ALISON L. GASH

BELOW THE RADAR

How Silence Can Save Civil Rights

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Acknowledgments

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1

Introduction

"WE WERE JUST two guys in love who wanted to get married," recalls Joseph Melillo of his attempt to obtain a wedding license in 1991 from a county clerk in Hawaii. "It's unfortunate it's all gotten so political."[1] But intentions aside, Melillo's grievance provoked a hailstorm of opposition toward and public debate about legalizing same-sex unions. When Melillo, his partner, and two other same-sex couples—each of whom had been denied wedding licenses by state clerks—petitioned Hawaii's highest court for redress, they provided an already brewing anti-gay movement with a rallying point. Where previous courts had been unwilling to consider arguments advanced by gays and lesbians (since the early 1970s) that marriage should be extended to same-sex couples, the Hawaii Supreme Court validated their claims. It seemed that Hawaii was on the verge of becoming the first state to permit same-sex couples to marry.

By the time the court handed down its 1993 decision in *Baehr v. Lewin*, arguing that the Hawaii constitution's equal protection clause included protections for gays and lesbians to marry, conservatives stood at the ready to launch a movement to limit marriage to heterosexual couples. In 1994 Hawaii's governor signed into law a bill outlawing same-sex marriage and criticizing the court for attempting to "encroach upon the legislature's lawmaking function."[2] By 1995 legislators in Utah, Alaska, and South Dakota had introduced measures to ban same-sex marriage—arguing that it would violate "what has been the sanctity of families for the last 100 years."[3] The following year, at least thirty states were considering similar legislation and Congress introduced, passed, and received presidential approval (with unprecedented speed) for the Defense of Marriage Act (DOMA)—barring same-sex marriage at the federal level and granting states the ability to

pass state-level bans. Supporters of DOMA claimed that nothing less than our foundations of democracy and family were at stake if "a single judge in Hawaii [could] redefine the scope of legislation throughout the other forty-nine states."[4] Argued Gary Bauer:

> We are being asked to pretend that somehow two men could replace a mother in a child's life or that two women could take the place of a father and that it won't make any difference to children.[5]

Buttressed by federal support, backlash to marriage equality gained momentum. By 1998, just five short years after the Hawaii Supreme Court ventured toward legalizing marriage equality for same-sex couples, twenty-nine states had implemented statutory or constitutional bans on same-sex marriage.[6] The fate of marriage equality had become one of the most hotly contested issues of the early twenty-first century—capturing the attention of school boards, church groups, commentators, Hollywood writers, Oval Office contenders, sitting presidents, and the Supreme Court. And although we know the story will likely have a happy ending—marriage equality has gained an unbeatable momentum—the journey there has been dominated by hostile protests and potshots from scores of demagogues, "average Joes," and political novices hoping to make a name for themselves.

In many ways this backlash was predictable: a minority group receives help from the courts, and the majority fights back with swift recriminations. Yet consider the similarly groundbreaking, but much more quietly received, decisions supporting same-sex parenting issued during the same year. Amidst the fury over Hawaii's movement toward marriage equality, judges in Vermont and Massachusetts issued two equally significant—but much less publicly contested—decisions validating same-sex families, dealing another blow to right-wing conceptions of family values. In what had become almost routine in some jurisdictions, a lesbian couple in each state asked a judge to allow one woman in the couple to adopt her partner's biological child, without requiring, as with traditional adoptions, the biological mother to relinquish her rights. In other words, they were asking the courts to accept the notion that one child could be jointly raised by two mothers (or two fathers). Although these couples were not entitled to the spousal exception inherent in most adoption statutes, which would have waived any biological parent stipulation, judges argued that requiring the birth parent in these couples to terminate her rights was "irrational, unreasonable, [and] absurd" and did not serve the "best interests of the child."[7] By validating

these unorthodox adoptions, judges and advocates were more directly challenging values at the heart of the anti-gay rights movement—that children require both a mother and a father.

