic civil right," the justices suggested that the prohibition against issuing licenses to same-sex couples violated state constitutional bans against gender-based discrimination. William Rubinstein, at that time the director of the American Civil Liberties Union's gay rights project, called the ruling "a major breakthrough."[1] This was the first time in U.S. history that a court came remotely close to approving "gay marriages," and it cracked open a nationwide debate that continues today. One can draw a straight line from this judicial instruction in Hawaii to the first

same-sex marriages in Massachusetts in May 2004 and the raft of prohibitionist measures that graced many state ballots in November 2004.

By any logic, the Hawaii decision ought to have thrilled me. I study social movements. I think daily about collective efforts to achieve justice and about how disenfranchised groups act to redress their grievances. In particular, I have studied the gay and lesbian movement for the past three decades and at various points along the way have been not merely an observer but a participant in the cause. What could be more exhilarating than to witness history being made, to watch a campaign develop involving something as fundamental as marriage?

Instead, from the moment that the Hawaii courts put the marriage issue squarely on the political agenda, the unfolding of the campaign for same-sex marriage has left me distinctly uneasy. For the past dozen years, most new developments in the campaign have made this gnawing discontent ever more insistent.

Most of the time I have attributed this response to my own particular queer history. I am a member of what is often referred to as "the Stonewall generation." I belong to an exuberant radical subset of my age cohort. We were permanently influenced by the rebellious counterculture of the 1960s and the provocative writings of pioneering radical feminists.[2] Coming out publicly during the early and mid-1970s meant that we experienced being gay or lesbian as a worldview, a political orientation, a form of rebellion against social and cultural norms. To borrow the description of John Waters, the director of such camp films as *Pink Flamingo* and *Hairspray,* this was the generation of gay men for whom "one privilege of being gay was that we didn't have to get married."[3]

Rather than a lifestyle, being gay seemed an entry point to remaking society. By definition, we thought, queer life was subversive of marriage and the family. In a nation that was led by Richard Nixon and that was bombing Southeast Asia back to the Stone Age, any kind of subversion seemed a very good thing indeed. We imagined a world in which bonds of friendship, companionship, and sexual intimacy were knitting communities together with ties more durable than those that no-fault divorce could dissolve with a signature and a small fee.

Put aside for the moment any qualms about whether those views were little more than utopian fantasies. Instead, carry that consciousness forward into the 1990s. You might expect someone like me to be arguing thus: "Why are we campaigning for same-sex marriage? Why are we seeking the sanction of the state for our intimate relationships? Why are we expending scarce movement resources so that couples can walk

smilingly into the sunset? What about *urgent* issues like AIDS prevention, homophobic violence, and the safety of queer youth, issues that legitimately might be termed matters of life and death?"

I lay this out for you—my personal history and where it might take me a generation later—but I am not able to convince even myself that this is why the marriage campaign has made me so disgruntled. Neither my head nor my heart subscribes to the argument that I just articulated. For instance, in my teaching, I regularly assign in my gay and lesbian studies courses a pair of short readings that were published together in 1989.[4] Tom Stoddard and Paula Ettelbrick, two lawyers then working at Lambda Legal took contrasting positions about marriage in order to foster community debate and reflection on this issue. Stoddard argued that access to marriage was a basic civil rights issue. Whether one wanted it for oneself was irrelevant. The denial of the right to marry a partner of the same sex marked gay men, lesbians, and bisexuals as second-class citizens. It excluded us from many of the rights and privileges of civil society. In contrast, Ettelbrick articulated a radical feminist position. She saw marriage historically as an oppressive institution and she celebrated the way that gays and lesbians stood outside conventional frameworks. Why, she asked, would we seek inclusion in something old, tired, and oppressive when, as a community, we could create something new and visionary? However much Ettelbrick makes my queer soul sing, Stoddard has always made more sense to me. My head tells me that his argument has merit.

The research I did for a biography of Bayard Rustin only made the logic of this civil rights reasoning more powerful. A gay man in the generation before any kind of gay politics developed in the United States, Rustin was a lifelong agitator for justice. A Quaker and a pacifist, he did more than anyone to bring Gandhian methods of nonviolence to the black freedom struggle in the United States. Rustin's pacifist convictions were so strong that he willingly accepted prison rather than serve in the military during World War II. Yet in the late 1940s, Rustin helped shape activist campaigns to desegregate the military and make it fully accessible to African Americans. Whatever his own convictions about the immorality and inhumanity of war, he knew that restricting military service because of race diminished the status of black Americans.[5] Likewise, whatever one's own views about the institution of marriage, to acquiesce in one's exclusion from it means accepting a diminished status in law and society.

Moreover, again and again I have seen evidence of how attaching gays and lesbians to love, the emotion most closely associated with marriage,

loosens the grip of homophobia on heterosexuals and creates bonds of sympathy and identification across lines of sexual orientation. The first time I encountered this was at a roundtable on family issues that I organized for the National Gay and Lesbian Task Force in 1995. One of the participants, an African American activist in New York City, described the reaction in her workplace to the announcement that she and her female partner were planning a wedding. Suddenly an aspect of her life that her co-workers had assiduously avoided became the subject of animated conversation. Everyone wanted to share wedding stories, offer advice, see pictures, hear about the honeymoon. What had seemed like entrenched homophobia one day began to dissolve the next. Or take this example: many times I have observed the reaction of undergraduates to the documentary film *Chicks in White Satin*. Most students who enroll in gay and lesbian studies courses identify as heterosexual. Most of them, including many of the guys, become weepy by the end of the film. Apparently, love and weddings conquer all, including the stubborn sense that "they" are different from "us."

Finally, my own life experience makes me skeptical of the argument that gays and lesbians should take it upon themselves to remake the family and marriage as a step toward some hazily defined utopian future. With each passing year of my own intimate relationship, I find that the lack of legal recognition rankles more and more. The absence of marriage creates an endless series of awkward and stressful situations that heterosexual married couples never have to face. The absence of what marriage brings fosters a low-level discontent that is always simmering and that threatens, at any moment, to erupt into a rage. Any same-sex couple who has been together for a length of time can recount its own version of these situations.

The truth is that I would likely get married if marriage were available to me, just to be done with the annoyances and complications that the lack of marriage involves. I would not register at Bloomingdale's. I would not hold a reception for my four hundred closest friends. My partner and I would not purchase lavender tuxedos for the occasion. But I would leave campus early one afternoon, meet my sweetheart of twenty-six years at City Hall, and get the whole damned thing over with.

No. I'm grumpy about the campaign for same-sex marriage not because I'm philosophically opposed to marriage. It is not because I'm a descendent of the nineteenth-century free lovers who rejected the right of the state to intervene in their intimate lives. It is not a sign that I'm stuck in the sexual ethics of the Stonewall era, unable to reach gay maturity.

