

THE NEXT CHAPTER IN THE STRUGGLE FOR LGBTQIA EQUALITY: TRANSCRIPT

*Steven Shapiro**
*Melissa Murray***
*Kevin M. Cathcart****
*Eliza Byard*****

This panel explored issues that continue to pose challenges for the lesbian, gay, bisexual, transgender, queer, intersex, and asexual (“LGBTQIA”) community in the wake of the Supreme Court’s decision in Obergefell v. Hodges, and that are now at the forefront of the movement for LGBTQIA rights. This includes “second generation” issues that arise directly from marriage, such as divorce, family rights, and enforcement of judgments; employment rights, such as pay and benefits disparities; additional gender-equality issues, such as equal rights for trans individuals; problems involving safety and equality in incarceration; and issues affecting equality of education, including bullying.

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OPENING REMARKS OF STEVEN SHAPIRO 470
 REMARKS OF MELISSA MURRAY 472
 REMARKS OF KEVIN M. CATHCART 484
 REMARKS OF ELIZA BYARD 496
 QUESTIONS AND ANSWERS..... 503

[35:00] *Amanda Sterling:*

Thank you so much. I would like to now invite our first panel to take the stage. And while they do that, I will introduce our moderator, Steven R. Shapiro. Mr. Shapiro is the Legal Director of the ACLU, where he has served in that position since 1993. He’s authored more than two hundred ACLU *amicus* briefs to the United States Supreme Court. He’s a member of the Policy Committee of Human Rights Watch and a Lecturer in Law at Columbia Law School. If they’re all set up, I’ll let them take it away.

STEVEN SHAPIRO

Thank you very much, Amanda. I was going to begin by thanking the law school and the *Journal* for inviting me to participate, but I’m no longer quite so sure because Andy is a tough act to follow. But I do want to especially thank him for reminding us that the issues we’re going to be talking about today are not just [36:00] local or national but they truly are global issues and that none of us have achieved equality until all of us have achieved equality around the world.

It’s a great pleasure and privilege for me to be here today. Tom was not only a colleague; Tom was a close personal friend as well. The first same-sex marriage I ever attended was the marriage between Tom and Walter. Of course, it was not a marriage in the sense that New York State did not recognize it. It was not recognized in any other state in the country. The United States Supreme Court certainly did not recognize it. But for all of us who were there that day, there was no doubt that it was a marriage. And it only took the United States Supreme Court twenty-two years to catch up and recognize that reality.

I want to begin with a few observations. [37:00] For those of us who have played some small role in this journey, there is sometimes a tendency with hindsight to think that, boy, this really proceeded at warp speed. And as a person who’s been involved in various social movements for equality, the truth is, in my professional career, I’ve never seen such rapid movement towards greater equality as we have seen in the LGBT community over the past decade or so. But it’s

important to remember that that is true only if you look at a small snapshot of history.

In the United States Supreme Court alone, we have been fighting this issue for the past four decades.¹ And, of course, the history of discrimination against the LGBT community goes back centuries, if not millennia. Once we started to make movement [38:00] towards greater equality, the movement in this country has indeed been very swift; but let us not forget, there were hundreds and hundreds and hundreds of years when there was no movement whatsoever. And so the achievements of the past decade have been built upon a very, very long history of injustice and suffering and inequality that has imposed an enormous toll on untold numbers of individuals. That's the first point.

The second point is that there is a temptation, when you win a victory like we all won last spring, to think that the battle is over. And of course we all know better: the battle is not over. In saying that, I don't want to underestimate the importance of what happened in *Obergefell*.² As I like to say, many Supreme Court decisions are important; very few Supreme Court decisions are historic. *Obergefell* [39:00] was an historic decision, long overdue, but an historic decision. It did not, however, solve all the problems confronting the LGBT community. In many ways [it] opened up a whole series of additional questions that we are now going to have to confront and answer, many of which I hope will be the subject of discussion by the panelists who are up here with me today.