To be sure, not all courts at this time were amenable to gays and lesbians raising children or willing to use their discretion to grant second-parent adoptions. In the same year as the landmark decisions in Hawaii, Vermont, and Massachusetts, a judge in Virginia removed a child from his mother's home and awarded custody to the child's grandmother because of his mother's sexual orientation. The judge argued that her "immoral" and "illegal" conduct rendered her unfit to raise her two-year-old.[8] An Iowa court argued similarly, in the midst of determining custody, that a mother's lesbian relationship "was disruptive to the continued good relationship between the two children and both parents."[9] In 1994, when faced with a set of facts paralleling those presented in Vermont and Massachusetts, the Wisconsin Supreme Court declined to grant a lesbian couple co-parent status.[10]

However, despite widespread opposition to same-sex families, the parenting cases in Vermont and Massachusetts (and the many that followed them) inspired little public acrimony. While the country feuded over the merits and pitfalls of legalizing same-sex unions and members of Congress referred to President Clinton's choice for assistant secretary of HUD, Roberta Achtenberg, as "a damn lesbian," the co-parenting cases went relatively unnoticed.[11] Few journalists picked up on the courts' decisions. There was little statewide action. And Congress remained silent on the issue. In fact the pro-same-sex parenting court decisions issued since the mid-1980s and through the present day in more than half of the states have remained relatively uncontested in the public realm, despite massive resistance to the concept of gay or lesbian couples raising children.

How can we explain these two contemporaneous and yet divergent responses to same-sex family litigation? Conventional wisdom suggests that civil rights advocates who use the courts will see their efforts stymied by backlash. Scholars and pundits alike warn judges and advocates against pursuing court decisions that buck majority will or ignore "the brutal realities of American politics."[12] As the *Los Angeles Times* suggested, "the probable backlash" from Supreme Court intervention into marriage equality litigation "would be substantial and might well do more damage than good to the future of gay rights and other important causes."[13] From white backlash to *Roe* rage, American history is replete with stories of unpopular minorities attempting to secure rights—especially through the courts—and opponents rising up to impede these rights. Court orders to end racial segregation in public schools

were met with resistance, political unrest, and often violence against those who were simply exercising their lawful rights. Efforts by disabled individuals to implement their court-declared rights to establish group homes have been thwarted by irate homeowners, zoning officials, and local politicos attempting to secure their seats. And of course, *Roe v. Wade*'s "clash of absolutes"[14] produced, as David Brooks describes, "a cycle of political viciousness and counter-viciousness that has poisoned public life ever since."[15] From this perspective, then, same-sex parenting litigation may be just an aberration or, perhaps, simply an indication that the public actually supported the idea of same-sex parenting during its heyday in the courts.

I offer a different interpretation. Although the threat of backlash is real, its consequences significant, and its effect on judicial actors and outcomes considerable, it is neither inevitable nor invulnerable. Minority rights court victories are not always at the mercy of opposition efforts. Nor are the exceptions mere happenstance. In sharp contrast to supporters of same-sex marriage, same-sex parenting advocates were able to minimize backlash and opposition by capitalizing on a range of low-visibility techniques that rendered the copious litigation in this field virtually invisible to even the staunchest gay rights opponents. Instead of focusing on strategies that would either deliberately or unintentionally catapult the issue of same-sex parenting into the limelight, advocates deployed methods to shield their clients (and their wins) from public scrutiny.

The use of low-visibility court-centered tactics to advance civil rights claims is not unique to same-sex parenting advocacy. Individuals with disabilities and their supporters also recognize the merits of low-profile advocacy in their attempts to secure group homes in single-family neighborhoods. Although, on the whole, the group homes issue is not as *nationally* contested as gay rights, group home residents have long been the subjects and victims of intense local public opposition. When those who are battling mental illness, contending with physical disabilities, or recovering from substance abuse explore group living as a viable housing alternative, many single-family homeowners bristle and fight back. In their efforts to secure housing in single-family neighborhoods, group home residents risk having to confront property owners who will go to great lengths to bar them from their neighborhoods. During zoning board hearings, city council meetings, or less formal community gatherings, proposals for group homes are often defeated by the anxious cries of middle-class families—"We don't want that! I've got to think of my child. I do not want them on my property."[16]

From professors to preachers, opponents come from all walks of life and will consider a wide range of strategies to keep their neighborhoods group-home free. While most will simply air their grievances in hearings or letters, others will resort to intimidation, slander, or even coercion or arson to block group homes from setting up shop. Some group home advocates attempt to mollify "NIMBY" (Not in my Backyard) sentiments by courting communities and public officials early in the group home siting process. Others adopt an approach similar to same-sex parenting advocates. Rather than encouraging public debate about group homes, these advocates remain below the radar about their housing intentions in order to minimize the duration, severity, and damage of their opposition.