The source of my discontent finally became clear in the weeks after *Lawrence v. Texas*. On June 26, 2003, the Supreme Court issued a 6–3 decision in which it declared the remaining state sodomy laws unconstitutional.[6] These laws, as much as the often-quoted biblical passages from Leviticus and the Epistles of Paul, have been the grounding for the inferior status of gay men and lesbians. The criminalization of our sexual activities was the excuse for the thousands upon thousands of yearly arrests by local police forces. The criminal behavior that might erupt at any moment was an underlying rationale for why gay men, lesbians, and bisexuals should be excluded from government employment and other jobs that demanded moral probity. Our inherent criminality justified the denial of child custody and visitation rights after a divorce and a host of other restrictions on our rights and our lives. Although most states had already repealed these statutes by 2003, their survival anywhere linked the present to a long history of oppression. In that sense, *Lawrence* was profoundly important. It firmly closed a chapter in U.S. history that stretched back to the earliest years of English colonization of North America.[7]

Barely had Justice Anthony Kennedy finished reading the majority opinion than attention shifted away from sodomy laws and the story became, as *Newsweek* suggested, "Is Same-Sex Marriage Next?" [8] Print media, television journalists, and on-line commentators all seemed to converge around the assumption reflected in a Los Angeles *Times* headline: "Ruling Seen as Precursor to Same-Sex Marriage." [9]

Since the connection between sodomy laws and the right to marry is not immediately evident, why did it prove so easy to make this leap? One reason was coincidence. Earlier that month, the Court of Appeal in Ontario, Canada, had issued a decision clearing the way for same-sex marriage. Moreover, the national government in Ottawa quickly announced that it would support the ruling. There it was, just across the border. For many same-sex couples in the United States, marriage now seemed, metaphorically and literally, within reach, a short drive or a quick plane ride away.

Another reason for the easy leap from sodomy laws to same-sex marriage was that Justice Antonin Scalia, in his scathing dissent from the majority in *Lawrence*, said the leap was easy. Justice Kennedy's reasoning, he claimed, "leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples." In case a reader missed his point, Scalia repeated it four paragraphs later: "Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made

between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned." [10]

It did not surprise me that Scalia leveled these accusations. The man is an unabashed ideologue. Scalia certainly was not speaking to his peers on the bench nor even to a community of constitutional law experts outside the courtroom. He wrote those passages for a much larger constituency. He meant to sound an alarm, to mobilize the armies of the Christian right, to alert conservatives to a danger in its midst and call them to action. How else to explain the ridiculous claim in his dissent that the Court "has largely signed on to the so-called homosexual agenda"? A phrase like that resonates not in the world of legal scholars but in the ranks of conservative Christian activists.

But it did surprise me when so many voices within the queer community and among its allies echoed that perspective. In the weeks and months that followed, lawyers, organizational leaders, journalists, and others all seemed intent on proffering the same spin: in the wake of *Lawrence,* same-sex marriage was close to a sure thing. The chorus of voices only grew more insistent when, in November 2003, the Supreme Judicial Court of Massachusetts swept away the legal barriers to same-sex marriage in the state. The prohibitions were "constitutionally suspect," said one prominent legal scholar. Same-sex marriage was "inevitable," said an activist lawyer. "It's not going to happen this year or next, but in the next decade," said another. Evan Wolfson, who, perhaps more than any other lawyer, has pressed for a court-based assault on the laws against same-sex marriage, even appropriated Scalia's language. The restrictions on the right to marry, he said, were on "very shaky grounds." [11] It is not often that one finds gay advocates and right-wing radicals in such close agreement.

Reading all this commentary crystallized why the marriage campaign of the previous decade had provoked such queasiness. Suddenly I understood the source of my discontent. As I encountered all these pronouncements about how *Lawrence* puts same-sex marriage within our grasp, I found myself thinking: "Oh, no. Oh no, no, no. You misapprehend the central lesson of *Lawrence.* If Justice Kennedy's opinion teaches us anything, it is this: *the Supreme Court follows rather than leads.* The Court does not boldly chart new directions. It does not venture on to new ground. Rather, it tends to consolidate change that has already occurred. The Supreme Court articulates a constitutional rationale that codifies these changes, that shapes them into a new consensus and then declares them, through its decision, to be right and good and just."

If *Lawrence* tells us anything, it is that same-sex marriage is still a long way off. In fact, in late 2006 we may have been farther away from attaining marriage rights universally in the United States than we were in 1993, when a court in Hawaii set in motion the contemporary campaign for same-sex marriage.

I take no joy in this assessment. I do not like being the bearer of bad news. But as a historian of social movements who is fascinated by the delicate interplay of activist forces with the larger cultural, social, and political environment, as one who believes that individuals and organizations have the freedom to choose among strategies and tactics and that those choices have profound consequences, I think it is best to write frankly.

Simply put, the marriage campaign has been a disaster. It is far better to assess the damage and learn from it, better to figure out if a course correction can be made, than to proceed down the current road blissfully in denial, claiming that night is day, stop means go, and defeats are victories.

To support this argument, I approach the contemporary campaign from three different angles. First, I offer a quick overview of how the freedom movement of gays and lesbians developed over the course of the past two generations and how marriage came to be on the community's agenda by the mid-1990s. Then I spend some time analyzing what I like to describe as "the ghosts of Supreme Court cases past." These have hovered silently over the campaign for same-sex marriage, impelling a strategy of litigation as the primary means of securing marriage rights. Finally, I assess the court-based strategy of the past decade to see what it has provoked. Despite all the cheering for the gains we have made, the attempt to achieve marriage through the courts has provoked a series of defeats that constitute the greatest calamity in the history of the gay and lesbian movement in the United States.

THE GAY AND LESBIAN MOVEMENT: HISTORICIZING THE ISSUE OF SAME-SEX MARRIAGE

The marriage debacle aside, the history of the gay and lesbian movement since its beginnings in the 1950s has been one of change so rapid and extraordinary that it can justifiably be described as progress. Fifty or more years ago, when the first gay and lesbian organizations in the United States were taking shape in California, every state had sodomy laws that criminalized homosexual behavior. Local police forces used them as warrant

for making thousands and thousands of arrests every year. The federal government enforced a blanket ban against its employment of lesbians, gay men, and bisexuals, and many state governments and professional licensing agencies did likewise. Cold War rhetoric about perversion and sexual menace saturated the public domain. Christian religious teaching utterly condemned same-sex desires. The medical profession categorized homosexuality as disease, and many states allowed judges to send gays to asylums with indeterminate sentences and permitted parents to institutionalize their queer teenagers.[12]