So, let me just introduce them quickly in the order in which they are going to speak. I'm not going to go through their complete biographies because they're in the program and you can read them, but they're not seated in the order in which they are going to speak. [W]e're going to begin with Melissa Murray who is on the faculty of UC Berkeley School of Law and has written extensively and persuasively about family law issues involving but not limited to the LGBT community. [40:00] One of the things that she's going to be talking about is the impact of *Obergefell* on individuals and couples who choose to live outside traditional marriage, and what this decision means for their autonomy to choose their own familial relationships.

Melissa's going to be followed by Kevin Cathcart, who's the Executive Director of Lambda Legal. He's going to be talking about

1. *See, e.g.*, *Baker v. Nelson*, 409 U.S. 810 (1972) (dismissing a challenge to Minnesota's ban on same-sex marriage for want of a substantial federal question).

2. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

ongoing issues in employment discrimination; problems confronting the trans community, which thankfully have now finally reached the level of public consciousness; and ongoing issues of HIV discrimination, which many people think are a thing of the past but are not really.

And then we will end up with Eliza Byard, who's going to be talking about issues—Eliza's the Executive Director of GLSEN, the Gay, Lesbian & Straight Education Network— and she's going to be talking about issues that kids are facing in schools and elsewhere. There are a lot of stories of hope there, but there are also a lot of stories of horror. [41:00] I have asked each of the speakers to talk for fifteen minutes or so. I hope we will then have a five-minute discussion among the panelists after each speaker is finished, and then when all the panelists are done we should have a half an hour or so, I hope, for general discussion within the group. So, let me just turn it over to Melissa and we can begin.

MELISSA MURRAY

Thank you so much for having me. I very much appreciate being the *Journal's* guest today. And many thanks to Sylvia Law and Adam Cox for their leadership [and] their supervision of the *Journal* and its students. I also want to thank Paul, Weiss; not only is Paul, Weiss a generous sponsor of this event, but back ten years ago, when I was a legal writing fellow at Columbia, my husband was an associate at Paul, Weiss, and Paul, Weiss was the purveyor of my health care, [42:00] and for that I was incredibly grateful.

It's good to start with that anecdote, because it reinforces an aspect of marriage that perhaps goes unstated in the discussion of marriage equality. And that is to say that marriage has been, for generations, a means of privatizing the dependency of individuals. This was certainly something that was discussed throughout the marriage equality debate—the idea that if marriage was extended to same-sex couples, we would allow individuals to share their employment benefits like health care; we would allow individuals to take advantage of immigration benefits that are available only to married persons. I don't dispute any of this. But I want to say that marriage is not the only way to get health insurance. And it is worth thinking about that. [43:00] There are lots of different ways that we might provide individuals with all of their basic needs without relying on marriage as a means for doing do.

And so, I want to just posit for the purposes of our discussion the idea that, not only is marriage a vehicle for privatizing dependency, it

is actually the only means that we have in this country of patching and repairing our badly tattered public safety net. With this in mind, it is not surprising to me that the marriage equality movement gained so much traction in the late 1990s and early 2000s at a time when we were seeing the systematic dismantling of the public safety net.³ It is not surprising that this occurred at the same time that we saw calls for welfare reform.⁴ At the same time, we saw efforts to promote marriage among the poor.⁵ This is all part and parcel of the same kind of impulse, and we ought to be aware of that.

So, on June 26, 2015, [44:00] I was celebrating the expansion of civil marriage to same-sex couples, but I was a little bit wistful for other projects that might have been. Marriage is not the only way we might have secured these basic benefits for individuals. And I agree wholeheartedly that expanding marriage was a necessary thing to do, because the exclusion from civil marriage signaled the systematic discrimination and denigration of LGBTQ people. But, as a method of securing rights and benefits, I am skeptical of what marriage can do and indeed what marriage is doing.

