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Michael Boucai

Associate Professor, SUNY Buffalo Law School.

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Glorious Precedents: When Gay Marriage Was Radical

Michael Boucai*

INTRODUCTION

*“There are some glorious precedents for thinking of homosexuality as truly disruptive. . . .”*¹

*“Since when is marriage a path to liberation?”*²

In the years immediately following the Stonewall riots of June 1969,³ a

* Associate Professor, SUNY Buffalo Law School.

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Copies of all unpublished sources, except where otherwise indicated, are on file with the author.

1. LEO BERSANI, *HOMOS* 76 (1996).
2. Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, *OUT/LOOK*, Autumn 1989, at 8–12.

period when “gay liberation” rather than “gay rights” described the ambitions of a movement, at least ten same-sex couples across the United States applied or attempted to apply for marriage licenses. All were refused except for two men in Texas, one of whom apparently looked convincing in a miniskirt, a wig, and false eyelashes.⁴ Lawsuits ensued in five states, and four made their way to and beyond trial.⁵ The three that produced written judicial opinions⁶—*Baker v. Nelson* in Minnesota,⁷ *Jones v. Hallahan* in Kentucky,⁸ and *Singer v. Hara* in Washington State⁹—have endured for decades as precedents supporting a heterosexual definition of marriage.¹⁰ This Article is about that early trilogy of cases

3. The Stonewall riots, triggered by a police raid on a gay bar in New York City, marked the emergence of gay liberation. See *HOMOPHILE YOUTH MOVEMENT, GET THE MAFIA AND THE COPS OUT OF GAY BARS* (1969), reprinted in DONN TEAL, *THE GAY MILITANTS* 24-25 (1971) (“The nights of Friday, June 27, 1969 and Saturday, June 28, 1969 will go down in history as the first time that thousands of Homosexual men and women . . . went out into the streets to protest the[ir] intolerable situation.”). For a historian’s account of the riots, see MARTIN DUBERMAN, *STONEWALL* (1993).

4. On the Texas incident, see *Marriage of Males Claimed*, HOUSTON CHRON., Oct. 6, 1972, at 2; *Legal Gay Marriage In Texas?*, ADVOCATE, Oct. 25, 1972, at 3 (recounting the “quixotic love story” of Antonio Molina and William ‘Billie’ Ert); Rob Shivers, *Texas Gay Marriage Apparently Within Law*, ADVOCATE, Nov. 8, 1972, at 7; and Lauren McGaughy, *Unlikely Gay Marriage Pioneers Tied Knot in Houston*, HOUSTON CHRON., Nov. 30, 2014, at A1. For reports of other refused marriage applications, see Rob Shivers, *More Gays Seek Marriage Licenses: County Clerks Stop Joking, Start Fretting*, ADVOCATE, Dec. 20, 1972, at 18 (discussing two men in Texas who, unlike Ert and Molina, were refused a license altogether, as well as two Arkansas women who were denied a license in Oklahoma); Rob Cole, *Two Men Ask Minnesota License for First Legal U.S. Gay Marriage*, ADVOCATE, June 10–23, 1970, at 1; John Finley, *Two Louisville Women Denied Marriage License*, COURIER-J. (Louisville), July 9, 1970, at C1; *Two Men Refused License to Marry*, SEATTLE POST-INTELLIGENCER, Sept. 21, 1971, at A14; Pete Fisher, *Gay Couples Celebrate Engagement at Marriage License Bureau*, GAY, July 5, 1971, at 1, 14 (discussing rejected marriage application in Hartford, Connecticut); *Two Milwaukee Women Fight for Marriage License*, ADVOCATE, Dec. 8, 1971, at 5 (discussing rejected marriage application in Wisconsin); and *Judge Blocks 2 Marriages*, ADVOCATE, Jan. 6–19, 1971, at 6 (discussing two rejected marriage applications in Tampa, Florida). See also TEAL, *supra* note 3, at 289 (discussing a same-sex civil marriage ceremony performed in 1970 at the Southbend England Registrar’s Office); *Two L.A. Girls Attempt First Legal Gay Marriage*, ADVOCATE, July 8–21, 1970, at 1, 5 (discussing attempt to marry civilly pursuant to a law recognizing religious solemnizations).

5. The Wisconsin suit was dismissed because the plaintiffs, two African-American women, did not answer the Milwaukee County Clerk’s motion to dismiss. See *Burkett v. Zablocki*, 54 F.R.D. 626 (E.D. Wis. 1972).

6. In Texas, after Wharton County Clerk Marek Deflin twice refused to file the license that Ert and Molina had secured in Houston, the couple filed a writ of mandamus in state district court. When the writ was denied, Ert and Molina appealed to the Court of Civil Appeals. See Shivers, *More Gays Seek Marriage Licenses*, *supra* note 4, at 18. The appellate court presumably affirmed the denial, but it did so without a published opinion and (so far as this author can ascertain) without sparking any further media coverage.

7. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *aff’d*, 409 U.S. 810 (1972).

8. *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973).

9. *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974), *appeal denied*, 84 Wash. 2d 1008 (1974).

10. See, e.g., *Adams v. Howerton*, 486 F.Supp. 1119, 1122-1124 (C.D. Cal. 1980) (citing *Baker*, *Jones*, and *Singer* in a decision denying “immediate relative” status, for immigration purposes, to an Australian citizen who claimed to have married another man in Colorado in 1975); *De Santo v. Barnsley*, 476 A.2d 952, 953, 956 (Pa. Super. Ct. 1984) (citing *Baker*, *Jones*, and *Singer* in a decision holding that two persons of the same sex cannot contract a common-law marriage under Pennsylvania law); *Dean v. District of Columbia*, 653 A.2d 307, 315-16 (D.C. 1995) (citing *Baker*, *Jones*, and *Singer* in a decision upholding denial of marriage license to two men); *Goodridge v. Dep’t of Pub.*

and about the movement that inspired them.

The *Baker*, *Jones*, and *Singer* decisions were not, in fact, courts' first words on the legality of same-sex marriage. As early as 1682, celebrated English singer Arabella Hunt obtained an annulment of her marriage to one "James Howard" after a jury of midwives confirmed the latter to be a "perfect woman in all her parts."¹¹ Centuries later, and just one year before the *Baker* case commenced in Minneapolis, another English judgment nullified the marriage of a post-operative male-to-female transsexual on the ground that "sex," construed as chromosomal sex, "is clearly an essential determinant of the relationship called marriage," which "is and always has been recognised as the union of man and woman."¹²

To speak of *Baker*, *Jones*, and *Singer* as "the first same-sex marriage cases"¹³ is therefore to notice something other than the novelty of the basic question they raised about who may and may not marry. These lawsuits were firsts because they framed that question not defensively but offensively, in constitutional terms, just as gay rights advocates would do with greater success in such landmark cases as *Baehr v. Lewin*,¹⁴ *Goodridge v. Department of Public Health*,¹⁵ and *United States v. Windsor*.¹⁶

Yet *Baker*, *Jones*, and *Singer* were more than mere precursors to *Baehr*, *Goodridge*, and *Windsor*.¹⁷ Notwithstanding some basic similarities of legal form and rhetoric, marriage litigation in the age of gay liberation was a very different enterprise than marriage litigation in the age of gay rights.

Health, 798 N.E.2d 941, 991, 1004 (Mass. 2003) (Cordy, J., dissenting) (citing *Baker* and *Singer* in an opinion arguing that the Massachusetts Constitution does not compel recognition of same-sex marriages); *Conaway v. Deane*, 932 A.2d 571, 599, 601, 602, 604, 619, 628, 631 (Md. 2007) (citing *Baker*, *Jones*, and *Singer* in a decision upholding Maryland's statutory prohibition of same-sex marriage); *Windsor v. United States*, 699 F.3d 169, 192, 199, 206 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013) (Straub, J., dissenting in part and concurring in part) (citing *Baker*, *Jones*, and *Singer* in an opinion arguing for the constitutionality of Section 3 of the federal Defense of Marriage Act); *DeBoer v. Snyder*, 2014 WL 5748990, at *5-7 (6th Cir. Nov. 6, 2014) (explaining at length why the U.S. Supreme Court's summary affirmance in *Baker* remains binding precedent even after the Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), which invalidated a key provision of the federal Defense of Marriage Act).

11. Patricia Crawford & Sara Mendelson, *Sexual Identities in Early Modern England: The Marriage of Two Women in 1680*, 7 GENDER & HISTORY 362, 364-65 (1995).

12. *Corbett v. Corbett*, [1971] P. 83 at 105-06 (Eng.).

13. See, e.g., Michael Klarman, Op-Ed., *The Court of Public Opinion*, L.A. TIMES, Aug. 15, 2010, at A31.

14. 852 P.2d 44 (Haw. 1993) (holding that same-sex couples' challenge to Hawaii's marriage laws raised a colorable claim of unconstitutional sex discrimination).

15. 798 N.E.2d 941 (Mass. 2003) (holding that same-sex couples are entitled to marry under the Massachusetts Constitution).

16. 133 S. Ct. 2675 (2013) (invalidating provision of the federal Defense of Marriage Act that withheld federal recognition of otherwise valid same-sex marriages).

17. Cf. Scott Barclay & Shauna Fisher, *Cause Lawyers in the First Wave of Same Sex Marriage Litigation*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 84, 89 (Austin Sarat & Stuart A. Scheingold eds., 2006) (arguing that the *Singer* litigation "was a necessary predecessor" of marriage cases "thirty years later—necessary not only to literally stake a claim upon the validity of the idea in the general public, but also to allow gay and lesbian individuals to decide whether marriage was a path they really wanted to pursue.").

One obvious distinction is that these first cases stood no chance of winning.¹⁸ Except in moments of extraordinary bombast or naïveté, neither the litigating couples nor their attorneys expected the lawsuits to succeed in any conventional sense.¹⁹ To claim a right to marry a same-sex partner in the early 1970s was necessarily to seek something other than a favorable judgment in court and a license from city hall. What was that something? Where, if not to the altar, were the first gay marriage cases supposed to lead?

This Article proposes that marriage litigation in the wake of Stonewall had much more to do with gay liberation generally than with gay marriage specifically—which is not to deny that its expressive power derived precisely from marriage’s status as a foundational structure of sexual and family relations. Indeed, the *Baker*, *Jones*, and *Singer* cases deployed the symbolism of marriage to proclaim homosexuality’s equality, legal and moral, in a society that almost ubiquitously criminalized its practice.²⁰ They vividly protested the traditional gender roles that gay liberationists located at the heart of their oppression and that marriage, at the time, not only fostered but legally prescribed.²¹ They provided a platform from which to critique other aspects of marriage, such as the rule of monogamy and the state’s coercive, intrusive preference for a particular form of intimate association. And perhaps most importantly, these cases were sensational advertisements of gay people, gay relationships, and the

18. See MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 22 (2013) (“Whether or not same-sex couples wanted marriage, they were not going to get it in the 1970s. This was a decade of incremental progress for gay rights, and gay marriage was a radical reform, not an incremental one.”). To say that the lawsuits were doomed to fail is not to suggest that they were frivolous or brought in bad faith. All of the plaintiffs’ legal arguments expressed genuine grievances against marriage as a heterosexual institution, see *infra* Part II.B, and some are now the stuff of judicial opinions, like the claims that same-sex marriage bans deny equal protection of the laws and violate “the freedom to marry” announced in *Loving v. Virginia*, 388 U.S. 1 (1967). See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (accepting both claims); *In re Marriage Cases*, 183 P.3d 384, 440-45 (2008) (same).

19. See *infra* notes 453-460 and accompanying text. Cf. Edward Stein, *The Story of Goodridge v. Department of Public Health: The Bumpy Road to Marriage for Same-Sex Couples*, in *FAMILY LAW STORIES* 27, 33 (Carol Sanger ed., 2007) (“Baker and McConnell were publicly confident about the likelihood that they would be allowed to marry, but they must have known that their lawsuit was a long shot.”).

20. See Joshua Dressler, *Gay Teachers: A Disesteemed Minority in an Overly Esteemed Profession*, 9 RUTGERS-CAM. L.J. 399, 404 (1978) (“As recently as 1971, forty-eight of the fifty states punished copulation *per anum* and/or *per os*.”). On sodomy law repeals in Illinois (1961) and Connecticut (1969), see WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS 124-27, 161-63 (2008). Sodomy prohibitions were the cornerstone of a larger system of criminalization. See William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 857 (1997) (“[M]ost arrests of gay people occurred under broadly phrased vagrancy, lewdness, disorderly conduct, and solicitation laws.”).

21. For thoughtful observations on this aspect of the *Baker* case, see Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. Rev. 1199, 1213-16 (2010); and Peggy Pascoe, *Sex, Gender, and Same-Sex Marriage*, in IS ACADEMIC FEMINISM DEAD? 86, 92-101, 110 (Soc. Justice Grp. at the Ctr. for Advanced Feminist Studies, Univ. of Minn. ed., 2000). See also GEORGE CHAUNCEY, WHY MARRIAGE? 90 (2004) (noting, in a discussion of *Baker* and *Jones*, that gay marriage “would . . . undermine sex roles.”).

nascent gay liberation movement.²²

From the standpoint of the early twenty-first century, it is surprising and ironic that marriage litigation was once “a path to liberation,”²³ as that goal was understood in the months and years after Stonewall. Because marriage was antithetical to gay liberation’s ideals of sexual freedom, sex equality, gender nonconformity, and genuinely alternative lifestyles,²⁴ the first gay marriage cases are today widely considered anachronistic—out of step with the radical spirit of their times, yet consonant with the liberal, assimilationist ethos of later generations.²⁵ Ideologically diverse writers across a range of disciplines portray the *Baker*, *Jones*, and *Singer* plaintiffs as audacious but regressive renegades,²⁶ marginal to and marginalized by the broader movement,²⁷ having less in common with their contemporaries than with the legions of couples who, since the early 1990s, have clamored with perfect sincerity for the dignity of civil matrimony.²⁸ Like the Supreme Court’s “neat and questionable” account of the messy facts underlying *Lawrence v. Texas*, the 2003 case that held sodomy laws unconstitutional, this “stubborn myth” about the early marriage lawsuits

22. Thus it is not merely to avoid anachronism that this article generally speaks of “gay marriage” rather than “same-sex marriage” or “sex-neutral marriage.” “Gay marriage” better captures the idea that these lawsuits proposed an arrangement, not necessarily legal, that was different from “straight marriage”—in Jack Baker’s words, “an alternative to the nuclear family.” Randy Wicker, “*Couples Night*” on *David Susskind*, *GAY*, Mar. 12, 1973, at 10 (quoting Baker’s nationally televised interview with David Susskind).

23. Eitelbrick, *supra* note 2.

24. See *infra* Part I.

25. For an influential articulation of this ethos, see, for example, ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* (1995).

26. See WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE?* 17 (2006) (“Gay radicals viewed the formal equality sought by gay-liberals such as Baker and McConnell as reactionary.”); *id.* at 16 (“Once lonely pioneers, Baker and McConnell now enjoy the company of many other committed same-sex couples.”); MICHAEL WARNER, *THE TROUBLE WITH NORMAL* 87-88 (1999) (arguing that, despite the issue’s “theatrical appeal” and “the strength of [Jack] Baker’s reasons” for claiming a right to marry, “gay men and lesbians resist[ed] marriage over the twenty-five-year period of their most defiant activism[.]”).

27. CHAUNCEY, *supra* note 21, at 88 (“[I]n the heady early days of gay liberation, a handful of same-sex couples filed lawsuits insisting that the state [issue them marriage licenses]. The courts dismissed their petitions as preposterous, and most lesbian and gay activists agreed.”); Stein, *supra* note 19, at 32-33 (“[F]ew members of the LGBT community reacted to the post-Stonewall climate the way Baker and McConnell, Jones and Knight, and Singer and Barwick did, that is, by trying to get married. . . . In the 1970s, the idea of same-sex marriage was outlandish to most Americans [and] even many LGBT people were opposed to [it] or thought it should not be a priority.”); see also KLARMAN, *supra* note 18, at 20-22 (“The queer politics of the 1970s embraced slogans such as ‘Smash the Nuclear Family’ and ‘Smash Monogamy.’ Marriage did not comfortably fit into that picture.”). Klarman holds that “most gay activists in the early 1970s were not much interested in marriage,” *id.* at 22, and he cites “a detailed position paper for the ACLU in Washington State calling for the abolition of marriage,” *id.* That paper goes on, however, to recommend that “until society is ready to abolish the official status of marriage, . . . relief from its discriminatory aspects can be obtained by,” *inter alia*, recognizing homosexuals’ “right to marry.” TIM MAYHEW, *POSITION STATEMENT ON MARRIAGE* (Dec. 5, 1971).

28. See ESKRIDGE & SPEDALE, *supra* note 26, *passim* (referring frequently to Kentucky plaintiffs Jones and Knight and especially to Minnesota plaintiffs Baker and McConnell, and comparing them to more recent litigants for gay marriage).

has polemical utility.²⁹ Those who champion the gay movement's drift from "sexual liberty to civilized commitment" proffer their sanitized narrative as evidence of an ostracized minority's maturation toward respectability and of marriage's timeless and all-the-more heartrending allure to same-sex couples.³⁰ Meanwhile those who see nothing emancipating in the "freedom to marry" invoke gay liberation's supposed hostility to these first cases as proof of a later generation's "repudiation of queer culture's best insights."³¹ At loggerheads politically, the two camps are, in this respect, on much the same page historiographically.³²

It is no accident that a study positing a thick and often friendly relationship between gay liberation and marriage litigation is the first to thoroughly examine *Baker*, *Jones*, and *Singer* in tandem. Detailed juxtaposition of the various plaintiffs' lives and lifestyles, their political communities and commitments, their statements to the mainstream media and their treatment in the gay press, allows patterns to emerge that disrupt easy assumptions about the past and its relation to the present. Prior discussions of Stonewall-era marriage litigation have tended to focus primarily or exclusively on *Baker*, the only case whose plaintiffs are still a couple today.³³ Marriage enthusiasts in particular do well to downplay *Jones* and *Singer*. They make no mention of the Kentucky litigants' role in "spark[ing] a novel militancy in Louisville's homosexuals,"³⁴ and they say nothing of the women's involvement in Louisville's sexual underground. The Washington plaintiffs, John Singer and Paul Barwick, are ignored altogether.³⁵ These men were steadfast political comrades but only occasional lovers who called marriage "wrong" and "oppressive" from the standpoint of their "revolutionary morality."³⁶ As Singer explained, "we

29. DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* xiv (2012).

30. See WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996). Historian George Chauncey also says that marriage has long been "an aspiration for large numbers of lesbians and gay men" and that, even in the 1970s, "most lesbians and gay men looked for a steady relationship," but he distances himself from the claim that prioritizing access to marriage "represents a 'maturation' in the movement or in the individuals involved."). CHAUNCEY, *supra* note 21, at 94-95.

31. See WARNER, *supra* note 26, at 91.

32. While this Article denies that the first wave of marriage litigation was antithetical to gay liberation's radical politics, it affirms other aspects of Michael Warner's take on these early cases. Warner rightly observes that "[t]he mere posing of the issue was a jolt. It made the heterosexuality of marriage visible, to many people, for the first time. It drew attention to the exclusions entailed by marriage, through provisions for inheritance, wrongful death actions, tax rates, and the like. And it advanced a claim of equality that had undeniable appeal." *Id.* at 87.

33. See, e.g., KLARMAN, *supra* note 18, at 18-19; WARNER, *supra* note 26, at 87-90. For notable exceptions to this trend, see Catherine Fosl, *It Could Be Dangerous! Gay Liberation and Gay Marriage, Louisville, Kentucky, 1970*, 12 OHIO VALLEY HISTORY 46 (2012); and Barclay & Fisher, *supra* note 17 (comparing *Singer* to more recent marriage litigation in Washington State).

34. Frank Clifford, *Louisville Gets Its Own "Gay Liberation Front: "Homosexuals Unite to Seek Equality*, LOUISVILLE TIMES, July 10, 1970.

35. See, e.g., CHAUNCEY, *supra* note 21; ESKRIDGE, *supra* note 30, at 265 (mentioning *Singer* once, in an Appendix listing relevant cases); ESKRIDGE & SPEDALE, *supra* note 26; KLARMAN, *supra* note 18.

36. "Non-Believers" *Seek Marriage License*, ADVOCATE, Nov. 10, 1970, at 12; see also John

would just as soon abolish marriage.”³⁷ Excavating such details evidently does not advance “the cause of marriage equality.”³⁸ Better to conjure images of a “dashing” Jack Baker and a “dimpled” Michael McConnell, “old-fashioned romantics in the Midwestern tradition” who wanted nothing more than to “live happily ever after.”³⁹ Better not to mention that even these plaintiffs were proselytizers for non-monogamy⁴⁰ who sought, in McConnell’s words, to “turn the whole institution of marriage upside down.”⁴¹

Like the *San Francisco Chronicle* reporter who in 1970 cited *Baker* and *Jones* as evidence of a “gay marriage boom,” commentators on these early cases have failed to adequately distinguish between gay marriage litigation and gay marriage *tout court*.⁴² To be sure, the two phenomena overlapped in practice insofar as the Minnesota and Kentucky plaintiffs were among the thousands of couples who sought in the wake of Stonewall to solemnize their relationships in private ceremonies.⁴³ The two phenomena also overlapped in their political implications insofar as some of those private unions were flamboyantly public affairs and, to that extent, shared with *Baker*, *Jones*, and *Singer* a certain brazenness about homosexuality.⁴⁴

Singer, *Together*, SEATTLE GAY LIBERATION FRONT NEWSL., July 2, 1970, at 2.

37. “Non-Believers” *Seek Marriage License*, *supra* note 36, at 12.

38. William N. Eskridge Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275, 278 (2013) (referring to “the cause of marriage equality”).

39. ESKRIDGE & SPEDALE, *supra* note 26, at 5, 15, 251.

40. See Lars Bjomson, *New President Greeted by “So What,”* ADVOCATE, May 12–25, 1971, at 6, 14.

41. KAY TOBIN & RANDY WICKER, *THE GAY CRUSADERS* 144 (1972).

42. See Rob Cole, *Gay Marriage “Boom:” Suddenly, It’s News*, ADVOCATE, Aug. 6–18, 1970, at 6, 7. Marriage was hardly the only issue where such distinctions could be—and were—drawn. See ANNE ENKE, *FINDING THE MOVEMENT: SEXUALITY, CONTESTED SPACE, AND FEMINIST ACTIVISM* 25 (2007) (describing protests against a Minneapolis bar’s refusal to admit unaccompanied women and noting, in relation to the picketers’ failure to return, that “it was worth making a statement at the bar, but the bar itself was not worth fighting for.”).

43. See, e.g., Dick Leitsch, “*I Now Pronounce You Man and Husband!*,” GAY, Jan. 4, 1971, at 7 (“Not a week goes past but at least two couples call Mattachine seeking a clergyman to perform marriage ceremonies over them.”). Such ceremonies became more popular and public after Stonewall, but they have a long and varied history; see also, for example, JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* (1994); and LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA* 73 (1991) (discussing same-sex marriages in Harlem in the 1920s).

44. As Michael Warner has noted, “gay marriage—at least, gay marriage *ceremonies*—would have a cultural impact similar to that of coming out. . . . *I’m gay! I do!*” WARNER, *supra* note 26, at 131. Yet Warner might be the first to observe that such rites were often staged before a particular kind of “counterpublic.” MICHAEL WARNER, *PUBLICS AND COUNTERPUBLICS* 56 (2005) (defining a counterpublic in terms of “tension with a larger public” and “dispositions [and] protocols” that “contravene the rules obtaining in the world at large”). In venues like the Metropolitan Community Church, which Reverend Troy Pery founded in 1968 as “a church for homosexuals,” or in cocktail-bar weddings like that of Kentucky plaintiffs Marjorie Jones and Tracy Knight, the audience would have been largely or exclusively gay. See Transcript of Evidence at 36, *Jones v. Hallahan*, No. CR 140,279 (Jefferson Cir. Ct., Ky. Dec. 14, 1970) [hereinafter *Jones* Transcript of Evidence] (“[B]y our own homosexual colony we were married by Gay Liberation.”); John Dart, *A Church for Homosexuals*, L.A. TIMES, Dec. 8, 1969, at C1.

But where Stonewall-era “mock marriages” and “covenant services”⁴⁵ were paradigmatically “efficacious performances,”⁴⁶ occasions for earnest promises of love and commitment (if only sometimes of permanence and sexual fidelity),⁴⁷ the first gay marriage cases were deliberately “failed performances,” clearly unable to achieve the legal goal they ostensibly sought.⁴⁸ As with so many other fights at that moment in gay history, “winning through losing,” to use Douglas NeJaime’s expression,⁴⁹ was these lawsuits’ best and only hope.⁵⁰

* * *

Glorious Precedents continues one author’s effort to identify and amplify some of the more disruptive aspects of the increasingly innocuous claim to gay marriage.⁵¹ The Article is in that sense directly responsive to the political context in which it was written. At the same time it eschews a “retrospective approach” to history—the tendency to interpret the past as a

45. DEL MARTIN & PHYLLIS LYON, *LESBIAN/WOMAN* 99 (1991).

46. See RICHARD SCHECHNER, *From Ritual to Theatre and Back: The Structure/Process of the Efficacy-Entertainment Dyad*, 26 *EDUC. THEATRE J.* 455, 466 (1974), reprinted in *ESSAYS ON PERFORMANCE THEORY* 63, 74 (1977) (describing an efficacious performance as one that “effects what it celebrates”—where “[t]he mode of achieving ‘real results’” is the performance itself); see also J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 42-43, 130 (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975) (taking the marriage vow “I do” as an example of a “performative utterance” that, when pronounced in the appropriate contexts, effects the result it speaks).

47. See SIDNEY ABBOTT & BARBARA LOVE, *SAPPHO WAS A RIGHT-ON WOMAN: A LIBERATED VIEW OF LESBIANISM* 91 (1972) (“A gay ceremony recognizes an existing relationship and usually does not entail vows of faithfulness or permanency unless the couple wishes them to be included.”); SYLVAIN LAROCQUE, *GAY MARRIAGE: THE STORY OF A CANADIAN SOCIAL REVOLUTION* 15 (Robert Chodos et al. trans., James Lorimer & Co. 2006) (2005) (quoting Chris Vogel, who in 1974 attempted to legally marry his same-sex partner, as noting that “[t]he minister didn’t pronounce us man and wife, but as long as love should last”); TOBIN & WICKER, *supra* note 41, at 26 (noting Rev. Troy Perry’s use of the phrase “till [sic] death do us part” only upon request: “I feel it’s almost hypocritical. Realistically, I think that a marriage ceremony should read that the two should remain faithful to each other as long as there is love.”).

48. See THOMAS ELSAESSER, *GERMAN CINEMA: TERROR AND TRAUMA SINCE 1945* 156 (2014) (likening “failed performance” to the psychological phenomenon of parapraxis, “an apparent mistake of speech, action or behavior, which, on closer inspection, reveals another layer of meaning.”). I thank Marc Boucai for encouraging me to consider the *Baker*, *Jones*, and *Singer* cases in these terms.

49. Douglas NeJaime, *Winning Through Losing*, 96 *IOWA L. REV.* 941 (2011).

50. Gay liberationists invoked the notion of “winning through losing” in a variety of ways and circumstances. See, e.g., ABBOTT & LOVE, *supra* note 47, at 130 (noting Carol Turner’s belief that “we may have won through losing” when the National Organization of Women (NOW) was forced to confront the issue of lesbianism after Turner and other gay women were “purged” in January 1971 from leadership positions in NOW’s New York chapter); Arthur Evans, *How to Zap Straights*, in *THE GAY LIBERATION BOOK* 114 (Len Richmond & Gary Noguera eds., 1973) (discussing confrontational tactics that “present the oppressor with a dilemma: either capitulate, or win by resorting to violence. In either case, the Gay Liberation movement wins—for violence against gays, especially when well-publicized, always politicizes more gays.”); Dennis Altman, *A Young Australian Speaks His Mind About Gay Liberation*, *VECTOR*, Oct. 1970, at 38 (arguing that “the real significance of Gay Liberation” was its refusal, despite “a loss of immediate political effectiveness,” to “conform” or “to play by the rules”).

51. See Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 *SAN DIEGO L. REV.* 415 (2012) (arguing that same-sex marriage bans have the purpose and effect of channeling individuals into heterosexuality and therefore substantially burden their constitutional liberty, under *Lawrence v. Texas*, 539 U.S. 558 (2003), to choose homosexual relations and relationships).

mere prelude to, or rehearsal for, the present.⁵² Drawing on extensive archival research and on personal interviews with key players in each of the first marriage cases, it presents *Baker*, *Jones*, and *Singer* as they were experienced and understood in their own time, not as early landmarks on a road leading ineluctably to “marriage equality.”

Part One, “Gay Liberation,” surveys the movement’s basic tenets, goals, and tactics in the brief period under consideration—roughly 1969 to 1974. It identifies points of ideological and strategic affinity between militants “hell-bent on revolution,”⁵³ radical reformers,⁵⁴ and lesbian feminists,⁵⁵ emphasizing those facets of gay liberation that were most relevant to the motivations, conduct, and reception of marriage litigation in the years after Stonewall. Part One shows that gay liberationists, though far from “monochromatic,”⁵⁶ generally advocated gay equality, sexual freedom, disruption of the gender binary, and opposition to patriarchy and the nuclear family; and they tended to favor confrontational tactics designed to empower participants and politicize other gay people.

Part Two, “Marriage Litigation,” describes in detail the *Baker*, *Jones*, and *Singer* plaintiffs, their local contexts, their deep and multiple involvements with the gay liberation movement, and their first steps, via the county clerk’s office, toward litigation. It then summarizes the cases’ distinctly legal aspects: arguments raised and rejected, decisions rendered and appealed. Together these sections confirm Edward Stein’s observation that the first marriage cases, unlike their recent counterparts, were “bottom-up” enterprises undertaken without a realistic hope of winning.⁵⁷

Part Three, “Married to the Movement,” turns squarely to the

52. See Risa Goluboff, *Lawyers, Law, and the New Civil Rights History*, 126 HARV. L. REV. 2312, 2320 (2013) (advocating “a prospective rather than retrospective approach to the past”).

53. TEAL, *supra* note 3, at 104 (describing the more radical members of New York City’s Gay Liberation Front).

54. “Radical reformers” like Jack Baker and Michael McConnell should be distinguished from the “civil libertarian and reformist” activists who were, essentially, old-school homophile activists with “updated language” and greater tolerance of publicity. LAUD HUMPHREYS, *OUT OF THE CLOSETS: THE SOCIOLOGY OF HOMOSEXUAL LIBERATION* 103 (1972). New York City’s Gay Activists Alliance, which splintered in 1970 from the revolutionary Gay Liberation Front, was arguably the organizational paradigm of radical reformism. A pamphlet called *The GAA Alternative* explained that “[t]he basic principle underlying [GAA’s] activism” was “commitment to bring about change in the present, rather than theorize about change in the distant future.” Yet GAA’s “militant intent” was uncompromising. Because the organization’s Constitution declared a “right to treat and express our bodies as we will, to nurture them, to display them, to embellish them solely in the manner we ourselves determine,” it promised that “[n]o member of the group would be asked to stay behind the scenes because of his or her style of dress.” Because the Constitution declared a right “to express our feelings in action, . . . to make love with anyone, any way, any time, provided that the action be freely chosen by all persons concerned,” it resolved that members should not be prohibited from “engag[ing] in sexual solicitation in public.” GAY ACTIVISTS ALLIANCE, PAMPHLET, *THE GAA ALTERNATIVE* (1973), at 1-3.

55. For an overview of the lesbian feminist movement in the 1970s, see TOBY MAROTTA, *THE POLITICS OF HOMOSEXUALITY* 227-303 (1981).

56. HUMPHREYS, *supra* note 54, at 103 (1972). As one of the Seattle plaintiffs wrote to some of his fellow activists, “[W]e certainly haven’t agreed on many aspects of exactly what Gay liberation entails.” Letter from Fayege Singer to the Bd. of the Seattle Gay Alliance (June 11, 1973).

57. Stein, *supra* note 19, at 28.

relationship between gay liberation and marriage litigation, first by considering the sincerity of each plaintiff couple's desire for civil marriage and then by elaborating the political reasons they all shared for litigating the issue. Examining local reactions in Minneapolis, Louisville, and Seattle, Part Three goes on to show that opposition to the lawsuits came not from fellow gay liberationists but from more conservative and closeted homosexuals in each city. Moving from the local to the national stage, it then assesses the lawsuits' surprisingly if not universally supportive reception in other quarters of the gay liberation movement.

The Article's Conclusion begins by situating the Stonewall-era marriage cases within a longstanding scholarly conversation about the multifarious utility of litigation, even losing litigation, to social movements. It then specifies how the content and style of activism around same-sex marriage have changed since legal victory became a credible possibility, and it tentatively suggests some causes for that dramatic transformation. Finally, it proposes explicitly what the rest of the Article conveys implicitly—that the cultural meanings, social effects, and political implications of gay marriage transcend the rhetoric and expectations of its current advocates.

I. GAY LIBERATION

A. Ideals and Aspirations

About a month before Jack Baker and Michael McConnell “donned their best suits” and appeared in the Hennepin County Clerk's office,⁵⁸ John Howard, a sociology professor at Rutgers University, reported to colleagues in his field on the recent emergence of gay liberation.⁵⁹ His lecture emphasized two “turning points”: the founding in April 1969 of Homosexuals Intransigent at City College of New York; and, of course, the Stonewall riots of June 1969 in New York's Greenwich Village.⁶⁰ According to Howard, both events were representative of the “essential elements differentiating . . . gay liberation” from the homophile movement of prior decades—namely, “open declaration of identity and tactical

58. TOBIN & WICKER, *supra* note 41, at 145.

59. John Howard, Address at the Meetings of the Pacific Sociological Association: The Transformation of Stigma: An Analysis of the Gay Liberation Movement (Apr. 1970). A modified version of Howard's lecture was published under the same title in *THE CUTTING EDGE: SOCIAL MOVEMENTS AND SOCIAL CHANGE IN AMERICA* 121 (John R. Howard ed., 1974).

60. Howard's version of events downplayed comparably important developments in other parts of the country, especially Los Angeles. See TEAL, *supra* note 3, at 40 (“What some gay militants do not recognize today is that they are, in certain respects, . . . the final grassroots development of an awakening that was comparably thrilling when, in 1957, One, Inc. [in Los Angeles], published the words ‘I'm glad I'm Homosexual’ on its magazine cover and many subscribers canceled; or when, on February 11 a decade later, several Angeleno [sic] homosexual organizations coordinated the Black Cat demonstrations with actions by other oppressed minorities.”). For further details on the Black Cat protest and other acts of gay resistance in Los Angeles during this period, see LILLIAN FADERMAN & STUART TIMMONS, *GAY L.A.* (2006).

militance [sic].”⁶¹

In the “imperative to come out,”⁶² a demand so strong that voting members of Homosexuals Intransigent were prohibited from ever denying their sexual orientation,⁶³ the personal and the political merged with special poignancy.⁶⁴ The very vocabulary of coming out—“I am gay”—affirmed one’s sexuality not only descriptively but normatively. “Gay” was “a word of confrontation,” a declaration that “I define myself—you do not define me.”⁶⁵ “Relatively free from the stigma attached to” the clinical term “homosexual,” this synonym for “joyful” and “carefree” implied that the ability to feel homoerotic attractions is “as great a gift as the capacity to have heterosexual desires.”⁶⁶ To come out was therefore to proclaim that “gay is good,”⁶⁷ that “Gay is proud!”⁶⁸—that, indeed, “Gay Love is Beautiful! Gay Love is Desirable! Gay Love is Essential for a Sane Society!”⁶⁹

The leap from homosexuality’s goodness and beauty to its necessity “for a sane society” suggests how far-reaching were gay liberation’s aims and imagined consequences. True, the movement’s “primary orientation” was toward the plight of gay people;⁷⁰ the first Gay Liberation Front (GLF), organized in New York City, described itself as “a militant coalition of radical and revolutionary homosexual men and women” that “exists to fight the oppression of the homosexual as a minority group, and to demand the right to the self-determination of our own bodies.”⁷¹ But these foremost priorities were thought attainable “only . . . within the context of a much broader sexual liberation,”⁷² not least because the “minority group” in question was far more numerous than it appeared.