The first cohort of pioneering activists had little room to agitate for justice. They tried, successfully, to secure de facto recognition of their right to assemble, a not insubstantial victory since police could argue that, when gays met together, it was prelude to criminal activity. They won from the courts acknowledgment that their publications were not obscene. Influenced by the nonviolent demonstrations of civil rights activists, a few of them in the 1960s braved public exposure by mounting picket lines outside government buildings and carrying signs that demanded fair treatment. Still, for all their effort, by the late 1960s there were fewer gay and lesbian organizations in the entire United States than exist today in the state of New Jersey alone.[13]

Then "the sixties" intervened. I use this as shorthand for the few years when the United States experienced at home a broad-based challenge to authority. Core institutions found themselves under assault. At least temporarily, bodies as diverse as the presidency, the medical profession, the military, the university, national political parties, and local police saw their legitimacy questioned, their exercise of power challenged.[14]

Gay liberation and lesbian feminism rushed into this vacuum. Like those who launched the sit-in movement in the South a decade earlier, activists were relatively young, many of them college students or not far removed. They were deeply influenced by the message of self-assertion that came from the black power movement; by the challenge to white middle-class values that came from the counterculture; and especially by the rethinking of gender norms, sexual ideology, and family structure that women's liberation put forward. Their radicalism impelled them to violate one of the central principles of gay life in the generation that preceded them. They refused to stay hidden and keep their identity secret. Instead, they turned the mandate to stay in the closet on its head. They made "coming out" a new imperative. Men and women who came out more easily became activists in a movement.[15]

In the course of the 1970s, the movement achieved a host of victories. The American Psychiatric Association removed homosexuality from its catalogue of mental illnesses. The Civil Service Commission dropped its blanket exclusion of gay men and lesbians from federal employment. A number of states eliminated their sodomy statutes. Almost three dozen cities enacted statutes banning discrimination on the basis of sexual orientation. Federal courts repeatedly affirmed the First Amendment speech and assembly rights of homosexuals. Of greatest significance, perhaps, activists in many cities succeeded in sharply curtailing the police harassment that had been endemic to queer life.

Measured by the expectations of the early twenty-first century, the gains provoked by gay liberation seem like just a few faltering steps on a very long road to the still-unreached destination of equality. Measured by what had preceded them, they seemed huge to activists at the time. The constraints on police behavior had especially profound consequences. In the 1970s a queer public life became visible. It was different from the queer worlds that existed earlier, less contingent on the whims of law enforcement, less contained and restricted. It was visible and accessible in a sustained and continuing way. Among men, it was highly commercialized, consisting primarily of bars, bathhouses, discos, and sex clubs. Among women it was more overtly oppositional, consisting of coffeehouses, music festivals, small presses and bookstores, and art and theater collectives.[16]

Stop for a moment and reflect on what I've described in the preceding few paragraphs. Where does "family" fit in this story? What kind of a policy agenda around family will a movement produce when the primary influences on this movement have been the hippie counterculture (think "communes, free love, Woodstock Nation") and radical feminism (think "Down with the patriarchy!")? *

There was a bit of a family agenda in the 1970s. The one concrete plank in it was "defend the rights of lesbian mothers," though even here the meaning of that exhortation then was far different from what it might connote today. Defending the rights of lesbian mothers signified fighting to allow the lesbians who had become mothers when they were still living in heterosexual marriages to keep their children. It did not mean campaigning for the right of lesbians to choose to become mothers.

To the extent that family figured in the queer politics of the 1970s it did so in the form of slogans like "smash monogamy" and "smash the nuclear family" that helped mark these activists as oppositional, as radical.

Listen to what some of them had to say about the family and marriage. In "Gay Is Good," one of the earliest pieces of gay liberation literature, Martha Shelley described lesbians and gays as "women and men who, from the time of our earliest memories, have been in revolt against the sex-role structure and nuclear family structure." In "A Gay Manifesto," a widely circulated document of the gay liberation era, Carl Whitman called marriage "a prime example of a straight institution fraught with role playing. Traditional marriage is a rotten, oppressive institution." In New York City, an organization of radical gays of color asserted that "all oppressions originate within the nuclear family structure." Meanwhile, gay liberation groups in Chicago defined one of the key virtues of being gay as its contribution to breaking down the nuclear family.[17]

These were not the only sentiments in the gay and lesbian community, of course. During these same years, the Metropolitan Community Church, a Christian organization created by Troy Perry to provide a safe place of worship for gays, lesbians, and their allies, performed union ceremonies—weddings, in other words—for members in committed relationships. Indeed, almost everywhere that gay folk came together through religious affiliation, a yearning for marriage would surface. In West Virginia in the mid-1970s, Jim Lewis, an Episcopal minister, gained a reputation for being sympathetic to gays. Soon couples began approaching him and begging him to marry them, although the ceremonies would not have the force of law.[18] In the early 1970s, moreover, a few gay and lesbian couples—in Minnesota, Kentucky, Washington, and Colorado—made efforts, all unsuccessful, to have their unions recognized as legally sanctioned marriages.

But if a consensus in the gay community was absent, the radical voice was certainly the loudest and most evident. In this era, *family* and *homosexual* seemed mutually antagonistic. Here was a place where homophobe and homosexual seemed to unite. If straight America could not imagine queers in the family photo album, neither could lesbians and gay men imagine themselves within the family's bosom. In the work of novels as different as *Another Country* by James Baldwin and *Rubyfruit Jungle* by Rita Mae Brown, gay life took shape—indeed, could only take shape—through escape from the confines of family. Queers lived in exile from home and hearth, rejected by their families and rejecting family as well.

This, then, is where things stood in the early 1980s. Yet a mere decade later, not only had same-sex marriage emerged in Hawaii as a viable issue, but the gay and lesbian community had fashioned a full-fledged

multiplank platform of family issues. Matters such as partnership recognition, spousal benefits at the workplace, parenting by same-sex couples, the place of queer youth, and gay-supportive public school policies had all become rallying points for activists.

What provoked the gay and lesbian community's relation to family to shift so profoundly in so short a time? A number of developments in the 1980s contributed to this reorientation.