And while I was excited about the *Obergefell* decision and its outcome, when I finally downloaded the decision and read it—I was horrified. Absolutely horrified. And, I *will* name names. Justice Kennedy’s rhetoric horrified me. Full stop, it is a horrifying decision [45:00] in its rhetoric. There are lots of ways that we could have gotten to this outcome—the legalization of same-sex marriage. We could have talked about sex discrimination as Sylvia Law has written about persuasively for many years.⁶ We could have talked about liberty and privacy and autonomy in intimate life as Justice Kennedy has dis-

3. See Angela P. Harris, *From Stonewall to the Suburbs? Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539, 1555 (2006) (“[F]rom the 1970s into the 2000s, politicians, policymakers, intellectuals, and activists have fought together with remarkable success to dismantle the American welfare state . . .”).

4. See generally Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783 (2003) (discussing the effort to reform public assistance programs).

5. See Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform’s Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1648 (2005) (discussing Congress’s “imposition of a marital solution to poverty”); DORIAN SOLOT & MARSHALL MILLER, ALTERNATIVES TO MARRIAGE PROJECT, LET THEM EAT WEDDING RINGS: THE ROLE OF MARRIAGE PROMOTION IN WELFARE REFORM 4 (2d ed. 2007), <http://www.unmarried.org/wp-content/uploads/2013/01/rings2.pdf> (critiquing marriage promotions initiatives and making recommendations for framing issues of family structure).

6. See, e.g., Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984) (discussing the neglect of sex discrimination argument in constitutional law claims and jurisprudence).

cussed for many years.⁷ But instead what we got was this sort of jurisprudential *Bridget Jones's Diary*. And if you read the opinion, you will see what I mean.

In the opinion, there is this wonderfully provocative statement that marriage responds to the universal fear that an individual will call out in the night only to find no one there. Reading this, I was reminded of being twenty-three and reading Helen Fielding's *Bridget Jones's Diary* for the first time. The novel focuses on the romantic life of Bridget Jones, a London spinster, who bemoans her uncoupled fate, musing that if she does not clean up her act soon—by which she means losing weight and abstaining from cigarettes and alcohol—she will never find a husband and will die alone in her apartment [46:00] “found three weeks later half-eaten by an Alsatian.”⁸ This is an overwrought statement for Bridget Jones. And the *Obergefell* opinion—its jurisprudential analogue—is equally overwrought.

[Both statements paint an inaccurate picture of marriage and life outside of marriage.] Marriage *can* be about two people coming together for love. It *can* be about two people coming together to share common resources. It *can* be about two people coming together for the purpose of raising children. It can be about a lot of things. [It can also be profoundly lonely and sad—especially when it does not live up to these expectations of coupled bliss.]

Likewise, life outside of marriage can be loving, committed, profound—or not. Either way, our understanding of what marriage does and whether it should be expanded to include same-sex couples need not be built on the backs of those, who, whether purposely or not, have chosen to live their lives outside of marriage. And that's something I would like us to think about as we think about the *Obergefell* decision and its aftermath and legacy. This is a decision that is at once progressive in its expansion of marriage rights, and yet

7. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (internal citations omitted) (“The petitioners are entitled to respect for their private lives Their right to liberty under the Due Process Clause gives them the full right to engage in their [private, sexual] conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”).

8. HELEN FIELDING, *BRIDGET JONES'S DIARY* 18 (1996).

is also a throwback in its insistence on prioritizing marriage as the normative ideal for adult intimate life.

[47:00] When I say that the opinion is a throwback, I mean that it recalls a vision of marriage that, for many people, sounds like the 1950s. [It does not speak to the challenges of dual career marriages, coparenting, and other aspects of modern marriage. It is utterly silent on the issue of divorce.] But yet, this is the vision of marriage that is presented on the pages of *Obergefell*. And the decision's neglect of these realities of modern marriage should give us pause about what this decision and its constitutional logic will mean going forward.⁹ Let me say a bit about that.