61. Howard, *supra* note 59, at 14; *see also* Altman, *supra* note 50, at 38 (“The older homophile movements emerged out of Eisenhower America . . . and their great cry was respectability. Time and patience and judicious prodding, they felt, would win the homosexual his place in the sun. . . . Gay liberation represents a new style that is disinterested [sic] in respectability and unconcerned with ‘passing’: ‘I’M GAY AND I’M PROUD’—OUT OF THE CLOSETS AND INTO THE STREETS!”).

62. John D’Emilio, *Cycles of Change, Questions of Strategy: The Gay and Lesbian Movement After Fifty Years*, in *THE POLITICS OF GAY RIGHTS* 31, 90 (Craig A. Rimmerman et al. eds., 2000).

63. Howard, *supra* note 59, at 12.

64. John D’Emilio, *After Stonewall*, in JOHN D’EMILIO, *MAKING TROUBLE* 234, 244 (“[C]oming out . . . embodied the insight that ‘The personal is political’ as no other single act could.”). As Nan Hunter later put it, “[t]o be openly gay, when the closet is an option, is to function as an advocate.” Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1696 (1993).

65. PETER FISHER, *THE GAY MYSTIQUE* 233 (1972).

66. Dressler, *supra* note 20, at 399 n.1.

67. The expression “Gay Is Good” is widely attributed to Frank Kameny, who claimed to have been inspired by a 1968 television broadcast of Stokely Carmichael leading demonstrators in the chant, “Black is Beautiful.” *See* Lisa Neff, *History Makers*, *ADVOCATE*, Jan. 21, 2003, at 30. The slogan became a mantra of gay liberation.

68. TEAL, *supra* note 3, at 79 (citing *A Thousand Times, No!*, *GAY FLAMES*, no. 2 (1969)); *see also* FISHER, *supra* note 65, at 232 (“*Gay is good, gay is proud.*”).

69. Advertisement, *Seattle Gay Liberation Front* (1970).

70. TEAL, *supra* note 3, at 51 (quoting activist Seth Overseth).

71. 10 GLF NEWS (Gay Liberation Front, N.Y.) (c. Feb. 1970).

72. Dennis Altman, *Introduction*, in *THE GAY LIBERATION BOOK*, *supra* note 50, at 58.

Gay liberationists took for granted that sanctions and stigma force many people into exclusive heterosexuality, and many also believed that “the great majority of ‘homosexuals’ are not even conscious of being such.”⁷³ Others rejected the naturalness of heterosexuality and homosexuality alike: “Given an opportunity to grow naturally, without arbitrary and distorting influence, most individuals would develop into true ambisexual wholeness.”⁷⁴

Advocating the liberation of homosexuality, even as distinct from the liberation of homosexuals, was one way for gay liberationists to “Fight Repression of Erotic Expression,” the declared goal of the University of Minnesota student group—FREE—that marriage plaintiff Jack Baker led in his first year of law school.⁷⁵ But it was hardly the only way. In *Sexual Politics* (1969), a work widely celebrated and deeply influential among gay liberationists,⁷⁶ Kate Millett described the range of battles that a true “sexual revolution” would have to win:

A sexual revolution would require, perhaps first of all, an end of traditional sexual inhibitions and taboos, particularly those that most threaten patriarchal monogamous marriage: homosexuality, “illegitimacy,” adolescent, [and] pre- and extra-marital sexuality. . . . The goal . . . would be a permissive single standard of sexual freedom, and one uncorrupted by the crass and exploitative economic bases of traditional sexual alliances. Primarily, however, a sexual revolution would bring the institution of patriarchy to an end, abolishing the ideology of male supremacy and the traditional socialization by which it is upheld in matters of status, role, and temperament. . . . A related event here would be the re-examination of the traits categorized as “masculine” and

73. GUY HOCQUENGHEM, *HOMOSEXUAL DESIRE* 44 (Daniella Dangoor trans., Duke Univ. Press 1993) (1972); see also JACK ONGE, *THE GAY LIBERATION MOVEMENT* 33 (1971) (“Gay people are feared because they remind heterosexuals they have repressed their sexual desires toward members of the same sex.”); The Red Butterfly, *Comments on Carl Wittman’s A Gay Manifesto* (1970), reprinted in *WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS* 393 (Mark Blasius & Shane Phelan eds., 1997) (“We want to reach the homosexuals entombed in you.”); Allen Young, *Foreword*, in *AFTER YOU’RE OUT: PERSONAL EXPERIENCES OF GAY MEN AND LESBIAN WOMEN* 8 (Karla Jay & Allen Young eds., 1975) (“Every straight man is a target for gay liberation.”).

74. *The Roots of Gay Oppression*, SEATTLE GAY LIBERATION FRONT NEWSL., June 27, 1970, at 1.

75. FREE (FIGHT REPRESSION OF EROTIC EXPRESSION), LEAFLET, A MANIFESTO (1969), available at <https://www.lib.umn.edu/sites/default/files/images/freedoc.preview.jpg> [hereinafter FREE MANIFESTO]. The acronym apparently did not originate in Minneapolis. See, e.g., “Marcus,” *Fight Repression of Erotic Expression: Our Editorial Policy*, S.F. FREE PRESS, Oct. 16-31, 1969, at 3.

76. KATE MILLETT, *SEXUAL POLITICS* (1969); see, e.g., ABBOTT & LOVE, *supra* note 47, at 60 (citing Millett’s account of “sex-role stereotyping”); DENNIS ALTMAN, *THE END OF THE HOMOSEXUAL* 53 (2013) (counting *Sexual Politics* “among the three or four [books] . . . that had a lasting impact on how I saw the new world that seemed to be emerging”); TEAL, *supra* note 3, at 193 (“Millett emphasized that it was morally and humanely necessary for women’s lib to come to terms with gay liberation. . . . [Her] stand served as a rallying point at which lesbians and non-radical women’s lib could at last unite publicly.”); Steven Dansky, *On Anger: The Months After the Stonewall Rebellion*, in *AFTER HOMOSEXUAL: THE LEGACIES OF GAY LIBERATION* 55, 56 (Carolyn D’Cruz & Mark Pendleton eds., 2013) (including *Sexual Politics* among three “classics of essential feminist work” that “totally transformed” gay political consciousness).

“feminine,” with a reassessment of their human desirability. . . .⁷⁷

Millett’s linkage of homophobia and patriarchy was a central premise of gay liberationist thought.⁷⁸ Within the movement, there was widespread consensus, in theory if not always in practice,⁷⁹ that the problems of sex, gender, and sexuality were inextricable. Both gay and women’s liberation stressed the “imperative” to claim “a responsibility”—“control of one’s own body”—hitherto constrained by “the rules of male-dominated society.”⁸⁰ Both movements also spurned “the tyranny of genital identity”⁸¹—the “traditional socialization,” as Millett called it,⁸² of males into masculine men, females into feminine women.⁸³ As Kay Tobin and Randy Wicker observed, “many of today’s gay liberationists . . . call for a total reexamination of society’s suffocating, arbitrary sex roles.”⁸⁴ Indeed, if gay liberation seemed “on the surface” to be “a struggle by homosexuals for dignity and respect,” it was, said Dennis Altman, at its core “a struggle against . . . sexism.”⁸⁵ FREE in Minneapolis concurred. Asked to state in a single sentence what gay liberation was “trying to do,” the group’s leaders

77. MILLETT, *supra* note 76, at 85-86; *see also* ABBOTT & LOVE, *supra* note 47, at 139 (quoting this passage); DENNIS ALTMAN, *HOMOSEXUAL: OPPRESSION AND LIBERATION* 81 (1971) (quoting this passage).

78. *See* John D’Emilio, *Still Radical After All These Years: Remembering Out of the Closets* (1992), *reprinted in* JOHN D’EMILIO, *THE WORLD TURNED* 45, 54-56 (2002) (arguing that “gay liberationists . . . saw the battle against sexism as the very heart of their struggle”); *see also* Guy Hocquenghem, *Towards an Irrecoverable Pederasty*, in *RECLAIMING SODOM* 235 (Jonathan Goldberg ed., Chris Fox trans., Routledge 1994) (1972) (“The homosexual revolt proclaims itself straightaway to be on the side of women.”).

79. *See, e.g.*, Radicalesbians, *Leaving the Gay Men Behind*, 1 *COME OUT!* (Dec. 1970–Jan. 1971), *reprinted in* *OUT OF THE CLOSETS: VOICES OF GAY LIBERATION* 290, 292 (Karla Jay & Allen Young eds., 1972) (noting that many founding members of Radicalesbians “could not affiliate with a male-dominated organization [New York GLF] that was, in large part, sexist.”); John Fish, *The Mad Gay Turkey*, *TRASH* (GLF Newsl., Louisville, Ky.), Jan. 1972, at 2 (describing a national gay liberation meeting where “the white, middle-class males . . . tended to dominate and alienate the women,” who “[e]ventually . . . left the conference.”); Del Martin, *If That’s All There Is*, *ADVOCATE*, Oct. 28–Nov. 10, 1970, at 21-22 (“Goodbye to the male chauvinists of the homophile movement . . . and to gay liberationists whose liberation would only further enslave us.”).

80. ABBOTT & LOVE, *supra* note 47, at 143.

81. *Id.* at 142.

82. MILLETT, *supra* note 76, at 85-86.

83. Some gay men, styling themselves “faggot effeminists,” turned such critiques against their own eroticism, worrying that male homosexuality, “centered on the male bonding ideal,” was “misogynistic and ‘counterrevolutionary’ by definition.” JOHN LOUGHERY, *THE OTHER SIDE OF SILENCE: MEN’S LIVES AND GAY IDENTITIES: A TWENTIETH-CENTURY HISTORY* 327 (1998).

84. TOBIN & WICKER, *supra* note 41, at 10; *see also* RADICALESBIANS, *THE WOMAN-IDENTIFIED WOMAN* (1970), *available at* <http://library.duke.edu/rubenstein/scriptorium/wlm/womid/> (“[L]esbianism, like male homosexuality, is a category of behavior possible only in a sexist society characterized by rigid sex roles.”).

85. Allen Young, *Out of the Closets, Into the Streets* (1971), *reprinted in* *OUT OF THE CLOSETS*, *supra* note 79, at 10; *see also* Gay Liberation Front (L.A.), *A Statement on Gay Liberation 2* (Working Paper, 1970) (“We demand an end to sexism—discrimination because of sex or sexual preference.”); *Statement of the Male Homosexual Workshop, Revolutionary People’s Constitutional Convention* (1970), *reprinted in* *WE ARE EVERYWHERE*, *supra* note 73, at 402 (“Sexism is a belief or practice that the sex or sexual orientation of human beings gives to some the right to certain privileges, powers, or roles, while denying to others their full potential. Within the context of our society, sexism is primarily manifested through male supremacy and heterosexual chauvinism.”).

declared: “Smash cultural and institutional sexism.”⁸⁶

Many gay liberationists sought alliance not only with feminism but with the full range of causes associated with the New Left of the late sixties and early seventies.⁸⁷ Whereas homophile activists of previous decades had quietly sought tolerance for a narrow and largely invisible constituency, the Stonewall generation’s demands for “freedom” and “acceptance” purported to target the same “politico-economic system” challenged by “black panthers, student militants, women’s liberationists and others seeking a dramatic restructuring of the society.”⁸⁸ Across the United States, self-styled “Gay Liberation Fronts”—the name was itself an allusion to the Viet Cong’s National Liberation Front⁸⁹—declared solidarity with “the revolutionary struggles of all oppressed peoples.”⁹⁰ Espousing variants of a Freud- and Marx-inflected philosophy most closely associated with Herbert Marcuse,⁹¹ many gay radicals felt directly invested in the “cause of freedom for all people.”⁹² True sexual liberation, they believed, was antithetical to “the competition and mutual aggression inherent in a capitalist society.”⁹³

Nowhere did feminist and anticapitalist critique combine so forcefully as in gay liberation’s attacks on the “patriarchal capitalist family”⁹⁴—“the

86. Editorial, “Smash Sexism!” *Sexism Destroys People*, MPLS FREE (Newsl., MPLS FREE: Gay Liberation of Minnesota, Student Grp., Univ. of Minn.), c. Nov. 1970, at 2.

87. Hence the Los Angeles GLF’s demand for “the full right of participation of gays in the people’s revolutionary army.” Gay Liberation Front (L.A.), *supra* note 85, at 2. On some groups’ determination to “avoid[] involvement in any program of action not obviously relevant to homosexuals,” see TEAL, *supra* note 3, at 126-30.

88. Howard, *supra* note 59, at 15; see also Len Richmond & Gary Noguera, *Random Notes from the Editors*, THE GAY LIBERATION BOOK, *supra* note 50, at 13 (“We have a commitment not just to homosexual liberation but to total human liberation. Gay liberation . . . advocates a radical change in society—its social structures, power structures, its racism and sexual dogmas.”).

89. LOUGHERY, *supra* note 83, at 323.

90. Gay Liberation Front (L.A.), *supra* note 85, at 1.

91. See ABBOTT & LOVE, *supra* note 47, at 185-90 (acknowledging that “[t]he street people at Stonewall probably had not read [Wilhelm] Reich or Marcuse” but affirming gay liberation’s debt to those thinkers); ALTMAN, *supra* note 77, at 58, 61, 62, 65-68, 72 (“I am particularly indebted to Marcuse. . .”), 80-95, 161, 170; Martin Duberman, *Homosexual Literature*, N.Y. TIMES, Dec. 10, 1972, at 6 (stating that the Gay Liberation Front “seemed to embody Herbert Marcuse’s prophetic suggestion in ‘Eros and Civilization’ . . . that homosexuals, because of their explicit ‘rebellion against the subjugation of sexuality under the order of procreation’ and their implicit rejection of genital tyranny, might provide a social critique of immeasurable significance.”).

92. *GLF Politics?*, SEATTLE GAY LIBERATION FRONT NEWSL., Dec. 11, 1970, at 2. Lynn Pfuhl, the self-described “red diaper baby” who accompanied Marjorie Jones and Tracy Knight to the clerk’s office when the two women applied for a marriage license, wrote that same year in the *Louisville Free Press*: “When the homosexual, male or female, realizes that Capitalism, as it’s manifested in the Amerikan [sic] economy . . . is his implacable and implacateable [sic] enemy, he will realize also” the futility of any “attempt to attain full human identity within that economy. . . .” Fosl, *supra* note 33, at 46 (featuring a photograph of Pfuhl’s article), 50. See also Terrence Kissack, *Freacking Fag Revolutionaries: New York’s Gay Liberation Front, 1969-1971*, 62 RADICAL HIST. REV. 104, 115 (1995) (“The oppression of homosexuals was often linked, functionally, to capitalism, racism, or sexism. Gay Liberation Front broadsides called for the overthrow [of these systems] as the means to end oppression of homosexuals.”).

93. Gay Liberation Front (L.A.), *supra* note 85, at 2.

94. Hocquenghem, *supra* note 78, at 223.

microcosm of phallocracy,”⁹⁵ “where all oppression originates.”⁹⁶ Specific grievances against the nuclear family were multiple and crosscutting. Gay liberationists claimed that “the American family is . . . the starting point for anti-gay attitudes.”⁹⁷ Premised on “inflexible” gender roles, it was assigned special responsibility for producing the “artificial categories” of masculinity and femininity⁹⁸ and, in turn, the equally “false categories of homosexuality and heterosexuality.”⁹⁹ Liberationists held that the nuclear family embodied capitalism’s instrumentalist view of sex, its “negative attitude toward all sexual urges other than those that are genital and heterosexual,” and they championed homosexuality as an “expression of hedonism/love free of any utilitarian social ends.”¹⁰⁰ Denying the state’s prerogative “to specify the structure of our emotional and sexual life, any more than it may specify our religion,”¹⁰¹ they characterized marriage, with its attendant prohibitions of fornication and adultery, as the centerpiece of an intricate system of unwarranted sexual regulation.¹⁰² They criticized the marriage contract’s promise of lifetime fidelity, so often observed in the breach,¹⁰³ for “smother[ing]” spouses,¹⁰⁴ foisting “impossible demands” on them,¹⁰⁵ and importing “competition and exclusive possession, traits of the marketplace,” into “interpersonal relationships.”¹⁰⁶

95. David Ferbach, *Introduction*, in MARIO MIELI, *HOMOSEXUALITY AND LIBERATION: ELEMENTS OF A GAY CRITIQUE* 10 (David Ferbach trans., Gay Men’s Press 1980) (1977).

96. Third World Gay Liberation, *What We Want, What We Believe* (Mar. 1971), reprinted in *OUT OF THE CLOSETS*, supra note 79, at 363, 365; see also Chicago Gay Pride, *Gay Revolution and Sex Roles* (June 1971), reprinted in *OUT OF THE CLOSETS*, supra note 79, at 252, 253 (calling the family “a blueprint for modern oppression”); ONGE, supra note 73, at 33-34 (“Radical Gay Liberationists theorize that the capitalist system currently forces people into sexual roles such as husband and father, mother and wife.”).

97. THE RED BUTTERFLY, PAMPHLET, *GAY OPPRESSION: A RADICAL ANALYSIS* 5 (c. 1970).

98. N.A. DIAMAN, GAY FLAMES COLLECTIVE, PAMPHLET, *ON SEX ROLES* 4 (c. 1971). A substantially revised version of this essay was published in a gay liberation anthology. See *infra* note 110.

99. Third World Gay Liberation, supra note 96, at 363, 365.

100. *Id.* at 66.

101. Press Release (Draft), Gay Liberation Front of Seattle (Sept. 24, 1971). A version of this press release was issued on or around the same date; it is quoted extensively in various news outlets. See, e.g., “Non-Believers” *Seek Marriage License*, supra note 36; see also L.A. INT’L SOCIALISTS GAY CAUCUS, PAMPHLET, *GAY LIBERATION AND THE MOVEMENT AS A WHOLE* 3 (c. 1972) (arguing that “[p]eople should have the freedom to establish any kind or number of relationships” and that “marriage should not be a legal contract; it should be a voluntary emotional bond.”).

102. See, e.g., FISHER, supra note 65, at 304 (calling marriage “inseparable from all the other laws in which the government assume[s] the right to regulate sexual conduct: those against homosexual acts, and those against heterosexual sodomy, fornication, and adultery.”).

103. ABBOTT & LOVE, supra note 47, at 168 (calling monogamy a “fantasy”); FISHER, supra note 65, at 203 (suggesting that monogamy is not genuinely expected of men, and that “many women” also “become involved in extramarital affairs”).

104. Carl Wittman, *Refugees from Amerika: A Gay Manifesto*, S.F. FREE PRESS, Dec. 22, 1969 [hereinafter Wittman, *Manifesto*], reprinted as *A Gay Manifesto*, in *OUT OF THE CLOSETS*, supra note 79, at 330, 333.

105. *Id.* at 333.

106. The Red Butterfly, *The Anthropological Perspective* (1970), reprinted in *OUT OF THE CLOSETS*, supra note 79, at 157, 164-65; see also Wittman, supra note 104, 333-34 (arguing that a gay

Monogamy was but one aspect of the nuclear family's alleged conflation of people and property. With its "authoritarian, male-dominated model of human relationships,"¹⁰⁷ "legal marriage" was considered "a bondage of female to male"¹⁰⁸—a dynamic "so unequal, so exploitative, . . . so non-communicative, so manipulative, . . . [and] so tied up in power struggle . . . that a ridiculously unloving standard of love is accepted" as the cultural norm and ideal.¹⁰⁹ "Bound together by legal and economic pressures,"¹¹⁰ including costly and laborious divorce procedures and post-marital support obligations, many couples were forced to remain in loveless unions. Gay relationships, on the other hand, were thought to "last as long as they are wanted. . . . If the love goes, they dissolve simply, as they ought."¹¹¹ Liberationists encouraged heterosexuals to follow the gay model: "Partners should have no economic or legal responsibility for each other" and there should be "free and immediate divorce at the request of either partner[,] . . . with child support costs paid by the state."¹¹²

Some gay liberationists sought "abolition of . . . the bourgeois nuclear family."¹¹³ Others, like N.A. Diaman, hoped it would simply wither away, allowing "liberated people of the future, no longer divided by gender," to create structures that "better serve their needs for companionship, love, sex, all that is humanizing."¹¹⁴ For as Dennis Altman stressed, the death of "the nuclear family as the central organizing principle of our society" would not mean "an end to the importance of human relationships," rather it would mean "an end to legalizing them, to compulsory monogamy and possessiveness, [and] to the assumption . . . that it is 'natural' to divide up

person who pursues monogamous same-sex relationships "continues to subscribe to the heterosexual orientation" and exhibits "self-hatred"); ABBOTT & LOVE, *supra* note 47, at 54, 90, 92 (arguing that lesbians who seek monogamy have failed to overcome their "socialization as women" and that "many younger Lesbians feel women desire [monogamy] . . . because they are programed to want it").

107. John E. Adams, *An Expression of Love*, OBERLIN REV., Apr. 16, 1971, available at <http://www.oberlinlgbt.org/historical-documents/expression/>.

108. *Emancipation of Wives*, THE EFFEMINIST, Fall 1971, at 3, 15; see also JILL JOHNSTON, LESBIAN NATION: THE FEMINIST SOLUTION 81 (1973) (arguing that lesbians' "very articulation as a political group is the prime instrument of refusal to participate directly in the institution of [their] oppression."); THE RED BUTTERFLY, *supra* note 97, at 5 ("[T]he normal family . . . fosters male supremacy [and] enforces the inferior, dependent status of women.").

109. Chicago Gay Pride, *supra* note 96, at 252.

110. N. A. Diaman, *On Sex Roles and Equality* (Oct. 1970), reprinted in OUT OF THE CLOSETS, *supra* note 79, at 262, 263.

111. TIM MAYHEW, PAMPHLET, 15 THINGS YOU SHOULD KNOW ABOUT GAY PEOPLE 2 (May 20, 1973); see also ROEDY GREEN, A GUIDE FOR THE NAÏVE HOMOSEXUAL 23 (1971) ("Gay people do get married . . . [but] these marriages have nothing but love to hold them together as there is not the glue of children, dependency of the wife, or the legal hassle of divorce present in heterosexual marriages.").

112. L.A. INT'L SOCIALISTS GAY CAUCUS, *supra* note 101, at 3.

113. Third World Gay Liberation, *supra* note 96, at 363, 365; *Statement of the Male Homosexual Workshop*, *supra* note 85, at 403 (calling for "abolition of the nuclear family").

114. DIAMAN, *supra* note 98, at 3; see also Gay Revolution Party, *Manifesto*, GAY ECSTASY (c. 1970), at 5 ("Gay revolution will not lead to . . . straight-defined homosexuality with marriages and exclusive monogamy. Gay revolution will produce a world in which all the social and sensual relationships will be gay and in which homo- and heterosexuality will be incomprehensible terms.").

into couples who live isolated by and large from other couples.”¹¹⁵ Even Del Martin and Phyllis Lyon, who “started out in 1953” and in 2008 became the first same-sex couple to wed legally in California,¹¹⁶ refused any part of marriage in 1972: “[F]ormalizing our relationship has never appealed to us. We consider love and sex our own private affair and much prefer ‘living in sin.’”¹¹⁷

B. Methods

Unsurprisingly, the gay liberation movement’s ambitions far outstripped its capacity to implement them.¹¹⁸ Achieving immediate aims like sodomy law repeal and nondiscrimination legislation would prove difficult enough, let alone more utopian goals like eradicating gender roles, abolishing the marital family, and destroying an entire socio-economic order. Such grand visions were pursued primarily within the burgeoning gay subculture, which sought to “anticipate, as far as possible, the free society of the future.”¹¹⁹ In *Sappho Was a Right-On Woman: A Liberated View of Lesbianism* (1972), Sidney Abbott and Barbara Love described a “highly introspective” movement, initially “more concerned with internal than with external changes.”¹²⁰ Gay liberationists engaged in constant “consciousness-raising,” which meant developing a political perspective and a politicized identity by comparing experiences, interrogating “hang-ups,” venting anger, and discussing radical ideas.¹²¹ Gay men disavowed masculine privilege in principle and struggled to disown it in deed,¹²² while lesbians repudiated the “butch-femme syndrome” as a form of “role-playing” associated with less enlightened times—and with marriage.¹²³

115. ALTMAN, *supra* note 77, at 90.

116. See Jesse McKinley, *A Landmark Day in California as Same-Sex Marriages Begin to Take Hold*, N.Y. TIMES, June 17, 2008, at A1.

117. MARTIN & LYON, *supra* note 45, at 102; see also Phyllis Lyon, Op-Ed., “It Never Was Much of an Issue for Us”, L.A. TIMES, May 26, 2009, at A21.

118. See D’Emilio, *supra* note 64, at 243 (noting “the inability of radical gay liberationists to devise a strategy commensurate with their political vision”).

119. London Gay Liberation Front, *Manifesto* (1971), available at <http://www.fordham.edu/halsall/pwh/glf-london.asp>; see also Purposes and Methods, Washington [D.C.] Gay Liberation Front, Temporary Fact Sheet (Aug. 1970), at 1 (identifying “self-knowledge” and “a sense of community among gay people” as the organization’s primary aims).

120. ABBOTT & LOVE, *supra* note 47, at 15.

121. For some people these were exercises in navel-gazing or worse, see TOBIN & WICKER, *supra* note 41, at 231-33, but for others consciousness-raising was “a conversion experience from self-hatred to self-respect; . . . an intellectual awakening from ignorance to awareness of the possibility of resistance; a . . . transition from unexamined conventional morality to individual principles; a recovery from sickness to health.” ABBOTT & LOVE, *supra* note 47, at 15, 220. See also Hal Tarr, *A Consciousness Raised*, in SMASH THE CHURCH, SMASH THE STATE! THE EARLY YEARS OF GAY LIBERATION 22, 22 (Tommi Avicelli Mecca ed., 2009) [hereinafter SMASH THE CHURCH, SMASH THE STATE!] (“Consciousness-raising groups were the heart of GLF.”).

122. See, e.g., Radicalqueens Manifesto #2 (1973), reprinted in SMASH THE CHURCH, SMASH THE STATE!, *supra* note 121, at 114; Fish, *supra* note 79 (“I still have a masculine ego which searches for new ways to . . . dominate. . . . But I do have a little better understanding of these things . . . [a]nd I am now a little more willing to work on my own problems.”).

123. London Gay Liberation Front, *supra* note 119; see also ABBOTT & LOVE, *supra* note 47, at

Both groups strove to cultivate sexual relationships free from jealousy and possessiveness.¹²⁴ Seeking alternatives to the bar scene (even as they demanded respect and fair prices from exploitative proprietors),¹²⁵ they exercised a newly claimed “right to form living and loving communities” beyond the nuclear family.¹²⁶ They formed communes.¹²⁷ They founded Gay Liberation Houses—“the ultimate goal” of many early militants¹²⁸—as “centers for homosexual services and activities.”¹²⁹ They started gay newsletters and newspapers.¹³⁰ They organized gay social events on and off college campuses.¹³¹ They organized self-defense workshops,¹³² established hotlines and telephone directories,¹³³ and offered legal services.¹³⁴ They provided military and draft counseling,¹³⁵ dispensing advice on “how to stay out/how to get out.”¹³⁶ Because these self-help and community-building efforts often provoked opposition from straight

36, 92, 94, 98 (“Role playing is important to the Lesbian’s damnation.”).

124. See, e.g., John Knoebel, *Somewhere in the Right Direction: Testimony of My Experience in a Gay Male Living Collective* (1972), reprinted in *OUT OF THE CLOSETS*, *supra* note 79, at 301, 310; Jeri Dilno, *Monogamy and Alternate Life-Styles*, in *OUR RIGHT TO LOVE: A LESBIAN RESOURCE BOOK* 56, 56-58 (Ginny Vida ed., 1978).

125. See, e.g., *U. of Minn. Recognizes Homophile Group*, *ADVOCATE*, Feb. 1970, at 6 (“What we’re trying to do is to counteract the ‘gay bar’ mentality and help those under 21 especially to meet people as human beings before they become hardened to life.” (quoting Minneapolis marriage plaintiff Jack Baker)); Rita Crabtree, *Liberation in Louisville*, 1 *FREE PRESS OF LOUISVILLE*, Aug. 1970, at 10 (reporting on a “boycott against the Queen Bee, one of two gay bars in Louisville” because of price gouging and the owner’s refusal to allow GLF representatives in the bar); *Gay Lib House Closes; New Beginnings*, *TRASH* (GLF Newsl., Louisville, Ky.), Dec. 1971, at 2 (“We wanted to provide some kind of reasonable alternative to the local gay bars. . . .”); Telephone Interview with Paul Barwick, Seattle Marriage Plaintiff (Jan. 20, 2011) [hereinafter Boucai/Barwick Interview] (“[T]he idea of the Community Center was to provide an alternative to the bars, because at that time, that was about the only gay social life that there was. We wanted to provide a coffeehouse atmosphere, [and] a dance floor where you could interact without alcohol.”).

126. *Gay Liberation Front (L.A.)*, *supra* note 85, at 3.

127. See, e.g., *ABBOTT & LOVE*, *supra* note 47, at 168; N.A. Diaman, *The Baltic Street Collective*, in *SMASH THE CHURCH, SMASH THE STATE!*, *supra* note 121, at 234; Knoebel, *supra* note 124, at 301, 303-10.

128. JOHN MURPHY, *HOMOSEXUAL LIBERATION* 134 (1971); see also *New Meeting Place for GLF*, *SEATTLE GAY LIBERATION FRONT NEWSL.*, July 2, 1970, at 1 (“We have it! We have our own meeting place! . . . This place will be entirely ours, no time limits; no hassles.”).

129. HUMPHREYS, *supra* note 54, at 161; see also *Gay House Formed as Drop-In Center*, *GAY HOUSE NEWSL.* (Minneapolis, Minn.), May 9, 1971, at 1 (describing a “center dedicated to the concept of Gay help for Gay people . . . in a non-exploitative atmosphere.”).

130. *TEAL*, *supra* note 3, at 82 (“[B]y summer 1970 the gay world had a real gay press: a variety of homosexual newspapers representing the variety that are gays [sic].”).

131. See, e.g., Evans, *supra* note 50, at 113 (“Every Saturday night [New York’s Gay Activists Alliance] holds a huge gay dance.”); *Spring Quarter Gay Dances Scheduled in Coffman Union*, *MPLS FREE* (Newsl., Fight Repression of Erotic Repression, Student Grp., Univ. of Minn.), Apr. 1, 1970, at 1 (announcing “regularly scheduled Tuesday night dances”).

132. See Wittman, *Manifesto*, *supra* note 104, at 330; FAITH AGOSTINONE-WILSON, *MARXISM AND EDUCATION BEYOND IDENTITY: SEXUALITY AND SCHOOLING* 204 (2010).

133. See, e.g., Service Directory, 3 *TRASH* (GLF Newsl., Louisville, Ky.), Jan. 1972, at 4 (listing phone number for a “free rap line”).

134. See, e.g., *id.* (offering “legal aid”); *GAY HOUSE NEWSL.*, *supra* note 129, at 1 (offering “legal counseling”).

135. See, e.g., Service Directory, *TRASH*, *supra* note 133, at 4.

136. *LOUISVILLE GAY LIBERATION FRONT NEWSL.*, Oct. 1971, at 1.

society, some of gay liberationists' most pressing fights after Stonewall were ones they did not intentionally pick, and were for rights—to organize, assemble, speak, and publish—more basic than those claimed in their manifestos.¹³⁷

When it came to political engagement outside the gay community, the movement's "special sphere of opportunity" was "to raise questions by confrontation, to force the straight majority to acknowledge the homosexuals in [its] midst and consider what to do about them."¹³⁸ Within this broad framework, liberationists were "surprisingly diverse."¹³⁹ Their notorious "impatience with law reform efforts"¹⁴⁰ usually derived less from opposition to the specific rights sought (and sometimes won) by more moderate activists than from skepticism about the adequacy of a rights-based agenda and disagreement about the best mechanisms of social change.¹⁴¹ Liberationists with a "totalizing and revolutionary perspective" insisted on Marx's distinction between political and human emancipation.¹⁴² Others simply refused to negotiate with "enemies"—"We are not liberals," roared Seattle GLF¹⁴³—or to navigate the normal channels of power: "We do not intend to ask for anything. *We intend to stand firm and assert our basic rights.*"¹⁴⁴ Still others stressed "legal reform as a means rather than an end," like the GLF defectors who in November 1969 formed New York City's Gay Activists Alliance (GAA) in order to focus "exclusively" on "the liberation of homosexuals."¹⁴⁵ The

137. After attendees of "the first national Gay Liberation Convention" were denied permission to meet on the University of Minnesota campus, FREE member Jim Chesebro complained that gay people's "right[s] of free speech, assembly, and petition" had been infringed and the group's newsletter regretfully reported that it had been "unable to begin a court action in time" for the conference. JIM CHESEBRO, PAMPHLET, *THE FIRST NATIONAL GAY LIB CONVENTION: ONE VIEW FROM MINNEAPOLIS 1*, c. Nov. 1970; *16 Groups Come Together at First National Gay Lib Convention*, MPLS FREE (Newsl., MPLS FREE: Gay Liberation of Minnesota, Student Grp., Univ. of Minn.), c. Nov. 1970, at 1; see also Franklin Kameny, *Action on the Gay Legal Front*, VECTOR (S.F.), Nov. 1972, at 9 (reporting on gay campus organizations' difficulties securing university recognition, gay organizations' struggles in various states to incorporate and secure tax-exempt status, and the continued denials of liquor licenses to any "place which has become 'a meeting place or rendezvous for homosexuals' . . ."); Boucai/Barwick Interview, *supra* note 125 (["W]e had to fight with the phone company to use the word 'gay' in the listing for the gay community center."). Cases involving organizations' right to incorporate include *Gay Activists Alliance v. Lomenzo*, 320 N.Y.S.2d 994 (Sup. Ct. 1971), *rev'd sub nom. Owles v. Lomenzo*, 329 N.Y.S.2d 181 (App. Div. 1972); and *In re Thom Lambda Legal Def. & Educ. Fund, Inc.*, 337 N.Y.S.2d 588 (App. Div. 1972), *rev'd sub nom. Application of Thom*, 301 N.E.2d 542 (N.Y. 1973).

138. Tim Mayhew, *GLF Complements Dorian*, COLUMNS (Seattle), July 1970, at 5.

139. TOBIN & WICKER, *supra* note 41, at 10.

140. *London Gay Lib Shares Aims of U.S. Chapters "In Principle"*, ADVOCATE, Aug. 18–31, 1971, at 7.

141. On Stonewall-era law reform, see Kameny, *supra* note 137, at 7.

142. MIELL, *supra* note 95, at 110; see also Richmond & Noguera, *supra* note 88, at 11 (distinguishing homosexual liberation and human liberation).

143. *GLF Rejects Socialist Body*, ADVOCATE, Nov. 25–Dec. 8, 1970, at 6.

144. *London Gay Liberation Front*, *supra* note 119.

145. Gay Activists Alliance, *Flyer, Action Workshops 1* (June 1971); see also Gay Activists Alliance, *Flyer, What Is GAA?* (Sept. 1971) (stressing that GAA "avoids involvement in any program of action not obviously relevant to homosexuals").