One factor was the impact of the Sharon Kowalski case. In 1983 Kowalski was involved in an automobile accident that left her ability to communicate seriously impaired. The courts awarded guardianship to Kowalski's father rather than to her partner, Karen Thompson, who for years was denied access to Kowalski. Across the United States, lesbian communities hosted forums, organized fundraisers, and worked to raise public awareness about the case. After an eight-year battle the courts eventually made Thompson the legal guardian, but in the meantime "Free Sharon Kowalski" became a rallying cry among lesbians concerned about the lack of legal recognition for their relationships.[19]

If this one case could so powerfully affect so many lesbians, then multiplying it by the thousands can give one a grasp of the force of the AIDS epidemic in redefining the significance of family for gay men. In the course of the 1980s, sickness and death became part of the everyday experience of young and middle-aged gay men. Many of them faced situations where the phrase "next of kin" came into play: hospital visitation rights; decision making about medical care; choices about funeral arrangements and burials; the access of survivors to homes, possessions, and inheritance. The ugly dramas that in some situations played themselves out between gay partners and their friendship circles on one hand and families of origin on the other exposed the legal inconsequentiality of same-sex relationships.[20]

Another factor inducing a shifting politics of family was the emergence of newly organized constituencies, both nationally and locally, among gays and lesbians. Some, but not all, of this was provoked by AIDS. From the beginning, the epidemic disproportionately affected African Americans and Latinos. Gays and lesbians of color took the lead in battling the disease in their home communities, and the infrastructure generated by AIDS funding helped build organizations—such as the National Latino/a Lesbian and Gay Organization, founded in 1985, and the National Black Lesbian and Gay Leadership Forum, founded in 1987—that served as their platform in the movement. The disease also spurred the proliferation of queer organizing beyond metropolitan

centers so that, by the late 1980s, the movement had an unprecedented national spread. One result was a subtle shift in the rhetoric of family away from tropes of exile and exclusion and toward themes of dialogue, engagement, and belonging. For gays and lesbians of color, family was a needed resource, a means of survival; for those in smaller cities and towns, life existed within a web of dense ties of kinship and neighborliness.[21]

The lesbian (and gay) baby boom was the fourth reason family issues came to the fore. Unbeknownst to a culture that had thoroughly associated gay life with sexual abandon and deadly disease (lesbians were largely erased from mainstream discourses), more and more individuals within the community were now choosing to become parents. The means varied—from the "turkey baster" babies conceived through the cooperation of gay men with the procreative desires of lesbian friends to the use of sperm banks, adoption agencies, surrogacy, and sex among friends—but the growing visible presence of children in the community made family less metaphorical and more descriptive of the contours of queer life.[22]

Generational change also played a role in the shifting priorities of the gay and lesbian movement. On one hand, as members of the Stonewall generation advanced into middle age, more of them were likely to be settled in long-term relationships. In every way except the legal, these partnerships had the texture of marriages. At the same time, a younger generation came of age and it had never known anything but the era of pride and visibility. Having come out to family and friends early, many had seamlessly integrated their sexual identities into every sphere of their lives. Why shouldn't they be able to get married, just like all their straight friends?

Finally, never underestimate the power of sheer orneriness in the evolution of a policy agenda. A politics of "traditional family values" took shape during the Reagan-Bush era. One of the first legislative proposals of the Reagan years was the draconian Family Protection Act; one of the last rhetorical engagements of the Bush White House was Vice President Dan Quayle's attacks on the unwed motherhood of Murphy Brown, a fictional newscaster on a popular network television series. As the Republican Party and evangelical Christians made family a cause that bound them together, was it any wonder that queers would respond "we are family too"?[23]

The embrace of family by lesbians and gay men was more than a self-defensive reaction to a homophobic opposition. It generated a platform

of sorts, a cluster of issues loosely bound together conceptually under the heading of family. It provoked a decade's worth of creative organizational initiatives. It sparked an intriguing inventiveness from a community striving to extend understandings of family to include queer folk. Although AIDS may have overshadowed this at the time, the 1980s witnessed a widespread reclaiming of family among gays and lesbians.

One form of this creativity came from the National Center for Lesbian Rights. Lesbian couples raising children together faced a problem. The nonbiological parent had no legal standing as a parent, since no state laws and no courts had ever recognized as parents of a child two individuals of the same sex. In case of the death of the biological mother, legal challenges from the sperm donor, or the breakup of the couple, "the other woman" risked loss of access to the child, and the child risked loss of access to a woman who had filled the role of parent. In the early 1980s lawyers at NCLR fashioned the notion of "second parent adoption," and soon lesbian couples were petitioning courts around the country for the right to have two women declared the parents of a child. Confronted with real families with a real problem, some judges responded flexibly. By the early 1990s family court judges were creating, in effect, new law on the ground.[24]

Another imaginative response to the legal barriers to gay and lesbian family recognition was the invention of the concept of "domestic partnership." In the early 1980s, domestic partnership received its first incarnation as simple registries, created by municipalities, so that same-sex couples could achieve a modicum of legal recognition. Registration put couples on firmer ground if they confronted situations—in hospitals, for instance—in which the nature of their relationship needed confirmation. By the late 1980s, some municipalities were taking this a step further and extending spousal benefits, such as health insurance and family medical leave, to employees in same-sex domestic partnerships. Interestingly, many of these early measures were equally available to same-sex and opposite-sex couples.[25]

From my vantage point as a student of social movements, what made these policy innovations especially notable was that they were the tangible outcome of a much broader organizing impulse. By the late 1980s, one could find much evidence of community mobilizations taking shape around the concept of family. For instance, the National Gay and Lesbian Task Force (NGLTF) created a Families Project at the end of the decade. Because it was the national organization most committed to a philosophy of community organizing and with close ties to grassroots

activists around the country, NGLTF's initiative in this area signaled that more change was on the horizon. The growing attention to the issue of children raised by gay parents provoked the formation in 1990 of COLAGE (Children of Lesbians and Gays Everywhere).[26] Its members functioned not only as a support group for one another but also as an advocacy organization campaigning for fair treatment for queer families. Most dramatically, perhaps, these years witnessed an explosion of activism within the corporate world. Gay and lesbian employees, and increasingly bisexual and transgender workers as well, formed organizations at the workplace where they campaigned for, among other things, domestic partnership benefits. These efforts led not only to major shifts in the policies of corporate America but to changes in workplace culture as well. The last bastion of the closet was fast becoming a site of queer visibility.[27]

Where was marriage in this story? It would be a mistake to say that marriage never surfaced in the 1980s. At the massive March on Washington in October 1987, one of the unforgettable moments was the mass "wedding" of same-sex couples on the steps of the National Cathedral. But the event was as much a public expression of love and commitment in the face of AIDS and American homophobia as it was a step in a campaign for the right to marry. Indeed, writing two years later in *Out/Look,* Tom Stoddard, the executive director of Lambda Legal, commented: "As far as I can tell, no gay organization of any size, local or national, has yet declared the right to marry as one of its goals." [28] In other words, marriage was a peripheral matter in the vibrant new family politics that lesbians and gay men had created by the early 1990s.

THE GHOSTS OF COURTROOMS PAST

By the time of the national elections in 2004, when the issue of same-sex marriage jockeyed for headlines with news about war and terrorism, it was hard to remember that the gay, lesbian, bisexual, and transgender movements had ever had a politics of family that was about anything except marriage. Beginning in the 1990s, litigation to win the right to marry had moved forward in four states. Cases brought in Hawaii and Alaska had resulted in judicial victories, but the state legislatures intervened to undo them. In 1999 the Vermont Supreme Court gave the state legislature the unambiguous instruction that it must extend the rights and privileges of marriage to same-sex couples, and the legislature responded by creating a new status called civil unions. In 2003, the Supreme Judicial Court of Massachusetts ruled that only marriage would do. The first weddings in May 2004 coincided with feverish debates in more than a dozen state legislatures about whether to adopt constitutional bans to forestall any possibility of same-sex marriage.