I've written for a number of years about what I've called "non-marriage,"¹⁰ and full disclosure: my interest in non-marriage is incredibly personal. I was raised by a single mother. My father died when I was a teenager, and for years, my widowed mother wore her wedding ring everywhere. And I couldn't understand it. I [thought], "You're never going to meet another man if you've got some other guy's wedding ring on." But she wore it, [48:00] and I never understood why until I—twenty-five years later—was pregnant with my first child. I live in Berkeley. I have kept my maiden name. And during my pregnancy my mother came to me, and she said, "Is this the moment? Is this when you're going to do it?"

I [asked], "Do what?"

"Is this the moment you're going to take your husband's name?"

I [said], "No. This is not the moment. [Audience laughter.] That moment is never going to happen."

And she [asked], "Well, why not?"

And I [said], "[Why] would I do that? I've been Melissa Murray my whole life. This is who I am."

She [said], "I know that, but now you're going to be a mother. Don't you worry that people are going to look at you, look at this

9. See Melissa Murray, *Obergefell v. Hodges and Non-marital Inequality*, 104 CAL. L. REV. (forthcoming 2016) (discussing the court decision and its rhetoric).

10. See, e.g., Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 COLUM. L. REV. 573 (2016) (discussing continued regulation of sex and sexuality outside of marriage); Melissa Murray, *Accommodating Nonmarriage*, 88 S. CAL. L. REV. 661 (2015) (discussing the erasure of nonmarriage and nonmarital relationships); Melissa Murray, *Paradigms Lost: How Domestic Partnership Went From Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291 (2013) (considering domestic partnerships as a species of nonmarriage); Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387 (2012) (considering nonmarriage and illegitimacy).

child, see that you have different names, and assume that you're a single mother? Assume that you're not respectable?"

And in that moment, the enormity of the weight that my mother had carried for years became obvious to me. She was a single woman living in a world where marriage was the paradigm of familial respectability, and even though she was a widow, [49:00] she felt the weight of her single status quite acutely: to the point where she insisted on wearing her wedding ring—this badge of respectability—for the rest of her life.

That's the cultural freight and stigma that's associated with non-marriage. The fact that, in this moment where we are preparing to celebrate the arrival of her first grandchild, the thing that concerns my mother most is whether I will be perceived as respectable to people who recognize the disjunction between my child's last name and my own. That is the weight of non-marriage in our culture, and Justice Kennedy's opinion in *Obergefell* does nothing to dismantle the stigma of non-marriage. If anything, it augments it and amplifies it in a way that makes that weight even more crushing.

And I want us to think about what that means. At this moment, 53% of individuals in the United States live outside of marriage.¹¹ [A little over 40% of all births in the United States are to unmarried women,¹²] and that number is even higher within minority communities [50:00].¹³ Some women in minority communities have consciously chosen to partner and have children, but not be married because the men that are available to them are, in their view, unsuitable marriage partners. The twin scourges of mass incarceration and dismal employment prospects exacerbate these views. Marriage is an institution built on particular gender norms, including the norm of a masculine breadwinner, and when that identity is not available to everyone, or is insecurely available, marriage becomes harder to obtain and harder to sustain. So for lots of different reasons, in these communities, there is an absence of marriage. That doesn't mean there is an absence of family. Nor does it mean that there is an absence of kinship networks.

11. See U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2014, at tbl. A1 (2014), <https://www.census.gov/hhes/families/data/cps2014A.html>.

12. NAT'L CTR. FOR HEALTH STATISTICS, BIRTHS: FINANCIAL DATA FOR 2014, at tbl. B (2014), <http://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm>.

13. Mark Mather & Diana Lavery, *In U.S., Proportion Married at Lowest Recorded Levels*, POPULATION REFERENCE BUREAU (Sept. 2010), <http://www.prb.org/Publications/Articles/2010/usmarrieddecline.aspx>.