GAA combined conventional interest-group politics with “brash and threatening” direct-action techniques and offered its various “strategies and actions” as inspirations to “the gay communities of other cities.”¹⁴⁶ The group’s written constitution specifically mandated “mass demonstrations, disruption of meetings, and sit-ins,”¹⁴⁷ and it was GAA that perfected what came to be the movement’s preferred method of “carefully staged” provocation:¹⁴⁸ the “zap.” Zaps were nonviolent but usually unruly confrontations with politicians and government officials,¹⁴⁹ journalists,¹⁵⁰ and even other leftists.¹⁵¹ They often combined standard protest tools like chants and placards with distinctively gay provocations: public displays of same-sex affection,¹⁵² for example, or appearance in “scag drag” (also known as “whiz”), a form of “radical” cross-dressing that makes “no attempt to present a consistent . . . performance of the opposite sex role.”¹⁵³ Writing in a local gay publication, Seattle marriage plaintiff Paul Barwick described how twenty GLF members used scag drag to protest charges of disorderly conduct lodged against two men who had skated hand-in-hand at a local ice rink:

They strolled into the courtroom . . . in beards and floor-length gowns, men with hairy chests and mini-skirts. . . . [They then] seated themselves in the spectator section, pulled out compacts, mascara brushes, lipsticks, cans of hairspray . . . and proceeded to repair whatever damage might have resulted from their brief walk

146. LOUGHERY, *supra* note 83, at 329; Gay Activists Alliance, Action Workshops, *supra* note 145 (advertising presentations, coinciding with the second annual commemoration of Christopher Street Liberation Day, on “confrontation tactics,” “starting a gay organization,” “lobbying and legal reform,” “political action and consciousness-raising,” and on using “mass media as gay propaganda.”). GAA correctly noted in September 1971 that “like groups are springing up across the country, some adopting the constitution of GAA and . . . GAA’s goals and policies.” Gay Activists Alliance, What Is GAA?, *supra* note 145.

147. See TEAL, *supra* note 3, at 128 (quoting GAA Constitution); see also Evans, *supra* note 50, at 111.

148. MAROTTA, *supra* note 55, at 137.

149. The first “zaps” involved the New York City mayoral elections: infiltration and disruption of a League of Women Voters event at a Queens synagogue (“It’s 1776,” cried one activist, “The homosexual revolution has begun!”); and encirclement of Mayor John Lindsay at the Metropolitan Opera’s opening night by tuxedoed GAA members shouting “End police harassment!” and “Gay power!”. TEAL, *supra* note 3, at 65-66; MAROTTA, *supra* note 55, at 136, 178, 186; see also ABBOTT & LOVE, *supra* note 47, at 118 (describing a Lavender Menace zap of NYC Councilwomen Carol Greitzer in 1970).

150. Stuart Byron, *The Closet Syndrome* (1972), reprinted in OUT OF THE CLOSETS, *supra* note 79, at 58, 64-65 (describing zap of *Harper’s* magazine’s headquarters); MAROTTA, *supra* note 55, at 186-88 (describing zap of talk-show host Dick Cavett’s television studio).

151. See Kissack, *supra* note 92, at 122 (describing Radicalesbians’ zap of the second Congress to Unite Women).

152. See, e.g., MOSAIC NO. 1: LIFE STORIES FROM ISOLATION TO COMMUNITY, ORAL HISTORIES FROM THE NORTHWEST LESBIAN AND GAY HISTORY MUSEUM PROJECT 154 (Ruth Pettis ed., 2002) [hereinafter MOSAIC ORAL HISTORIES] (describing a kiss-in).

153. HUMPHREYS, *supra* note 54, at 164; see also Tommi Avicolti Mecca, *Introduction, in SMASH THE CHURCH, SMASH THE STATE!*, *supra* note 121, at ix, xi (“We wore outrageous outfits and paraded in the street in what was then called ‘genderfuck,’ a form of dress that turned upside down society’s notion of gender. A bearded man in long hair, an evening gown, makeup and army boots.”).

from the parking lot.¹⁵⁴

Like so much early movement activism, zaps were intentionally theatrical, “full of bravado and daring.”¹⁵⁵ To be sure, such “obstreperous” and “obnoxious” tactics could be “self-defeating” as methods of persuasion.¹⁵⁶ Interviews on television and radio, free courses on college campuses, visits to high school classrooms, lectures at local churches and libraries—in large part opportunities for “curiosity seekers to meet and greet a queer”¹⁵⁷—were surely more effective in this regard, as gay liberationists learned in Minneapolis, Louisville, Seattle, and elsewhere.¹⁵⁸ But zaps and other histrionics could stun hostile spectators into passivity rather than violence,¹⁵⁹ and occasionally they yielded substantial concessions.¹⁶⁰ (The Seattle judge whose courtroom was overrun by deliberately unconvincing transvestites never did call the disorderly conduct case;¹⁶¹ the charges eventually were dropped.¹⁶²) In any event, such protests also pursued goals other than persuading voters and public officials. Conceived first and foremost as “publicity tool[s],”¹⁶³ these actions were directed largely at other gay people.¹⁶⁴ “[T]actics of confrontation,” explained GAA, were well suited to “the first necessary stage in homosexual liberation”: “the development of an open sense of

154. Paul Barwick, *Justice Not Blind? Or What a Little WHIZ Can Do*, COLUMNS NORTHWEST (Seattle), July 1972, at 7.

155. D’Emilio, *supra* note 78, at 103; *see also* LOUGHERY, *supra* note 83, at 330 (“A sense of the theatrical enlivened GAA”); MAROTTA, *supra* note 55, at 176 (discussing the GAA’s “Street Theatre Subcommittee”); TEAL, *supra* note 3, at 69, 74 (describing San Francisco’s “Gay Liberation Theatre,” whose performers explored “the continuum of violent and non-violent confrontation”); FREE Manifesto, *supra* note 75 (counting “guerilla theatre” among the Minnesota group’s “creative education” techniques).

156. JAMES T. SEARS, REBELS, RUBYFRUIT, AND RHINESTONES 61 (2001).

157. Fosl, *supra* note 33, at 52-53 (quoting Louisville GLF co-founder Lynn Pfuhl).

158. *See Director of Kinsey Institute Study Speaks April 17*, MPLS FREE (Newsl., Fight Repression of Erotic Repression, Student Grp., Univ. of Minn.), Apr. 1, 1970, at 3; *GLF Reaches the Public*, SEATTLE GAY LIBERATION FRONT NEWSL., July 2, 1970, at 1 (describing a panel on gay liberation at Belleview Community College); *Louisville Gay Lib Class Survives Critics*, ADVOCATE, Oct. 28–Nov. 10, 1970, at 9 (describing how a Free University class on Gay Liberation at the University of Louisville “survived the displeasure of several state legislators”); *What We’ve Done: Where We’re Going*, SEATTLE GAY LIBERATION FRONT NEWSL., Dec. 11, 1970, at 2 (noting GLF radio appearances and an invitation to speak at a local YMCA).

159. Kiyoshi Kuromiya recalls antiwar demonstrations at which he and other members of the Philadelphia Gay Liberation Front would “go up to a line of cops with tear gas grenades and horses and clubs[. . .] link arms and do a can-can. Stopped them in their tracks. Every time.” MARC STEIN, CITY OF SISTERLY AND BROTHERLY LOVES 329 (2004).

160. *See* Evans, *supra* note 50, at 114 (“Zapping works. The noise, abuse and general camping-up demoralize the oppressors” and make them “look foolish and vulnerable.”); Political Action Committee, Seattle Gay Alliance, “Dear Friend” Letter, Jan. 1, 1973 [hereinafter SGA Dear Friend Letter] (“The[] ‘zaps’ may have scandalized a lot of people, including a lot of gay people, but they were provoked by scandalous abuses, and they have usually been effective, winning both sympathetic news coverage and often concessions from public officials.”). The SGA Dear Friend Letter was a two-page fundraising appeal.

161. Barwick, *supra* note 154, at 7.

162. *See Charges Dismissed Against Homosexuals*, SEATTLE TIMES, June 5, 1972, at A15.

163. MAROTTA, *supra* note 55, at 179.

164. *Id.*

public identity in the gay community.”¹⁶⁵ An “aggressively visible” movement would have “an inevitable effect upon the homosexual who is still in the closet. Never before has he seen gay people walking around town holding hands, . . . demonstrating on street corners. Never before has he seen homosexuals on television, or in the press,” represented not as “apologetic” but as “defiantly proud of themselves.”¹⁶⁶

Media coverage of gay liberationists’ audacious behavior “may have alienated some homosexuals,”¹⁶⁷ including those who were “reluctant to even think of themselves as gay,”¹⁶⁸ but it emboldened others to affiliate with a movement of individuals who were evidently pleased to have left the closet behind them.¹⁶⁹ Within a year of the Gay Liberation Front’s founding in New York, its Seattle chapter trumpeted the movement’s “mercurial” growth, noting with only slight exaggeration the existence of “GLF groups in every major [American] city.”¹⁷⁰

II. MARRIAGE LITIGATION

Drawing largely on sources from Minneapolis, Louisville, and Seattle, the previous Part emphasized aspects of the Stonewall-era gay liberation movement that are most germane to the marriage cases litigated in those cities between 1970 and 1974: the movement’s insistence on gay pride and the virtue of gay love; its deep commitment to feminism; its heterogeneous critique of marriage and of the nuclear family; and its pursuit of visibility through audacious and often theatrical disruption. The precise relationship between these general movement characteristics and marriage litigation will be explored primarily in Part Three. The present section further sets the scene for that inquiry by describing the remarkable

165. TEAL, *supra* note 3, at 128 (quoting GAA Constitution); *see also* ABBOTT & LOVE, *supra* note 47 (“The idea of making a point is to show clearly that Lesbians are not guilty and fearful anymore.”).

166. FISHER, *supra* note 65, at 226; *see also* SGA Dear Friend Letter, *supra* note 160 (“Homosexuality is news, and gay life styles are in the public eye. *Time*, *Newsweek*, *Life*, and Dick Cavett, among others, have all featured gay leaders like Troy Perry in the past two years. At least 46 non-fiction books about homosexuality with a positive attitude have been published since 1970. Many undergrad and student newspapers have regular gay columns. Movies with gay themes are being seen in theatres and even on television. . . . Gay periodicals are flourishing and are becoming available in libraries. Gay news is reported in the straight press more and more.”).

167. JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970*, at 235 (1983).

168. MAROTTA, *supra* note 55, at 176.

169. *See* D’EMILIO, *supra* note 167, at 235 (noting that activists’ “confrontational tactics and flamboyant behavior thrust gay liberationists into the public spotlight . . . [and] inspired many others to join the movement’s ranks”); D’Emilio, *supra* note 78, at 103 (stating that gay liberation’s “hit-and-run tactics [and] . . . in-your-face rhetoric . . . succeeded in capturing media attention . . . [as well as] an expanding body of recruits, especially among younger lesbians and gay men affected by the radical cultural politics associated with the sixties.”).

170. *GLF on Freedom and Love*, SEATTLE GAY LIBERATION FRONT NEWSL., July 24, 1970, at 1, 2; *see also* D’Emilio, *supra* note 62, at 31, 35 (“On the eve of Stonewall, . . . there were perhaps fifty gay and lesbian social change organizations in the United States. By 1973, four years after Stonewall, there were over eight hundred.”).

individuals behind these early lawsuits, the local contexts in which they operated, and the course and content of their dealings with county clerks, state judiciaries, and, in one case, the Justices of the U.S. Supreme Court.

A. Contexts and Characters

1. Minneapolis: Jack Baker and Michael McConnell

In January 1971, *Look* magazine ran an issue dedicated to “The American Family.” It featured a series of interviews in which such luminaries as Margaret Mead, Betty Friedan, and Shirley MacLaine opined on the question, “Is the Family Obsolete?” The number also showcased some nontraditional households, like that of Jack Baker and Michael McConnell, who lived in Minneapolis in a “stable” and “long-lasting” relationship.¹⁷¹ Over a generously illustrated three pages, readers learned that Baker was a second-year law school student at the University of Minnesota and that McConnell was pursuing a master’s degree in library science. Baker was “the youngest of ten children; his mother died when he was five, and his father a year later.”¹⁷² He grew up in a Catholic boarding school in Chicago, began college there, lived briefly in Arizona, and went on to serve four years in the Air Force. He then moved to Oklahoma to study industrial engineering and business administration.¹⁷³ Baker began “socializing and going to gay bars” at age twenty.¹⁷⁴ Six years later, on Thanksgiving Day, 1969, he came out to his siblings. “My eldest brother took it badly,” Baker recalled. “He said he never wanted me in his house again.”¹⁷⁵ McConnell’s family in Norman, Oklahoma, was more supportive. They progressed quickly from advocating conversion therapy to offering Baker and McConnell matching, homemade bathrobes for Christmas: “My parents couldn’t care less what I am. . . . They kiss and hug Jack like they do me.”¹⁷⁶

Baker and McConnell were introduced by a mutual friend “at an old-fashioned Oklahoma barn party” in 1966.¹⁷⁷ There was little chemistry at first, and only after dating “off and on” for more than a year did they

171. Jack Star, *The Homosexual Couple*, LOOK, Jan. 26, 1971, at 69.

172. *Id.*

173. See Bjornson, *supra* note 41, at 14; Star, *supra* note 171, at 69-71.

174. Star, *supra* note 171, at 77; see also Bjornson, *supra* note 40, at 14 (reporting that Baker had been “socializing and going to bars . . . since 1963, . . . just before . . . enlist[ing] in the Air Force”).

175. Star, *supra* note 171, at 69; see also Tobin & Wicker, *supra* note 41, at 140 (providing information from which the date can arguably be inferred.)

176. Interview by Kay Tobin with Jack Baker & Michael McConnell (1971) (recording) (on file in the Gittings-Tobin Collection at the New York Public Library) [hereinafter Tobin/Baker/McConnell Interview]; see also Star, *supra* note 171, at 70. Kay Tobin, one of the founding members of New York’s Gay Activists Alliance, was a writer for *Gay* newspaper in New York City at the time of her interview with Baker and McConnell. Tobin undertook the interview in preparation for her book with Randy Wicker, *The Gay Crusaders* (1971), *supra* note 41.

177. Bjornson, *supra* note 40, at 14; TOBIN & WICKER, *supra* note 41, at 138.

“begin thinking seriously about forming a permanent relationship.”¹⁷⁸ At some point after moving in together (“in the late 1960s”), they met gay rights pioneers Frank Kameny and Barbara Gittings. This was their “first introduction to gay liberation” and, according to McConnell, “that’s what lit our fires of pride.”¹⁷⁹ The encounter also may have emboldened McConnell, who considered himself “ahead of Jack” on the question of marriage, to “tease him about the possibility.”¹⁸⁰ Baker proposed on New Year’s Eve, 1969.¹⁸¹ From the start of their engagement, the couple aspired to be not only spiritually but legally married,¹⁸² but they deferred their plan until they were out of Oklahoma. “We decided,” said Baker in 1971, “that when I got to law school I would get into the movement full force.”¹⁸³ Baker matriculated at the University of Minnesota in the fall of 1969. McConnell joined him in the spring of 1970, after receiving an offer to work in the University library.¹⁸⁴

Minneapolis was an unusually, if not uniformly, welcoming place to be gay in this period.¹⁸⁵ John Preston, who would become “a personal friend” and vocal supporter of Baker and McConnell,¹⁸⁶ remembers moving there “because it had one of the earliest and strongest gay communities in the country.”¹⁸⁷ Though not yet a student at the University of Minnesota,

178. Cole, *supra* note 4, at 4 (“They were introduced by a mutual friend ‘who thought we might like each other.’ And did you at first? The Advocate asked. ‘No, not necessarily.’”).

179. JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE* 163 (2001).

180. TOBIN & WICKER, *supra* note 41, at 143.

181. *Id.*

182. *Id.*

183. *Id.* at 140.

184. See *McConnell v. Anderson*, 316 F. Supp. 809, 810-11 (D. Minn. 1970) (noting that McConnell’s offer letter was dated April 27, 1970, and implying that McConnell moved to Minneapolis between that date and May 18, 1970, when he and Baker applied for a marriage license); see also Robert Frame, *Minnesota Led the Two Coasts on Marriage Rights, and Should Do So Again: Jack Baker and Michael McConnell*, QUATREFOLIO (Quatrefoil Library Newsl., St. Paul, Minn.), Apr. 20, 2011, available at <http://hosted-p0.vresp.com/643090/3c6a9dafc4/ARCHIVE> (“McConnell moved to Minneapolis in spring 1970.”).

185. A few indicators: (1) Gay establishments and their patrons generally went unmolested by police; a raid on a gay coffeehouse in the fall of 1971 was the first such action “in years.” *Gay Club Raided on Opening Night*, MPLS FREE (Newsl., MPLS FREE: Gay Liberation of Minnesota, Student Grp., Univ. of Minn.), c. Nov. 1970, at 1; (2) As of 1972, the *Minneapolis Star* was the “only . . . establishment daily in the country which ha[d] an openly gay reporter assigned to the gay beat.” Byron, *supra* note 150, at 64; (3) In 1971, “five main-line Protestant denominations in Minneapolis” provided financial support to lease a house that would serve as a gay community center. HUMPHREYS, *supra* note 54, at 145; (4) The Minneapolis City Council passed a gay-rights ordinance in March 1974. DAN C. HANSON, *HISTORY OF THE MINNESOTA GAY AND LESBIAN LEGAL ASSISTANCE* (MNGALLA) 2-3 (2009), available at <https://www.lib.umn.edu/pdf/rare/mnglla.pdf>.

186. Memorandum from Minn. Student Ass’n for Release (Sept. 7, 1971), at 1; see also John Preston et al., *Pointed Reply*, MINN. DAILY, Apr. 15, 1971, at 5 (dismissing concerns raised about “Jack Baker’s candidacy for [student body] president” as “tacky, tacky, tacky.”).

187. John Preston, *Introduction: My Brother and the Letter*, in *A MEMBER OF THE FAMILY* (John Preston ed., 1992), at 2. Although the Twin Cities’ gay bars were largely run by gay people, even before Stonewall, they generally (and sometimes exclusively) served men. It was not until the late 1960s that local women began to open and patronize their own bars, mainly in St. Paul. See ENKE, *supra* note 42, at 38-49.

Preston joined FREE,¹⁸⁸ the first gay liberation group in the upper Midwest.¹⁸⁹ The organization was founded, surprisingly, in May 1969—one month before the Stonewall riots—by two alumni who had recently taught a well-attended course on “The Homosexual Revolution.”¹⁹⁰ FREE received official recognition as a student organization, apparently without controversy, the same semester that Baker began law school.¹⁹¹ In September 1969, Baker became the group’s president, initiating a period of intense community-building and political activity. FREE’s meetings that term drew from 60 to 80 people, about 25 of them dues-paying, and its weekly dances drew many more.¹⁹² The group orchestrated Minnesota’s first “test case of homosexual discrimination” and, in turn, the state’s first gay rights demonstration.¹⁹³ A pamphlet designed in 1970 for incoming freshmen listed some of the organization’s other activities and accomplishments: lobbying the state human rights commissioner for nondiscrimination protections; successfully pressuring the University’s Social Policy Committee to refuse campus facilities to recruiters that “discriminate against Gay people”; “sponsoring the first Gay dance on a college campus”; coordinating an encounter between gay students and “rookies on the Minneapolis police force”; and sending dozens of FREE members to speak “at high schools, colleges, churches, hospitals and dorms.”¹⁹⁴

In September 1970, FREE’s membership voted to change the group’s

188. Robert Halfhill, *John Preston Joins an Organization of Gay Students* (Dec. 17, 2010), available at <http://duskpeterson.com/preston/timeline/halfhill.htm>.

189. John D. Wrathall, “*What Are You After?* ”: *A History of Lesbians, Gay Men, Bisexuals, and Transgender People at the Twin Cities Campus of the University of Minnesota 1969-1993*, in *BREAKING THE SILENCE: FINAL REPORT OF THE UNIV. OF MINN. SELECT COMM. ON LESBIAN, GAY, AND BISEXUAL CONCERNS* 55 (1993), available at <http://www.youngstranger.com/whatareyouafter.pdf>; Preston et al., *supra* note 186, at 5.

190. The founding students were Koreen Phelps and Steven Ihrig. *U. of Minn. Recognizes Homophile Group*, *supra* note 125, at 6. That there was consciousness of a “Homosexual Revolution” one month before Stonewall is a startling fact that warrants a discussion beyond the scope of this article.

191. Tom Spaniolo, *Homosexuals Form “Gay Clubs,”* MICH. STATE NEWS (East Lansing, Mich.), Jan. 8, 1970; *U. of Minn. Recognizes Homophile Group*, *supra* note 125, at 6; TOBIN & WICKER, *supra* note 41, at 140. The organization was refused permission, however, to host on the University’s campus “the first national Gay Liberation Convention ever held.” *16 Groups Come Together*, *supra* note 137, at 1, 4.

192. *Spring Quarter Gay Dances*, *supra* note 131; *U. of Minn. Recognizes Homophile Group*, *supra* note 125, at 6.

193. *FREE Member Tells Boss He’s Gay; His Reply: “Find Another Job!”*, MPLS FREE (Newsl., Fight Repression of Erotic Repression, Student Grp., Univ. of Minn.), Feb. 10, 1970, at 1; *Protest RTBN Firing*, MPLS FREE (Newsl., Fight Repression of Erotic Repression, Student Grp., Univ. of Minn.), Feb. 10, 1970, at 1; Wrathall, *supra* note 189, at 55.

194. FREE, PAMPHLET, *GAY LIBERATION OF MINNESOTA* (1970) [hereinafter FREE PAMPHLET]. On FREE’s campaign to bar discriminatory employers from recruiting on campus, see *Baker Attacks Job Discrimination; Moves to Bar Anti-Gay Recruiters From Campus*, MPLS FREE (Newsl., Fight Repression of Erotic Repression, Student Grp., Univ. of Minn.), Apr. 1, 1970, at 1; Vic Stoner, *On-Campus Recruiting Plan Won’t Affect U Hiring Policy*, MINN. DAILY, 23 Oct. 1970, at 1. On FREE’s “frank and open wrap session” with local police, see Marcus Overseth, *Minnesota*, GAY POWER, Mar. 1970, at 7.

name from “Fight Repression of Erotic Expression” to “FREE: Gay Liberation of Minnesota,” explaining that “the new name more clearly emphasizes FREE’s commitment to the Gay Liberation Movement.”¹⁹⁵ Yet there was no consensus within the organization about what, exactly, that commitment entailed. The name change might have appealed to different people for different reasons. Referring to “gay liberation” rather than “erotic expression” captured some members’—especially Jack Baker’s—belief that “the term ‘Gay’ describes a life style that may or may not include a sexual act” and “convey[s]” better than “the word ‘homosexual’ . . . the emotional attachment involved in this essentially social relationship.”¹⁹⁶ Jim Chesebro, of the group’s far-left faction, might have appreciated the organization’s more pointed association with the radical Gay Liberation Fronts that were sprouting nationwide. Indeed, when Chesebro’s circle came to dominate FREE in the fall of 1970, it emulated those other groups by focusing on internal consciousness-raising,¹⁹⁷ dispensing with a formal leadership structure,¹⁹⁸ and endorsing the Black Panthers “as the vanguard for the elimination of repression for all people.”¹⁹⁹ Chesebro’s moderate nemesis, Robert Halfhill, might have supported the name change on exactly opposite grounds. His densely typed, fifteen-page tract defending a “liberal” politics against the “revolutionary” philosophy represented by Chesebro was titled, tellingly, “Radicalism *versus* Gay Liberation.”²⁰⁰

If Halfhill and Chesebro represented two extremes of FREE’s ideological spectrum, Baker and McConnell fell somewhere in the “militant middle.”²⁰¹ Baker did not see himself as a radical (though Halfhill called him one),²⁰² and he was surprised to hear that label applied

195. *Members Vote Name Changed to FREE: Gay Lib of Minnesota*, MPLS FREE (Newsl., Fight Repression of Erotic Repression, Student Grp., Univ. of Minn.), Sept. 1970, at 1.

196. FREE PAMPHLET, *supra* note 194; see also Jack Baker, *Defining “Gayness” Under the Law*, MINNEAPOLIS STAR, Mar. 19, 1974, at 8A (advocating for a gay rights ordinance that covers “affectional [sic] or sexual preference” rather than “sexual orientation” because “sex is only one aspect of [gay people’s] lives. . . . Our feelings are utmost. . . .”).

197. See TOBIN & WICKER, *supra* note 41, at 155 (noting Baker and McConnell’s “disappoint[ment] that the organization has become loosely structured and more interested in consciousness-raising than in action.”).

198. See *Structural Changes for FREE Planned*, MPLS FREE (Newsl., MPLS FREE: Gay Liberation of Minnesota, Student Grp., Univ. of Minn.), c. Nov. 1970 (“FREE elected a new coordinating committee October 15 that will abolish itself within a few weeks.”).

199. See *Panthers Get FREE Nod*, ADVOCATE, Nov.25–Dec. 8, 1970, at 6.

200. Halfhill’s angry essay denounced, among many other things, the “self-flagellation” of “white, middle-class radicals” and decried their “demagoguery over the issues of sexism, racism, and classism.” Robert Halfhill, *Radicalism vs. Gay Liberation*, at 6 (c. Jan. 1971) (emphasis added).

201. See FISHER, *supra* note 65, at 189 (describing New York GLF members who formed the Gay Activists Alliance out of “disenchantment with revolutionary rhetoric in place of action, demands for ideological conformity, political infighting, and the misuse of CR [consciousness-raising] sessions”).

202. Halfhill, *supra* note 200, at 11 (referring to “a certain radical leader in FREE and his lover”); see also *University Students Elect First Gay President*, GAY, May 10, 1971, at 1, 15 (calling Baker “radical or near-radical”).

to FREE.²⁰³ McConnell, “a strong-willed activist in his own right,”²⁰⁴ considered himself “more radical than Jack,” “a good measure”²⁰⁵ to the left of him. Whatever the precise ideological distance between them, both men were (unlike Halfhill) vocal feminists,²⁰⁶ and both eagerly anticipated a “tremendous” (if non-violent) “socio-sexual revolution.”²⁰⁷ Baker and McConnell sought gay people’s “integration” into straight society, but on their own terms; assimilation for those who “look like heterosexuals and behave nicely” was not their idea of progress.²⁰⁸ Indeed it was a point of pride for Baker that, when the Minneapolis City Council refused to cover transvestites in a nondiscrimination bill pushed by FREE, the group “essentially told them,” in Baker’s words, “to shove it up their ass.”²⁰⁹ And in their own relationship, which they considered “just like being married,” Baker and McConnell vocally rejected both “male-female role playing” and conformity to a “heterosexual standard” of sexual monogamy that, said Baker, “doesn’t fit in the gay world.”²¹⁰ As McConnell told the *Advocate*, “We decided not to get hung up on this straight idealism about perfect fidelity.”²¹¹

Thus it was quite an unconventional pair who, accompanied by other FREE members, appeared at the Hennepin County Clerk’s office on May 18, 1970.²¹² Having been tipped earlier that day by a local newspaper “that two male persons were expected to present themselves,”²¹³ Deputy Clerk Robert Q. Anderson was prepared for the ensuing exchange:

Applicants: We would like to apply for a marriage license.

Anderson: For you two gentlemen?

Applicants: Yes.

Anderson: Are you both citizens of the United States?

203. Tobin/Baker/McConnell Interview, *supra* note 176 (“People even think FREE is radical, . . . that’s the word that comes back, and of course we’re not radical at all.”).

204. TOBIN & WICKER, *supra* note 41, at 137, 154 (discussing the “gay liberation plan of action for gay librarians” that McConnell presented at the American Library Association’s 1971 convention); see also Jim Lord & Chuck Lee, *Mike McConnell Voices View on Gay Pride*, COLUMNS NORTHWEST (Seattle), June 1972, at 7-8 (discussing, in the magazine’s “Pride Issue,” McConnell’s invited speech at the Seattle Gay Community Center).

205. Tobin/Baker/McConnell Interview, *supra* note 176.

206. See TOBIN & WICKER, *supra* note 41, at 153 (“Michael and Jack both wear women’s liberation buttons.”); see also *infra* notes 482, 483, and 494, and accompanying text.

207. Tobin/Baker/McConnell Interview, *supra* note 176. Baker also told Tobin that “the radicals . . . want this great social revolution, but they don’t know how to get it. . . . I’m going to effect a greater social revolution than they are.” *Id.*

208. Jack Baker, *The Right to be Human and Gay*, MANITOBAN (Univ. of Winnipeg), Mar. 13, 1972, reprinted in KEN BRONSON, *A QUEST FOR FULL EQUALITY* 69 (2004).

209. *Id.*

210. Star, *supra* note 173, at 71.

211. Bjornson, *supra* note 40, at 14.

212. Jurisdictional Statement of Appellant at 3, Baker v. Nelson, 409 U.S. 810 (1972) (No. 71-1027) [hereinafter *Baker Jurisdictional Statement*].

213. Brief for the Respondent and Appendix at A-17, Baker v. Nelson, No. 43009 (Minn., Aug. 27, 1971) [hereinafter *Baker Respondent’s Brief*].

Applicants: Yes.

Anderson: Are you both of legal age? . . . What are your exact ages?

Applicants: Twenty-eight and twenty-seven.

Anderson: Does the female reside in Hennepin County?

Applicants: There is no female.

Anderson: I see.

Anderson handed Baker and McConnell an application, which they duly completed and signed.

Anderson: Since there is no female involved in this contemplated marriage, it will be necessary that we obtain an opinion from the County Attorney

Applicants: We understand. . . .

Anderson: If there is no legal impediment, the marriage license will be available in this office²¹⁴

Given the ostensible need for further instruction from the County Attorney, Anderson warned the couple that it “may take longer than the normal five days” to process their application.²¹⁵ As it turned out, the wait lasted just four days. By a letter dated May 22, 1970, the County Clerk informed Baker and McConnell that he was “unable to issue the marriage license” because Minnesota law “prohibit[s] the marriage of two male persons.”²¹⁶

Like the initiatives Baker spearheaded as president of FREE, the bid for a marriage license reflected a “dynamic, outward-looking” approach to gay liberation.²¹⁷ Both men preferred starting fights to “sit[ting] around” trying “to raise our level of consciousness.”²¹⁸ Their shared disdain for an important movement-building tool may have distinguished them from many gay liberationists, but in their tactical militancy they were exemplary. They aimed, said Baker, “to provoke a heterosexual backlash by rhetorical and psychological confrontation. Make our presence felt by the straight society, make them face the issue.”²¹⁹ It was in that pugnacious spirit—and also, to be sure, out of genuine affection²²⁰—that Baker and McConnell sought a civil marriage license—and held hands on campus, and behaved as a couple in church, and kissed each other at the airport, and “liberated” the law school’s annual Barrister’s Ball by dancing

214. *Id.* at A-17–A-18.

215. *Id.*

216. Brief of Appellants and Appendix at A-1 (quoting the “Letter Denying Marriage License”), *Baker v. Nelson*, No. 43009 (Minn., May 27, 1971) [hereinafter *Baker Appellants’ Brief*].

217. Robert Halfhill, *Letter Mistaken*, MINN. DAILY, Apr. 14, 1971, at 5.

218. TOBIN & WICKER, *supra* note 41, at 140, 232.

219. *Id.* at 140.

220. *See infra* notes 436–441 and accompanying text.

together alongside another same-sex couple.²²¹

Such flagrant behavior was generally tolerated in live-and-let-live Minneapolis, and it even found a significant measure of acceptance.²²² When Baker ran for student body president in his second year of law school, he secured a strong endorsement from the campus newspaper on the basis of his “work and leadership in the area of Gay Liberation.”²²³ Several weeks later, in an election with record turnout, he won by a margin of nearly one thousand votes.²²⁴

2. Louisville: Marjorie Jones and Tracy Knight

On June 6, 1970, less than a month after Baker and McConnell’s visit to the Hennepin County Clerk’s office, two women with aliases Marjorie Jones and Tracy Knight attempted to apply for a marriage license in Jefferson County, Kentucky. “The boys had just applied,” recalls Jones, “and we couldn’t let the boys get ahead of us.”²²⁵

Notwithstanding Jones’s eagerness to claim gay marriage for women as well as men, the idea for the application actually originated with a reputation-hunting criminal lawyer named Stuart Lyon, who had heard about the Minnesota lawsuit and wanted a “controversial case” of his own.²²⁶ So he asked Lynn Pfuhl and Mike Randall, two of the more identifiably queer members of Louisville’s gay community, to find him plaintiffs. Pfuhl and Randall immediately thought of Jones and Knight, who were known “to be flamingly in love.”²²⁷ They approached the couple along with Lyon and another lawyer—the “brash,” cigar-toting, Brooklyn-accented David Kaplan, who was friends with Jones and had previously represented her in other matters.²²⁸ Although the women’s relationship would not last long (“she was a sweet girl,” says Jones, “but she was

221. TOBIN & WICKER, *supra* note 41, at 141, 226.

222. *Id.* at 226; Bjornson, *supra* note 40, at 6 (“[T]he student reaction to Jack’s being gay had to be described as, ‘So what?’”).

223. Lars Bjornson, *Baker Wins Decisively in Campus-Wide Vote*, *ADVOCATE*, Apr. 28–May 11, 1971, at 1.

224. Steve Brandt, *Baker Wins in Record Vote*, *MINN. DAILY*, Apr. 8, 1971, at 1.

225. Fosl, *supra* note 33, at 56; *see also* Telephone Interview with Marjorie Jones (Feb. 2, 2013) [hereinafter Boucai/Jones Interview] (“Because those guys had already done it, and we figured well, the girls should do it too. . . . [I]t was right after they [sic], and then we did it.”).

226. Interview by David Williams with Michael Randall (Oct. 2, 2009); Interview by Catherine Fosl with Lynn Pfuhl in Louisville, Ky. (2007) [hereinafter PfuhlFosl/Pfuhl Interview] (“I suspect he thought it would make his reputation. . . .”); Interview by Catherine Fosl with Bruce Miller, former Jefferson County Attorney (Dec. 27, 2011) [hereinafter Fosl/Miller Interview] (“His name was Stuart Lyons [sic]. He was a criminal lawyer. He was always looking for publicity.”).

227. Telephone Interview with Lynn Pfuhl (Jan. 21, 2011) [hereinafter Boucai/Pfuhl Interview].

228. Fosl, *supra* note 33, at 55; Interview by Catherine Fosl Marjorie Jones (Jan. 16, 2012) (“[T]he attorney was a friend of mine.”) (“David Kaplan was my attorney most of the time.”) [hereinafter Fosl/Jones Interview]; Boucai/Pfuhl Interview, *supra* note 227 (calling Kaplan “a sort of . . . father figure to [Jones]”); Fosl/Miller Interview, *supra* note 226 (“Kaplan was loud, smoked big cigars, . . . would wear polka-dot shirts and striped pants. I mean he looked like a circus clown. He was unbelievable. And funny, of course, with a Brooklyn accent in Louisville.”).

young and flighty”), they agreed to file an application. Then all six of them—two applicants, two acquaintances, and two attorneys—“up and went to the marriage license bureau.”²²⁹

Mike Randall remembers his friend “Margie Jones” as an “outgoing, . . . lovely lady,” a devoted keeper of “Siamese cats and Chihuahuas,” and a “wonderful mother” of three children.²³⁰ At the time, Jones’s nineteen-year-old son was serving as a Marine in California (he later served in Vietnam), her eighteen-year-old daughter lived elsewhere in Kentucky, and her fifteen-year-old son lived at home in Louisville. A churchgoing, “matronly” blonde “with a bouffant hairdo,”²³¹ Jones was twice divorced, once from a man so brutal, she says, “he just beat me all the time. If I didn’t have black eyes, they thought he was out of town.”²³² It was this same man who once demanded that Jones have “sex with another woman” in his presence; “that’s how I got my start,” she recalls, chuckling.²³³ Eventually, as Jones told the psychologist who served as an expert witness in the marriage trial, “I had just had enough with men and abuse . . . and I never got that with a woman.”²³⁴

Jones met Knight, a hippie who dressed in denim-fringe vests and sandals, many years later at a gay bar in Lexington, Kentucky.²³⁵ As with Baker and McConnell, their relationship was not a case of love at first sight: “We were friends,” explains Jones, “and we just got to be much more so.”²³⁶ Their application for a marriage license indicated that Knight, age 25, was a Louisville native, and that Jones, age 39, was born in Steubenville, Ohio. Knight, listed as the groom, entered “nurse” as her “usual occupation.” Jones, listed as the bride, was not asked for this information, but on a supplementary form she called herself a “sales girl.”²³⁷ Both answers contained some truth—Knight apparently had trained to be a nurse and Jones did sell things—but they did not tell the

229. PfuhiFosl/Pfuhi Interview, *supra* note 226.

230. Telephone Interview with Michael Randall (Jan. 20, 2011) [hereinafter Boucai/Randall Interview].

231. Boucai/Jones Interview, *supra* note 225; Frank Clifford, *2 Local Women Apply for Marriage License*, LOUISVILLE TIMES, July 7, 1970; Finley, *supra* note 4, at B1.