Why did the field of gay family politics shift—some might say narrow—so dramatically in the course of the 1990s? How did litigation for marriage become the magic bullet expected to deliver on the promise of equality? Why did one tactic and one goal replace many tactics and many goals?

Underlying the decision to pursue through the courts the right to marry is an unspoken belief that goes something like this: "The courts are the place to go for the redress of grievances. When elected officials and public opinion are lined up against us, the courts can be relied upon to protect minorities from the tyranny of the majority. In fact, through the mechanism of civil rights litigation the courts can be the engine of progressive social change." This assumption is so pervasive that it hardly needs to be articulated. It has been espoused by liberals and progressives, who endorse the idea, and by conservatives, who rail against it. The field of civil rights and public interest law has been constructed around it. Some of the best minds, some of the young people most committed to social justice, choose law as a profession out of the conviction that this is the way to change the world.

The source of this belief (a belief that would have been considered unusual for much of American history) is not difficult to identify. It emanates from popular understandings of two historic Supreme Court cases of the mid-twentieth century: *Brown v. Board of Education* (1954), in which the Court declared racially segregated public schools to be inherently unequal and hence unconstitutional, and *Roe v. Wade* (1973), in which the Court struck down state laws that banned abortion.[29] Each of these cases is closely associated with social movements—the African American civil rights movement and the second wave of feminism—that deeply changed America. In fact, each of them is seen as somehow central to the success of their respective movements.

To see these cases as provoking vast political upheaval on behalf of social justice badly misreads the historical evidence. The cases did not break new ground or map new territory. They did not take the law in new directions. Indeed, one could just as plausibly argue that these cases provoked the opposite of what they intended. Because of them, powerful reactionary movements had rallying points that allowed them to mobilize against racial and gender justice.

Take the *Brown* decision. When the Warren Court handed down its ruling, the forces already tending toward the demise of legally sanctioned racial segregation were compelling. Here are only a few of them:

- Less than a decade earlier, the United States had fought a world war in which a major aim was the destruction of a Nazi regime that rested on an ideology of Aryan supremacy. Fighting a war against racism abroad weakened acquiescence to racial hierarchy at home.
- Cold War foreign policy impelled the United States to seek the support of Africans and Asians in its struggle against the Soviet Union. Racial apartheid in the American South seriously weakened diplomatic claims that the United States represented the pole of freedom in a global fight with communism.
- In 1947, a civil rights commission appointed by President Harry Truman released a report that outlined a comprehensive agenda to achieve racial equality. The White House itself seemed to be endorsing a racial justice platform.
- By the early 1950s, the Truman administration had committed itself to a thorough desegregation of the U.S. armed forces, thus establishing racial equality as a desirable goal in a key national institution.
- Many northern and western states had already enacted civil rights laws prohibiting racial discrimination in a wide variety of arenas. Racial equality rather than racial hierarchy was becoming the formal legal norm.
- Increasingly in the years after World War II, "Jim Crow" came to be perceived as a regional practice, an artifact of southern life that was discursively cordoned off as deviant, as un-American.

In this environment, the Supreme Court's declaration that legally mandated racial separation was unconstitutional did not suddenly chart a new course for race relations. The Court aimed to consolidate a developing consensus, to add the force of the Constitution to powerful tendencies in American life. It declared its principles so unambiguously in part because these tendencies already commanded judicial notice. As Jack Greenberg, one of the lawyers involved in the litigation, phrased it, "There was a current of history . . . and the Court became part of it." [30]

Notice also how the case had made its way to the Supreme Court. Since the late 1930s, the National Association for the Advancement of

Colored People (NAACP) had litigated a series of cases designed to chip away at the edifice of white supremacist law. By the early 1950s the Supreme Court had provided civil rights forces with a number of victories. It had outlawed the exclusion of black voters from political primaries, court enforcement of racially restrictive housing covenants, separate seating arrangements in interstate transportation, and the denial of access to law school and graduate school education. Although none of these cases had been a sure thing, Thurgood Marshall, the chief legal strategist for the NAACP, employed rigorous criteria when deciding whether to take them on. According to one of his assistants, "Thurgood had to be convinced of victory beyond a reasonable doubt before he said yes." [31] Thus *Brown* was the last step in a carefully planned legal strategy that had moved forward one step at a time.

At first glance, the circumstances surrounding *Roe v. Wade* might appear very different from those attending *Brown*. As late as the mid-1960s, every state prohibited abortion. A law reform movement was slowly gathering force, but criminalization remained the norm. To some, the 1973 *Roe* decision seemed like "a bolt out of the blue," unexpected and without warning.[32] Thus the case might seem to prove that, yes, the courts will set us free.

Behind this decision, however, lay more than half a century of change. Change had proceeded along two fronts that were thoroughly germane to the issue in *Roe*. First, among American women, contraceptive practice had spread until it was almost universal. Second, in the two decades before *Roe*, the Supreme Court had delivered a series of decisions that took sexuality out of the Victorian era and placed it firmly within a modern sensibility.

By the time *Roe* was decided, Americans had already experienced a revolution in their practice of birth control. This was in part achieved by the radical agitation of militant advocates of contraceptive freedom, such as Margaret Sanger. Women and their male allies disrupted public events, gave fiery lectures, risked arrest, and went on hunger strikes in order to end restrictions on access to birth control information and devices. By the 1940s, with the rise of organizations such as Planned Parenthood, birth control became part of mainstream culture, a form of "family planning." Scientists investigated fertility control and entrepreneurs invested in it, provoking such innovations as the birth control pill. Controlling fertility had become so normative that even American Catholics, in the face of papal edicts against contraception, employed artificial methods of birth control at the same rate as other Americans.[33]

Meanwhile, beginning in 1957 with *Roth v. United States,* the liberal Supreme Court of Chief Justice Earl Warren pronounced on a number of cases involving sexuality. Many of these concerned the issue of obscenity. Federal statutes dating from the nineteenth century had placed tight restrictions on the representation of sexuality in literature, the arts, popular culture, and media. As understood by legislators, police, judges, and purity crusaders, these laws essentially equated sexuality and the erotic with obscenity. For decades, writers, artists, and publishers pressed against the limits of obscenity law; they changed social practice even as the laws constrained them. Finally, in the 1950s and 1960s, a string of cases challenging federal and state obscenity laws reached the Supreme Court. Although the Warren Court never declared the regulation of obscenity to be unconstitutional, it sharply attenuated the connection between sex and obscenity. Its rulings made the depiction and discussion of sexuality a commonplace in American culture and social life. So much changed in these decades that, in 1970, a presidential commission actually recommended the decriminalization of pornography.[34]