The following chapters explore in detail the use of both high- and low-visibility legal strategies in same-sex family (Chapters 3 and 4) and group home (Chapters 5 and 6) advocacy in order to understand how legal advocates minimize or mitigate against opposition efforts. Exploring issue areas that have been at times highly visible and at other junctures have gone unnoticed serves several purposes that have both substantive and scholarly implications. First, in many ways the high-visibility narratives provide a glimpse of the expected outcome in each case study. In these instances members of a disenfranchised community (same-sex couples or individuals with disabilities) engaged in advocacy strategies that attracted significant attention and scrutiny and, inevitably, contended with or succumbed to backlash efforts. These stories, then, illustrate the climate of opposition surrounding all advocacy efforts within these policy domains. Same-sex parenting advocates feared that the same tactics used to bar marriage equality would be used to thwart parenting gains. Low-visibility group home advocates understood the costs and risks of transparency and sought to diminish these costs by delaying notification. The low-visibility case studies illustrate advocacy strategies developed to compensate and accommodate for this potential for backlash. In so doing, they challenge commonly held assumptions that civil rights legal advocacy is always vulnerable to significant opposition and backlash when the causes or beneficiaries are unpopular. They suggest that advocates have more attractive choices than helplessly walking into the backlash abattoir or abandoning litigation entirely.

The low-visibility cases also confirm and enhance a growing body of research pointing to subterranean governance as a potent source of policy change. According to these narratives, policymakers can, and do, hide policy initiatives from the public, often through artful modifications to the tax code or administrative rules. However, in general, these accounts suggest that the

subterranean state is accessible only to elites in their attempts to decrease social, or increase corporate, welfare. Low-visibility legal advocacy, while similar in concept to its legislative or administrative counterparts, utilizes different tools and produces distinct outcomes. On the whole, then, examining these lesser-known, yet extremely significant, instances of low-visibility civil rights advocacy will expand our understanding of the promise and the pitfalls of both litigation and below-the-radar policy development.

In order to understand why some court-centered civil rights efforts become mired in opposition, while others elicit a more temperate response or remain unscathed, it is important to examine theories on backlash, opposition, and movement-countermovement dynamics. My analysis takes seriously the notion that advocates often contend with opposition or backlash in ways that undermine the ultimate success of their policy campaigns. I am also compelled by arguments suggesting that legal action, compared to other forms of civil rights advocacy, may be more vulnerable to backlash. However, when we move beyond instances of high-impact and high-visibility litigation, the politics surrounding civil rights legal advocacy begin to shift or wane—and a new set of outcomes emerges. Unlike common perceptions of civil rights battles, where advocates are powerless to anticipate or prepare for opposition efforts, these accounts suggest that civil rights advocates can and do shape both the incidence and influence of backlash.

This study of below-the-radar approaches is informed by a number of traditions within political science, sociology, and public law. Borrowing from current research on low-visibility policymaking, I focus on the capacity of legal advocates to choose, from among a range of options, strategies that not only maximize wins in court, but also promote policy longevity. In so doing I draw from theories that explore the application and implications of various policy mechanisms; among them, the most critical are theories of framing, venue-shopping, and choice of legal doctrine or authority. At the same time, this study speaks to those who suggest that the range of policy tools available to legal advocates is often contingent upon the characteristics of the issue, the risks at stake, and the population featured in the policy debate. Finally, my analysis is deeply informed by debates about the benefits and drawbacks of public deliberation and transparency in the policy process. As the next chapter illuminates, these frameworks and perspectives are critical to examining both why and how legal advocates develop low-visibility tactics and the degree to which these tactics, in turn, play a role in promoting or discouraging the incidence and potency of opposition efforts.