232. Jones vividly recounts the incident that prompted her to leave the marriage: “He finally . . . hit me over the head with a tripod when I was still doing the dishes in the kitchen, and knocked me out. And when I came to, I was on the floor, and I said ‘That’s it.’” Boucai/Jones Interview, *supra* note 225.

233. *Id.*; see also Jones Transcript of Evidence, *supra* note 44, at 55-56 (“Q: You stated you were married twice before to people of the opposite sex? A: Yes. Q: When did you change your mind about how it ought to be? A: When my husband brought a woman home and insisted that I go to bed with her.”).

234. Fosl/Jones Interview, *supra* note 228 (recalling her pre-trial interview with the psychologist); see also Jones Transcript of Evidence, *supra* note 44, at 19-24 (psychologist Sandor Klein testifying that Jones could not maintain an erotic or marital relationship with a man).

235. Clifford, *supra* note 231; Boucai/Jones Interview, *supra* note 225.

236. Boucai/Jones Interview, *supra* note 225.

237. Certificate of Marriage and Application for Marriage License, Tracy Knight and Marjorie Jones, July 6, 1970.

whole story.²³⁸ “Tracy Knight” (this was a stage name that stuck)²³⁹ worked most evenings as a “scantly attired” go-go dancer at a “well-known Louisville club,”²⁴⁰ and she worked other nights as a male impersonator in gay bars.²⁴¹ Knight disclosed none of this at trial, but she also mentioned nothing about nursing. “I work for my wife,” she said.²⁴² What this meant is not entirely clear. Knight testified about a business called the “L-A-M Reducing Salon,”²⁴³ which operated in a “seedy” part of town and had a sign in the window advertising: “If your figure isn’t becoming to you, you should be coming to us!”²⁴⁴ The Louisville *Courier-Journal* called the establishment a “massage parlor,”²⁴⁵ but it is clear that, in addition to hairstyling and diet advice, L-A-M offered services other than massage on its leopard-print tables.²⁴⁶ The Louisville Gay Liberation Front met at this location until Jones herself, who may have been known “in police circles and [by] vice squads” as Margo Ross,²⁴⁷ suggested moving to another venue because “we could all end up in jail. We had a bust last week.”²⁴⁸

Thus when County Attorney J. Bruce Miller declared that he failed to see in Jones’s household “any of the requisites of a happy home,” finding nothing there “but the pure pursuit of hedonistic and sexual pleasure,” he may have been insinuating Jones and Knight’s life on Louisville’s seamy

238. Jones Transcript of Evidence, *supra* note 44, at 39 (“I’m a registered nurse.”).

239. Interview by David Williams with Mickey Schickel (Aug. 2001) [hereinafter Williams/Schickel Interview] (explaining that Tracy Knight was a “drag name”). No one who knew Tracy Knight at the time calls her anything else—even those who remember her real name. Boucai/Pfuhl Interview, *supra* note 227; Boucai/Randall Interview, *supra* note 230; Boucai/Jones Interview, *supra* note 225; Telephone Interview with Micky Nelson (Jan. 21, 2011) [hereinafter Boucai/Nelson Interview].

240. Geoffrey Brown, *County Attorney Rules Out Woman-Woman Wedding*, LOUISVILLE TIMES, July 8, 1970, at A10; Finley, *supra* note 4, at B1.

241. Boucai/Jones Interview, *supra* note 225.

242. Jones Transcript of Evidence, *supra* note 44, at 58.

243. *Id.* at 39.

244. David Williams, *It Was Thirty Years Ago Today*. . . , 12 THE LETTER, Dec. 2001, at 11.

245. Finley, *supra* note 4 at B1. Mike Randall called it a “quote-unquote massage parlor.” Boucai/Randall Interview, *supra* note 230.

246. Boucai/Nelson Interview, *supra* note 239 (describing interior); Williams/Schickel Interview, *supra* note 239 (describing interior); Boucai/Pfuhl Interview, *supra* note 227; Boucai/Randall Interview, *supra* note 230; E-mail from former Louisville GLF member John Fish to Louisville activist and journalist David Williams (Aug. 2, 2009) [hereinafter Fish/Williams E-mail] (“[O]f course Marge was a madam.”); *see also* Fosl, *supra* note 33, at 55, 63-64 & n.21 (stating that “the salon appears to have offered services that ranged from diet advice to hairstyling to massage to escorts” and noting Louisville GLF members’ “belie[f] that the salon was indeed a house of prostitution”).

247. Boucai/Nelson Interview, *supra* note 239. A letter from Jones’s attorney to the Jefferson County Attorney refers to plaintiffs “Tracy Knight and Margo Ross.” Letter from Stuart L. Lyon to Bruce Miller (Oct. 30, 1970).

248. Boucai/Randall Interview, *supra* note 230; *see also* Fish/Williams E-mail, *supra* note 246 (recalling fears that GLF members would be charged with “consorting with a known prostitute.”). Kentucky law made no special provision for this offense, but it is conceivable that evidence of “consorting” would have supported a charge under the state’s pandering statute. *See* KY. REV. STAT. ANN. § 436.040 (West 1970).

side no less than their lesbian relationship.²⁴⁹ Not that the two forms of deviance were unrelated. In these first years, indeed months, after the riots at Stonewall—itsself a “sleazy” bar frequented by hustlers, drag queens, and others who were too blatant or poor to afford more discreet venues²⁵⁰—individuals who “took for granted the impossibility of their acceptance in society” were more likely to “throw themselves into the struggle, . . . ahead of professionals and the middle class.”²⁵¹ Jones and Knight were hardly the only Louisville GLF members whose sexual improprieties extended beyond homosexual conduct. Founder Lynn Pfuhl says, “I was out of the mainstream anyway, quite openly and frankly . . . supporting myself as a prostitute.”²⁵² Her co-founder Mike Randall was a hairdresser by day and a go-go dancer by night—a transvestite go-go dancer” no less, who had been arrested for female impersonation in 1966.²⁵³ “That’s what got me out of the draft,” he says. “One of the best things that ever happened to me.”²⁵⁴

Pfuhl and Randall were atypical of the Louisville gay community, which was overwhelmingly “closeted,” “quiescent,” and “unobtrusive.”²⁵⁵ In the uneasy peace it managed with police—according to Pfuhl, the rule was “you stay there [in the bars] and we won’t bother you”²⁵⁶—Louisville measured up well “compared to Cincinnati or Nashville, for instance.”²⁵⁷ Still, as Jones recalls, “things were pretty rough back in those days.”²⁵⁸ The bar scene, though tolerated, was “pretty depressing,”²⁵⁹ premised as it was on price-gouging by straight owners who had little political sympathy for their sheepish and apolitical clientele.²⁶⁰ Entrapment remained a problem in public venues like Cherokee Park,²⁶¹ and police harassment

249. Brief for Appellants at 23, *Jones v. Hallahan*, No. W-152-70 (Ky. Ct. App. 1973) [hereinafter *Jones Appellants’ Brief*]. It probably did not help matters that Jones rented the rooms above her salon to the Louisville Outlaws, the local motorcycle club. Fosl/Jones Interview, *supra* note 228.

250. TEAL, *supra* note 3, at 13, 29.

251. DUBERMAN, *supra* note 3, at 181, 181-90; ABBOTT & LOVE, *supra* note 47, at 160-61; see also Allen Young, *Introduction*, in *OUT OF THE CLOSETS*, *supra* note 54, at xxxv (“[T]he mainstay ‘members’ of the Gay Liberation Front . . . were street people, men and women in working-class jobs who had no great worries about career advancement, students, artists, unemployed hippies, and college-educated Marxists subsisting in the New Left movement.”).

252. Boucai/Pfuhl Interview, *supra* note 227.

253. Fosl, *supra* note 33, at 50; Boucai/Randall Interview, *supra* note 230.

254. Boucai/Randall Interview, *supra* note 230.

255. Fosl, *supra* note 33, at 46; David Williams, *Gay Men*, in *THE ENCYCLOPEDIA OF LOUISVILLE* 332 (John E. Kleber ed., 2001).

256. Boucai/Pfuhl Interview, *supra* note 227.

257. Frank Clifford, *Homosexuals Hate Charade, Want a Better Image in Society*, *LOUISVILLE TIMES*, July 17, 1970, at A9.

258. Fosl/Jones Interview, *supra* note 228.

259. Interview with John Fish in L.A., Cal. (Jan. 29, 2011) [hereinafter Boucai/Fish Interview].

260. *Louisville GLF Pickets Bar, Backs Suit*, *ADVOCATE*, Aug. 19–Sept. 1, 1970, at 2. The owners of the Downtowner even hosed down GLF activists who tried to leaflet near the bar’s entrance. See Fosl, *supra* note 33, at 52.

261. See Porky Pigiggle, *An Incident Near Hogan’s Fountain*, *FREE PRESS OF LOUISVILLE*, Sept. 1970, at 14 (a surreal, caustic, and risqué fairytale about cruising and police entrapment in Cherokee

and discrimination were commonplace. “I’m tired of being cursed at by policemen, just because they don’t like my appearance,” said one young man at an early GLF meeting.²⁶² “I am tired,” complained another, “of being investigated every time a sex crime is committed, just because I am known as a homosexual.”²⁶³ Outright violence was another consequence of visibility. Jones remembers that there were “a lot of beatings . . . out around the bars, sometimes really bad. They were beating up the poor guys because they were gay. . . .”²⁶⁴

Ideologically as well as occupationally, Jones and Knight had more in common with Pfuhl and Randall than with the docile and generally “conservative” bar crowd.²⁶⁵ All four were part of “a core group” that existed “before there was any sort of official Gay Liberation Front, before we knew what to call ourselves, before anything like that.”²⁶⁶ Jones, who would go on to “march with them in the parades,”²⁶⁷ hosted GLF’s earliest meetings in the summer of 1970. At the first of these she told her guests that “we can no longer allow ourselves to be characterized as sordid, perverted freaks.”²⁶⁸ Later that year she drove Knight, Pfuhl, Randall, and other GLF members to and from Washington D.C. for the second Revolutionary People’s Constitutional Convention, organized by the Black Panthers.²⁶⁹ Yet she maintains that Knight, who went on to join a lesbian-separatist commune under the pseudonym “Saturn Beard Womyn,”²⁷⁰ was the “more political of the two”²⁷¹—“she was a fighter.”²⁷² During an earlier stint living in Houston, Texas, Knight and twenty other women who had been arrested in a lesbian bar successfully challenged an ordinance prohibiting females from wearing “fly-front pants, meaning a zipper in the front.”²⁷³ And it was Knight who convinced Jones to pursue a marriage license.²⁷⁴ They did so, reported the *Courier-Journal*, “[i]n the name of gay liberation.”²⁷⁵ “Others have a peace cause or a civil rights

Park).

262. Clifford, *supra* note 257, at A9.

263. *Id.*

264. Fosl/Jones Interview, *supra* note 228.

265. *Gays in Louisville Choosing Sides Over Liberation Group*, *ADVOCATE*, Oct. 14–17, at 2 (quoting Mike Randall’s statement that the bar crowd “accepted the Establishment’s views on everything”).

266. Boucai/Nelson Interview, *supra* note 239.

267. Fosl/Jones Interview, *supra* note 228 (“I used to get out there and march with them in the parades.”).

268. Clifford, *supra* note 257, at A9.

269. Boucai/Fish Interview, *supra* note 259.

270. Boucai/Nelson Interview, *supra* note 239; Boucai/Jones Interview, *supra* note 225.

271. Boucai/Jones Interview, *supra* note 225.

272. Fosl/Jones Interview, *supra* note 228.

273. *Jones Transcript of Evidence*, *supra* note 44, 35 n.119. For further information on this incident, see SEARS, *supra* note 156, at 52-53.

274. Boucai/Jones Interview, *supra* note 225.

275. Finley, *supra* note 4, at B1.

cause,” declared Knight, “and I have a sexual cause.”²⁷⁶

It was not a cause well understood by the Jefferson County clerks. They were “confused,” says Jones, “so confused.”²⁷⁷ Pfuhl affirms, “I saw the clerks literally drop their pens and go into shock.”²⁷⁸ *The Louisville Times*, which had been warned in advance of the application, reported that “[s]nickers, gasps and guffaws sounded from a crowd of more conventional brides- and grooms-to-be.”²⁷⁹ The marriage application was nonetheless accepted pending legal counsel from County Attorney Miller, who initially had assumed that Jones and Knight were playing a “joke.”²⁸⁰ Two days later, in a letter to County Clerk James Hallahan, Miller stated:

In examining the public policy of Kentucky and the intent of the Kentucky legislatures [that adopted our marriage laws] in 1798 and 1970, I have no reservation in my firm belief that neither . . . ever intended to permit two practicing homosexuals or lesbians to be blessed with the sanctity of a marriage contract. To the contrary, it [sic] has outlawed their sexual activities as being against public policy and contrary to nature. . . . I therefore order [the] marriage license to be denied. . . .²⁸¹

3. Seattle: John Singer and Paul Barwick

In September 1968, *Vector*, a homophile magazine published by San Francisco’s Society for Individual Rights, informed its readers that “gay life in Seattle”—“appropriately dubbed ‘the Queen City’”—“is as pleasant and relaxed as anywhere” in the United States.²⁸² Indeed, when Seattle hosted “a convention of homosexual organizations” one year earlier, local publications reported with something like hometown pride on the “broadmindedness of many Seattleites” and the “tolerance” that prevailed in their city.²⁸³ Unlike in Louisville (or New York, for that matter), Seattle’s “dozen or so” gay bars—some for men, some for women, and some mixed—were owned and staffed primarily by gay people,²⁸⁴ and

276. Finley, *supra* note 4, at B1. Knight’s “sexual cause” was one she encouraged others to wear on their sleeves. See E-mail from John Fish to David Williams (July 27, 2009) (mentioning “a leather vest that Tracey [sic] had made for me that said ‘Gay Lib’ on the back”).

277. Boucai/Jones Interview, *supra* note 225.

278. Boucai/Pfuhl Interview, *supra* note 227. Two Manitoban men who applied for a marriage license in 1974 faced a similar reaction from the provincial Registrar of Marriages, who “took one look at them and said, ‘This is a joke, right?’” LAROCQUE, *supra* note 47, at 16.

279. Clifford, *supra* note 231.

280. PfuhlFosl/Pfuhl Interview, *supra* note 226.

281. Letter to James Hallahan from J. Bruce Miller, Jefferson Cnty. Attorney (July 8, 1970), Jones v. Hallahan, Brief for Appellee, No. W-152-70 (Ky. Ct. App. 1973), Appendix 1, at 25 [hereinafter Hallahan/Miller Letter].

282. *Gay Life in Other Cities*, VECTOR, Sept. 1968.

283. Bill Sieverling, *It’s a Gay, Gay World*, SEATTLE POST-INTELLIGENCER (NORTHWEST TODAY), Apr. 30, 1967, at 14; Ruth Wolf, “*It Was a Wonderful Feeling to Be Loved*,” SEATTLE: THE PACIFIC NORTHWEST MAGAZINE, Nov. 1967, at 36, 61.

284. Sieverling, *supra* note 283, at 14; *Gay Life in Other Cities*, *supra* note 282; MOSAIC ORAL HISTORIES, *supra* note 152, at 140 (“[M]y experience of gay bars in Seattle really struck me as

patrons felt free “to express affection and, in [certain] bars, dance together.”²⁸⁵ Relations with police, “while not necessarily cordial,” were “good enough.”²⁸⁶ According to *Seattle* magazine, “the position of the city’s vice squad appears to be this: As long as homosexuals make no public nuisance of themselves, they are free to live in peace.”²⁸⁷ Under this so-called “‘tolerance policy,’ . . . entrapment was not practiced, and the individual Gay person did not need to fear official prying into her or his life.”²⁸⁸ The key word here was “official.” As in other cities, Seattle saw “many cases of extortion, blackmail, robbery and assault” that were never even “reported to police because the victim [was] homosexual.”²⁸⁹ In 1968, a homophile group called the Dorian Society warned its members that “[a] problem which is not new to the gay community has recently become more serious. . . . It seems there are certain ‘straights’ who get their kicks from ‘beating up on a queer.’”²⁹⁰

Founded in January 1967, the Dorian Society’s mere existence was an accomplishment, to say nothing of the various projects it undertook before transitioning in 1971, under the influence of gay liberation, into the Seattle Gay Alliance.²⁹¹ Dorian—the name itself was a kind of closet²⁹²—was paradigmatic of the late homophile movement, cautious and brave in equal measure.²⁹³ According to one of the group’s founders, members were for the most part “responsible individuals,” people “struggling . . . to reconcile their sexual natures with their desire to be accepted.”²⁹⁴ Most of them used pseudonyms at first, and they disagreed internally over whether to be a

amazing, after the East Coast bars, because *here*, you see, they were owned by gay people. I mean, you’d go to a bar: Oh! The bartender is gay! Oh – he’s there to serve *you*! How nice!”).

285. Sieverling, *supra* note 283, at 14; *see also Gay Life in Other Cities*, *supra* note 282 (noting the sometimes “close” dancing to be found in some of Seattle’s gay bars).

286. *Gay Life in Other Cities*, *supra* note 282.

287. Wolf, *supra* note 283, at 37.

288. *Police Harassment*, Seattle Gay Liberation Front Newsl., Jan. 22, 1971, at 3.

289. Sieverling, *supra* note 283, at 14 (quoting Seattle Police Chief Frank Ramon).

290. *A Warning!*, DORIAN COLUMNS (Seattle), June 1968, at 3.

291. *See* Dorian Society of Seattle, Notice and Vote Tally, June 24, 1971 and July 1, 1971 (recording 18-to-4 vote to “change the name of our organization to the SEATTLE GAY ALLIANCE.”); *see also* Letter from Peter D. Francis, Francis & Ackerman, Attorneys at Law, to Marion V. Larson (Aug. 30, 1971) [hereinafter Francis/Larson Letter] (“The Dorian Society is now doing business as Seattle Gay Alliance.”); *infra* notes 338-344 and accompanying text (regarding influence of gay liberation on the formation of the Seattle Gay Alliance).

292. *See* DAVID M. HALPERIN, ONE HUNDRED YEARS OF HOMOSEXUALITY 3 (1990) (“In a . . . study . . . first published in 1820-24, Karl Otfried Müller devoted a chapter to a detailed . . . consideration of the evidence for paederastic initiation rituals in Sparta and Crete, behaviors which Müller took to be inherited from the military pre-history of ‘the Dorian race.’ (Müller thereby provided Oscar Wilde’s Dorian Gray, more than a half-century later, with his un-Christian first name.)”). *The Picture of Dorian Gray*, which provided much of the basis for “the literary part” of the first of Wilde’s 1895 trials, H.M. HYDE, THE TRIALS OF OSCAR WILDE 196 (1973), is “the perfect distillation of the open secret, . . . shaped by the conjunction of extravagance of deniability and an extravagance of flamboyant display,” EVE KOSOFSKY SEDGWICK, THE EPISTEMOLOGY OF THE CLOSET 165 (1990).

293. GARY L. ATKINS, GAY SEATTLE: STORIES OF EXILE AND BELONGING 108-09 (2003).

294. Wolf, *supra* note 283, at 62 (quoting Rev. Mineo Katagiri, “who was instrumental in organizing the Dorian Society.”).

social or activist group.²⁹⁵ As a social group, Dorian organized an annual drag ball and its members busied themselves with picnicking, hiking, music, and bridge.²⁹⁶ As activists—or at least as humanitarians—they reached out to “the desolate and the desperate” in their own community by setting up a hotline and counseling services, and they helped those in the broader community by collecting toys for local orphanages.²⁹⁷ Even at their most brazen, they strove to be inoffensive. In November 1967, several Dorian members cooperated with *Seattle* magazine on an issue whose cover showed a young, bespectacled, clean-shaven man wearing a three-piece suit and sitting in a leather office chair.²⁹⁸ The headline announced: “This is Peter Wichern. He is a local businessman. He is a homosexual.”²⁹⁹

Although many members of the Dorian Society, including Peter Wichern, came to embrace gay liberation,³⁰⁰ the *Seattle* cover exemplifies the differences between that organization and the Seattle Gay Liberation Front, founded in May 1970.³⁰¹ “We looked down on them as a bunch of closet cases who were afraid to push,” explains Barwick. “I was wearing a big Gay Power tee-shirt”—this is indeed what Barwick wore on the day he and Singer applied for a marriage license—“and they wouldn’t be caught dead in anything but” (*pace* Wichern) “a three-piece suit.”³⁰² “That was the major difference,” said Singer, “how out to be.”³⁰³ “*Ours* was the group that in the early seventies would walk on Broadway holding hands.”³⁰⁴ Seattle’s GLF was comprised of people like Patrick Haggerty, an avowedly “rabid” liberationist who in 1973 recorded the first “openly

295. MOSAIC ORAL HISTORIES, *supra* note 152, at 139, 140 (interview with Nicholas Heer).

296. *Four Candles on the Cake, or Dorian’s Four Years of Hassel*, COLUMNS NORTHWEST (Seattle), Jan. 1971, at 5.

297. *Id.*

298. ATKINS, *supra* note 293, at 116.

299. *Four Candles on the Cake, supra* note 296, at 5.

300. See notes 338–341 and accompanying text (describing the radical elements in Dorian’s successor organization, the Seattle Gay Alliance). As for Peter Wichern, who died in 1996, his partner of thirteen years believes that the *Seattle* cover misrepresented him: “[Peter] was a rabble-rouser, without a doubt. . . . He thought he looked like a nerd in the picture. . . , like a total jerk! . . . He had always been a radical. . . . [In the 1980s] he decided to get involved with Queer Nation, and started going to a number of protests, which he *loved*. I think it took him back to the sixties.” Northwest Lesbian and Gay History Museum Project, *Oral History Interview with Louis Giguere*, April 1, 2002, available at <http://home.earthlink.net/~ruthpett/lgbthistorynw/seamag.htm>.

301. See *GLF on Freedom and Love, supra* note 170 (noting the organization’s founding “about two months ago”).

302. ATKINS, *supra* note 293, at 125; see also Altman, *supra* note 50, at 38 (“[N]othing is less counter-culture than a suit.”).

303. MOSAIC ORAL HISTORIES, *supra* note 152, at 157; see also Minutes of October 1970 Meeting, Dorian Society of Seattle/Seattle Gay Alliance Executive Board Minutes [hereinafter Dorian/SGA Minutes], at 73 (“Most of GLF are not working. So they can be open. They appreciate our hang-ups.”).

304. Interview by Jill Bateman, Seattle University Communication and Community Project, with Fayettele ben Miriam in Seattle, Wash., Northwest Lesbian and Gay History Museum Project (1995) (recording) [hereinafter Bateman/ben Miriam Interview] (emphasis added).

gay country LP,"³⁰⁵ which included tracks like "Come Out Singin'" and "Cryin' These Cocksucking Tears."³⁰⁶ Unlike the Dorians—who fretted in the wake of Stonewall over associating with "radicals,"³⁰⁷ just as they had previously worried about "becom[ing] associated with the hippie movement"³⁰⁸—the GLF activists were, quite precisely, radical hippies who were prepared, in Haggerty's words, to give up their "aspirations for careers" and "cast our fate to the wind. . . ."³⁰⁹ And as Singer explained, the "political differences" between the two groups often extended beyond specifically gay concerns: "A number of us"—including Singer himself—"were either anarchist or socialist."³¹⁰

Singer was a lifelong activist. Born in 1944 in New York City to leftist, working-class, first-generation Jews,³¹¹ he refused in junior high school to join class prayers; in the mid-1960s he volunteered through AmeriCorps for civil-rights missions; and during the Vietnam War he was a conscientious objector, serving instead in Germany as an Army medic.³¹² When Singer heard of the Stonewall riots upon returning to New York in the summer of 1969, he joined Homosexuals Intransigent at City College, where he was completing a liberal arts degree.³¹³ After becoming the group's Vice President in a "power struggle" that ousted "a terrible misogynist,"³¹⁴ he fell in love with a man who, he said, "happened to be involved in the Gay Activists Alliance. And so I joined that. If I had stayed in New York I probably would have ended up gravitating toward Gay Liberation Front. . . ."³¹⁵ Joining GLF was just what Singer did when he moved to San Francisco in early 1970.³¹⁶ He arrived in Seattle a few months later, driving a Dodge van plastered with slogans like "Gay Power" and "Faggots against Fascism."³¹⁷ There he helped to form a new GLF chapter and took a lead role in organizing the city's first Gay Pride

305. Chris Dickinson, *Country Undetectable: Gay Artists in Country Music*, 21 J. COUNTRY MUSIC (1999) 28, 33 (quoting Haggerty).

306. The latter song was "about the rigid sex roles that men were . . . trained to assume and how that role was oppressive to women and to us." Both the album and the band (which also included Michael Carr, Bob Hammerstromm, and Eve Morris) were called Lavender Country. See *The History of Gay Country-Western Music, Part 1* (Transcript of Radio Broadcast) (Mar. 2005), <http://queermusicheritage.com/mar2005s.html>.

307. Minutes of April 1971 Meeting, Dorian/SGA Minutes, *supra* note 303, at 114 (summarizing a discussion about co-sponsoring a dance with the University of Washington GLF and noting members' worry that the group's "affiliation with [the] radical left" might "interfere with our image").

308. ATKINS, *supra* note 293 (quoting Dorian Society minutes of July 1968).

309. Dickinson, *supra* note 305, at 33.

310. MOSAIC ORAL HISTORIES, *supra* note 152, at 157.

311. Bateman/ben Miriam Interview, *supra* note 304; MURDOCH & PRICE, *supra* note 179, at 189.

312. Carole Beers, *Faygele benMiriam Crusaded for Rights*, SEATTLE TIMES (June 7, 2000, 12:00 AM), <http://community.seattletimes.nwsourc.com/archive/?date=20000607&slug=4025290>.

313. *Id.*

314. Bateman/ben Miriam Interview, *supra* note 304.

315. *Id.*

316. *Id.*

317. *Id.*

Weekend.³¹⁸ It was also in Seattle that Singer began to pursue more confrontational ways of “getting away from a male-identified position.”³¹⁹ He took to “wearing dresses,”³²⁰ and in 1973 traveled to North Carolina to have his name legally changed to Faygele ben Miriam.³²¹ (“Faygele” means little bird in Yiddish, and is also derogatory slang for homosexual; “ben Miriam,” meaning “son of Miriam,” defies the traditional Jewish practice of calling males by their fathers’ names.³²²) In the mid-seventies, along with other “men committed to working [against] sexism,” he founded Elma Farm, a precursor of the Radical Faeries.³²³ Upon his death in 2000, the Seattle *Post-Intelligencer* called him “the grandfather of Seattle’s gay and lesbian movement.”³²⁴

Singer lived in a GLF commune with a fluctuating number of other gay men,³²⁵ one of whom was Paul Barwick, also a “self-styled, in-your-face-radical.”³²⁶ Born in 1946 and raised in the small town of Shelton, Washington, Barwick dreamed as a teenager of becoming a policeman. He signed up for military police training upon joining the Army in his early twenties and, after serving in Vietnam, he became a radio operator for the Washington State Patrol.³²⁷ When he realized that he “had to come out,” Barwick left the Patrol and enrolled at Bremerton College.³²⁸ There he confided his secret to a kindly young nurse, who accompanied him to his first GLF meeting.³²⁹ Within months he was running for student body Vice President “on a gay liberation platform,” ultimately losing the election by two votes.³³⁰ The next year he became manager of Seattle’s first Gay Community Center.³³¹ Given his training in law enforcement, Barwick’s

318. *Id.*; ATKINS, *supra* note 293, at 126; Memorandum from John F. Singer Regarding Gay Pride Weekend (June 1972). The Memorandum, addressed “Dear People,” was likely distributed to the membership of the Seattle Gay Liberation Front.

319. John F. Singer, *Good Gay Lib Stuff, But Not Gospel*, *ADVOCATE*, Feb. 28, 1973, at 28 (reviewing RICHMOND & NOGUERA, *THE GAY LIBERATION BOOK* (1973)) (describing “the alternative offered by transvestites” to “male-identified patterns of living”).

320. Some members of GLF, the “Whiz Kids, they used to go around in dresses, they would just float about town, they would also do some performances. . . . I did it full time.” Bateman/ben Miriam Interview, *supra* note 304.

321. Beers, *supra* note 312.

322. See also Susan Chadwick, *Gay Wins Six-Year Battle*, *SEATTLE POST-INTELLIGENCER*, Sept. 17, 1976, at D20 (“He said his new name means ‘Faggot Son of Miriam’ in Yiddish.”).

323. Bateman/ben Miriam Interview, *supra* note 304. “We formed a nucleus of people who were trying to change patterns of dress and attitude and ways of treating each other. We were out there saying, ‘We are different from others’—and giving that difference expression. . . . We didn’t call ourselves ‘fairies’ back then, but we were.” Mark Thompson, *This Gay Tribe: A Brief History of the Fairies*, in *GAY SPIRIT* (Mark Thompson ed. 2005) 260, 266 (quoting Faygele ben Miriam).

324. MOSAIC ORAL HISTORIES, *supra* note 152, at 218.

325. It was called the Gay Liberation Front Collective. ATKINS, *supra* note 293, at 167; Boucai/Barwick Interview, *supra* note 125.

326. *Id.* at 158-161.

327. MOSAIC ORAL HISTORIES, *supra* note 152, at 218.

328. Boucai/Barwick Interview, *supra* note 125.

329. *Id.*

330. *Id.*

331. Seattle Gay Alliance, Newsletter and Calendar of Events, Oct. 1971 (announcing Barwick’s

other activism focused largely on the Seattle Police Department and its “piggy” new police chief, George Tielsch.³³² Tielsch’s appointment in 1970 put an end to the Department’s “tolerance policy” and introduced a campaign of “surveillance and . . . harassment” that lasted, on and off, at least through 1973.³³³ An angry Barwick wrote letters to the mayor and other city officials;³³⁴ he organized protests outside police headquarters and Tielsch’s house,³³⁵ and, in response to widespread entrapment in parks where gay men congregated and cruised,³³⁶ Barwick and other GLF members took to patrolling those areas themselves, informing park users of the cops’ presence and sometimes super-gluing shut the doors of their parked police cars.³³⁷

By the time Singer and Barwick took the bold step of applying for a marriage license, Seattle had become “one of the most highly and harmoniously organized cities in the gay movement.”³³⁸ The Dorian Society, again, had expired in July 1971, and its new incarnation, the Seattle Gay Alliance (SGA), was sufficiently radicalized that there was not only coordination but overlap between its members and those in GLF.³³⁹ Individuals straddling the two organizations included Tim Mayhew, apparently the most active and articulate of Seattle’s early gay liberationists,³⁴⁰ as well as Singer and Barwick.³⁴¹ According to Mayhew,

appointment).

332. Boucai/Barwick Interview, *supra* note 125; *see also Police Harassment*, *supra* note 288, at 3 (noting that Tielsch’s public remarks “indicated a strong personal distaste for homosexuals and homosexuality”).

333. *See* WALT CROWLEY, RITES OF PASSAGE: A MEMOIR OF THE SIXTIES IN SEATTLE 290 (1995) (noting that Tielsch’s tenure as Police Chief began on September 3, 1970); *Police Harassment*, *supra* note 288, at 3 (describing several instances of police misconduct, including “72 hours jailing and ill treatment of a woman for jaywalking after leaving a Gay bar; entrapment of a young man in one of the parks; saturation raids and ID checking in several Gay bars; more jaywalking tickets in the vicinity of Gay bars; verbal abuse of Gay persons; [and] the severe beating of at least one person taken during a raid.”); Lauren Selden, *ACLU 1972: Report on the Year*, CIVIL LIBERTIES (Newsl.), Dec. 1972, at 1 (describing the Washington ACLU’s intention to fight the Seattle Police’s “campaign to harass gay people”); Memorandum from Teri Katz to ACLU of Washington Legal Committee (Nov. 5, 1973) at 2 (recording a request for advice from two organizations, including the Legal Aid Committee for Gay Harassment, that had “decided to file suit against the Seattle Police Department on behalf [individuals] . . . arrested and beaten by the Seattle Police.”).

334. *See, e.g.*, Letter from Wes Uhlman, Mayor of Seattle, to Paul C. Barwick (Dec. 22, 1971) (referring to Barwick’s letter of December 7, 1971); Letter from Paul Barwick to Mayor Wes Uhlman (July 10, 1972) (writing “in regard to the attitude and actions of the Police Department toward Gay Citizens”).

335. *Gays Picket Police*, SEATTLE GAY LIBERATION FRONT NEWSL., May 1973, at 1; *Police Beating of Gay Woman Triggers Protests in Seattle*, ADVOCATE, June 6, 1973, at 10; *50 Homosexuals Stage a Protest at Tielsch Home*, SEATTLE POST-INTELLIGENCER, May 6, 1973, at E19.

336. *See* Boucai/Barwick Interview, *supra* note 125; *see also* Selden, *supra* note 333, at 1 (describing “arrests in public parks, many after open police solicitation”).

337. Boucai/Barwick Interview, *supra* note 125; MOSAIC ORAL HISTORIES, *supra* note 152, at 122-23.

338. *See* SGA Dear Friend Letter, *supra* note 160.

339. *Id.*; *see also Seattle Gay Community Tries Unity*, ADVOCATE, Sept. 15-28, 1971, at 2 (stating that the University of Washington Gay Liberation Front was one of several groups that was now working under the auspices of the Seattle Gay Alliance).

340. Mayhew, in fact, was one of a few individuals who affiliated not only with GLF and SGA,

it was he who gave Singer the idea of bringing a marriage lawsuit, because it was he who first informed Singer that a key provision of Washington's domestic relations law, the article specifying criteria for eligibility to marry, recently had been rewritten in sex-neutral language.³⁴² According to Barwick, news of the statutory revision came from State Senator Pete Francis, a supporter of gay rights³⁴³ who spoke at one of the Dorian Society's last meetings in the spring or summer of 1971—or, more likely, at one of the SGA's first meetings in summer or fall of that year.³⁴⁴ Of course at any point in 1971 the "idea" of gay marriage was very much in

but also with the Dorian Society, SGA's more conservative predecessor. See Mayhew, *supra* note 138, at 5 ("How will the Gay Liberation Front and the Dorian Society relate to each other? . . . GLF will raise the questions and scare the public into the arms of Dorian, where they will find the answers. This does not imply that the gay militants, of whom I am one, cannot themselves do a good job of educating, but that they will generally not be trusted by that very conservative part of the population that causes most of our problems.").

341. See Seattle Gay Alliance, *supra* note 331 (announcing Barwick's appointment as Manager of the Gay Community Center); Barwick, *supra* note 154, at 7 (one of several articles Barwick wrote for a magazine published by the Seattle Gay Alliance); Memorandum from Faygele Singer, Chairperson, Legal Def. Fund Comm., to Bd. of Dirs., Seattle Gay Alliance, Nov. 9, 1972; SGA Election Minutes (Jan. 18, 1973) (noting election of "Faygele Singer" to the SGA Board of Directors). Singer resigned from the Board later that year, explaining: "I desire the freedom to say and do as I please, and membership in any group, no matter how much [sic] of their principles I do agree with, hinders that process." Letter from Faygele Singer, *supra* note 56.