The Court's willingness to consider an issue such as obscenity made it unsurprising when, in the mid-1960s, it began to rule on state laws that restricted access to contraception. In *Griswold v. Connecticut* the Court not only invalidated a law that infringed on a married couple's ability to prevent pregnancy; it also framed its decision as a constitutional right to privacy. At least for married couples, the Court deemed fertility control—and, by extension, sexual expression—a liberty protected by the Constitution. In 1971 *Eisenstadt v. Baird* extended these principles to unmarried male-female couples.[35]

This was the environment in which the Supreme Court addressed the matter of abortion. By 1973, when the justices ruled on the constitutionality of state laws prohibiting abortion, contraceptive practice was normative, the Court had drawn some forms of sexual expression into the sphere of protected liberties, and sexual matters were an integral part of public culture in the United States. Add to these the fact that abortion had not always been criminalized in the United States (there were no antiabortion laws at the time the Constitution was written) and that a number of states were already revising their abortion statutes. One can then see *Roe* not as a ruling on the frontier of constitutional law but as firmly located within the realm of common social practice and cultural values.

To summarize: neither *Brown* nor *Roe* ought to be seen as decisions that placed the Supreme Court in the vanguard of social change. Instead, both decisions built on strong foundations in American society,

culture, and law. They attempted to place a constitutional imprimatur on trends already well under way.

Although this interpretation is commonplace in scholarly writing about this era in American life, it is at odds with what we might call the "folk wisdom" about these decisions. For different reasons, both liberals and conservatives, the Left and the Right, have an investment in seeing these cases as radically innovative, as ruptures with the past. For progressives who in recent decades have seen themselves increasingly locked out of legislative majorities and the executive branch, the courts seem the last remaining hope for the survival of their political values. What the democratic process no longer seems to provide, the courts still promise. When prejudice, inertia, ideology, or electoral outcomes stand in the way, liberals can rely on the courts to extend personal liberties and nurture the impulse toward social justice. Liberals and the Left applaud this view of the courts, and thus they stake their political capital on defending the courts against conservative encroachments.

Adopting the same view of such cases as *Brown* and *Roe,* conservatives and the Right condemn what they describe as an activist judiciary. They have used the rhetoric of "judge-made law" as a mobilizing tool to rouse their constituencies and extend their political power. In the process, they have succeeded, far more than their rhetorical thrusts would suggest, in making the federal judiciary more conservative than it has been since the early 1930s.

But, to say it again, liberals and conservatives, the Left and the Right, have it wrong. Especially when one considers Supreme Court rulings in historic cases, it becomes clear that the Court cannot be relied on to push the nation in new directions. Instead, it moves, and by implication shifts, with the prevailing winds of history.

Interestingly, the decision in *Lawrence v. Texas* confirms both the prevailing misunderstanding of what the Court does and this more modest view of the Court's role as well. The gay community hailed the ruling as a breakthrough that paved the way for the approval of same-sex marriage. The Right denounced the ruling as a travesty that paved the way for the approval of same-sex marriage. Yet if *Lawrence* tells us anything, it is that the Court takes a measured approach to the cases before it and is reluctant to step far out in front of public opinion and social values. As Justice Kennedy took pains to point out in his opinion, most states had already repealed their sodomy laws; the legal profession had been calling for repeal for half a century; the European Court of Human Rights had already declared sodomy laws an infringement on basic human rights.

Eliminating the remaining ones might easily pass unnoticed in the daily life of Americans. The *Lawrence* case closed the books on sodomy laws. The Court was not ahead of its time but was catching up to its time.

WHAT POOR STRATEGY HAS WROUGHT

What happens when we apply to the topic of same-sex marriage this historical understanding of the relation of the courts to social movements and social change? What will we notice if we keep in mind that the Supreme Court rarely places itself far in front of public opinion, social practice, and cultural values?

One important thing to notice is that in April 1991, when *Baehr v. Levin* was initially filed in Hawaii, no foundation had yet been built for same-sex marriage. Sodomy laws still survived in American law. Fewer than half a dozen states included sexual orientation in their civil rights laws. One of the two major political parties in the United States had written antigay planks into its platform. The military excluded lesbians, gays, and bisexuals. Not one state legislature had approved domestic partnership benefits for public employees. Does this look like a society on the brink of accepting same-sex marriage?

Most of all, throughout the history of the United States, marriage had been understood, legislatively and in practice, as the union of a man and a woman. Yes, the institution of marriage had changed through the centuries. Yes, that change had been substantial. But this particular aspect of marriage, the gender and number of the partners, had remained fixed in law. Americans who challenged that, notably Mormons and various utopian communities in the nineteenth century, were viciously persecuted and scorned, and legislatures used the existence of deviations to ratify the norm of a man and a woman. This aspect of marriage—the "Adam and Eve, not Adam and Steve or Ada and Eve" part—has not budged, and in the popular imagination it has the quality of being fixed and eternal. The opposite-sex feature of marriage has seemed so rooted in history and nature that, in the early 1970s, when a few gay and lesbian activists mounted challenges to the ban on same-sex marriage in the states of Minnesota, Washington, Kentucky, and Colorado, judges dismissed their efforts as ludicrous.[36]

The second important thing to notice is that, although judges in Hawaii and Alaska opened the door to same-sex marriage by declaring the ban against it discriminatory, the state legislatures and the voters unambiguously erased those decisions by overwhelmingly approving an

amendment to their state constitutions. Thus, the first court victories proved to be phantoms.

The third important thing to notice is that none of the above seemed to deter the gay and lesbian legal community. In fact, its commitment to pursue marriage through the courts only grew in the course of the 1990s, while resistance to a strategy of litigation crumbled.

But, a proponent of litigation might say, look at what our determined pursuit of marriage through the courts has accomplished. In Vermont in 1999, judges once again declared the ban on same-sex marriage discriminatory. This time the legislature responded not with new discriminatory laws but with the innovation of civil unions, a legal form that extended to same-sex couples in Vermont all the rights of marriage but without the name. In Massachusetts in 2003, the state's highest court went further. It said only marriage will do for same-sex couples. Since May 2004, same-sex couples there have been marrying, and the legislature has failed to come up with new measures to stop them. And in other states there are more court cases on the docket that promise additional gains. Bit by bit, we have made inroads; we are accumulating victories. "Why," such a proponent might say to me, "do you remain so crabby? Why are you attacking our campaign to achieve marriage rights in the face of these undeniable victories?"