Prioritizing marriage as the only kinship network that matters, that makes sense, casts these other kinds of families in a dim light. And Justice Kennedy is unabashed about prioritizing marital families over other alternatives in the *Obergefell* opinion. [51:00] One of the four pillars that he identifies for rooting marriage within fundamental rights discourse and for expanding same-sex marriage to include same-sex couples is the needs of children.¹⁴ As he explains, marriage allows the children of gay men and women to understand the integrity of their family units in relation to the rest of their community. What, then, does that mean for the children who are raised by single parents? What does that mean for the children who are being raised, not in traditional married units or even by single parents, but by other family members and extended networks of kin? These are families too, and *Obergefell* denies that family recognition. And that is a shame.

And these families are hiding in plain sight in *Obergefell*. Make no mistake about that. Consider the circumstances of Jayne Rowse and April DeBoer, the petitioners in the Michigan case. When they filed their claim, [52:00] they were not seeking to challenge Michigan's laws excluding them from marriage.¹⁵ Instead, they wanted to challenge Michigan's law that prevented unmarried persons from jointly adopting children.¹⁶ That is a very different claim. It is not a claim about exclusion from marriage.

As their claim proceeded through the Michigan courts, Rowse and DeBoer were advised by their lawyers and by the judge to reframe their claim. Instead of challenging the law that prohibited unmarried persons from adopting, they should instead challenge Michigan's exclusion of same-sex couples from marriage.¹⁷ And that might have been purely instrumental. Momentum for marriage equality was gathering, and the judges and the lawyers are aware of this growing recognition of marriage equality. But it also might simply have been a marriage of convenience (no pun intended). [Rather than take on the

14. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (“A third basis for protecting the right to marry is that it safeguards children and families . . .”).

15. Julie Bosman, *One Couple's Unanticipated Journey to Center of Landmark Gay Rights Case*, N.Y. TIMES, Jan. 25, 2015, at A14 (“April and Jayne, as much as they wanted to get married and adopt their kids, never set out to challenge the marriage ban.”).

16. *Id.*

17. See *DeBoer v. Snyder*, 772 F.3d 388, 397 (6th Cir. 2014) (“Rather than dismissing the action, the court ‘invi[te]d the plaintiffs to seek leave to amend their complaint to . . . challenge’ Michigan’s laws denying them a marriage license.”); see also Bosman, *supra* note 15, at A4 (noting that the trial judge encouraged Rowse and DeBoer to “[a]mend [their] claim to take on Michigan’s law banning same-sex marriage”).

question of whether unmarried persons should be permitted to adopt children, it might have been easier to hitch their wagon to marriage equality's star and pursue marriage and all of the rights and benefits therein.]

[53:00] After all, if Rowse and DeBoer married, there would be no obstacle to adoption. This is the same kind of argument that people made about the sharing of public benefits. If you are married, you can share your spouse's healthcare. If you are married, you can share the immigration benefits that are made available to spouses. Likewise, if you are married, you can adopt jointly. And so, they reframed their claim. Suddenly, it was not about the adoption, but about the exclusion from civil marriage that prevented them from adopting.

And as we know, they prevailed.¹⁸ They've married and are now legally able to adopt their children. But I remain wistful for that other claim. Their original claim challenging the Michigan's adoption laws was about family integrity in the purest sense of those terms. Couples who are married, like Rowse and DeBoer, don't have to worry about those exclusions. But [for] all of the other families [54:00] that remain unmarried, for whatever reason, these kinds of impediments do not evaporate because of *Obergefell*. And those are the families I think we ought to be interested in as we move forward. And I appreciate all of the things that have been said, and I agree that this is truly a momentous occasion and an amazing moment to celebrate. But we cannot lose sight of these other families and these other goals.

When Tom Stoddard wrote his seminal article advocating for what was then only an idea (and an elusive one at that), Paula Ettelbrick was on the other side of the debate, cautioning us to be critical of marriage as a path to liberation. As Paula Ettelbrick warned, "Marriage will not liberate [LGBT people]. . . . In fact, it will constrain [them], make [them] more invisible, force [their] assimilation into the mainstream, and undermine the goals of gay liberation."¹⁹ By this, Ettelbrick was referring to marriage's very complicated history. Marriage has been the vehicle for women's exclusion from civil society. It has been a vehicle for perpetuating gender stereotypes about caregiving and family stereotypes that prevent women [55:00] from reaching their full potential in public life. And more importantly, it is—and has been—an exclusive institution.