342. E-mail from Tim Mayhew to Michael Boucai (Aug. 27, 2014) ("I was indeed the first person to tell John Singer about the new law, because he was surprised and excited."); see also Act of Feb. 24, 1970, 1970 Wash. Sess. Laws 145, 146-48 (replacing the words "males" and "females" with the word "persons" and eliminating sex-based age requirements for marriage).

343. Francis was legal counsel to the Dorian Society and then to the Seattle Gay Alliance. See Letter from Peter D. Francis, Francis & Ackerman, Attorneys at Law, to Landon R. Estep (June 26, 1970) (stating that Francis was representing the Dorian Society; Estep was the attorney representing an individual who had threatened to sue the Dorian Society for defamation); Francis/Larson Letter, *supra* note 291; see also Schedule, Symposium on Religion and the Homosexual, Jan. 25, 1969 (listing address by "Seattle Attorney Pete Francis" on "The Homosexual and the Law"); *Most Candidates Ignore Gay Voter*, COLUMBUS NORTHWEST, Sept. 1970, at 2 (reporting that only five of seventy-three candidates "bothered to respond" to a questionnaire soliciting views on gay rights, and counting Francis among those who favored "immediate . . . homosexual law reform"); Rachel de la Corte, *Gregoire Signs Gay Civil Rights Bill into Law*, SEATTLE TIMES, Jan. 31, 2006 (noting, upon passage of a state-wide gay rights law, that Francis sponsored the first such bill in 1977).

344. Apparently relying on a published interview with Paul Barwick, Gary Atkins writes that Singer and Barwick heard Senator Pete Francis discuss the revised marriage law at a meeting of the Dorian Society. See ATKINS, *supra* note 293, at 125; MOSAIC ORAL HISTORIES, *supra* note 152, at 165-66 (Barwick recalling that Francis seemed to be telling the group: "'Go do something now! You know about it now!' At least that's how we took it."). But the Dorians voted themselves out of existence on July 1, 1971, several months before Barwick and Singer attempted to apply for a marriage license; and as Barwick later observed, it is improbable that radicals like himself or Singer would have attended one of their meetings. Boucai/Barwick Interview, *supra* note 125. Indeed, when Singer was asked in 1995 whether he had ever been involved with the Dorian Society, his halting answer seemed to indicate that he affiliated with the group only after it had transitioned into the more militant Seattle Gay Alliance (SGA). See Bateman/ben Miriam Interview, *supra* note 304 ("Um, I went to meetings when it became—but it was—I was radical, so I was in GLF."). Moreover, both Singer and Barwick recalled that Francis's talk took place at the Gay Community Center—which, as Atkins notes, did not open until September 1971, the same month that Singer and Barwick sought a marriage license. *Id.*; Boucai/Barwick Interview, *supra* note 125; ATKINS, *supra* note 293, at 167. Weaving all these threads together, the most likely scenario is that Singer and Barwick made their fateful trip to the King County Clerk's Office after discussing Washington's revised marriage law (which they may have already heard about from Tim Mayhew) at a September 1971 meeting of the Seattle Gay Alliance.

the air. That January, John Landahl, an employee of the Department of Zoology at the University of Washington,³⁴⁵ circulated to a number of legislators and organizations (including Pete Francis and the Dorian Society) a list of “Proposed Modifications to the Revised Code of Washington Pertaining to Marriage, Divorce, Rights of Women, Illegitimacy, and Sexual Conduct.”³⁴⁶ One of Landahl’s suggestions was “[o] remove bars to the marriage of homosexuals by altering language presuming that one of the marriage partners is a husband and the other a wife, and by removing ‘sodomy’ from the catalog of sex offenses.”³⁴⁷ Perhaps the zoologist had heard about Jack Baker and Michael McConnell in Minnesota, or about Marjorie Jones and Tracy Knight in Kentucky? Certainly Barwick and Singer had.³⁴⁸ Indeed, there was talk throughout 1971 of a visit to Seattle by Baker and McConnell.³⁴⁹

According to Barwick, it was not clear initially which members of their commune would serve as plaintiffs.³⁵⁰ He and Singer were only occasional lovers, and they definitely were not a couple: “It was the era of ‘free love’ and collective sex, collective everything else. But we were very close, as close as anybody in that house.”³⁵¹ Ultimately Singer and Barwick were the two who “felt free enough to gain publicity [and] challenge this law.”³⁵² On the morning of September 20, 1971, their friend and fellow activist Robert Perry tipped the local media about what was going to transpire.³⁵³ When the two men, accompanied by a crowd of supporters, arrived at the King County Administration Building, the press was already waiting for them.³⁵⁴ Holding hands amid flashing camera bulbs, Singer and Barwick requested an application.³⁵⁵ “They wouldn’t give us one,” says Barwick, “so then we filed suit.”³⁵⁶

345. See John T. Landahl, Curriculum Vitae, *available at* <http://www.infostrategist.com/jlandahl/bkgd/cv.htm>.

346. See Letter of John Landahl to the Dorian Society (Jan. 18, 1971); John Landahl, Proposed Modifications to the Revised Code of Washington Pertaining to Marriage, Divorce, Rights of Women, Illegitimacy, and Sexual Conduct (Jan. 15, 1971) [hereinafter Landahl, Proposed Modifications].

347. Landahl, Proposed Modifications, *supra* note 346, at 1 (Jan. 15, 1971).

348. Boucai/Barwick Interview, *supra* note 125 (“We had read about the folks in Minnesota and . . . really agreed with what they were doing.”).

349. Letter from Jack Baker to SGA Board Member Herb Lee (Apr. 17, 1971) (discussing possible visit); Letter from Jack Baker to Herb Lee (July 1, 1971) (same). Ultimately it was only McConnell who made the trip. See Lord & Lee, *supra* note 204 (reporting on McConnell’s April 1972 visit to Seattle).

350. MOSAIC ORAL HISTORIES, *supra* note 152, at 165-66.

351. *Id.*

352. *Id.*

353. ATKINS, *supra* note 293, at 127.

354. Bateman/ben Miriam Interview, *supra* note 304; MOSAIC ORAL HISTORIES, *supra* note 152, at 165-66 (quoting Paul Barwick).

355. *Two Men Refused License to Marry*, *supra* note 4, at A14.

356. MOSAIC ORAL HISTORIES, *supra* note 152, at 165-66 (quoting Paul Barwick).

B. Three Cases: Baker v. Nelson, Jones v. Hallahan, and Singer v. Hara

Although all three plaintiff couples “expected to go to court right from the beginning,” as Jack Baker put it on the day his application to marry Michael McConnell was denied,³⁵⁷ in each of the first marriage cases there was some delay before formal legal proceedings commenced. Baker and McConnell were informed of the County Clerk’s decision in May 1970, but they did not file a writ of mandamus in Hennepin County District Court until December of that year.³⁵⁸ John Singer and Paul Barwick’s request for a marriage license was refused in September 1971, but it took them until April of 1972 to move in King County Superior Court for an order to show cause.³⁵⁹ Events unfolded more quickly in Louisville, but not without some initial hesitation. Perhaps fearful of provoking County Attorney Bruce Miller to pursue his threat to investigate Jones’s fitness as a parent,³⁶⁰ the couple’s attorney at first disclaimed any intention to sue. Several days later, the *Louisville Courier-Journal* reported that Jones and Knight had “reconsidered” that decision and would proceed to court after all.³⁶¹

The need to find adequate legal representation may be one reason why the *Baker* and *Singer* cases took longer than *Jones* to get off the ground.³⁶² The Kentucky case, again, was the brainchild of the couple’s attorney, Stuart Lyon, whose performance on behalf of his clients would leave much to be desired.³⁶³ Still, Lyon was canny enough to solicit help from the Kentucky Civil Liberties Union, whose attorneys backed away from the lawsuit when they realized that “[a]ny lawyer who takes it is going to be suspected of being queer. . . .”³⁶⁴ Baker and McConnell fared better with Minnesota Civil Liberties Union (MCLU) attorney Lynn Castner and young Minneapolis lawyer R. Michael Wetherbee, who became in the

357. *Homosexual Marriage License Denial Urged*, MINNEAPOLIS STAR, May 23, 1970, at 5A.

358. *Baker* Jurisdictional Statement, *supra* note 212, at 4.

359. *Singer v. Hara*, 522 P.2d 1187, 1188 (Wash. Ct. App. 1974).

360. Hallahan/Miller Letter, *supra* note 281.

361. John Finley, *Women Denied Marriage License Sue*, COURIER-J. (Louisville), July 11, 1970, at A7.

362. Bateman/ben Miriam Interview, *supra* note 304 (“It took them [the ACLU of Washington] a full year to finally give us a no.”).

363. See, e.g., Complaint at 5, *Jones v. Hallahan*, No. CR 140,279 (Jefferson Cir. Ct., Ky. July 10, 1970) (raising the silly claim that Kentucky’s prohibition of same-sex marriage violated the federal Civil Rights Act of 1964); *Jones* Transcript of Evidence, *supra* note 44, at 74 (confessing to the trial judge that “I’m glad that I’m in the role of an attorney where I don’t have to make the decision, because I do not know how I would handle something like this.”); *Jones* Appellants’ Brief, *supra* note 249, at 40 (arguing that encouraging gay people to enter heterosexual marriages would create dysfunctional families and, in turn, would “increase the incidence of ‘classic patterns’ from which homosexual children spring and consequently increase the incidence of homosexuality and acts of sodomy.”). Meanwhile Lyon’s co-counsel David Kaplan appears to have taken a strangely narrow view of the case. See *Marriage Bid Rejected; Pair Appeal*, ADVOCATE, Apr. 14–27, 1971, at 4 (“It’s a question of the right to contract. . . . That’s the main issue as I see it.”).

364. Bill Peterson, *Without Fee or Fear: The KCLU Picks Cause, Then a Lawyer Who’s Not Afraid of Controversy*, COURIER-J. (Louisville), July 17, 1970, at B1.

course of the litigation the first openly gay attorney hired by an ACLU affiliate.³⁶⁵ But the MCLU as such appears only once in the entire *Baker* record,³⁶⁶ though it may have paid some of the costs of the couple's appeals.³⁶⁷ Until the case went to the U.S. Supreme Court, Wetherbee and Baker—who were named on one brief as co-counsel—appear to have handled the matter themselves.³⁶⁸ The ACLU's national office declined to get involved in the case.³⁶⁹ In Seattle, Singer and Barwick were represented by several members of the National Lawyers Guild who had recently formed a leftist law collective: Robert Welden and Christopher Young in the trial court, then Michael Withey on appeal.³⁷⁰ The record in *Singer* suggests communication and perhaps collaboration between Withey in Seattle and Wetherbee in Minneapolis; large portions of Singer and Barwick's brief to the Washington Court of Appeals recite verbatim Baker and McConnell's brief to the Minnesota Supreme Court.³⁷¹

Like its counterparts in Minnesota and Kentucky, the American Civil Liberties Union of Washington (ACLUW) was hesitant to involve itself in

365. See American Civil Liberties Union, Special Docket: Homosexuals, May 1, 1972, at 3; *Minnesota ACLU Chapter Hires Gay As Its Lawyer*, *ADVOCATE*, May 26–June 6, 1971, at 14.

366. Letter from Lynn S. Castner to the Clerk of the Supreme Court of Minnesota (Jan. 10, 1972) (informing the Clerk of Baker and McConnell's intention to appeal to the U.S. Supreme Court); cf. Marcia Coyle, *The First Case, 40 Years On*, *NAT'L L.J.*, Aug. 23, 2010, at 1-2 ("The Baker case was the first same-sex marriage lawsuit in the country and, at the time, there was never a question in the mind of the president of the Minnesota Civil Liberties Union that his organization would take the lead. 'Of course it was controversial, but we were a major force with regard to gay and lesbian rights, and someone had to be the first to do it,' said Matthew Stark.")

367. See Lord & Lee, *supra* note 204, at 7 ("In the marriage case, Jack and I paid the first \$3,000 ourselves. The Supreme Court has that case in front of it now. The Minnesota Civil Liberties Union has now stepped in and decided to take care of the additional expenses—another \$3,000 or so.")

368. See BRONSON, *supra* note 208, at 26 (asserting that Baker "wrote the briefs" to the state Supreme Court, "supervised by Wetherbee"). Baker's participation might explain some of the more heated prose that appears in certain filings. See, e.g., *Baker Appellants' Brief*, *supra* note 125, at 10 ("The most charitable thing that can be said of Respondent is that he is a misguided public official who is attempting to impose his concept of 'God's Law' on the people of Minnesota instead of upholding the laws written by the elected representatives of the people."). One finds similar rhetoric in the brief that Baker and McConnell filed *pro se* challenging the Veteran Administration's refusal of spousal benefits to McConnell. See Joint Brief of Appellants and Appendix at 1 *McConnell v. Noonan*, No. 76-CIV-1606 (8th Cir. Aug. 2, 1976) ("This controversy presents an opportunity for judicial review of bureaucratic participation in the national pastime of Gay baiting, the refusal to tender the constitutionally-guaranteed right of equal protection to Gay citizens specifically and unmistakably [sic] because of the obvious destiny postulated by THE GAY IMPERATIVE."); *id.* at 3 ("Most Gays realize that trial courts are worthless as defenders of constitutional equality, especially insofar as that birthright is perceived as a threat to breeder sexuality. . . . Judge Larson's behavior is an ugly reminder of the discredited albeit coordinated effort by sick and twisted minds to have government regiment conformance to an amorally assumed, mythic, and never fully described 'higher law.'")

369. Coyle, *supra* note 366, at 2 ("When the MCLU took Baker and McConnell's case, Stark recalled, 'I personally went to the ACLU executive committee in New York—I was on the national board—and asked them to join. They said no.'")

370. Bateman/ben Miriam interview, *supra* note 304; MOSAIC ORAL HISTORIES, *supra* note 152, at 165-66 (quoting Paul Barwick). Telephone interview with Michael Withey (Jan. 26, 2011) [hereinafter Boucai/Withey Interview]. Withey went on to successfully champion a number of progressive causes over the course of his career. See Barclay & Fisher, *supra* note 17, at 86.

371. See also Boucai/Withey Interview, *supra* note 370 ("I think we probably did chat [with the Baker lawyers] at one point in time.")

a gay marriage case.³⁷² In March 1972, after four months of meetings and extensive investigation into “all of the literature they could obtain dealing with homosexuality,” members of an “Ad Hoc Committee on Sex and Marriage” unanimously recommended to the ACLUW’s Board of Directors that the organization endorse as a matter of “policy” the constitutional right to marry a same-sex partner. A majority of the committee further recommended taking Singer’s case, notwithstanding the fact that gay people faced “more serious civil liberties problems” and despite their recognition that “John Singer was not a good test litigant because he really doesn’t want to get married.”³⁷³ The Committee’s proposal was debated at a board meeting attended by several guests, including Singer himself and Seattle Gay Alliance representative Tim Mayhew.³⁷⁴ Board members expressed a variety of reservations: homosexuality’s arguable “abnormality,”³⁷⁵ a desire to address the broader problem of discrimination against single people,³⁷⁶ and skepticism about the legal grounds for gay marriage.³⁷⁷ The Board referred the question to the organization’s Legal Committee,³⁷⁸ which recommended the following month that Singer and Barwick’s case “should not be taken due to lack of policy in this area.”³⁷⁹ The Board agreed that the ACLUW would not directly represent Singer and Barwick, but it voted to file an amicus brief on their behalf in order to “spearhead” the “growth of [such] policy.”³⁸⁰ As ACLUW Executive Director Laura Selden explained in the organization’s 1972 Annual Report, “[t]he probability of success is not great, but it is important that the rights of gay people be asserted vigorously by the ACLU.”³⁸¹ It does not appear, however, that the

372. See Bateman/ben Miriam Interview, *supra* note 304 (recalling the ACLUW’s refusal to take the case); MOSAIC ORAL HISTORIES, *supra* note 152, at 165-66 (quoting Paul Barwick) (same).

373. The Committee also recommended that the ACLUW endorse the position that “the State should *never* be allowed to interfere with a parent’s right in his or her child merely because that parent is a practicing homosexual” and it concluded that “no one should be automatically excluded from *consideration* [as an adoptive parent] merely because of homosexuality.” Memorandum from the Ad Hoc Comm. on Sex and Marriage to Am. Civil Liberties Union of Wash. Bd. of Dirs., Mar. 10, 1972, at 1, 2, 5 [hereinafter Committee Memo to ACLUW Board].

374. Minutes, Am. Civil Liberties Union of Wash. Bd. of Dirs. Meeting of Mar. 18, 1972, at 2.

375. One board member said that considerations of “normality or abnormality” were relevant to the question, given that marriage was an “economic structure” that “aimed at taking care of children.” Another board member, who had recently read a “psychologist’s report . . . against homosexual marriage,” agreed that “the normal/abnormal question needed serious review.” *Id.* at 2, 3.

376. “[Board member] Meltzer said singles are also discriminated against and if the Board wants policy it should be to erase all discrimination.” *Id.* at 3.

377. “[Board member] Gottfried . . . said the privacy doctrine . . . has not been ‘mined’ and the constitutional rationale for its applicability here is lacking. . . . [Board member] Biglan said lawyers had felt that the intention of legislators in making the state’s marriage law would prohibit getting far with the *Singer* case.” *Id.* at 3.

378. *Id.* at 3; Minutes, Am. Civil Liberties Union of Wash. Bd. of Dirs. Meeting of Apr. 15, 1972, at 1.

379. Minutes, Am. Civil Liberties Union of Wash. Bd. of Dirs. Meeting of Apr. 15, 1972, at 1.

380. *Id.*

381. Selden, *supra* note 333, at 1.

promised amicus brief was ever filed.³⁸²

Selden's pessimism about *Singer's* prospects probably had more to do with the political novelty of the issue than with the theoretical viability of the plaintiffs' constitutional claims. Each of the most prominent arguments in today's gay marriage arsenal was presented in these first cases. Plaintiffs leaned heavily on the theory that state law did not explicitly ban same-sex marriages and so did not prohibit them at all, an argument that gay rights advocates have sometimes pressed (though not so strenuously) in more recent litigation.³⁸³ Relying on then-recent Supreme Court precedents like *Loving v. Virginia*³⁸⁴ and *Griswold v. Connecticut*,³⁸⁵ all three couples claimed that their exclusion from civil marriage violated a fundamental right to marry and intruded on constitutionally protected privacy interests.³⁸⁶ They argued that same-sex marriage bans invidiously discriminated on the basis of sex, and so violated their right to equal protection of the laws.³⁸⁷ This claim was strangely absent in the *Jones* case, but it was especially conspicuous in *Singer* due to Washington's 1972 adoption of an Equal Rights Amendment, which, plaintiffs argued, imposed a nearly "absolute prohibition" on any "legislative classification based on sex."³⁸⁸ *Singer* and Barwick also advanced the novel idea that discrimination "against homosexuals" is presumptively unconstitutional because gay people satisfy all the "criteria" of an "inherently suspect" classification. They argued that gay people were politically powerless, had historically suffered discrimination, were "subject to myths and stereotypes," and possessed a more-or-less "immutable characteristic."³⁸⁹ True to their unapologetic politics, *Singer* and Barwick were equivocal as to this last criterion: "Even though our society attempts to make love

382. On September 22, 1972, the Washington Court of Appeals construed *Singer* and Barwick's "petition for writ of certiorari . . . as a proper notice of appeal from the trial court's order." More than a year later, the ACLUW's Annual Report stated (incorrectly) that the *Singer* case was "pending in the Washington Supreme Court" and that "an amicus brief is being prepared." TERI KATZ & MARY HOWELL, 1973 ANN. LEGAL REP., ACLU OF WASH. FOUND. (c. Dec. 1973), at 14. The Washington Court of Appeals reached its decision in May of 1974, and the state Supreme Court denied review in October of that year. Although the full *Singer* case file could not be obtained (it was discarded by the Washington State court system many years ago), SUNY Buffalo law student Jeffrey Hartman and ACLUW employee Lindsay Anderson found no evidence of an amicus brief in their diligent searches of relevant materials in the ACLUW's archives.

383. See *Baker* Appellants' Brief, *supra* note 216, at 45-50; *Jones* Appellants' Brief, *supra* note 249, at 47-50; *A Legal Brief on the Legitimacy of Gay Marriage: Singer & Barwick vs. Hara*, at 14-17 (c. 1972) [hereinafter *Singer* Appellants' Brief]. Although, as noted in the preceding footnote, the *Singer* case file could not be obtained, the plaintiffs and/or the Seattle Gay Alliance and/or the Seattle Gay Liberation Front turned their appellate brief into an advocacy pamphlet.

384. 388 U.S. 1 (1967).

385. 381 U.S. 479 (1965).

386. *Baker* Jurisdictional Statement, *supra* note 212, at 18; *Jones* Appellants' Brief, *supra* note 249, at 6-8; *Singer* Appellants' Brief, *supra* note 383, at 5-8.

387. *Baker* Appellants' Brief, *supra* note 216, at 4-5, 75-78; *Singer* Appellants' Brief, *supra* note 383, at 14-17.

388. *Singer* Appellants' Brief, *supra* note 383, at 16; see also *Singer v. Hara*, 522 P.2d 1187, 1190-93 (Wash. Ct. App. 1974) (describing and rejecting plaintiffs' sex discrimination claim).

389. *Singer* Appellants' Brief, *supra* note 383, at 6, 9, 17-23.

gender-related, . . . environmental conditioning to that effect is not perfect and it is a fact that a significant portion of our society either cannot or will not pair up with the opposite sex. Besides, perfect mental conditioning and environmental control works against recognized standards of freedom, creativity and respect for differences.”³⁹⁰

Some of the plaintiffs’ legal theories were bold by contemporary standards. Perhaps because they did not expect to win, they could make arguments with political rather than legal purchase. For instance, today’s litigators would not dream of arguing that same-sex marriage bans violate the Eighth Amendment.³⁹¹ The point of this claim, raised in all three cases, was not simply that refusal of a marriage license constituted cruel and unusual punishment “[u]nder circumstances where there should be no punishment at all,”³⁹² but that such deprivation effectively conditioned provision of a marriage license on one partner’s resort to sex reassignment surgery: “The mandate by the State that one of the appellants have his penis cut off before issuance of a license is ‘conduct that shocks the conscience.’”³⁹³ Today’s gay rights advocates also shy away from the religious freedom claims that consumed much of the briefing in Kentucky. There Jones and Knight argued that the state violated the First Amendment’s Free Exercise Clause by preventing them from “act[ing] consistently with their religious beliefs” and, perhaps more plausibly, that it violated the Establishment Clause insofar as “[t]he religious teachings and beliefs of the Christian and Jewish faiths” are the basis of “the modern social conviction that marriage must be between members of the opposite sex.”³⁹⁴

County attorneys rebutted the plaintiffs’ claims in a variety of ways. In addition to invoking “the nature of civilization and . . . life itself”³⁹⁵ and making dire predictions of “absolute chaos” should “we attempt to undermine the law of our Creator in the most fundamental area of the relationship of man and woman as man and wife,”³⁹⁶ they argued that individual states have wide latitude in defining the marital relationship;³⁹⁷

390. *Id.* at 6; see also Baker Appellants’ Brief, *supra* note 216, at 18 (employing similar language).

391. Baker Appellants’ Brief, *supra* note 216, at 50-55; Jones Appellants’ Brief, *supra* note 249, at 51-55; Singer Appellants’ Brief, *supra* note 383, at 28-30.

392. Singer Appellants’ Brief, *supra* note 383, at 30; see also Baker Appellants’ Brief, *supra* note 216, at 53-55; Jones Appellants’ Brief, *supra* note 249, at 51.

393. Singer Appellants’ Brief, *supra* note 383, at 30; Jones Appellants’ Brief, *supra* note 249, at 51 (“[T]he only way either party could marry . . . would be to wait until medical science perfects a method of installing male sexual organs and accessories into the body [sic] of females. . . . It would be cruel and unusual to compel . . . such an ordeal in order to secure the ‘happiness’ of being married.”).

394. Jones Appellants’ Brief, *supra* note 249, at 9, 45.

395. *Id.* at 13.

396. Appellee’s Motion to Dismiss Appeal and Brief at 5, 18, Baker v. Nelson, 409 U.S. 810 (1972) (No. 71-1027).

397. *Id.* at 3-7.

that “homosexual marriages” were clearly contrary to legislative intent,³⁹⁸ that permitting them would contravene the state’s sodomy law;³⁹⁹ that bans on such marriages were justified by the state’s interest in procreation;⁴⁰⁰ and that sanctioning gay marriage would “necessarily . . . encourage[.]” homosexual relationships, enabling their “spread throughout the world.”⁴⁰¹

Judges rebuffed the plaintiffs’ claims at every turn.⁴⁰² The U.S. Supreme Court’s dismissal of *Baker* “for want of a substantial federal question”⁴⁰³ captures the perfunctory reaction of nearly all the benches that heard these first cases.⁴⁰⁴ At the close of a hearing on *Baker* and McConnell’s writ of mandamus, Hennepin County Judge Tom Bergin “indicated that he was not interested in having any briefs filed on the constitutional issues or . . . develop[ing] other points further” because “he already knew which way he was going to rule. . . .”⁴⁰⁵ When the case reached the Minnesota Supreme Court for oral argument, “none of the seven justices asked a single question” and one of them, Justice Fallon Kelly, is said (perhaps apocryphally) to have swiveled in his seat, “literally turning his back” on attorney Mike Wetherbee.⁴⁰⁶ The court’s short and unanimous opinion “dismiss[ed] without discussion” the plaintiffs’ arguments under the First and Eighth Amendments, and it disposed cursorily of their equality and right-to-marry claims on the ground that marriage, an institution “as old as

398. *Baker* Respondent’s Brief, *supra* note 213, at 6-10; Brief for Appellee at 5-9, *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973) (No. W-152-70) [hereinafter *Jones* Appellee Brief].

399. *Jones* Appellee Brief, *supra* note 398, at 5-9.

400. See, e.g., *Jones* Appellants’ Brief, *supra* note 249, at 7.

401. *Jones* Transcript of Evidence, *supra* note 44, at 57.

402. In October 1971, the Minnesota Supreme Court unanimously affirmed the Hennepin County Clerk’s order quashing *Baker* and McConnell’s writ of mandamus. See *Baker v. Nelson*, No. 672384 (Minn. Dist. Ct. Jan. 1, 1971) (order quashing writ of mandamus); *Baker v. Nelson*, No. 672384 (Minn. Dist. Ct. Jan. 29, 1971) (amended order incorporating findings of fact and conclusions of law into Jan. 8, 1971 order); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). In November 1973, an undivided Kentucky Court of Appeals affirmed the Jefferson County Circuit Court’s 1971 ruling against *Jones* and Knight. See *Jones v. Hallahan*, No. C140279, slip op. (Ky. Cir. Ct. Feb. 25, 1971); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973). And in October 1974, the Washington Supreme Court declined to review the state Court of Appeals’ unanimous affirmance of the King County Superior Court’s denial of *Singer* and *Barwick*’s motion to show cause. *Singer v. Hara*, No. 43391 (Wash. Oct. 10, 1974) (order denying petition for review).

403. *Baker v. Nelson*, 409 U.S. 810 (1972).

404. As Michael Klarman observes, “[t]he judges who decided these early gay marriage cases did not simply reject the plaintiffs’ arguments; they treated them with derision.” KLARMAN, *supra* note 18, at 19. The Washington Court of Appeals, however, was not totally scornful. See *Singer v. Hara*, 522 P.2d 1187, at 1196 n.12 (Wash. Ct. App. 1974) (“We are not unmindful of the fact that public attitude toward homosexuals is undergoing substantial, albeit gradual, change. . . . [W]e express no opinion upon the desirability of revising our marriage laws to accommodate homosexuals and include same-sex relationships within the definition of marriage. That is a question for the people to answer through the legislative process. We merely hold such a legislative change is not constitutionally required.”).

405. *Minnesota Court Again Denies License*, ADVOCATE, Feb. 3–16, 1971, at 3.

406. On the Justices’ complete silence, see Lars Bjornsen [sic], *License Fight Reaches Minnesota High Court*, ADVOCATE, Oct. 13, 1971, at 3. On Justice Kelly’s behavior, see ESKRIDGE & SPEDALE, *supra* note 26, at 22 (citing BRONSON, *supra* note 208, at 26 (quoting *Baker*)). Contemporaneous verification of this story about Justice Kelly is elusive. It is particularly striking that Bjornsen, *The Advocate*’s Minneapolis correspondent, did not mention it in his coverage of the oral argument.

the book of Genesis,” “uniquely involv[es] the procreation and rearing of children.”⁴⁰⁷

In *Jones*, trial judge Lyndon Schmid’s first act was to send Tracy Knight home to replace her “offensive” beige pants suit with a proper dress. “She is a woman,” he barked before a crowded gallery, “and she will dress as a woman in this court.”⁴⁰⁸ When Knight returned to the courtroom in a short dress, Judge Schmid evinced a keen interest in her bare legs.⁴⁰⁹ This curiosity about Knight’s anatomy may have been related to an off-the-record question he asked her attorney: “Which of the two is the he-she and which one’s the she-she?”⁴¹⁰ In any case Judge Schmid, “a crusty old curmudgeon” who was “obviously totally revolted” by the case, took rather less interest in the plaintiffs’ legal claims.⁴¹¹ His written opinion contained, at most, a single sentence responsive to their arguments.⁴¹² But he went out of his way to discount plaintiffs’ expert testimony on anthropological and psychological aspects of homosexuality. Evidence that “other cultures at other times” have sanctioned homosexuality and same-sex marriage was irrelevant, he wrote, because “in other cultures human sacrifice is practiced, head-hunting is the order of the day, and until comparatively recent years the most delectable piece-of-resistance [sic] was the human body.”⁴¹³ And even if “able psychologists and psychiatrists could” defend homosexuality, so too could they “justify the acts of a murderer or thief.” Thus Judge Schmid saw “no reason why we should condone and abet a spirit of . . . perverted lust any more than we should condone and abet a spirit of thievery or chicanery.”⁴¹⁴ The Kentucky Court of Appeals likewise ignored all of Jones and Knight’s constitutional arguments, albeit with less rhetorical flourish: “In our view . . . no constitutional issue is involved.”⁴¹⁵

Finally, in *Singer*, the Washington Court of Appeals found it “unnecessary to discuss” any of the plaintiffs’ arguments other than their

407. *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971).

408. Stan MacDonald, *Two Women Tell Court Why They Would Marry*, COURIER-J. (Louisville), Nov. 12, 1970, at A14; PfuhlFosl/Pfuhl Interview, *supra* note 226 (“I remember that the courtroom was packed.”).

409. Fosl/Jones Interview, *supra* note 228 (“[T]he judge got down in front when Tracy went onstage. He got down in front so he could see her sitting up there with her short dress and her legs all showing and he—it was a joke, I mean they even commented, everybody commented that saw—and he actually sat down in the front instead of being up there where he was supposed to be.”).

410. PfuhlFosl/Pfuhl Interview, *supra* note 226.

411. *Id.*

412. See *Jones v. Hallahan* at 4, No. CR 140,279 (Jefferson Cir. Ct. Feb. 19, 1971) (containing no legal analysis except for one quotation from the Mormon polygamy case, *Reynolds v. United States*, 98 U.S. 145 (1879), which presumably was meant to answer the plaintiffs’ Free Exercise claim); see also Stein, *supra* note 19, at 35 (“Plaintiffs’ statutory arguments were addressed primarily by resort to supposedly timeless definitions of marriage.”).

413. *Jones v. Hallahan*, at 2, 5.

414. *Id.*

415. *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973).

sex discrimination claim under the state ERA.⁴¹⁶ Disregarding the U.S. Supreme Court's rejection of the notion that a racially discriminatory law is constitutional if it applies equally to whites and blacks—say, a segregation statute, or a ban on interracial marriage⁴¹⁷—the Washington court upheld the state's prohibition of same-sex marriage because it applied equally to men and women and disadvantaged neither class.⁴¹⁸ And even if the law did discriminate on the basis of sex, said the Court of Appeals, that discrimination would be constitutional because it rested on an eminently rational basis—namely, “the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children.”⁴¹⁹

What enabled such dismissive responses in all three cases was an understanding of marriage so intuitive, so “fundamental,” as to render sustained legal analysis superfluous.⁴²⁰ In the question-begging logic of the Washington Court of Appeals, Singer and Barwick were not “denied entry into the marriage relationship because of their sex,” but rather “because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex.”⁴²¹ The Court supported this circular proposition with a citation to the appellate decision in *Jones*, which had quoted no less than three dictionaries to buttress its conclusion that the plaintiffs were not entitled to “issuance of a marriage license because what they propose is not a marriage.”⁴²²

III. MARRIED TO THE MOVEMENT

“I was married to the movement for many, many years. I would have little affairs with men.”

—Faygele ben Miriam (né John Singer)⁴²³

A. Motives for Litigating: Sometimes Personal, Always Political

Perhaps all gay marriage plaintiffs, at all times, are courageous simply by virtue of their willingness to tolerate public scrutiny. But it was gutsier

416. *Singer v. Hara*, 522 P.2d 1187, 1195 n.11 (Wash. Ct. App. 1974).

417. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Loving v. Virginia*, 388 U.S. 1 (1967).

418. *Singer*, 522 P.2d at 1191-92.

419. *Id.* at 1195.

420. See *Baker v. Nelson*, 191 N.W.2d 186, 187 (Minn. 1971) (using the word “fundamental” four times in relation to the traditional conception of marriage and family); see also Pascoe, *supra* note 21, at 92 (observing that judges were “exasperated by the need to provide explicit justification for assumptions they and so many others had long taken for granted”).

421. *Singer*, 522 P.2d at 1192.

422. *Id.* (quoting *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973)); see also *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (reviewing dictionary definitions and finding it “unrealistic to think that the original draftsmen of our marriage statutes, which date from territorial days, would have used the term in any different sense.”).

423. MURDOCH & PRICE, *supra* note 179, at 190.

to bring a marriage case in the early 1970s. The probability of drastic consequences was not just higher then; it was huge. Paul Barwick and his father never spoke after he applied for a marriage license.⁴²⁴ John Singer lost his job as a typist with, ironically, the Equal Employment Opportunity Commission, prompting yet another protracted legal battle.⁴²⁵ Mike McConnell, who came to Minneapolis with an offer in hand to work in the University of Minnesota library, likewise found himself suing the state Board of Regents; his appointment was revoked when the Board determined that his marriage “stunt” would “subject the University to ridicule, embarrassment, and criticism.”⁴²⁶ In Louisville, County Attorney Bruce Miller threatened an investigation into whether Marjorie Jones was “contributing to the delinquency” of her fourteen year-old son,⁴²⁷ whom she sent to live temporarily in Ohio—probably not with “relatives,” as the *Advocate* reported, but with a lesbian friend.⁴²⁸ When Jones, now in her eighties, looks back on the case, the terrible prospect of losing her children is what she remembers most keenly.⁴²⁹ She also recounts with palpable sadness how the lawsuit prompted a neighbor to have her fired from a part-time job taking care of disabled people.⁴³⁰

Given the potential and actual costs of their defiant behavior, one has to ask what spurred the first marriage plaintiffs. To a great extent we know what drives their contemporary counterparts. Gay marriage advocates’ focus on an ostensibly “universal desire for romantic love and committed intimacy” is more than canny posturing.⁴³¹ Their clients participate

424. Boucai/Barwick Interview, *supra* note 125.

425. See *Singer v. United States Civil Serv. Comm’n*, 530 F.2d 247, 256 (9th Cir. 1976) (holding that the EEOC’s interest “‘in promoting the efficiency of the public service’ outweighed the interest of its employee in exercising his First Amendment Rights through publicly flaunting and broadcasting his homosexual activities.”).

426. Joint Brief of Respondents in Opposition to Petition for Writ of Certiorari at 10-11, *McConnell v. Anderson*, No. 71-978 (U.S. Mar. 2, 1972).