I remain so crabby because of the fourth important thing that one should notice: the most significant outcome of litigation has been neither the existence of favorable court opinions nor the advent of same-sex marriage in Massachusetts. These have been phantom victories. Instead, the most significant outcome of litigation has been the negative legislative and voter response that the Hawaii case and its successors have elicited. Before a trial court judge in Hawaii ruled that the prohibition of same-sex marriage violated the state constitution, in 1996 both the Senate and the House of Representatives passed by overwhelming majorities the federal Defense of Marriage Act. President Clinton, who fashioned himself a friend of the gay community, signed DOMA into law. The statute affirmed that, for the purpose of interpreting and implementing federal law, marriage was to be understood as the union of a man and a woman. No matter whether any individual state decided to approve same-sex marriages; the federal government would only recognize marriages between a man and a woman—for tax purposes, for the dispersal of such benefits as Social Security, for the determination of immigrant status, and for the many hundreds of other matters in which federal policy impinges on marriage.

Congress was not alone in its resolve. Beginning with Utah in 1995, at least thirty-eight states have passed "little DOMAs." That is, these state legislatures have declared that marriage is the union of a man and a woman and that their states will not recognize same-sex marriages performed elsewhere. The fear that so-called activist judges will try to impose same-sex marriage in their own states—as judges in Hawaii, Alaska, Vermont, and Massachusetts seemed to do—have led legislatures and voters in at least twenty-seven other states to go even further. Not only have these states declared that they will not recognize same-sex marriages from other states but, either through legislation or voter initiative, they have also amended their constitutions to include prohibitions against same-sex marriage.

This legislative onslaught has not yet ended. More states are considering little DOMAs. More states are considering amendments to their constitutions. Key Republican congressional leaders keep hauling out the threat of a federal constitutional amendment to prohibit same-sex marriage.

But, the cheerleaders for same-sex marriage might respond, why does this ultimately matter? Won't the Supreme Court eventually declare all these prohibitions unconstitutional when the same-sex marriages from a state such as Massachusetts are used to challenge them?

Cannot a strategy of targeted litigation lead us, state by state, to the promised land? Not likely. With the federal judiciary growing more conservative with each new appointment to it, we have only to look at the *Lawrence* decision to remind ourselves why. The Supreme Court will not set us free. It took until 2003 to declare sodomy statutes unconstitutional. *Lawrence* ruled on the fossilized remains of history. Same-sex marriage is an unprecedented innovation. As for the states, when even liberal courts such as those in New York and Washington vote against same-sex marriage, we have to see faith in judicial solutions as misplaced.

In 1984 the anthropologist Gayle Rubin published an extremely insightful and provocative article called "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality." She wrote it at a time when sexual issues had become deeply polarizing within feminism and when new forms of state intervention regarding sexuality loomed on the horizon. Rubin identified sex law as one of the chief—and most powerful—means of sustaining sexual hierarchies and enforcing sexual oppression. She elaborated the point in the passage that provides the epigraph to this chapter: "Sex laws are notoriously easy to pass. . . . Once they are on the books, they are extremely difficult to dislodge." [37]

Applied to the current battles concerning same-sex marriage, Rubin's point highlights how great a catastrophe for the gay and lesbian community the efforts to achieve marriage via the courts have provoked. Through the new legislation and state constitutional provisions it has instigated, the court-based campaign has ignited a firewall of protection against same-sex marriage that will burn for at least another generation. The homophobic reaction to this court-based campaign has provided an abundance of evidence that the restriction of marriage to a man and a woman is not an artifact from the ancient past but a long tradition that overwhelmingly majorities of elected officials and voters have reaffirmed in the present.

Rubin also made much of the idea of "sex panics," the power of issues related to sexual matters to stimulate intensely irrational reactions in society and the body politic. Long after the current homophobic panic is over, these DOMA statutes and state constitutional amendments will survive as a residue that slows the forward movement of the gay community toward equality. Contrary to the cheerleading from strategists for same-sex marriage who try to assure us that we are making progress, the promise of equal marriage rights for same-sex couples has disappeared beneath the horizon of reachable political change. Rather than a magic bullet, litigation to achieve same-sex marriage has morphed into a boomerang.

I can only hope that my understanding of social change and my skills of historical analysis will prove to be wrong.

ENDNOTES

I first presented these ideas in February 2004. Three years later, events seem to have confirmed the analysis. I thank Ellen Lewin, Nancy Hewitt, and Jonathan D. Katz, each of whom arranged visits for me to lecture at, respectively, the University of Iowa, Rutgers University, and Yale University, where my argument sparked lively debate and discussion.

1. Jeffrey Schmalz, "In Hawaii, Step Toward Legalized Gay Marriage," *New York Times,* May 7, 1993, 14.
2. See, e.g., such texts as Theodore Roszak, *The Making of a Counter Culture: Reflections on the Technocratic Society and Its Youthful Opposition* (Garden City, NY: Doubleday, 1969), and Shulamith Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (New York: William Morrow, 1970).
3. Terry Gross, interview with John Waters, on National Public Radio, *Fresh Air,* February 25, 2004. http://www/npr.org/templates/story/story.php?storyId5170056l.
4. See "Gay Marriage: A Must or a Bust?" *Out/Look* no. 6 (Fall 1989): 8–17.

5. John D'Emilio, *Lost Prophet: The Life and Times of Bayard Rustin* (New York: Free Press, 2003), esp. chaps. 3–7.
6. *Lawrence v. Texas,* 539 U.S. 558 (2003).
7. For analyses of the *Lawrence* decision, see Harry Hirsch, ed., *The Future of Gay Rights in America* (New York: Routledge, 2005).
8. Evan Thomas, "The War over Gay Marriage," *Newsweek,* July 7, 2003, 38–45.
9. David G. Savage, "Ruling Seen as Precursor to Same-Sex Marriage," *Los Angeles Times,* A21.
10. *Lawrence v. Texas.*
11. Linda Greenhouse, "Supreme Court Paved Way for Marriage Ruling with Sodomy Law Decision," *New York Times,* November 19, 2003, 24 ("constitutionally suspect"); David G. Savage, "Ruling Seen as Precursor to Same-Sex Marriage," *Los Angeles Times,* June 28, 2003, A21 ("inevitable," "next decade"); Chad Graham, "Changing History," *Advocate,* January 20, 2004, 36–39.
12. See David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* (Chicago: University of Chicago Press, 2004).
13. On the homophile movement see John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940–1970,* 2d ed. (Chicago: University of Chicago Press, 1998); Marc Stein, *City of Sisterly and Brotherly Loves: Lesbian and Gay Philadelphia, 1945–1972* (Chicago: University of Chicago Press, 2000); Elizabeth A. Armstrong, *Forging Gay Identities: Organizing Sexuality in San Francisco, 1950–1994* (Chicago: University of Chicago Press, 2002); and Nan Alamilla Boyd, *Wide-Open Town: A History of Queer San Francisco to 1965* (Berkeley: University of California Press, 2003).
14. For a recent account of the 1960s that captures how tumultuous the era was, see Maurice Isserman and Michael Kazin, *America Divided: The Civil War of the 1960s,* 2d ed. (New York: Oxford University Press, 2004).
15. There is not yet a satisfying book-length account of the gay liberation era. For aspects of it see Stein, *City of Sisterly and Brotherly Loves;* Armstrong, *Forging Gay Identities;* Dudley Clendinen and Adam Nagourney, *Out for Good: The Struggle to Build a Gay Rights Movement in America* (New York: Simon & Schuster, 1999). See also Terence Kissack, "Freaking Fag Revolutionaries: New York's Gay Liberation Front, 1969–1971," *Radical History Review* no. 62 (Spring 1995): 104–34; Justin David Suran, "Coming out against the War: Antimilitarism and the Politicization of Homosexuality in the Era of Vietnam," *American Quarterly* 53 (2001): 452–88. Important accounts from the era are Dennis Altman, *Homosexual: Oppression and Liberation* (New York: Avon, 1971), and Karla Jay and Allen Young, eds., *Out of the Closets: Voices of Gay Liberation,* 20th anniv. ed. (New York: NYU Press, 1992).
16. For aspects of the 1970s see Dennis Altman, *Coming out in the Seventies* (Boston: Alyson, 1981); Bonnie J. Morris, *Eden Built by Eves: The Culture of Women's Music Festivals* (Los Angeles: Alyson, 1999); and Karla Jay and Allen Young, eds., *Lavender Culture* (New York: NYU Press, 1994).
17. Jay and Young, *Out of the Closets,* 32, 333, 365, 258.