The case studies discussed over the following chapters offer detailed accounts of high- and low-profile advocacy initiated on behalf of same-sex families (through marriage and parenting litigation) and group home residents. Through extensive interviews with advocates and opposition elites and current legal and media analyses, I explore why specific strategies were chosen and the outcomes that emanated.[17] I also analyze public attitudes in each policy domain as a way of underscoring the potential for backlash that advocates faced.

The case study on same-sex marriage offers a sense of the degree and scope of backlash feared by parenting advocates, and, more generally, an example of a predictable majoritarian response to high-visibility minority rights advocacy. Although recent victories suggest that same-sex marriage is on its way to widespread legalization, the politics of marriage equality can best be characterized as a stormy tango between courts and voters. During the period between 1996 and 2006—in response to only a handful of court decisions validating marriage equality—more than forty states had instituted same-sex marriage bans. Despite the fact that these cases were based on interpretations of state constitutions, many feared that other states would be constitutionally required to recognize these marriages through the full faith and credit clause. The majority of the bans remained in place up until the fall of 2014—when the Supreme Court let stand several appellate decisions rulings that overturned state bans, increasing the total number of marriage equality states to 30 plus the District of Columbia.[18] In addition to electoral battles (and likely in response to rapid progress on the marriage equality front) the LGBT community saw a concomitant increase in the number of hate groups targeting its members and a persistent (and in some areas increasing) trend in the incidence of hate crimes against LGBT individuals—especially in states that had legalized same-sex marriage.[19]

The topic of same-sex marriage has enjoyed a high profile since that fateful 1993 Hawaii decision. Local and national media outlets devote significant time and space to debating the merits and costs of marriage equality. Public officials at all levels of government, from local school boards to the US president, have weighed in on the issue. In public debates, hearings, and campaign advertisements, supporters and opponents pit equality and justice against children's welfare and religious freedom. It is, therefore, not surprising that the pattern of backlash exhibited in the aftermath of state court decisions validating marriage equality—particularly between 1996 and 2006—is similar to that of *Brown v. Board of Education (1954)* and *Roe v. Wade (1973)*. It follows the familiar pattern of majoritarian backlash against a controversial

court decision. The courts advanced an unpopular cause and opponents quickly expressed their disapproval, consistent with our conventional understanding of courts and social change. Significantly, it also underscores the puzzle as to why same-sex parenting cases—which involve similar stakes—have yet to provoke a full-scale assault.

From the perspective of the LGBT community (and its opposition), "adoption rights is one of the most threatening policy agendas pursued by the movement."[20] And yet, despite this threat, the multitude of court rulings validating same-sex couples and gays or lesbians as parents have yet to trigger the kind or degree of opposition witnessed on the marriage front. By 2006—when the country was awash in same-sex marriage bans—co-parenting lesbians and gays in at least twenty-five states had the option of being jointly and legally recognized as parents to their children.[21] Only eight states had either legislatively or judicially imposed restrictions on same-sex parenting—ranging from full adoption bans to limitations on second parent adoptions. In the aftermath of the 2003 Massachusetts court decision in *Goodridge v. Dept. of Public Health*, gay adoption and parenting advocates geared up for the battle to protect the gains they had made through the courts. In 2006 in particular, sixteen states were in play to restrict same-sex parenting rights through legislation or initiatives. However, this battle never came to fruition, in part, I argue, because of the reliance on below-the-radar tactics. As one scholar remarked, "Given how significantly the welfare of children figures in the same-sex marriage debates, it is curious that the adoption, custody, and visitation rights of LGBT parents have not become a bigger political issue in their own right."[22] This project directly addresses why the politics of same-sex marriage and parenting played out so differently.

As we shall see in Chapter 4, based on interviews with advocates, experts, and opponents of parenting rights (and other evidence), same-sex parental rights advocates maintained a low profile in order to minimize the *incidence* of opposition. By eschewing high-profile legal strategies and, instead, locating their arguments within the technicalities of family law and precedence established in heterosexual parenting cases, they diluted one key ingredient to a successful counter-campaign—public awareness or interest. Similarly, they opted for a legal frame that focused on children's rights rather than gay rights in order to promote commonality across all family structures, gain powerful political allies, and avoid the hot button topic of homosexuality. To date, despite significantly more widespread court approval (relative to marriage) for same-sex parenting, the topic has received far less public or right-wing attention.