427. Hallahan/Miller Letter, *supra* note 281. Miller describes himself as “a pretty liberal guy,” who as a law student led “a battle to integrate Vanderbilt [University].” But the presence of children in Jones’s home was, he says, “something that really pissed me off. I remember that. . . . I remember I blew my gasket about that.” Fosl/Miller Interview, *supra* note 226.

428. *Louisville GLF Pickets Bar, Backs Suit*, *supra* note 260, at 2; Fosl/Jones Interview, *supra* note 228 (“[W]e took my kids to another state, took them back up to where I used to live, and had a friend of mine take care of them who was gay and she took care of them.”).

429. Boucai/Jones Interview, *supra* note 225; see also Fosl/Jones Interview, *supra* note 228 (“I’d never have done it, I would never have done it if I had my right sense of mind. I just wanted to get the movement going, that was all. . . . But I just never thought that they would try to take my kids away from me.”).

430. Boucai/Jones Interview, *supra* note 225 (“I would take this one lady, an old lady, she had never fished in her life, never been around a lake, and I took her [to the creek] to fish. . . . And my neighbor made a complaint . . . , saying I was queer and that I shouldn’t [be around her]. . . . You know that lady was having the time of her life. . . . I wasn’t causing [her] no problems. I was just trying to give her a little bit of a life she had never had. She really enjoyed fishing up there.”).

431. Ariel Levy, *The Perfect Wife*, *NEW YORKER*, Sept. 30, 2013, at 61 (describing the romantic ideal that, based on opinion polls and focus-group research, supplanted equal rights as the core message of gay marriage advocacy).

sincerely in the modern mythology of marriage.⁴³² Whatever other motives litigating couples have today—including, for some, making a political statement and obtaining marriage’s tangible benefits—by far the most important, the *sine qua non*, is a wish to celebrate, validate, and perpetuate their “love and romance” by joining the foremost institution through which society valorizes those ideals.⁴³³ “‘Marriage is a magic word,’” declared Edie Windsor on the steps of New York’s City Hall, forty-two years after she embarked on a relationship with Thea Spyer but just two years after their marriage in Canada.⁴³⁴ “Thea looks at her ring every day,” said Windsor, “and thinks of herself as a member of a special species that can love and couple ‘until death do them part.’”⁴³⁵

To what extent did Baker and McConnell, Jones and Knight, Singer and Barwick, wish to “marry for love”?⁴³⁶ Surely the Minnesota plaintiffs did, even though both men considered marriage “a horseshit institution” that, in McConnell’s words, was “definitely on its way out.”⁴³⁷ Their hand-carved wooden wedding rings, when placed together, spelled out “Jack loves Mike,”⁴³⁸ and the couple’s “secret plan”⁴³⁹ to obtain a license by fraud was evidence, said Baker, of “how much Mike and I want to be married.”⁴⁴⁰ The lawsuit politicized what to them was personal—and it

432. ROLAND BARTHES, MYTHOLOGIES 142-43 (trans. Annette Lavers, Hill & Wang 1972) (1957) (“Myth is constituted by the loss of the historical quality of things; in it, things lose the memory that they were once made. . . . [Myth is *depoliticized speech*. . . . [It] does not deny things, on the contrary, its function is to talk about them; simply, it purifies them, it makes them innocent, it gives them a natural and eternal justification, it gives them a clarity which is not that of an explanation but that of a statement of fact.”).

433. Kimberly D. Richman, *By Any Other Name: The Social and Legal Stakes of Same-Sex Marriage*, 45 U.S.F. L. REV. 357, 375, 382-83 (2000). Interestingly, this finding comes from a study of disproportionately politicized or activist same-sex brides and grooms: participants in San Francisco’s “summer of love,” when Mayor Gavin Newsom, in an act of civil disobedience, authorized the issuance of marriage licenses to same-sex couples. See Verta Taylor et al., *Culture and Mobilization: Tactical Repertoires, Same-Sex Weddings, and the Impact on Gay Activism*, 74 AM. SOC. REV. 865 (2009).

434. Levy, *supra* note 431, at 60.

435. *Id.*

436. There are, of course, reasons other than “love and romance” why these couples might have earnestly wished to marry. An obvious one is benefits, which both Baker and Knight mentioned in their trial testimony. *Baker Appellants’ Brief*, *supra* note 216, at A-25 (Transcript of Proceedings before Hon. Tom Bergin, Hennepin C’ty Courthouse, Jan. 8, 1971); *Jones Transcript of Evidence*, *supra* note 44, at 33. Less obvious, perhaps, is the possibility that a civil marriage would have insulated sex that was otherwise doubly illicit—both non-marital and homosexual. See TEAL, *supra* note 3 (quoting Baker’s statement that “living together ‘in sin’ is not a satisfactory arrangement”); *Jones Transcript of Evidence*, *supra* note 44, at 34 (Knight: “[A]s I understand by the laws, . . . our sexual acts are illegal. So if we were legally married . . . they would have to face that it’s not illegal[.]”); see also Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1769 (2005) (describing the numerous ways by which, in 1970, criminal and civil laws made marriage “the prerequisite to engaging lawfully in most any form of sexual activity.”).

437. Tobin/Baker/McConnell Interview, *supra* note 176.

438. TOBIN & WICKER, *supra* note 41, at 149.

439. TOBIN & WICKER, *supra* note 41, at 150.

440. Lars Bjornson, *Adoption Ploy Gets Mr. to Mr. License*, ADVOCATE, Sept. 29–Oct. 12, 1971, at 1, 3. In August 1971, the Hennepin Juvenile Court granted McConnell’s petition to adopt Baker and permitted Baker to change his name to “Pat Lynn McConnell.” That same month Baker used this androgynous name on the marriage application that he alone filed in neighboring Blue Earth County.

personalized what to them was political. Standing outside a Minneapolis courthouse, Baker explained that the case was “a good way to get the heterosexual majority to sit up and take notice of the gay movement. And besides, Mike and I really want to be married.”⁴⁴¹

The Washington plaintiffs, as noted above, emphatically did not want to be married,⁴⁴² notwithstanding their not-necessarily-false statement in a press release that “We are both genital males who are in love with each other, and at present have decided that we wish to share our lives and experiences.”⁴⁴³ Their marriage lawsuit “was a political ploy,” says Barwick, “very much a political ploy.”⁴⁴⁴

Jones and Knight, whose relationship was short-lived, appear to have fallen between these two poles.⁴⁴⁵ Knight testified at trial that, at a Lexington cocktail lounge in June of 1970—before there was any thought of legal action—the two women were “informally . . . married by our own homosexual colony.”⁴⁴⁶ In the course of that ceremony they “vowed to spend the rest of their lives together—for better or worse, in sickness and in health.”⁴⁴⁷ When asked why she wanted a legal marriage, Jones testified, “[b]ecause I am a lesbian and I’m very much in love with Tracy.”⁴⁴⁸ But again, the idea to apply for a license was not their own.⁴⁴⁹ And neither Jones nor Knight initially expected their marriage bid to extend beyond an unsuccessful trip to city hall: “[W]e thought when we signed up, they’d just say no, and . . . they would put in the [news]paper that two known women applied for a marriage license. That’s all we were

A license was granted but was declared “defective” and “void on statutory grounds” when the County Attorney learned of the plot. *Baker Jurisdictional Statement*, *supra* note 212, at 5 n.3.

441. Lars Bjornson, *Appeal Planned: Judge Nixes Marriage Bid*, *ADVOCATE*, Dec. 9–22, 1970, at 4.

442. See *supra* note 373 and accompanying text (describing concern within Washington Civil Liberties Union that “Singer was not a good test litigant because he really doesn’t want to get married.”).

443. John Singer & Paul Barwick, Press Release (Draft) (c. Sept. 20, 1971) [hereinafter *Singer/Barwick Press Release*]. This portion of the Press Release was quoted in at least one of the local papers. See *County Balks at Two Men Marrying*, *SEATTLE TIMES*, Sept. 21, 1971, at A-4. With regard to the arguable truth of their statement, recall that Singer and Barwick were occasional lovers, “as close as anybody” in their shared house, and as such they were indeed sharing “their lives and experiences.” See *supra* note 351 and accompanying text. Moreover, as Barwick explained in an article defending non-monogamy:

While our relationships . . . do not attempt to guarantee . . . permanence, they are no less valid and certainly not as impersonal as [some may think]. . . . We do not believe that it is all right [sic] to do anything so long as we don’t feel anything about it. On the contrary, we believe that we must feel, share, and love.

Paul Barwick, *It’s Not All True, Mr. Balsley!*, *THE COLUMNS NORTHWEST*, Apr. 1972, at 3 (internal quotation marks omitted).

444. Boucai/Barwick Interview, *supra* note 125.

445. Boucai/Jones Interview, *supra* note 225 (Q: “And how long were you with Tracy?” A: “Tracy? Not too long. She was a sweet girl, but she was young and flighty.”).

446. *Jones Transcript of Evidence*, *supra* note 44, at 36. According to Jones, the ceremony took place at a Lexington establishment called The Downstairs Bar. Fosl/Jones Interview, *supra* note 228.

447. *Jones Transcript of Evidence*, *supra* note 44, at 36; Clifford, *supra* note 231.

448. *Jones Transcript of Evidence*, *supra* note 331, at 46.

449. See *supra* notes 226–228 and accompanying text.

supposed to do, but it didn't work out that way."⁴⁵⁰ Today Jones is adamant that "we knew we couldn't get a marriage license, which was fine with me. . . . I didn't plan on marrying the woman. . . . We didn't really want to get married."⁴⁵¹ Even their private marriage ceremony in Lexington was, in Jones's recollection, a defiant gesture urged upon them by gay male friends.⁴⁵²

The individuals involved in these first cases, including the plaintiffs' lawyers and fellow activists, generally shared Jones's sense that legal defeat was inevitable.⁴⁵³ This is not to deny that there were genuine moments of optimism,⁴⁵⁴ that the plaintiffs and their attorneys held earnest beliefs about what the law (properly construed) required,⁴⁵⁵ or that there sometimes existed within the gay community an almost poignant naïveté about the possibility and pace of legal reform.⁴⁵⁶ Yet except for Barwick, who initially thought the County Clerk's hands might be tied by Washington law's failure to prohibit same-sex marriage explicitly,⁴⁵⁷ they knew that licenses would not issue.⁴⁵⁸ And with the possible exception of Baker's attorney Mike Wetherbee,⁴⁵⁹ they equally knew that judges would

450. Fosl/Jones Interview, *supra* note 228.

451. Boucai/Jones Interview, *supra* note 225 ("[W]e were living together anyway, we didn't have to get married.").

452. Fosl/Jones Interview, *supra* note 226 (Q: "What made you all decide to have a wedding ceremony?" A: "Just aggravation, just to show them that we could do what we wanted to do. *We* didn't really care, but the guys just kept pushing us and pushing us to do it. And we used to all go down there at the bar, and it was a nice bar.").

453. *Id.* ("We knew we couldn't get it through, no way. . . . We knew we couldn't win at that time because there was so much against gays.").

454. Baker, for instance, explained that he and McConnell were planning a wedding ceremony for December 31 so that their families could attend and because "Dec. 31 is the last date you can marry and still receive an income-tax benefit by filing a joint return." *Two Men Apply for Marriage License*, GAY, June 15, 1970, at 12.

455. For example, the Washington legislature's elimination of gendered language from the statute setting forth requirements for a marriage license was what initially prompted Singer and Barwick to consider applying. See *supra* notes 342-344 and accompanying text. On the other hand, it seems unlikely that two men who had no desire to be married would have applied for a license if they expected state officials to accept their interpretation of the statute. See also Press Release, Seattle Gay Alliance (Sept. 23, 1971) (declaring the SGA's ostensible belief that marriage licenses are "authorized under already existing state law").

456. See, e.g., *Two L.A. Girls Attempt First Legal Gay Marriage*, *supra* note 4, at 1, 5 (calling the church wedding of two Los Angeles women "the first legal Gay marriage in history," and warning of "a legal hassle" upon the filing of a joint tax return); FISHER, *supra* note 65, at 204 (stating that "some states had been forced to recognize homosexual marriages because their laws fail to specify the gender of the marital partners"); *Marriage*, DETROIT LIBERATOR, Aug. 1970, at 4 ("It is becoming more and more possible for gays to be legally married.").

457. See Boucai/Barwick Interview, *supra* note 125 ("The law says 'persons.' You know, what are they gonna do?"). But see Monica Guzman, *Seattle Gay Rights Pioneer Reflects on Activism*, SEATTLE POST INTELLIGENCER: THE BIG BLOG (Nov. 3, 2009), available at <http://blog.seattlepi.com/thebigblog/2009/11/03/seattle-gay-rights-pioneer-reflects-on-activism/> ("We knew they weren't going to give us one, but damn it, they were going to have to tell us no to escort us out the door," Barwick said.").

458. See, e.g., *Homosexual Marriage License Denial Urged*, *supra* note 357, at 5A (stating that the Clerk's "decision came as no surprise to Jack Baker").

459. While Jack Baker did not "really, seriously believe [we] can win the marriage case," he told interviewer Kay Tobin that "my lawyer disagrees." Kay Tobin, Notes from Interview with Jack Baker,

not compel any other result.⁴⁶⁰ The idea of gay marriage was unthinkable to most people in 1970, by which date no state prohibited discrimination based on sexual orientation and only two states, Illinois and Connecticut, had so much as repealed their sodomy laws.⁴⁶¹ As the U.S. Supreme Court observed more than three decades later, “until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status . . . as that of a man and woman in lawful marriage.”⁴⁶² Indeed, after setting forth the basic issue before the Minnesota Supreme Court—“can two male persons obtain a license to marry each other?”—the Hennepin County Attorney asserted that “to merely raise the question is to answer it.”⁴⁶³

So even if a same-sex couple sincerely wished to be civilly married in the early 1970s, “the cards were pretty much dealt and everybody kind of knew that.”⁴⁶⁴ Legal matrimony was, at most, an ostensible goal of the first gay marriage cases. Echoing Barwick’s talk of a “political ploy,” Louisville GLF member Mickey Nelson says that the Kentucky lawsuit was “a political exercise” rather than “something we could realistically hope for.”⁴⁶⁵ Jones herself says she pursued the case “to help get a gay liberation movement started,” and—in the wake of the publicity over Baker and McConnell’s suit—to claim that movement for gay women as well as for gay men.⁴⁶⁶ Knight, again, spoke openly at trial of the “sexual cause” to which she was committed,⁴⁶⁷ and McConnell frankly acknowledged that his and Baker’s lawsuit was “a political act with political implications.”⁴⁶⁸

at 13 (1971).

460. See *Court Rules Homosexual Wedding Void*, INDEPENDENT PRESS-TELEGRAM (Long Beach, Cal.), Oct. 17, 1971, at 2 (“‘We are not all surprised,’ said Baker . . . ‘The ruling was not at all unexpected. After all, the members of the Minnesota Supreme Court are all white, male and heterosexual.’”); Patrick Condon, *Four Decades Ago, This Gay Couple Sued For Right to Marry—and the Supreme Court Rejected Them*, ASSOCIATED PRESS, Dec. 12, 2012, at 1 (quoting Baker’s statement that “[t]he outcome was never in doubt”). At one point McConnell called himself “a little more optimistic than Jack,” but he acknowledged that this was “naïve.” Tobin/Baker/McConnell Interview, *supra* note 176. See also *Marriage Bid Rejected*, *supra* note 363, at 4 (noting that Jones and Knight’s attorney David Kaplan “wasn’t too optimistic”); Boucai/Randall Interview, *supra* note 230 (“I don’t think anybody was so silly to think [the Jones case] would have gone anywhere”); Boucai/Withey Interview, *supra* note 370 (“I didn’t think we had a good shot [in *Singer*]”); Selden, *supra* note 333, at 2 (“The probability of success [in *Singer*] is not high.”).

461. See *supra* note 20.

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

463. *Baker Respondent’s Brief*, *supra* note 213, at 4.

464. Boucai/Nelson Interview, *supra* note 239.

465. *Id.*

466. Fosl, *supra* note 33, at 46; Fosl/Jones Interview, *supra* note 228 (“We didn’t know all that was going to happen, but we just wanted to put the women up there, too, so they would know it wasn’t just guys, that there were women the same as there were guys, and that women felt the same way that the guys did. And it was only fair that they weren’t getting all the hassle when there were just as many women—in fact, possibly more than there were men—that were gay.”).

467. Jones Transcript of Evidence, *supra* note 44, at 45; see also Fosl, *supra* note 33, at 55 (concluding that “the couple’s primary motivation for wishing to marry seems to have been political”).

468. TOBIN & WICKER, *supra* note 41, at 144.

B. Messages

But why this act specifically? Why marriage litigation? To be sure, these Stonewall-era cases conformed to what some activists called “Gay Liberation strategy number one”: “confront the opposition in an aggressive fashion so as not to be constantly on the defensive.”⁴⁶⁹ But with what, exactly, was the opposition confronted? What, if not marriage *per se*, were *Baker*, *Jones*, and *Singer* about?

First, marriage litigation was a forceful assertion of gay equality. This proposition may sound innocuous to many twenty-first century liberals and (no doubt for other reasons) it might have seemed bland to many gay liberationists in the early 1970s. But “fighting to establish equal rights for homosexuals” was an important project even then.⁴⁷⁰ For Jack Baker, a marriage case was simply the most noted accomplishment in an activist career whose “emphasis all the time,” he said, “was equal rights, equal rights in all areas of society!”⁴⁷¹ For Tracy Knight and Marjorie Jones, seeking a marriage license was a singular gesture in the same spirit; according to the Associated Press, they “applied for [a] marriage license because they believe[d] practicing homosexuals should be granted the same rights as heterosexuals.”⁴⁷² Paul Barwick shared that belief:

There’s a lot of things that I don’t care for but I will . . . fight[] for the right to do [them]. Because you’re not equal ‘til you’re equal. . . . To be blocked from marriage is to be . . . not worthy, you know, whether or not one believes in marriage.⁴⁷³

The *Baker*, *Jones*, and *Singer* cases pressed the claim of gay equality to what seemed, in the early 1970s, its logical extreme. If someone like John Singer could not only stomach the idea of gay marriage but bring a case himself—this was the same person who argued that “Gay Liberation can only be achieved through social revolution, for the issue here is not one of bourgeois ‘civil liberties’”⁴⁷⁴—it was because he perceived that this particular demand illustrated how far-reaching, how far from innocuous, the claim of equality could be. “We fight not for . . . tolerance,” wrote Seattle GLF Chairman Earl Corse, and tolerance was not what his

469. ABBOTT & LOVE, *supra* note 47, at 162.

470. *In Support of Larry Ward*, GAY LIBERATION FRONT NEWS, July 2, 1970, at 2; TEAL, *supra* note 3, at 51 (quoting activist Seth Overseth’s observation that “the primary orientation of the left Gay social revolutionaries is Gay. Their main interest in Gay liberation is just what the name implies—to end discrimination against homosexuals.”).

471. TOBIN & WICKER, *supra* note 41, at 141.

472. *Two Women Seek License*, SAN ANTONIO EXPRESS, July 8, 1971, at 11.

473. Boucai/Barwick Interview, *supra* note 125 (“[T]o be blocked from marriage is to be . . . put in some other category.”).

474. Singer, *supra* note 36, at 3. Singer’s disdain for conventional politics ran deep. Resigning in 1973 from the Board of Seattle’s GLF, he wrote, “I specifically do NOT wish to be connected in any way with any process that would validate or support any candidate for office who represents a major political party.” Letter from Fayege Singer, *supra* note 56.

comrades Singer and Barwick were seeking.⁴⁷⁵ Marriage, as many commentators have observed, is no run-of-the-mill civil right; it is the institution through which society expresses a strong moral valuation of certain relationships, giving secular blessing to sexual and romantic unions that many people understand primarily in spiritual and religious terms.⁴⁷⁶ So much was clear at the time. “People will live as they choose,” wrote opponents of Washington State’s proposed Equal Rights Amendment, “but the beauty and sanctity of marriage must be preserved from such needless desecration.”⁴⁷⁷ Litigation for marriage was thus an excellent vehicle for pressing the claim, fervently embraced by the gay liberation movement, that “gay is good”—even “to the degree of being sacred,” as the Supreme Court had described marriage just a few years earlier in *Griswold v. Connecticut*.⁴⁷⁸ As one gay man in San Francisco said, despite his reservations about gay marriage, “What more acceptance could the homosexual want?”⁴⁷⁹

Second, these cases protested the gendered nature of marriage, the vastly different expectations of husbands and wives and, in turn, of men and women.⁴⁸⁰ These roles continue to define the lives of millions of Americans, but in the early 1970s, before the great feminist law reforms of that decade, they defined what it meant to be legally married.⁴⁸¹ As the Hennepin County Attorney explained in his letter rejecting Baker and McConnell’s application, “[t]he distinctions between a husband and wife, a man and a woman, and the rights and duties upon each . . . are too numerous to set forth. . . .”⁴⁸² The Minnesota couple’s expectation that their case would “help women’s liberation . . . by calling into question laws that treat wives and husbands differently” goes far in explaining

475. Earl L. Corse, *Seattle’s Gay Liberation Front*, THE COLUMNS (Seattle), July 1970, at 2.

476. Proposals to legalize marriage for same-sex couples “are both supported and opposed primarily because of their expressive aspects as symbols of governmental acceptance of gay and lesbian relationships.” KENNETH KARST, LAW’S PROMISE, LAW’S EXPRESSION 14 (1993). See also Chai R. Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139, 182 (2005) (arguing that the rhetoric of political liberalism is “singularly unsuited to addressing the main concern that opponents of gay equality raise: that granting rights to gay people will necessarily imply governmental endorsement and approval of homosexual conduct. . .”).

477. Singer v. Hara, 522 P.2d 1187, 1190 n.5 (Wash. Ct. App. 1974), *appeal denied*, Singer v. Hara, 84 Wash. 2d 1008 (1974) (quoting 1972 Voters Pamphlet); see also James W. Harper & George M. Clifton, *Heterosexuality: A Prerequisite to Marriage in Texas?*, 14 S. TEX. L. REV. 220, 232 (1972-73) (“By the state’s recognition of homosexual marriage it is, in effect, also giving its approval.”).

478. 381 U.S. 479, 486 (1965).

479. George Mendenhall, *Gay Marriages*, VECTOR, Feb. 1970, at 27 (quoting Gene Nelson, who believed that the gay community should work on its internal prejudices before seeking marriage: “Before we can be accepted as being ‘married’ homosexuals, we have to accept one another first.”).

480. See Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1663 (1993) (“[W]hen homosexual people build relationships of caring and commitment, they deny the traditional belief and prescription that stable relationships require the hierarchy and reciprocity of male/female polarity. . .”).

481. See Case, *supra* note 436, at 1787.

482. Baker Appellants’ Brief, *supra* note 216, at A-1.

Baker and McConnell's intention to "cause a re-examination and re-evaluation of the institution of marriage," as well as their notion that gay marriage could "turn the whole institution . . . upside down."⁴⁸³

All three plaintiff couples resisted attempts by inquiring minds to assimilate their relationships to the traditional gendered model.⁴⁸⁴ When asked by reporters whether he or Barwick was the bride, Singer answered: "We don't believe in role playing. We're two people. We happen to be genital males. . . ."⁴⁸⁵ Confronted with the same question on the steps of the Hennepin County Clerk's office, Baker said, "We don't play those kind of roles."⁴⁸⁶ In a televised interview he elaborated the point: "One problem we have in dealing with the public is that they go looking for role playing. Who's dominant and who's submissive? The nice thing about gay relationships is you both come into it as two equal human beings and then negotiate among yourselves as to how your relationship will be structured."⁴⁸⁷ In Louisville, when asked at trial whether she played one role and Jones another, Knight acknowledged being the "butch" in the couple, but she insisted, "there really are no roles. We're both women and we do not take a man's stand either in our social or sexual affairs. . . . The only real identity that a woman plays in a lesbian role is that of a woman who loves a woman."⁴⁸⁸

Third, especially for the two gay male couples, these lawsuits were opportunities to posit visions and critiques of marriage beyond the specific issue of traditional gender roles. A "companionate" as opposed to "conjugal" view of the marital relationship, arguably implicit in the very notion of gay marriage, was made explicit in the plaintiffs' legal

483. TOBIN & WICKER, *supra* note 41, at 144. Christopher Vogel and Richard North, two men who in 1974 attempted to legally marry in Winnipeg, Manitoba, likewise saw their act as consonant with a feminist movement that was "reducing the damage done by traditional sex roles" and "changing the concept of marriage and family." SHAKUNTALA DEVI, *THE WORLD OF HOMOSEXUALS* 136 (1977).

484. So did the couple from Winnipeg. DEVI, *supra* note 483, at 134-35 ("You asked us which one of us is the husband and which one the wife in this marriage. . . . The answer is very simple. We're not trying to imitate a heterosexual marriage. . . . [W]e don't play sex roles.").

485. See *County Balks*, *supra* note 443, at A-4. Singer and Barwick's press release explicitly "condemned" heterosexual marriage for, among other things, its "continual engendering of role playing." Singer/Barwick Press Release, *supra* note 443.

486. TOBIN & WICKER, *supra* note 41, at 145.

487. McConnell then added, "I cook because I'm a better cook, not because I'm a couple of inches shorter. Jack does the dishes. I can't stand doing dishes." Wicker, *supra* note 22, at 22. In a similar vein, FREE's press release on Baker and McConnell's marriage application stated that words like husband and wife "do not apply to homosexuals" and that "the terms lovers or partners best describe a homosexual couple because they emphasize rotating social roles." *Announcement of Same-Sex Couple to Apply for a Marriage License*, FREE (U. of Minn.), May 7, 1970. See also Case, *supra* note 436, at 1785 ("The repudiation of sex-roles was reaffirmed in the couple's wedding ceremony, when . . . one said to the other, 'Touch me, I am your lover, brother, sister, and friend.'").

488. Jones Transcript of Evidence, *supra* note 44, at 36-37. Vogel and North, the plaintiff couple from Winnipeg, laughed at the suggestion that they approached marriage with an understanding "as to which one of you was going to play the role of the husband and which one was going to be the wife": "Ha. . . ha. . . what do you think, we're play-acting or something? . . . That's the heterosexual conception of marriage." DEVI, *supra* note 483, at 133.

arguments⁴⁸⁹—and, in Baker and McConnell’s case, in a number of other public statements: “Procreation cannot be the only standard used to legally recognize a significant love relationship. . . . We feel it’s the relationship, i.e., love and concern, that is important—not procreation. . . . Any relationship that promotes honesty, self-respect, mutual growth and understanding for two people and which harms no other person should be accepted by the law.”⁴⁹⁰ Unsurprisingly, the Seattle plaintiffs, who intended “to use the[ir] lawsuit . . . as a means of politically ridiculing the institution of marriage,”⁴⁹¹ were more skeptical of the state’s power to impose any “standards” at all upon such a “personal” and “individual” prerogative. In the press release they issued on the heels of their marriage application, Singer and Barwick announced: “Although we are seeking a marriage license under the laws of the State of Washington, this in no way implies that we accept or condone the institution. . . . On the contrary, we would prefer [its] abolition. . . .”⁴⁹² The two couples were equally opposed, however, to the rule of monogamy. Singer and Barwick’s press release stated: “We also condemn the monogamous aspects of marriage; monogamy cannot be enforced, but must come from within if the individual partners so desire.”⁴⁹³ On national television, Baker and McConnell called the “heterosexual phenomenon” of monogamy an artifact of an age without birth control, a time when “women were the property of men.”⁴⁹⁴ When asked whether they told each other details of their “affairs” outside the relationship, Baker frankly answered, “Yes, that’s something heterosexuals can learn from us.”⁴⁹⁵

Fourth, marriage litigation was a sure way to bring intense publicity to a movement that, in Paul Barwick’s words, was doing whatever it could just to “get people to say the word ‘gay.’”⁴⁹⁶ These first cases enlarged by

489. See *Baker Appellants’ Brief*, *supra* note 216, at 6, 8 (“[W]hen the State permits childless couples [to marry]. . . , it cannot be heard to complain when other childless couples seek similar rights. . . . Reproduction has never been a requirement of marriage.”); *Singer Appellants’ Brief*, *supra* note 383, at 3 (same); *Jones Transcript of Evidence*, *supra* note 44, at 8, 11 (plaintiffs’ expert witness, anthropologist Edwin Segal, testifying that “there are many childless marriages” and that “procreation” and “child-rearing” are not “absolute requirement[s]”).

490. TEAL, *supra* note 3, at 284 (quoting letter from Jack Baker). This language very nearly matches that contained in FREE’s press release announcing the couple’s intention to apply for a marriage license. *Announcement of Same-Sex Couple to Apply for a Marriage License*, *supra* note 487. See also *Minnesota Lovers Take Marriage Fight to State’s Top Court*, *ADVOCATE*, Mar. 31, 1971, at 2 (quoting Baker’s statement that “couples of the same sex should be permitted to marry “[a]s long as the state blesses the marriages of impotent men or infertile women—for companionship”).

491. Committee Memo to ACLUW Board, *supra* note 373, at 5.

492. Singer/Barwick Press Release, *supra* note 443.

493. *Id.* For an elaboration of Barwick’s views on monogamy, see Barwick, *supra* note 443.

494. Wicker, *supra* note 22, at 22 (“‘Monogamy is a heterosexual phenomenon,’ Baker asserted. ‘In Common Law, during the Middle Ages, they had no other method of birth control.’”).

495. *Id.* at 22. For a remarkably similar endorsement of gay non-monogamy, see GREEN, *supra* note 111, at 24 (1971) (“I have talked to many married gay couples and I found that every couple that had been together for 7 years or more had provided some form of escape valve for wanderlust. . . . I think straight people could learn from our attitude to[ward] adultery.”).

496. Boucai/Barwick Interview, *supra* note 125. Introducing a television segment on Baker and

orders of magnitude the audiences that Baker and McConnell had sought to desensitize by slow dancing at the Barrister's Ball, or that Singer, Barwick, and other GLF members would scandalize by walking down Seattle's Main Street holding hands.⁴⁹⁷ All three cases were widely covered in mainstream news outlets and together they generated "an incredible amount of publicity,"⁴⁹⁸ attracting "worldwide attention."⁴⁹⁹ Derided in some quarters for their "apparent penchant for notoriety,"⁵⁰⁰ Baker and McConnell became two of the movement's "first . . . media celebrities."⁵⁰¹ That the press was tipped in advance of each couple's trip to city hall shows that this was precisely their intention.⁵⁰² Baker and McConnell admitted to "playing to the cameras" and they freely described their lawsuit as a publicity stunt.⁵⁰³ The University of Minnesota agreed. It

McConnell's attempts to legally marry, Minneapolis newscaster Dave Moore promised viewers "some frank talk about a subject usually only spoken of in whispers. . . ." Pat Kessler, *A Rare Glimpse at Minn.'s 1st Gay Wedding in 1971*, Jul. 29, 2013, available at <http://minnesota.cbslocal.com/2013/07/29/a-rare-glimpse-at-minns-1st-gay-wedding-in-1971/>. See also Barclay & Fisher, *supra* note 17, at 91 ("For the embryonic lesbian and gay rights movement, litigation allowed them [sic] to publicly proclaim their presence.").

497. TOBIN & WICKER, *supra* note 41, at 141; Bateman/ben Miriam Interview, *supra* note 304. Drawing on Mary Anne Case's observation that visible same-sex coupling is "indicative" of a homosexuality "more firmly established than either an occasional furtive . . . encounter or a [mere] admission" that one is gay, Marc Poirier calls such everyday acts of resistance "microperformances of identity." We might in turn understand gay marriage litigation, especially the first cases, as "macroperformances" of identity. See Case, *supra* note 480, at 1643; Marc R. Poirier, *Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 3, 15 (2008).

498. Bateman/ben Miriam Interview, *supra* note 304. Although the full extent of press coverage would be nearly impossible to determine, a few indicators should suffice to disprove the claim that, "because the legal claims they raised seemed so implausible, these gay marriage cases attracted very little media coverage." KLARMAN, *supra* note 18, at 20. Between them, the Associated Press and United Press International released at least thirteen reports on Baker and McConnell's efforts to marry (including their adoption ploy), at least six reports on the Jones case, and at least one report on Singer. These reports were picked up in dozens, and more likely hundreds, of newspapers. NewspaperArchive.com—a database that includes over 6,000 newspapers but does not include thousands more, including such major and/or relevant publications as *The Chicago Tribune*, *The Courier-Journal* (Louisville), *The Minneapolis Star*, *The Minneapolis Tribune*, *The Louisville Times*, *The New York Times*, *The Seattle Post-Intelligencer*, *The Seattle Times*, and *The Washington Post*—uncovered 167 stories on these first gay marriage bids. (Of these, 99 dealt with the Minnesota couple.) See Memorandum Regarding State Press Coverage of *Jones v. Hallahan*, from Stephanie Plotin, Univ. Cal. L.A. Law Librarian, to author (Feb. 17, 2011) (collecting sources); Memorandum Regarding State Press Coverage from Stephanie Plotin, Univ. Cal. L.A. Law Librarian, to author (Feb. 25, 2011) (collecting sources); Memorandum Regarding State Press Coverage from Stephanie Anayah, Univ. Cal. L.A. Law Librarian, to author (Oct. 13, 2014) (collecting sources).

499. Jones Motion to Xerox Brief, *Jones v. Hallahan*, 501 S.W.2d 588 (Apr. 1, 1971); see also McGaughy, *supra* note 4, at A1 (noting that, "by 1970s standards," the story of two Texan men who fraudulently obtained a marriage license "went viral, making front-page headlines from El Paso to East Asia.").

500. Mike McConnell Joins St. Paul Health Board, ADVOCATE, Jan. 5, 1971, at 13 (quoting Norton W. Risdal of the Twin Cities Metropolitan Health Board).

501. DUDLEY CLENDINEN & ADAM NAGOURNEY, OUT FOR GOOD (1999). As New York activist Kay Tobin told them in 1971, "you're such public figures." Tobin/Baker/McConnell Interview, *supra* note 176.

502. See *supra* Part II-1.

503. "Playing to Cameras" *Educational, Baker Says*, ADVOCATE, May 10, 1972, at 10; TOBIN & WICKER, *supra* note 41, at 155 (losing cases were brought to "guarantee the gay movement more publicity") (quoting Baker).

defended its withdrawal of McConnell's job offer on the ground that the rebuffed librarian had "made a public spectacle" of himself: "a review of . . . newspaper[] articles discloses that the application for a marriage license was carefully staged to insure widest possible . . . coverage."⁵⁰⁴ Of course applying at all was staging enough. The idea of gay marriage, said Singer, was "so freaky they had to cover it."⁵⁰⁵

Singer's point that extensive media coverage of the lawsuits depended (at least partly) on the issue's novelty bears emphasizing in light of certain commentators' suggestion that these cases were not, in fact, the American public's first exposure to the question of gay marriage. In an article comparing *Singer v. Hara* to subsequent marriage litigation in Washington State, Scott Barclay and Shauna Fisher assert that "most of the national attention concerning same-sex marriage in the early 1970s was *initially* generated by groups opposed to . . . ratification of the federal Equal Rights Amendment (ERA) and its state equivalents."⁵⁰⁶ Indeed, according to Barclay and Fisher, the first gay marriage suits answered rather than fueled homophobic speculation that the ERA's strict requirement of sex equality would compel recognition of same-sex unions: "the *Singer* case . . . and its counterparts in Minnesota . . . and Kentucky" were "attempt[s] to . . . reclaim the territory of same sex marriage" from "those who sought to denigrate or dismiss the ERA."⁵⁰⁷ But the *Baker, Jones*, and *Singer* plaintiffs never so much as hinted at an intention to "reappropriate[] the idea of same-sex marriage" from anti-ERA forces,⁵⁰⁸ which in any event appear to have been neither the "initial[]" nor the most important instigators of "national attention" to this issue.⁵⁰⁹ Reported statements linking (or defensively de-linking) the ERA and gay marriage were rare and possibly nonexistent before *Baker* and *Jones* garnered headlines in the spring and summer of 1970. And even after those initial bursts of publicity, conflict over the ERA accounted for a significant fraction, but by no means a majority, of gay-marriage-related news coverage "in the early 1970s."⁵¹⁰

504. Joint Brief of Respondents in Opposition to Petition for Writ of Certiorari at 4, 11, *McConnell v. Anderson*, No. 71-978 (U.S. Mar. 2, 1972).