18. Keith Hartmann, *Congregations in Conflict: The Battle over Homosexuality* (New Brunswick: Rutgers University Press, 1996), 79–89.
19. On the Sharon Kowalski case see Karen Thompson and Julie Andrzejewski, *Why Can't Sharon Kowalski Come Home?* (San Francisco: Spinsters/Aunt Lute Press, 1988); Casey Charles, *The Sharon Kowalski Case: Lesbian and Gay Rights on Trial* (Lawrence: University of Kansas Press, 2003).
20. The literature on AIDS is vast. Some important works that discuss the impact of the epidemic in the 1980s and early 1990s are Cindy Patton, *Sex and Germs: The Politics of AIDS* (Boston: South End, 1985); Dennis Altman, *AIDS in the Mind of America* (New York: Anchor/Doubleday, 1986); Simon Watney, *Policing Desire: Pornography, AIDS and the Media* (Minneapolis: University of Minnesota Press, 1987); ACT UP/NY Women and AIDS Book Group, *Women, AIDS, and Activism* (Boston: South End, 1990); Martin P. Levine et al., eds., *In Changing Times: Gay Men and Lesbians Encounter HIV/AIDS* (Chicago: University of Chicago Press, 1997); and Cathy J. Cohen, *The Boundaries of Blackness: AIDS and the Breakdown of Black Politics* (Chicago: University of Chicago Press, 1999).
21. For writings by gays and lesbians of color from this era see Joseph Beam, ed., *In the Life: A Black Gay Anthology* (Boston: Alyson, 1986); Juanita Ramos, ed., *Compañeras: Latin Lesbians; An Anthology* (New York: Latina Lesbian History Project, 1987); Essex Hemphill, ed., *Brother to Brother: New Writings by Black Gay Men* (Boston: Alyson, 1991); Makeda Silvera, ed., *Piece of My Heart: A Lesbian of Color Anthology* (Toronto: Sister Vision Press, 1991); and Cherrie Moraga, *Waiting in the Wings: Portrait of a Queer Motherhood* (Ithaca, NY: Firebrand, 1997). For the perspective of gays and lesbians outside large urban centers, contrast Edmund White, *States of Desire: Travels in Gay America* (New York: Dutton, 1980) with Hartmann, *Congregations in Conflict.*
22. For discussions of the move toward parenting, see Kath Weston, *Families We Choose: Lesbians, Gays, Kinship* (New York: Columbia University Press, 1991); Mary Bernstein and Renate Reimann, eds., *Queer Family, Queer Politics: Challenging Culture and the State* (New York: Columbia University Press, 2001).
23. On the conservative family politics of the era see Didi Herman, *The Antigay Agenda: Orthodox Vision and the Christian Right* (Chicago: University of Chicago Press, 1997); Godfrey Hodgson, *The World Turned Right Side Up: A History of the Conservative Ascendancy in America* (Boston: Houghton Mifflin, 1996); and William Martin, *With God on Our Side: The Rise of the Religious Right in America* (New York: Broadway, 1996).
24. See Nancy D. Polikoff, "Raising Children: Lesbian and Gay Parents Face the Public and the Courts," in John D'Emilio et al., eds., *Creating Change: Sexuality, Public Policy, and Civil Rights* (New York: St. Martin's, 2000), 305–35; and http://www.nclrights.org/publications/2ndparentadoptions.htm.
25. David L. Chambers, "Couples: Marriage, Civil Unions, and Domestic Partnership," in D'Emilio et al., *Creating Change,* 281–304.
26. See its Web site, http://www.colage.org/.

27. On workplace activists see Kitty Krupat and Patrick McCreery, eds., *Out at Work: Building a Gay-Labor Alliance* (Minneapolis: University of Minnesota Press, 2001).
28. "Why Gay People Should Seek the Right to Marry," *Out/Look* no. 6 (Fall 1989): 12.
29. *Brown v. Board of Education,* 347 U.S. 483 (1954); *Roe v. Wade,* 410 U.S. 113 (1973).
30. Quoted in James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (New York: Oxford University Press, 2001), 72.
31. Ibid, 13.
32. Kristin Luker, *Abortion and the Politics of Motherhood* (Berkeley: University of California Press, 1984), 126.
33. For histories of birth control activism in the twentieth century see James Reed, *From Private Vice to Public Virtue: The Birth Control Movement and American Society since 1830* (New York: Basic, 1978); Linda Gordon, *Woman's Body, Woman's Right: A Social History of Birth Control in America* (New York: Grossman, 1976).
34. *Roth v. United States,* 354 U.S. 476 (1957); Commission on Obscenity and Pornography, *Report* (New York: Bantam, 1970).
35. *Griswold v. Connecticut,* 381 U.S. 479 (1965); *Eisenstadt v. Baird,* 405 U.S. 438 (1970). For a detailed discussion of the legal history that led to *Roe,* see David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of* Roe v. Wade (New York: Macmillan, 1994).
36. Important historical analyses of marriage include Stephanie Coontz, *Marriage: A History; From Obedience to Intimacy, or How Love Conquered Marriage* (New York: Viking, 2005); Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge: Harvard University Press, 2000); and E. J. Graff, *What Is Marriage For? The Strange Social History of Our Most Intimate Institution* (Boston: Beacon, 1999).
37. Gayle S. Rubin, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality." In *Pleasure and Danger: Exploring Female Sexuality,* ed. Carole Vance, 267–319 (Boston: Routledge).