505. Bateman/ben Miriam Interview, *supra* note 304.

506. Barclay & Fisher, *supra* note 17, at 86 (emphases added). Notably, Barclay and Fisher's own sources do not substantiate their claim. Two of those sources date to 1975. The other—a 1972 article from the *Seattle Post-Intelligencer*—is an exception that proves the rule, given that the *Singer* case, whose plaintiffs relied on an already-enacted state ERA, was then pending in Seattle.

507. *Id.* at 90, 91.

508. *Id.* at 91.

509. *Id.* at 90, 91.

510. *The New York Times*, for example, ran twelve articles touching on gay marriage between 1970 and 1973, only two of which had anything to do with the ERA. See Eileen Shanahan, *Professor Shifts on Equal Rights*, N.Y. TIMES, Sept. 12, 1970, at 6; Robert Sherrill, *That Equal-Rights Amendment—What, Exactly, Does It Mean?*, N.Y. TIMES (Magazine), Sept. 20, 1970, at 25, 98. For other references to gay marriage, see Edward B. Fiske, *Homosexuals in Los Angeles, Like Many Elsewhere, Want Religion and Establish Their Own Church*, N.Y. TIMES, Feb. 15, 1970, at 58; *Vatican Aide Condemns Homosexual Marriages*, N.Y. TIMES, July 26, 1970, at 8; *Homosexual Marriages*

Beyond simply “prov[ing] the existence of gay people,” which FREE in Minneapolis counted among its primary goals,⁵¹¹ the point of all this publicity was, says Barwick, “to show that we were organizing.”⁵¹² As with gay liberation’s other confrontational tactics, that message was aimed at both the general public and those with a direct but still-unacknowledged interest in the movement’s progress. With regard to the former, frank speech about gay people and gay relationships was seen as an essential step toward advancing many other political and cultural objectives.⁵¹³ McConnell felt that he and Baker had “accomplished our goal” just by getting “the entire world talking. . . .”⁵¹⁴ To be sure, much of that talk was disparaging, from the editorial pages of Minnesota (“We’re hopeful this distasteful business will be settled once and for all by the Supreme Court”) to those of the Vatican (whose daily newspaper called gay marriages “moral aberrations that cannot be approved by human conscience much less by Christian conscience”).⁵¹⁵ One commentator in a *Playboy* “symposium” on homosexuality opined that “[m]any homosexuals are exhibitionists, and to me this cry for a marriage license is more of their desire for exhibition.”⁵¹⁶ But at this point nearly any press was good press: “This was a topic which people wouldn’t talk about. You couldn’t say the word *homosexual* without choking.”⁵¹⁷ And sometimes there were surprising expressions of sympathy. In July 1970, the *San Francisco Chronicle* voiced its support for gay marriage,⁵¹⁸ and in August of that year *The New York Times* reported that Rita Houser, President Nixon’s

Defended by U.N. Aide, N.Y. TIMES, Aug. 11, 1970, at 23; Steven V. Roberts, *Homosexuals in Revolt*, N.Y. TIMES, Aug. 24, 1970, at 1, 28; *Homosexual Wins a Suit Over Hiring*, N.Y. TIMES, Sept. 20, 1970, at 56; *Supreme Court Actions*, N.Y. TIMES, Apr. 4, 1972, at 13; Eleanor Blau, *Homosexual Marriages Opposed by Methodists*, N.Y. TIMES, Apr. 27, 1972, at 16; *Homosexual Wins Fight to Take Bar Examination in Minnesota*, N.Y. TIMES, Jan. 7, 1973, at 55; Judy Klemesrud, *Lesbians Try to Be Good Mothers*, N.Y. TIMES, Jan. 31, 1973, at 46; *Australia Issue: Homosexuality*, N.Y. TIMES, Nov. 4, 1973, at 13.

511. As Stephen Ihrig told *The Minneapolis Star*, “One of our main functions as a group is to acclimatize the straight public to our existence—to our reality.” Wrathall, *supra* note 189, at 55.

512. Boucai/Barwick Interview, *supra* note 125.

513. Tracy Knight, tired of seeing homosexuality “pushed aside into a corner,” said she was “pleased” at the prospect that newspaper and television coverage of her case would “help to educate the public.” *Marriage License Asked by 2 Women*, THE MIDDLESBORO DAILY NEWS, June 8, 1971, at 19; *Women Await Ruling of Wedding*, ADVOCATE, Dec. 9–22, 1970, at 4.

514. MURDOCH & PRICE, *supra* note 177, at 172. According to Canadian plaintiffs Christopher Vogel and Richard North, “our main task at the time was to . . . engender public discussion[,] . . . attract publicity.” LAROCQUE, *supra* note 47, at 16 (quoting Christopher Vogel).

515. Editorial, *Marriage Not for Them*, DAILY J. (Fergus Falls, Minn.), Sept. 3, 1971, at 4; *Vatican Aide Condemns Homosexual Marriages*, *supra* note 510 (quoting an article in the Vatican’s newspaper, *L’Osservatore Romano*).

516. *Playboy Panel: Homosexuality*, PLAYBOY, Apr. 1971, at 61, 84 (quoting attorney and family law expert Morris Ploscowe).

517. LAROCQUE, *supra* note 47, at 16 (quoting marriage plaintiff Christopher Vogel).

518. MARTIN & LYON, *supra* note 45, at 101 (“Members of the heterosexual majority derive great security, pride and social acceptance from this ‘rendering public’ of an honest, social commitment in the eyes of ‘God and Man.’ It would seem only in keeping with the times that consideration be given to allowing the homosexual minority the same rights to this sense of fulfillment.” (quoting July 16, 1970 editorial)).

Ambassador to the U.N. Human Rights Commission, told a section of the American Bar Association that laws limiting marriages to different-sex couples were “based on . . . an outdated notion that reproduction is the purpose of marriage.”⁵¹⁹ The topic also generated lively and sometimes supportive commentary in the legal academy,⁵²⁰ even as state legislatures nationwide began considering and sometimes passing explicit prohibitions of same-sex marriage.⁵²¹

Gay people, whether they acknowledged their sexuality to others or even to themselves, were an especially important demographic among the millions who heard about one or more of these cases. Marriage litigation’s importance to movement-building, and particularly to the paramount task of getting gay people to come out, was more than just a matter of signaling, as Barwick puts it, “that you’re not alone, there’s other people like you, and we’re fighting back.”⁵²² The first marriage cases did send that message, but so did nearly all Stonewall-era activism. What made the publicity of marriage litigation uniquely powerful was its refutation of certain ideas about what it meant to be “a queer.”⁵²³ As one heterosexual

519. *Homosexual Marriages Defended by U.N. Aide*, *supra* note 510. The incident prompted Nixon to publicly voice his disapproval of gay marriage. See Kay Tobin, *Nixon Opposes Gay Marriage*, GAY NEWS, Sept. 7, 1970, at 1. Although Hauser continued to express support for “the homosexual civil rights cause in general,” she quickly disavowed personal approval of gay marriage. See Constituent Letter from Rita Houser [unaddressed and undated] (“The reported remarks were taken completely out of context. . . . I had been attempting to trace various legal conclusions that might result from the language of the proposed [Equal Rights] Amendment. I made perfectly clear that I was not advocating marriage between people of the same sex as a social policy.”).

520. By far the most influential work in this genre was a student-authored piece in the *Yale Law Journal* arguing that the proposed federal Equal Rights Amendment would “almost certainly” require legalization of same-sex marriage. Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 574 (1973). The Note was arguably a significant factor “linking the ERA to homosexual marriages”—an association that the Amendment’s opponents deployed through much of their successful campaign to defeat the measure. JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 129 (1986) (asserting that, “[i]n this case, the ERA movement was at the mercy not of its own supporters . . . , but of two law students who submitted a publishable article to get elected to the prestigious board of the *Yale Law Journal*.”). See also Ted L. Hanson, *Domestic Relations Case Note: Minnesota Marriage Statute Does Not Permit Marriage Between Two Persons of the Same Sex and Does Not Violate Constitutionally Protected Rights*, 22 DRAKE L. REV. 206 (1973); Harper & Clifton, *supra* note 477, at 276-77 (suggesting that the statutory definition of marriage be clarified and proposing a “new legal structure” called “homogamy” for same-sex couples); Ian McColl Kennedy, *Transsexualism and Single Sex Marriage*, 2 ANGLO-AM. L. REV. 112, 114 (1973) (arguing that “marriage . . . should be extended to cover single sex relationships”); Note, *Homosexual “Marriage,”* 10 GONZ. L. REV. 292 (1974-75) (criticizing the Washington Court of Appeals’ decision in *Singer*); Leo Sullivan, *Same-Sex Marriage and the Constitution*, 6 U.C. DAVIS L. REV. 275 (1973) (arguing that recognition of same-sex marriage was not compelled by existing constitutional provisions or by the proposed Equal Rights Amendment). See also Gail Brent, *Some Legal Problems of the Postoperative Transsexual*, 12 J. FAMILY L. 405, 413-16 (1972-73) (discussing a number of “matrimonial problems” faced by transsexuals).

521. “Beginning with Maryland, Texas, and Colorado in 1973, a total of fifteen states . . . passed legislation in the next five years designed to limit marriage to heterosexual couples.” CHAUNCEY, *supra* note 21, at 91.

522. Boucai/Barwick Interview, *supra* note 125.

523. As Richard Meyer has observed, an important goal of the early gay liberation movement was to alter “what it would mean to look at, . . . be looked at,” and look like a homosexual. Richard Meyer, *Gay Power Circa 1970: Visual Strategies for Sexual Revolution*, 12 GLQ: A JOURNAL OF LESBIAN AND GAY STUDIES 441, 451-2 (2006).

observer put it in 1971, “by and large, the homosexual’s life is a barren one; his sex life is likely to be loveless. . . ; his life, even when filled with friends, is basically alone; and rarely is there any long-term mutual commitment between two persons.”⁵²⁴ Unfortunately this stereotype was more exaggerated than unfounded.⁵²⁵ In *The Gay Mystique*, gay liberationist Peter Fisher affirmed that, as a seventeen year-old in the gay bars of Albany, New York, he was told “that love had a way of not lasting in the gay world,” and his “early experiences seemed to bear out this warning. . . . Straight society said there could be no such thing as a happy homosexual, and sure enough, many homosexuals were wretchedly unhappy. Straight society refused to . . . grant the slightest legitimacy to gay relationships, and sure enough, gay people found it quite difficult to hold their relationships together.”⁵²⁶

Thus, in crucial respects, footage of Baker and McConnell kissing at their wedding,⁵²⁷ and photos of Singer and Barwick holding hands at the clerk’s counter, were not so different from the more vulgar images reproduced in the *Gay Marriage Guide* (c. 1970), whose dozens of hardcore pictures of sex between men were accompanied by a remarkable quantity of explicitly political text.⁵²⁸ After stating—astoundingly for a work of pornography—that “today’s young people are . . . much less titillated when viewing films, magazines and books dealing with sexual motifs,” the *Guide* proceeded to explain what gay liberation was about:

The homosexual revolution is part of a wider revolution. . . . Our young people categorically reject the phony legal and moral codes

524. *Playboy Panel*, *supra* note 516, at 84 (quoting criminal law expert and former New York City Assistant District Attorney Richard H. Kuh).

525. See *Homosexuality: Questions and Answers*, TRENDS, July/Aug. 1973, at 8, 8 (“Do homosexuals form long-term relationships? Homosexuals are no less capable of forming long-term relationships than are heterosexuals. However, social pressures make it difficult for some homosexuals to do so. Whereas society pressures the straight couple to stay together, it works against the gay couple.”).

526. FISHER, *supra* note 65, at 201, 205. Similar thoughts were articulated by “Beverley,” who was invited to offer a lesbian’s perspective in Roedy Green’s *Guide for the Naïve Homosexual*:

Realize that society is against you. . . . There are no marriage counselors for gay people, no sympathetic clergy eager to help you succeed in living with each other. . . . You won’t be encouraged to attend social events with your gay partner. . . . You may feel obliged to hide your homosexuality for reasons such as job security. In short, there is a lot of outside pressure that will probably have some effect on your relationship.

GREEN, *supra* note 111, at 25.

527. *First Gay Wedding in Minnesota—Jack Baker & Mike McConnell, 1971* (WCCO-TV4 (ABC) television broadcast) available at <http://youtu.be/fNg7ffa99m0> (last accessed Nov. 16, 2014); see also TOBIN & WICKER, *supra* note 41, at 151 (noting dissemination of photographs of the Minneapolis couple “smiling happily over their wedding cake”).

528. RICHARD SUTTON (ATTRIB.), *GAY MARRIAGE GUIDE: VOL. I* (c. 1971) [hereinafter *GAY MARRIAGE GUIDE*] (“Youth has dropped the double standard,” the *Guide* announced on page one. “They have become less hypocritical than their elders. Honesty is important to them.”). No doubt the Supreme Court’s definition of obscenity as “utterly without redeeming social value” explains the presence of arguably edifying prose in a pornographic magazine. See *Roth v. United States*, 354 U.S. 476, 484 (1957). *Roth* does not explain, however, why the magazine would print this particular polemic.

that have prescribed sexual behavior in the past. . . . In the gay movement, young homosexuals are less hysterical than their counterparts were a generation ago. They rapidly adjust to gay life. They readily find identity. And . . . they are fighting the oppression and stigmas which society has placed upon them. Young gays have given up the passivity of the past for militant activism.⁵²⁹

Who, one asks, was the intended reader of this introduction to “the youth revolution”? Who might buy explicit gay material and yet need to be informed that sometimes “guys marry guys,” in the sense of entering “a loving relationship between two people”?⁵³⁰ In a 1971 article titled “Come Out!,” Louisville GLF founder Lynn Pfuhl described just such a person:

He may . . . internalize the image of himself held by his oppressor and believe that he is, if not a moral perversion, at least a psychiatric one. . . . He will spend thousands of dollars and thousands of hours of his life patronizing psychiatrists. . . . He will deprive himself of the private joys of loving and being loved, or involved with a partner [H]e will risk his reputation and his life picking up the hustlers who prey upon him. He may commit suicide. Or he may conceive of his situation as insular, seeking the warmth of the herd in the dark smoke-filled bar which is the physical reality of the gay ghetto, . . . at least one environment in which he need not hide his true identity, and he will have the company of his fellows with whom he may join in private liaisons.⁵³¹

In the early 1970s, one of the most widely lamented features of the life of a “closet case” was his inability, even if he managed to find gay sex, to enjoy what Pfuhl called the “private joys of loving and being loved.”⁵³² Christopher Vogel and Richard North, two Manitobans who attempted to marry in 1974, explained it this way: “It’s [e]specially important now for homosexual men and women to openly celebrate their relationships. The guilt and shame and . . . fear of exposure [have] prevented most homosexual people from having any significant relationship at all.”⁵³³ Jack Baker made a similar point when he was asked at a campus lecture whether “it is true that gay marriages break up more readily than heterosexual ones.”⁵³⁴ Baker alerted his audience to a “whole structure designed so that if two gay people are living together, get caught living together, they’ll lose their job [and] their parents will disown them. . . .”⁵³⁵

529. GAY MARRIAGE GUIDE, *supra* note 528, at 3.

530. *Id.* at 8, 9, 31.

531. Fosl, *supra* note 33, at 46 [hereinafter Pfuhl, *Come Out!*] (reproducing 1971 column, *Come Out!*, by Lynn Pfuhl); *see also supra* note 92 (providing further background information on this column).

532. Pfuhl, *Come Out!*, *supra* note 531.

533. DEVI, *supra* note 483, at 130.

534. Baker, *supra* note 208, at 71.

535. *Id.*

The idea that the closet is a poor incubator of love was pervasive in the literature of gay liberation.⁵³⁶ It can be found even in the most vociferous critiques of marriage generally and of “gay imitations of traditional marriage” specifically.⁵³⁷ Dennis Altman, who hoped that “liberation would . . . mean an end to the nuclear family,”⁵³⁸ nonetheless emphasized that, “in a society where concealment of one’s homosexuality can be important, it is far easier to manage a series of ‘one night stands’ than a lasting relationship. (Try telling your boss you can’t move to a new job because of your lover.)”⁵³⁹

In “pointing out a new way of life,” the first marriage plaintiffs were also “pointing out the humiliation and degradation of the old life” that remained the reality for most gay people.⁵⁴⁰ One aspect of the “old life” that liberationists found especially pitiable, a phenomenon frequently lamented in gay circles after Stonewall, was marriage—heterosexual marriage.⁵⁴¹ As Martin Hoffman observed, “the same social forces which act to prevent” active homosexuals from “developing closeness in a sexual relationship” kept many from becoming practicing homosexuals at all, and indeed propelled them into heterosexual convention.⁵⁴² The idea of gay

536. See, e.g., FISHER, *supra* note 65, at 211–12 (“[N]o matter how quiet a life a pair of homosexual lovers may lead, they are subject to many pressures which make it more difficult for them to preserve their relationship than would be the case for a heterosexual couple.”); DEVI, *supra* note 483, at 121 (“Forced to wear a heterosexual mask, we are brainwashed (without even knowing it) into believing that our sex is shameful and unnatural—this belief is usually expressed as a tendency toward compulsive promiscuity, sexual objectification of the other, and loneliness.” (quoting Chicago Gay Liberation, *Grievances Common to All Homosexuals*, Working Paper 1970)); *Playboy Panel*, *supra* note 516, at 84 (“It’s so easy to break up, it’s not surprising that gay ‘marriages’ usually don’t last a long time. What’s surprising is that so many last 20, 30 or more years”) (quoting Gay Activists Alliance leader Dick Leitsch).

537. ALTMAN, *supra* note 77, at 17; see also DIAMAN, *supra* note 98, at 3 (“Both straights and gays perpetuate the myth that heterosexuals have long and happy relationships which homosexuals can never achieve.”); *Question # 13: Are Homosexual Relationships As Stable As Heterosexual Ones?*, THE FIFTH FREEDOM (Buffalo, N.Y.), July 15, 1973, at 14 (“Homosexual couples are barred from showing affection in public. We are usually unable to join our partners at work-connected social functions. We frequently find it difficult to find living space. We’re often prevented from going together to family affairs. Under the circumstances, the number of long-lasting homosexual relationships is surprisingly high.”).

538. ALTMAN, *supra* note 77, at 60.

539. *Id.* at 17.

540. ABBOTT & LOVE, *supra* note 47, at 22.

541. See, e.g., FISHER, *supra* note 65, at 239 (“Unhappily married homosexuals would do themselves and their families a great favor by seeking a more realistic arrangement.”); GREEN, *supra* note 111, at 5 (“[A] young homosexual will probably spend several years engaged in fruitless and frustrating attempts to ‘overcome his disability’ . . . He may force himself into heterosexual relationships, even to the extent of getting married.”); MAYHEW, *supra* note 111, at 1 (warning that one “can’t . . . assume that a married person is not gay,” because “social pressure” forces “many gay men and women . . . into a heterosexual relationship before they develop an honest gay identity.”); see also Activity List, Society for Individual Rights, VECTOR, May 1972 [page unmarked] (advertising a confidential discussion group for “married men (only) who also have homosexual relationships”); *Homosexuality: Questions and Answers*, *supra* note 525, at 8–9 (“The homosexual who knows she/he is gay is seldom swayed by having heterosexual experiences, particularly if they are sought out of desperation or anxiety. Homosexuals who try marriage as a way out usually end up making themselves and their spouses miserable, as well as any children they may have.”).

542. MARTIN HOFFMAN, THE GAY WORLD: MALE HOMOSEXUALITY AND THE SOCIAL CREATION

marriage inverted that narrative; litigation for gay marriage challenged it explicitly. In a brief to the Hennepin County Superior Court, Jack Baker and Mike McConnell argued that, “if the incentive to contract opposite-sex marriages is removed [by permitting same-sex couples to wed], Gay people will stop contracting them in such large numbers.”⁵⁴³ The brief included a thirty-page appendix purporting to prove, on the basis of divorce expenditures owing to one spouse’s homosexuality, that “it costs Minnesotans approximately \$1.0 million annually” to prohibit same-sex marriage.⁵⁴⁴ Similarly, the *Jones* plaintiffs argued—and the state effectively conceded—that “prohibition of marriage between persons of the same sex would tend to encourage some individuals to enter into a heterosexual marriage. Because such a relationship would be against the . . . nature of one partner, the chances of an unsatisfactory marriage relationship . . . would be substantially increased.”⁵⁴⁵ (The point was also granted in one reader’s short and unwittingly beguiling letter to the *Louisville Courier Journal*: “Concerning homosexual marriages, that would be one way of halting the population explosion. Then we would not need to murder hundreds of unborn babies every day. But it would not solve the sin problem.”⁵⁴⁶) Finally, in Washington, plaintiffs Singer and Barwick argued that “the state has no compelling interest in seeing that two persons of the same sex not marry; on the contrary, the state has a compelling interest only in seeing to it that Gay people marry each other lest they attempt ‘heterosexual’ marriages which have a high probability of failure.”⁵⁴⁷

Notwithstanding the accuracy of plaintiffs’ claims that same-sex marriage bans channel some people who might otherwise choose homosexual relationships into heterosexual ones,⁵⁴⁸ the effects of Stonewall-era marriage litigation on such individuals were not quite what the legal briefs urged and anticipated. Again, these cases did not and could not provide an officially sanctioned gay alternative to straight marriage. Rather, by broadcasting (as the *Gay Marriage Guide* put it) that “those who accept their homosexuality and get great pleasure from it have the

OF EVIL 177 (1968).

543. *Baker Appellants’ Brief*, *supra* note 216, at A-31.

544. *Id.*

545. *Jones Appellants’ Brief*, *supra* note 249, at 40; *Jones Appellee Brief*, *supra* note 396, at 11 (“If uni-sexual marriages were permitted in our civilization and given the sanctity of society’s blessing, the attendant result . . . would necessarily be the encouragement by example of such marriages and such uni-sexual relationships.”).

546. Stella Berry, *Calls Homosexuality Evil*, *COURIER-J.* (Louisville), July 28, 1970.

547. *Singer Appellants’ Brief*, *supra* note 383, at 26 (“The restriction that parties to a marriage be of opposite sex . . . has been found to eat away at the very foundation of the institution of marriage. A full 23% of Gay females and 15% of Gay males attempt heterosexual marriages and fail. . . . The mental suffering and untold harm to the divorced spouse and his/her family, the children, the judicial cost and welfare cost of the marriages that do not work out is a price that society should not and need not pay.”).

548. *See generally* Boucai, *supra* note 51, at 438-52.

best chance for an emotional love of long duration;”⁵⁴⁹ by refuting (in N.A. Diaman’s words) “the myth that heterosexuals have long relationships which homosexuals can never achieve;”⁵⁵⁰ and by declaring (as Tracy Knight insisted) that “I can love a woman on my own terms,”⁵⁵¹ these cases presented “gay life [as] . . . fun rather than fearful.”⁵⁵² Enacting *avant la lettre* the vision that Michel Foucault conveyed in an essay titled *Friendship as a Way of Life*, the first marriage lawsuits cast gay love less as “a form of desire” than as “something desirable.”⁵⁵³

C. Reactions

The preceding section showed that, in their motivations and effects, *Baker*, *Jones*, and *Singer* grew out of the radical gay liberation movement and were largely consistent with its ideals and goals. Still the question remains whether the movement itself agreed. To a large and underappreciated extent, it did.

1. Local Receptions

In Minneapolis, Louisville, and Seattle, opposition to the lawsuits came not from the gay liberationist circles in which the plaintiffs themselves moved, but from the old-fashioned, cautious, and largely closeted homosexuals whom liberationists defined themselves against. Contrary to some assertions, Jack Baker and Mike McConnell did not apply for a marriage license “without the backing of FREE and without any real warning to other activists in the community about their intentions.”⁵⁵⁴ One week before the couple’s visit to city hall, Jim Chesebro, a leader of the group’s revolutionary contingent, issued a press release announcing the couple’s plan, and the organization’s newsletter subsequently confirmed that Baker and McConnell acted “with the support of FREE.”⁵⁵⁵ Later, in the course of a “bitter factional dispute” between a camp led by Baker and

549. GAY MARRIAGE GUIDE, *supra* note 528, at 3.

550. DIAMAN, *supra* note 98, at 3; *see also* FISHER, *supra* note 65, at 210 (“Few gays today are willing to accept the myth that love cannot be found in the gay world.”).

551. *Marriage License Asked by 2 Women*, *supra* note 513, at 19.

552. Alex Ross, *Love on the March*, NEW YORKER, Nov. 12, 2012, at 45; *see also* Gay Emmaus House (S.F.), *Rising Up Gay: How We Feel About Homosexuality*, 3 I AM (1971), at 2 (“We believe that gay is not only good but that it can be a source of gladness and fun.”).

553. Michel Foucault, *Friendship as a Way of Life* (trans. John Johnston) (1981), *reprinted in* FOUCAULT LIVE: COLLECTED INTERVIEWS, 1961-1984, at 308, 308 (Sylvère Lotringer ed., 1989).

554. PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT 160 (2000).

555. *Announcement of Same-Sex Couple to Apply for a Marriage License*, *supra* note 487 (“FREE . . . announced today that two FREE members will apply for a Minnesota Marriage License. . . . FREE will seek to have the U.S. Supreme Court affirm the legality of this relationship, if necessary.”); *FREE Couple Leads Fight For Marital Rights*, MPLS FREE (NewsL, MPLS FREE: Gay Liberation of Minnesota, Student Grp., Univ. of Minn.), Sept. 1970, at 1 (“Baker and McConnell, with the support of FREE, have argued that any relationship that promotes honesty, self-respect, mutual growth and understanding for two people and which harms no other person should be accepted by law.”).

a camp led by Chesebro, the latter's frustrations apparently had little to do with ideological opposition to the marriage lawsuit, perhaps because this particular effort could not be said to reflect a "liberal," "step-by-step" approach to gay liberation.⁵⁵⁶ Rather they complained about Baker's assertive leadership style,⁵⁵⁷ his alleged disrespect of certain elements in the gay community (which his opponents called "as malicious and harmful as the view of those who refused the marriage license"),⁵⁵⁸ and—citing only Baker's efforts in McConnell's employment discrimination suit—his purported concern for "no one's rights but his own."⁵⁵⁹ In short, the most radical members of FREE had any number of problems with Baker, but the marriage lawsuit was not one of them. Opposition on that score came from more moderate quarters. "Committed incrementalist" Steve Endean, a student at the University who went on to found the Human Rights Campaign, saw Baker and McConnell as "crazies."⁵⁶⁰ Similarly, a then-closeted history professor warned Baker and McConnell that their actions would "sabotage" less drastic efforts; "only the lunatic fringe," he said, would make an issue of marriage.⁵⁶¹

In Louisville, whose GLF was too small to accommodate factions,⁵⁶² activists dubbed Marjorie Jones and Tracy Knight "The First Ladies of Gay Liberation,"⁵⁶³ and all agreed that they were "doing something completely revolutionary."⁵⁶⁴ In fact, Louisville had no GLF *until* Jones and Knight applied for a marriage license.⁵⁶⁵ The group was formed that

556. Halfhill, *supra* note 188; Halfhill, *supra* note 200, at 2. In the hundreds of primary sources relating to *Baker v. Nelson* that were consulted in the production of this Article, a single sentence in Halfhill's 1971 essay constitutes the only evidence of opposition within FREE to the marriage case. Deep into Halfhill's fifteen-page, single-spaced, type-written tract championing a "liberal" (rather than "revolutionary") approach to gay politics, the author mentions a meeting at which he "and Jack Baker . . . attempted to call the new 'unstructured' leadership to account for their fiscal irresponsibility." This challenge sparked "a one hour session of character assassination and innuendo on the part of [Ed] Bertorelli and [Jim] Chesebro. . . . Most of their harangue dealt with irrelevances such as . . . Bertorelli's existential-sounding philosophies about the marriage case." Halfhill, *supra* note 200, at 12.

557. Halfhill, *supra* note 188.

558. Edward Bertorelli, *Erroneous Assertions*, MINN. DAILY, Apr. 19, 1971, at 6.

559. Halfhill, *supra* note 200, at 5.

560. CLENDINEN & NAGOURNEY, *supra* note 501, at 236 (1999).

561. David Von Drehle, *Same-Sex Unions Move Center Stage*, WASH. POST, Nov. 23, 2003, at A1. The professor was Allan Spear, who went on to become a Minnesota state senator in 1972. He came out of the closet in December 1974. *See also* Lord & Lee, *supra* note 204, at 7 ("[M]ost of the closet gays there feel we're extremely radical in the things we do.").

562. *See* Fish/Williams E-mail, *supra* note 246 (noting that members of Louisville GLF "went into culture shock" at the Revolutionary People's Constitutional Convention in Washington, DC, "when we found we were the last remaining group (in attendance, at least) where the lesbians and gay men were still on speaking terms and actually . . . working together.").

563. Clifford, *supra* note 34.

564. Boucai/Nelson Interview, *supra* note 239.

565. It has been suggested that Louisville's GLF's formation was directly related to a consciousness-raising tour in southern states by several veterans of the Stonewall riots. *See* David Williams, *Gay Men*, in THE ENCYCLOPEDIA OF LOUISVILLE 332 (John E. Kleber ed., 2001). Williams's own research, however, establishes that this tour passed through Louisville several months later. *See* E-mail from — [author requested anonymity] to David Williams (Aug. 24, 2009) ("Yes I

very week to defend the couple against attacks in the local press and to challenge the County Attorney's "outrageous" threat to investigate Jones for contributing to the delinquency of her youngest son.⁵⁶⁶ As the local *Times* reported, "the ill-fated hopes of two female homosexuals to marry each other may have sparked a novel militancy and a brand new movement in Louisville."⁵⁶⁷ But when GLF promised at its first meeting "to support Miss Jones and Miss Knight in whatever efforts they may make toward appealing the county attorney's action on their marriage application," it was not because the group's leaders were passionate supporters of gay marriage. Mike Randall, the cross-dressing go-go dancer who, along with Lynn Pfuhl, convened that first meeting at Jones's house, says he can't recall any debate within GLF about whether to support the case because it actually "didn't have anything to do with marriage, it had to do with being vocal homosexuals and drawing attention to the gay community."⁵⁶⁸ Nor did Pfuhl believe that, in facilitating the "futile" marriage lawsuit, she was betraying the "revolutionary critique" she espoused in the pages of the *Louisville Free Press*.⁵⁶⁹ The marriage controversy made "a concrete, visible" statement.⁵⁷⁰ It was "fun, shocking, liberating, even playful"—and, she stresses, "it was something we could actually *do*,"⁵⁷¹ something that did not require the support or participation of the city's discreet and complacent "bar crowd."⁵⁷² "They didn't want anything to do with gay liberation," says GLF member John Fish.⁵⁷³ "They thought that they were sick and needed medical attention and wanted to be saved."⁵⁷⁴ As the *Advocate* reported, "there seems to be a widespread feeling among the city's Gays—those who are aware of the

came through Louisville in the fall of 1970 with 4 other men (of whom Jim Fouratt was one)—two black guys and 3 white guys—[w]e were on a gay lib proselytizing tour and also recruiting to bring gay people to the Black Panther Constitutional Convention.”)

566. Boucai/Randall Interview, *supra* note 230; Clifford, *supra* note 34 (“What he [the County Attorney] said was outrageous,” remarked one woman. “We can no longer allow ourselves to be characterized as sordid, perverted freaks.”); Boucai/Nelson Interview, *supra* note 239.

567. Clifford, *supra* note 34; see also *Louisville GLF Pickets Bar, Backs Suit*, *supra* note 260, at 2 (“The Louisville GLF was organized as a result of the refusal of Jefferson County Atty. J. Bruce Miller to authorize issuance of a marriage license to two women.”).

568. *Louisville Gay Lib Class Survives Critics*, *supra* note 158, at 9; Boucai/Randall Interview, *supra* note 230.

569. Boucai/Pfuhl Interview, *supra* note 227; Pfuhl, *Come Out!*, *supra* note 531.

570. Boucai/Pfuhl Interview, *supra* note 227.

571. *Id.* (“I had the activist background and the readiness and had, you might have heard the name, Mike Randall—and it was a wonderful and unique relationship that I have never had again. We were friends. He needed a place to stay. We played girls together, and bleaching hair, and at the same time talking radical politics.”).

572. Boucai/Nelson Interview, *supra* note 239; see also *Gays in Louisville Choosing Sides*, *supra* note 265 (reporting that “[t]he recently organized Gay Liberation Front in this city has run into opposition from other elements in the gay community”); Boucai/Fish Interview, *supra* note 259 (“Q: What fraction of the Louisville gay community was of your ilk? A: Certainly less than ten percent. In terms of people who hoped that we would succeed but didn't have any desire to participate, I would say maybe thirty percent.”).

573. Boucai/Fish Interview, *supra* note 259.

574. *Id.*; see also Boucai/Pfuhl Interview, *supra* note 227.

GLF's existence—that all that it can do on its present course is stir up unnecessary trouble.”⁵⁷⁵

In Seattle, Singer and Barwick provoked similar reactions among some former members of the defunct Dorian Society, who believed that they were “asking too much and threatening their way of life.”⁵⁷⁶ But both the Seattle Gay Alliance (Dorian's more militant successor) and the Seattle Gay Liberation Front publicly endorsed the plaintiffs. Two days after Baker and Singer's marriage application was refused, the Alliance proclaimed its intention to “fully support their challenge [to] the laws and institutions which, favoring married couples, are prejudicial against homosexuals.”⁵⁷⁷ The more radical GLF announced not only its “approval” but also its intention to find more concrete “[w]ays of expressing support for Singer and Barwick in the various aspects of their cause.”⁵⁷⁸ As Barwick recalls, within GLF, “everyone was supportive.”⁵⁷⁹

2. National Responses

The gay liberation movement's response outside of Minneapolis, Louisville, and Seattle is somewhat harder to characterize. As Part One demonstrated, gay liberationists were consistent in their dislike of marriage and especially of same-sex relationships that adopted traditional sexual mores and binary gender roles. But when “gays writing to the *Advocate* and other publications” complained that “homosexuals degrade themselves or make themselves the legitimate butt of heterosexual jokes by . . . aping a straight institution,”⁵⁸⁰ were they talking about marriage litigation or marriage generally? Even if both answers are correct, the apprehension of mockery evident in this quotation—and in other commentary that more clearly targets the litigating couples—does not have a particularly radical ring to it. One *Advocate* reader, for example, complained that “the freaks who are applying for a marriage license” (called “pansies” in the same letter) invite “ridicule” and confirm the belief “that homosexuals are mental cases.”⁵⁸¹ In a similarly phobic vein, Martin Dennison's tirade in *Gay Flames* against “the Right of Homosexuals to Marry”—published before any same-sex couple had even applied for a license—worried about “how suitably a child could be reared in a homosexual home.”⁵⁸²

More thoroughly liberationist reservations were voiced by N.A. Diaman

575. *Gays in Louisville Choosing Sides*, *supra* note 265, at 2.

576. Boucai/Barwick Interview, *supra* note 125; Bateman/ben Miriam Interview, *supra* note 304.

577. Press Release, Seattle Gay Alliance (Sept. 23, 1971).

578. Singer/Barwick Press Release, *supra* note 443.

579. Boucai/Barwick Interview, *supra* note 125.

580. Cole, *supra* note 42, at 6.

581. Letter to the Editor, *Why Marriages?*, *ADVOCATE*, July 8–21, 1970, at 19.

582. Martin Dennison III, *All That's Gay Does Not Glitter, or We Have a Lunatic Fringe, Too*, *GAY POWER*, Sept. 1969, at 8.

in *Zygote*,⁵⁸³ and by Ralph Hall, who wrote in *Gay Power* that “homosexual marriages submitting to the guidelines of so called conventional rites must be classed as reactionary. The gay lib movement does not need these kinds of tactics. . . . That *isn't* the freedom we want.”⁵⁸⁴ But Hall’s article, so often cited as evidence of the first marriage cases’ deviation from liberationist principles,⁵⁸⁵ makes a considerably subtler argument about the relationship between gay marriage and gay liberation. As his reference to “marriages submitting to conventional guidelines” suggests, it was the content of gay marriages—not the fact of them, and certainly not the demand for legal recognition—that was cause for alarm:

There are homosexuals who want their marriage bond legal and recognized by the church and done out in public. Very good “theatre.” That’s exactly what the movement needs, more “open” theatre. And I’m not being sarcastic. Anything that “shakes, rattles and rolls” the oppressor’s mind is important to our movement. We must perform more, agree? . . . [But rather than] get into that shitty bag of xeroxing [existing forms and rituals], . . . [let’s] use our heads and attack the marriage system in other ways. Let’s come up with theatre marital rites of our own, less strenuous ones.⁵⁸⁶

When undertaken with originality and some sense of irony, Hall concluded, “institutional marriages between gays is [sic] a step in the *right* direction.”⁵⁸⁷

Thus there was room on the gay left to reconcile agitation around marriage with a staunchly radical agenda. One reason why gay liberationists could rally around the call for gay marriage is that, as

583. DIAMAN, *supra* note 98, at 3 (“Many gay people even use them [traditional institutions] as models for their own relationships, either advocating or proclaiming gay marriages. We should take every opportunity to develop something better.”).

584. Hall continued: “That *isn't* our liberation. That *isn't* the equality we want. And that *ain't* revolutionary.” Ralph Hall, *The Church, State, and Homosexuality: A Radical Analysis*, GAY POWER, Apr. 1970, at 18. See also Letter from Pearl M. Hart, Attorney, to Barbara Gittings, Lesbian Activist, July 6, 1971 (“I am returning the Baker-McConnell brief about which I don’t feel any excitement . . . or even amusement. In my opinion there are more important causes which need solution today.”).

585. See CHAUNCEY, *supra* note 21, at 93, 182; ESKRIDGE, *supra* note 30, at 53, 231; ESKRIDGE & SPEDALE, *supra* note 26, at 17, 283; SEARS, *supra* note 156, at 62; Fosl, *supra* note 33, at 60. As some of these references make clear, one reason why certain lines from Hall’s article have been so widely but selectively quoted is their appearance in an excellent secondary source that is more accessible than the April 1970 issue of *Gay Power* in which Hall’s essay originally appeared. See TEAL, *supra* note 3, at 291.

586. The article goes on to “offer some alternatives to the system’s marital rites.” Hall, *supra* note 584, at 18.

587. *Id.* An ironic but hardly hostile attitude toward gay marriage was evinced, for example, in an *Advocate* cartoon of two men at a leather bar captioned, “And would you promise to love, honor, and obey and obey and obey?” Joe Johnson, *Big Dick*, ADVOCATE, Nov. 22, 1972, at 35. A similar playfulness is evident in a 1971 poster announcing that “a wedding is cumming [sic]” to the Round Up Bar in San Francisco: “2 Cowboys from a little town in the West . . . get publicly branded together for life . . . Val DuVal to Wayne Weaver . . . Sun, June 27 . . . Reception to follow.” Advertisement, Round Up Bar, June 1971.

Michael Warner observes, the demand was “contextualized . . . in more sweeping changes designed to ensure that single people and non-standard households, not just same-sex couples, would benefit from it.”⁵⁸⁸ In 1972, for example, the National Coalition of Gay Organizations demanded, along with “elimination of tax inequities victimizing single persons and same-sex couples,” “repeal of all legislative provisions that restrict the sex or number of persons entering into a marriage unit and extension of legal benefits of marriage to all persons who cohabit regardless of sex or number.”⁵⁸⁹ These demands appeared in the Coalition’s 1972 Gay Rights Platform, “the first expression of a national consensus on the goals of the movement.”⁵⁹⁰

Seattle activist Tim Mayhew’s “Position Statement on Marriage,” prepared for the ACLU of Washington in December 1971, contained a similarly qualified demand for equal marriage rights. By reference to eight distinct areas (taxation, insurance, family membership rates, fares, housing, adoption, inheritance, and employment), Mayhew argued that “the institution of marriage, as it is presently constituted in law and custom, is discriminatory and prejudicial to the interests of gay people and single people.”⁵⁹¹ He wrote that “the only way to end completely this discrimination is to abolish marriage,” which would be just as well because “it is intrusive for the state to dictate in advance the terms of a private contract,” “it is destructive for the state to try to impede the separation of people who are ready to part company,” and it is law’s obligation to safeguard the “freedom of individuals to explore different lifestyles and patterns of relationship in their pursuit of happiness.”⁵⁹² After endorsing as viable family formations “polygamy, polyandry, homosexual and bisexual marriage, and group marriage of whatever type suits the participants,” Mayhew offered grudging permission of same-sex civil matrimony: “Until society is ready to abolish the official status of marriage, . . . present relief from its discriminatory aspects can be obtained by broadening access to marriage and by abolishing or sharing its privileges with single people.”⁵⁹³ As “interim steps” on the road to abolition, he wrote, “let the law recognize the right to marry” of “homosexuals” and of “groups of more than two persons, in any

588. WARNER, *supra* note 26, at 93; *see also* Don Jackson, *Singles and the Law*, GAY LIBERATOR (Detroit), Dec.–Jan. 1974, at 5; Ed Jackson, “*Reform Farce*”: *Singles Get Screwed Again in New Tax Law*, ADVOCATE, Mar. 1970, at 17.

589. HUMPHREYS, *supra* note 54, at 166-67.

590. The Platform was the work of around “200 individuals, representing 85 organizations.” It was “the most representative gathering of homophiles yet recorded. There were Mattachine Societies, GLF groups, and one-issue Activist Alliances. The largest representation was from university campuses. . . .” *Id.* at 164, 165.

591. MAYHEW, *supra* note 27, at 1.

592. *Id.* at 2.

593. *Id.* at 3.

combination of sexes.”⁵⁹⁴

As Mayhew’s Statement shows, the simple fact of antigay discrimination—in marriage as in anything—was insulting even to those who, like John Singer, “would just as soon abolish marriage.”⁵⁹⁵ Sidney Abbott and Barbara Love, for example, had no want of bad things to say about the institution, but they wrote supportively of the Kentucky lawsuit as “another path leading toward full constitutional rights for Lesbians.”⁵⁹⁶ New York’s Gay Activists Alliance (GAA) adopted a similar view. Although GAA “disdain[ed] the idea of assimilation into the overall straight culture” and took “no stand on the issue of gay marriages,”⁵⁹⁷ the organization did not hesitate to “zap” City Clerk Herman Katz—appearing at his offices with champagne and a tiered wedding cake to stage an “engagement party” for two gay couples—when Katz announced his intention to take legal action against a church that had performed same-sex unions.⁵⁹⁸ Katz’s threat “represented a clear-cut case of discrimination against homosexuals and the gay community.”⁵⁹⁹ Preparing for the zap, GAA member Mark Rubin instructed protesters: “I’m sure [that] . . . in your own rapping with the people around, they’ll really be interested in gay marriages. . . . Try to keep . . . to the point of ‘gay rights,’ ‘discrimination against gays.’”⁶⁰⁰ As Mike Randall said of the *Jones* lawsuit, “It didn’t have anything to do with marriage one way or the other.”⁶⁰¹

Most importantly, the first marriage cases’ sheer audacity “won support from emerging gay liberation groups,” which appreciated their “‘in your face’ political style.”⁶⁰² In pursuing marriage licenses, same-sex couples

594. *Id.*

595. ‘Non-Believers’ *Seek Marriage License*, *supra* note 36, at 12. One finds a comparable mixture of radical contempt for convention and gay umbrage at marital exclusion in points Five, Six, and Eight of the August 1969 manifesto prepared by the Youth Committee of the North American Conference of Homophile Organizations (NACHO):

5) We regard established heterosexual standards of morality as immoral and refuse to condone them by demanding an equality which is merely the common yoke of sexual repression.

6) We declare that homosexuals, as individuals and members of the greater community, must develop homosexual ethics and esthetics independent of, and without reference to, the mores imposed upon heterosexuality. . . .

8) We call upon the churches to sanction homosexual liaisons when called upon to do so by the parties concerned.

Youth Comm. of the N. Am. Conference of Homophile Orgs., *A Radical Manifesto: The Homophile Movement Must be Radicalized!* (Aug. 1969), *reprinted in* TEAL, *supra* note 3, at 38.

596. ABBOTT & LOVE, *supra* note 47, at 210.

597. Evans, *supra* note 50, at 111; Fisher, *supra* note 4, at 1, 14.

598. Fisher, *supra* note 4 at 1, 14. One of the couples included Vito Russo, a gay activist and film historian best known for his celebrated book, *The Celluloid Closet* (1987).

599. Evans, *supra* note 50, at 111; Fisher, *supra* note 4, at 14.

600. Randolfe Wicker, *Gay Marriage Bureau Takeover 1971*, YOUTUBE (Mar. 15, 2010), <http://youtu.be/Z7NU8B1EGnU>.

601. Boucai/Randall Interview, *supra* note 230.

602. Pascoe, *supra* note 21, at 89.

showed “guts and dedication to each other and to the Gay Liberation cause.”⁶⁰³ Kay Tobin, a GAA founder, directly told Baker and McConnell that she viewed their lawsuit “as a political act” and a “very major contribution to the gay movement”—in spite of the men’s personal investments in marriage, which Tobin clearly viewed as regressive.⁶⁰⁴ After the couple’s appearance on the David Susskind Show, Buffalo’s *Fifth Freedom*, a liberationist newsletter, reported that “gay marriage was discussed as a purely political act and in the perspective of marriage as a decadent institution.”⁶⁰⁵ As Donn Teal reported in *The Gay Militants* (1971), gay people might have been “divided . . . on the advisability of legalized homosexual marriage,” but they “by and large sent ‘Right on!’s to . . . McConnell, Baker, Knight, and Jones.”⁶⁰⁶

Movement journalists covered the cases extensively, in tones that ranged from neutral to enthusiastic. They were particularly interested in the attention the lawsuits garnered from “major American news media,”⁶⁰⁷ including “television in some areas.”⁶⁰⁸ Gay papers and newsletters across the country paid close attention to the reports “pounded out on the teletypes of the major news services such as The Associated Press” and plastered on “the front pages of such hinterland publications as the Louisville *Courier-Journal*.”⁶⁰⁹ They proudly noted details like the “ten million persons” who would have seen Baker and McConnell’s television interview with David Susskind.⁶¹⁰ And they rattled off influential titles—*The New York Times*, *The Washington Post*, *The San Francisco Chronicle*, *Look*, *Time*—as if they were trophies.⁶¹¹ To a movement that called the closet its worst enemy, such advertisements were no small thing.

603. *Le mariage!*, OPEN DOORS (Canadian Gay Activists Alliance Newsl.), May 1972, at 1 (reporting on the would-be marriage of Michel Girouard and Rejean Tremblay); see also Task Force on Gay Liberation, ALA Social Responsibilities Round Table, Resolution in Support of J. Michael McConnell (Mar. 8, 1971) (stating that McConnell’s application for “a license to marry his male lover . . . manifest[ed] his intellectual honesty as a free and proud human being despite prevailing social oppression. . .”).

604. Tobin/Baker/McConnell Interview, *supra* note 176 (“Why do you think you value society’s recognition so much, . . . this seal of approval?”).

605. *Gay Marriages on T.V.*, THE FIFTH FREEDOM (Niagara Frontier Gay Community Newsl.), Mar. 4, 1973, at 14.

606. TEAL, *supra* note 3, at 291 (reproducing *Gay Scene* report on same-sex couples’ challenge to British marriage law, ending “Right On, You Two!”). According to Jack Baker, most of the many letters that he and McConnell received after their profile in *Look* magazine were “from gay people saying ‘yay, we really envy you,’ ‘keep it up,’ and ‘I’m gonna tell my parents now too,’ and so on. . . .” Tobin/Baker/McConnell Interview, *supra* note 176.

607. Cole, *supra* note 42, at 6.

608. Cole, *supra* note 4, at 4; Lars Bjornson, *supra* note 223, at 1.

609. Cole, *supra* note 42, at 6.

610. Wicker, *supra* note 22, at 10.

611. Bjornson, *supra* note 41, at 6; *Minnesota Court Again Denies License*, *supra* note 405, at 3; Bjornson, *supra* note 440, at 3; *S.F. Chronicle Backs Gay Marriages*, *ADVOCATE*, Aug.19–Sept. 1, 1970, at 17.

CONCLUSION

Defying the conventional distinction between confrontational tactics like “direct action, protest, and disruption” and institutional tactics like litigation,⁶¹² the first gay marriage cases attest to law’s multifaceted role in the strategic repertoires of social movements. They confirm that even “‘losing’ litigation can achieve limited success in stimulating . . . meaningful social change.”⁶¹³ Ostentatiously useless as instruments of legal redress, these constitutional challenges to the heterosexual definition of marriage were used instead to communicate some of gay liberation’s central messages. The *Baker*, *Jones*, and *Singer* cases broadcast the movement’s demand for legal equality between gays and straights, and its assertion of moral equality between heterosexuality and homosexuality. They raised implicit and explicit objections to the gender roles embedded in heterosexual marriage, to governmental favoritism (and coercion toward) particular family forms, and to the marital norm of monogamy. Lastly, they garnered visibility, both as a means (in Jack Baker’s words) of forcing straight society to “take notice of the gay movement”⁶¹⁴ and as a revelation to other gay people of the shameless lifestyles to be enjoyed in a burgeoning, politicized subculture.

What, if anything, do the messages of *Baker*, *Jones*, and *Singer* have to do with more recent efforts to win “the freedom to marry”? What remains of gay marriage’s radical pedigree? While an exhaustive answer to these questions lies beyond the scope of this historical study, certain broad trends are sufficiently apparent to bear mentioning. The purpose of such a comparative inquiry is not to bemoan the current state of gay marriage activism but rather to emphasize the extent to which the claim to gay marriage carries different resonances in different legal, political, and cultural contexts.

Certainly the demand for legal equality has been as important in the past two decades of gay marriage advocacy as it was in the years immediately after Stonewall, when unwinnable marriage litigation announced that claim in a particularly strident register. Then as now, the idea of gay marriage served as a synecdoche for perfect state neutrality as between hetero- and homosexuality. But the cause of isonomy, symbolized by the claim to marriage, has changed in at least two crucial respects. First, Stonewall-era protests against discrimination between different-sex and same-sex couples complemented concurrent objections to discrimination

612. Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 669 (2012) (noting that “[s]ocial movement scholarship generally distinguishes between confrontational . . . and institutional tactics” and “traditionally associates the former with more radical movement politics and the latter with movement moderation and co-optation”).

613. Richard L. Gambitta, *Litigation, Judicial Deference, and Policy Change*, in GOVERNING THROUGH COURTS 259, 277-78 (Richard A.L. Gambitta et al. eds., 1981); see also NeJaime, *supra* note 49, at 969-1011 (documenting “the productive potential of litigation loss”).

614. Bjornson, *supra* note 441.

between married people and everyone else—single individuals, unwed cohabitants, hippie communes. Contemporary marriage advocacy, by contrast, tends to reify rather than dismantle marital privilege;⁶¹⁵ indeed it has positively alienated other groups that are marginalized by marriage's supremacy.⁶¹⁶ Second, the equality that gay marriage represents has come to occupy a large and arguably inordinate share of the movement's political imagination. Parity between gays and straights, to say nothing of gay marriage specifically, was but one liberationist goal among many. For the contemporary gay rights movement, equality is king, and gay marriage is its herald: it is the tide that will lift all boats,⁶¹⁷ if not the horizon of the movement's legitimate aspirations.⁶¹⁸

A comparable transmutation has occurred with respect to the assertion of moral equality. Where the claim to marriage was once a device for disputing homosexuality's supposed wickedness, marriage itself increasingly serves as the measure of gay people's virtue. Where the *Baker*, *Jones*, and *Singer* plaintiffs used marriage's privileged relationship to sex and romantic love to underscore the shocking notion that "gay is good," more recent marriage equality campaigns insinuate that goodness is not intrinsic to gayness but is instead established by various indicia of bourgeois respectability—most importantly gay relationships' conformity to marital convention, gay couples' yearning for the dignity of matrimony, and gay people's subscription to the sentimental ideology of marriage.

As many critics have noted, these messages are implicit in a great deal of contemporary marriage advocacy, legal and otherwise.⁶¹⁹ But one

615. See generally WARNER, *supra* note 26; see also Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 901, 918 (2005) ("While advocates for lesbian and gay parents once saw themselves as part of a larger movement to promote respect, nondiscrimination, and recognition of diverse family forms, some now appear to embrace a privileged position for marriage. They thus abandon a longstanding commitment to defining and evaluating families based on function rather than form, distancing themselves from single-parent and divorced families, extended families, and other stigmatized childrearing units.").

616. See, e.g., Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 390, 427 (2012) (arguing that child-centered arguments for gay marriage that cast "illegitimacy as injury" stigmatize unwed parents and carry divisive racial connotations).

617. This idea was perhaps most influentially articulated in Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, Fall 1989, at 12 ("[M]arriage is . . . the political issue that most fully tests the dedication of people who are not gay to full equality for gay people, and also the issue most likely to lead ultimately to a world free from discrimination against lesbians and gay men."). For an argument that Stoddard's prediction has come true, or promises to come true, see Josh A. Goodman, *Marriage Equality as a Catalyst for Full LGBT Equality?*, HUFFINGTON POST: HUFFPOST GAY VOICES (May 26, 2013), available at http://www.huffingtonpost.com/josh-a-goodman/marriage-equality-as-a-catalyst-for-full-lgbt-equality_b_2946588.html.

618. See, e.g., SULLIVAN, *supra* note 25, at 170-71, 178 (advocating "equal access to marriage" as the "centerpiece" of a politics whose "goal in the area of homosexuality is simply to ensure . . . that all public (as opposed to private) discrimination against homosexuals be ended. . . . And that is all.").

619. See, e.g., Libby Adler, *The Gay Agenda*, 16 MICH. J. GENDER & L. 147, 148 (2009) ("Gay rights advocates depict the gay family as morally indistinct from an idealized version of the heterosexual family, i.e., wholesome, monogamous, bourgeois and much more about love than sex."); Amy Brandzel, *Queering Citizenship? Same-sex Marriage and the State*, 11 GLQ: J. LESBIAN & GAY STUD. 171, 196 (2005) ("While the fight for same-sex-marriage rights has dented some elements of

example seems particularly revealing. In 2007, the California Supreme Court asked parties to a consolidated set of marriage cases whether the state's separate-but-equal problem—marriage for different-sex couples, domestic partnership for same-sex couples—could be solved by abolishing civil marriage altogether and instituting domestic partnership across the board. Here was an invitation (perhaps not entirely in good faith) to achieve full legal equality while unburdening the state of some of marriage's unsavory history and religious baggage. Gay rights advocates declined this invitation, however, invoking the plaintiffs' need to "express their love and commitment, and to publicly join their lives together, in the way that marriage—and only marriage—makes possible." These plaintiffs viewed marriage "not only as a fundamental human right, but as a fundamental dimension of human experience and belonging," affording a "unique quality of intimacy and emotional connection, on the one hand, and [a] unique public validation, on the other."⁶²⁰

Whether or not the authors of these lines (or the plaintiffs they describe) fully believe their own rhetoric is, for present purposes, beside the point. What matters is the distance gay marriage advocacy has traveled since John Singer and Paul Barwick called for marriage abolition at the same time as they sought a marriage license.⁶²¹ What matters is the marriage movement's outward renunciation of even the mild skepticism that Jack Baker and Michael McConnell expressed in their brief to the Minnesota Supreme Court, in which they acknowledged that "perhaps it is indeed true that the whole notion of marriage ought to be redefined and its purposes reexamined."⁶²²

Gone, then, are the days when gay marriage advocacy was a platform for critiquing the institution or for offering, as Baker put it, "an alternative to the nuclear family."⁶²³ Gone, too, are the days when marriage litigation waged an unambiguous attack on gender roles. On this last score, the gay rights movement is only partly to blame. With the demise of legal distinctions between husband and wife, and with different-sex couples' increasing embrace of egalitarianism, "same-sex marriage" has ceased to

heteronormativity, it has reified and bolstered it on the whole by asserting, over and over, that marriage is good, gays are normal, and 'we' are like 'you.'"); Marc A. Fajer, *Toward Respectful Representation: Some Thoughts on Selling Same-Sex Marriage*, 15 YALE L. & POL'Y REV. 599, 613-14 (1997) ("The process of arguing for marriage necessarily includes arguments that same-sex couples are essentially the same as traditional married couples.").

620. Respondents' Supplemental Brief at 22, *In Re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999), 2007 WL 2733221, at *22; see also Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529, 551 (2009) (arguing that the brief in question "demonstrate[s] just how narrow the advocacy for same-sex marriage has become. Advocates . . . see the marriage that different-sex couples have and they want that. They do not want to usher in a new era for everyone, although the California Supreme Court gave them that opportunity.").

621. See *supra* notes 37 and 492 and accompanying text.

622. *Baker Appellants' Brief*, *supra* note 216, at 69.

623. Wicker, *supra* note 22, at 10 (quoting Baker's nationally televised interview with David Susskind).

be the contradiction-in-terms it once was. Still, as Mary Anne Case observes in an article that incisively discerns the gender politics of *Baker v. Nelson*, “an explicitly feminist perspective has been underrepresented and undervalued” in more recent contests over gay marriage.⁶²⁴ By far the most prominent vestige of that perspective is the legal argument—practically inaudible outside the judicial arena and only occasionally effective within it⁶²⁵—that gay marriage bans discriminate on the basis of sex. But deploying feminist jurisprudence in litigation over gay marriage is not the same as announcing (as Baker did) that the very notion of gay marriage advances women’s liberation;⁶²⁶ it is not the same as using a marriage lawsuit (as Marjorie Jones did) to put a female face on gay liberation;⁶²⁷ and it is not the same as arguing (as Seattle GLF did) that, by opting for a same-sex rather than different-sex marriage, John Singer and Paul Barwick were refusing to “subjugate a woman.”⁶²⁸ In short, it is one thing to make a feminist claim on behalf of same-sex couples; it is quite another to make a gay rights claim on behalf of women. To be sure, the distinction between invoking sex equality in a dispute over gay marriage and using a dispute over gay marriage to advance sex equality should not be overstated. Many contemporary gay rights advocates have deep feminist commitments and surely some believe that legalizing gay marriage weakens traditional gender roles even when those roles are no longer written into marriage law.⁶²⁹ If so, however, they are far less determined than their predecessors to communicate that message.

Still, one might protest, the fight for gay marriage continues to advance that most important of Stonewall-era goals: visibility. Who, indeed, could

624. Case, *supra* note 20, at 1201.

625. American judges have by now authored many dozens of opinions on the constitutionality of same-sex marriage bans. Only a handful have embraced the argument that these bans impermissibly discriminate on the basis of sex. See *Latta v. Otter*, 771 F.3d 456, 496 (9th Cir. 2014) (Berzon, J., concurring); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206-07 (D. Utah 2013), *aff’d*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 131 S. Ct. 265 (U.S. 2014); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (plurality op.); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 970-72 (Mass. 2003) (Greeney, J., concurring); *Baker v. State*, 744 A.2d 864, 898 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part). In *Perry v. Schwarzenegger*, the district court “determine[d] that plaintiffs’ equal protection claim is based on sexual orientation, but this claim is equivalent to a claim of discrimination based on sex.” It went on to review the challenged law as a “classification[] based on sexual orientation.” *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996, 997 (N.D. Cal. 2008). Clifford Rosky persuasively argues, however, that the *Perry* plaintiffs’ sex-discrimination claim under the Equal Protection Clause was embedded in the court’s analysis of their freedom-to-marry claim under the Due Process Clause. Clifford J. Rosky, *Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913, 920-42 (2011) (“Instead of using the history of sex discrimination in marriage laws to show that Proposition 8 discriminates based on sex classifications, [Judge Walker] uses this history”—particularly the demise of coverture, once a defining feature of civil marriage—“to show that Proposition 8 infringes on the fundamental right to marry.”).

626. See *supra* note 483 and accompanying text.

627. See *supra* notes 225 and 466 and accompanying text.

628. “*Non-Believers*” *Seek Marriage License*, *supra* note 36, at 12.

629. For an eloquent argument that, notwithstanding formal sex equality in marriage law, gay marriage advocacy and legalization constitute valuable symbolic challenges to traditional gender roles, see Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 L. & SEXUALITY 9 (1991).

deny that two decades of concerted activism around this issue have contributed substantially to gay people's unprecedented familiarity to the American public? For some advocates and some couples, this is not just a fortuitous byproduct of their actions but a goal in and of itself.⁶³⁰ Yet something important has changed since the early 1970s. That something is not whether the marriage debate promotes gay visibility, but rather which gay people, which gay relationships, and which gay politics are rendered visible. Plaintiffs in the marriage cases engineered by major gay rights litigation firms are "chosen for their suitability,"⁶³¹ their ambassadorial value as "stable, appealing, and upstanding members of the community."⁶³² In *Goodridge*, attorneys for Gay and Lesbian Advocates and Defenders sought out "longtime couples who had been faithful to one another," who were "well-spoken, but not too political," who harbored "no skeletons in their closets," and who could pass "rigorous criminal background checks."⁶³³ Such qualifications obviously make strategic sense.⁶³⁴ Nearly three decades after Singer and Barwick unsuccessfully claimed a right to marry in King County Superior Court, a judge on that same tribunal said of the new generation of "standard bearers for the cause of same-sex marriage":

They are law-abiding, taxpaying model citizens. They include exemplary parents, adoptive parents, foster parents and

630. A common argument in favor of gay marriage is that it will offer gay and protogay youth positive role models, reassuring them that heterosexuality is not a prerequisite to love and family along conventional lines. As one supporter puts it, "[i]f the legalization of same-sex marriage can help just one young lesbian look to the future with hope, if it can allow one gay teenager to stop thinking of committing suicide, . . . then it will all have been worth it." LAROCQUE, *supra* note 47, at 286. This goal has recently received judicial endorsement. See *Kitchen v. Herbert*, 961 F.Supp.2d 1181, 1213 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 131 S. Ct. 265 (U.S. 2014) ("Utah's prohibition of same-sex marriage further injures the children of both opposite-sex and same-sex couples who themselves are gay or lesbian, and who will grow up with the knowledge that the State does not believe they are as capable of creating a family as their heterosexual friends.").

631. Edward Stein, *Marriage Or Liberation?: Reflections on Two Strategies in the Struggle for Lesbian and Gay Rights and Relationship Recognition*, 61 RUTGERS L. REV. 567, 571-93 (2009).

632. *Id.* at 581. Four such ambassadors—the litigating couples in *Perry v. Schwarzenegger*—can be found in a short video, *At Home with the Prop 8 Plaintiffs*, produced by the American Foundation for Equal Rights. Am. Found. for Equal Rights, *Kris Perry & Sandy Siier—Paul Katamie & Jeff Zarillo: At Home with the Prop 8 Plaintiffs*, YOUTUBE (July 2, 2013), http://youtu.be/_OBUI7t2TkE.

633. Yvonne Abraham, *10 Years' Work Led to Historic Win in Court*, BOSTON GLOBE, Nov. 23, 2003, at A1; see also Mary Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 31 (2005) ("[T]he job of plaintiff selection is critical. . . . Often, I met people in their homes, assuming that the media would be interviewing them there and wanting to know what that would look like. I knew they would get their 'fifteen minutes' of fame, but that could not be part of their motivation for joining, nor could they have anything particularly embarrassing in their backgrounds.").

634. In an opinion that made Massachusetts the first state to recognize same-sex marriages, Chief Justice Marshall wrote:

The plaintiffs include business executives, lawyers, an investment banker, educators, therapists, and a computer engineer. Many are active in church, community, and school groups. They have employed such legal means as are available to them—for example, joint adoption, powers of attorney, and joint ownership of real property—to secure aspects of their relationships.

Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 949 (Mass. 2003).

grandparents. They well know what it means to make a commitment and to honor it. There is not one among them that any of us should not be proud to call a friend or neighbor or to sit with at small desks on back-to-school night. There is no worthwhile institution that they would dishonor, much less destroy. . . . The characteristics embodied by these plaintiffs are ones that our society and the institution of marriage need more of, not less. Let the plaintiffs stand as inspirations for all those citizens, homosexual and heterosexual, who may follow their path.⁶³⁵

If it is impossible to imagine a court saying such things about Baker and McConnell, Jones and Knight, or Singer and Barwick, that is not just because the judiciary was in their day more hostile to gay litigants. The first plaintiff couples simply did not look, sound, or act like the “good gays” of contemporary marriage litigation.⁶³⁶ In their reassuring wholesomeness, today’s “standard bearers for the cause” contrast starkly with the plaintiffs from Minneapolis, activist troublemakers who boasted the superiority of their “open marriage” and proclaimed that “there’s nothing sacred about a penis and a vagina.”⁶³⁷ In their lifelong romantic commitments and their dignified occupations at home and in the workforce, today’s couples bear little resemblance to the briefly coupled, shadily-employed lesbians from Louisville. And in their mildly reluctant activism—their “hav[ing] to be political in order to be prepolitical”⁶³⁸—they are the flipside of the commune-dwelling, drag-donning, free lovers from Seattle.

It is for another day to describe what happened after *Baker*, *Jones*, and *Singer* to so radically alter the complexion and the meanings, or apparent meanings, of the fight for gay marriage. The best account of that process would be, in many respects, a history of the gay movement since Stonewall and a case study in American identity politics in the age of neoliberalism.⁶³⁹ It would incorporate complicated and overlapping legal, social, cultural, and economic trends, some of whose basic contours may be only hazily discernible today. Quite a few of those trends relate specifically to gay politics: the growth of a national movement directed

635. *Andersen v. King Cnty.*, 2004 WL 1738447, at *12 (Wash. Super. Aug. 4, 2004).

636. Douglas Nejaime, *Marriage, Cruising, and Life in Between: Clarifying Organizational Positionalities in Pursuit of Polyvocal Gay-Based Advocacy*, 38 HARV. C.R.-C.L. L. REV. 511, 542-43 (2003) (arguing that GLAD “goes to great lengths to discuss the plaintiff couples and describe their lives in hetero-normative terms,” as “exemplar[s] of family values”); Libby Adler, *The Gay Agenda*, 16 MICH. J. GENDER & L. 147 (2009) (critiquing the gay marriage campaign’s “normalization” strategy). As Marc Poirier has observed, using a terminology borrowed from Michael Warner, who borrowed it from Erving Goffman, “whereas the early gay and lesbian movement was characterized by the brave and sometimes insurrectionary acts of stigmaphiles,” today’s movement, especially in its marriage mode, is represented by “stigmaphob[e]s.” Poirier, *supra* note 497, at 71.

637. TOBIN & WICKER, *supra* note 41, at 144; Wicker, *supra* note 22, at 22.

638. SULLIVAN, *supra* note 25, at 186.

639. See, e.g., LISA DUGGAN, *THE TWILIGHT OF EQUALITY? NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY* xii, 45 (2003) (tracing some of the intersections of neoliberalism and identity politics, including “the push for gay marriage”).

mainly by professionals and funded largely by elites;⁶⁴⁰ a steady influx into the movement of individuals more conservative than those who came out with gay liberation;⁶⁴¹ increased sobriety in response to antigay backlash, beginning around 1977 with Anita Bryant's "Save Our Children" crusade;⁶⁴² the impact of AIDS on the movement's strategies of self-representation and its constituents' need for rights and benefits associated with marriage;⁶⁴³ the lesbian "baby boom" of the 1990s;⁶⁴⁴ the example of foreign countries, beginning with the Netherlands in 2000, that legalized gay marriage; and marriage's power to shape the rhetoric and ambitions even of gay rights advocates committed to achieving respect for and recognition of nonmarital relationships.⁶⁴⁵ Other relevant trends partake of more general phenomena: marriage's ongoing transformation from a near-universal expectation to a marker of class and race privilege;⁶⁴⁶ the disappearance of the New Left in the early 1970s and with it the evanescence of broad-based, radical utopianism in American politics;⁶⁴⁷ a steady rightward movement in the center of political gravity, and the ascendancy of "traditional family values" as explicit policy goals.⁶⁴⁸

There are, no doubt, other reasons why gay marriage is no longer the radical proposition it once was, and why, as such, it achieved pride of place on the gay agenda. The reasons just mentioned simply underscore the historical contingency of who claims a right to marry, and to what ends. The first marriage cases and today's marriage equality campaigns are products of their respective times, and it is a truism that times change. Perhaps the most important thing we can learn from the stories of *Baker v. Nelson*, *Jones v. Hallahan*, and *Singer v. Hara* is that the significance of

640. See *id.* at 45 ("many of the dominant national lesbian and gay civil rights organizations have become the lobbying, legal, and public relations firms for an increasingly narrow gay, moneyed elite."); NeJaime, *supra* note 612, at 711 ("Professionalized and formalized organizations, many of which are legal groups, lead the LGBT movement. . . . [They] have hierarchical and formal structures and employ elite-credentialed, full-time professional staff. . . . [They] enjoy a disproportionate amount of movement resources and control movement decision making to a significant degree.").

641. "Today any CPA can be gay. Back then you had to at least be interesting." Cei Bell, *The Radicalqueens Transformation*, in SMASH THE CHURCH, SMASH THE STATE!, *supra* note 121, at 116.

642. See ALEXANDRA CHASIN, *SELLING OUT: THE GAY AND LESBIAN MOVEMENT GOES TO MARKET* 172 (2001) (noting that, in 1977, the movement "moved significantly toward a deemphasis of the sexual liberationist values that had been [its] most public face . . . at least since Stonewall.").

643. See CHAUNCEY, *supra* note 21, at 96-104 (discussing "the impact of AIDS").

644. See *id.* at 105-110 (discussing the impact of "the lesbian baby boom").

645. See Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CAL. L. REV. 87, 91 (2014) (arguing that advocates who "wished to destabilize marriage . . . were constrained by a legal, political, and cultural framework that prioritized marriage in the recognition of familial and sexual relationships.").

646. See Jason DeParle, *Two Classes in America, Divided by "I Do,"* N.Y. TIMES, July 14, 2012, at A1.

647. See DUGGAN, *supra* note 639, at ix (calling 1972 the beginning of the "denouement" of "revolutionary" politics in the United States).

648. See generally RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S (Bruce Schulman & Julian Zelizer eds., 2008); SEAN WILENTZ, THE AGE OF REAGAN: A HISTORY, 1974-2008 (2008).

gay marriage and of the fight for that right are not exhausted by the rhetoric of contemporary gay-rights advocates. As Justice Samuel Alito observed in *United States v. Windsor*:

The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come. There are those who think that allowing same-sex marriage will seriously undermine the institution of marriage. Others think that recognition of same-sex marriage will fortify a now-shaky institution. At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be.⁶⁴⁹

The *Baker*, *Jones*, and *Singer* cases remind us what the signal gay rights issue of our time once represented, and they reveal what it may come to represent once more. These “glorious precedents” illuminate some of gay marriage’s obscured and perhaps latent possibilities, whose fulfillment in future decades could depend less on any traceable descendant of gay liberation—which, after all, aspired ultimately to human liberation—than on new and unanticipated constituencies for sexual freedom, gender dissent, and alternative family forms. Those ideals, no less than equality, constitute the radical heritage of a now-mainstream movement. Let us not forget them.

649. *United States v. Windsor*, 133 S. Ct. 2675, 2715-16 (2013) (Alito, J., dissenting). For a thoughtful reflection on ways in which same-sex couples’ incorporation into marriage might influence marital norms relating to “division of household labor, sexual exclusivity, and child-rearing,” see Nan D. Hunter, *Introduction: The Future Impact of Same-Sex Marriage: More Questions Than Answers*, 100 GEO. L.J. 1855, 1857 (2012).