18. See *Obergefell*, 135 S. Ct. 2584 (2015).

19. Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, OUT/LOOK: NAT'L GAY & LESBIAN Q., Fall 1989, at 14.

You cannot let people into marriage without erecting barriers that mark those who must be kept out. Tom Stoddard recognized that too, but Paula Ettelbrick's critique reminded us that even as we expanded civil marriage, there were those who were going to be on the outside: that were going to continue to be stigmatized and marginalized, even as marriage expanded to include new constituencies within its ambit. Going forward those are the people I would like us to think about, because there are a lot of people like that, and *Obergefell* does not answer their questions or respond to their problems. If anything, it amplifies them. Thank you.

[*Audience applause.*]

Steven Shapiro:

Thank you very much, Melissa. As promised, [56:00] I want to give Kevin and Eliza an opportunity to comment if they would like to do so.

Kevin Cathcart:

I'm up next, so I get to comment for fifteen minutes [*audience laughter*], but Eliza if you would . . .

Eliza Byard:

Only to say that I think—mostly to wait my turn—but just to say, a number of years ago, I had the opportunity to keynote an all-class LGBT reunion at my alma mater, that other school in New Haven. And my theme [for the keynote] echo[ed] exactly [what] you were saying. (And this was a number of years before the decision, and in the midst of many battle[s].) But my theme was that even when we have won rights for the gays, we are still going to have to worry about protecting the queer. And I['d like] just to underscore that, and we'll have chances to keep talking about it as we go on.

Steven Shapiro:

Let me then make one observation and ask a question maybe of the entire panel. And that [observation] is this: [57:00] I know that there have already been some employers, and maybe many employers, who have begun to revise their insurance policies, so that same-sex couples who were previously eligible for insurance coverage through one member of the couple on the theory that they could not get married are now being excluded from the employer's healthcare plan because the option of marriage is now available. So, for some employees

at least, the choice has become get married or lose your healthcare insurance.²⁰ How frequent is that phenomenon, if anyone knows? And to what extent do people see civil unions and domestic partnerships as temporary expedients that served a purpose when marriage was not available but have become anachronisms [58:00] now that marriage is available? Or, the other way around, does each of these structured relationships continue to have a place and a value?

Kevin Cathcart:

I think we don't know yet where this is going to fall. There certainly ha[ve] been moves from some companies already to change their domestic partner benefits.²¹ There are also statutes in place in some places.²² It's an interesting mix, because I think there are sort of two groups of people that have pushed this. And one has historically been LGBT people who couldn't marry, and the other tends to be older heterosexual people, frequently, who have been married before, and for whom it is financially disadvantageous to marry again.

So places like New Jersey, for example, have laws that allow it, but they have age limits for older people, and—I was just informed earlier this week—[59:00] there was some talk about it, but they seem quite confident that they will be able to keep their law because there is a real coalition of people to fight for it.²³ And I think part of the problem has been that the only obvious coalition to fight for this stuff has been LGBT people. And there isn't really an organized group of other people working on keeping this. And so it puts, I think, gay people in a weird position now—particularly now that we've won and there is a lot of enthusiasm and excitement for many of the people who want to get married, which is not everybody, but it is many people—to then be, sort of, stuck shouldering this other challenge, when in fact I do think the benefits are better, the laws are richer.

You know, it still is tough. If it's a domestic partnership law or a civil union law, you still only get the insurance benefits if your partner

20. See generally *In Your State*, LAMBDA LEGAL, <http://www.lambdalegal.org/in-your-state> (last visited Aug. 1, 2016).

21. See James Schaefer, *Domestic Partner Benefit in the United States: A Discussion of Issues Related to Cost, Plan Design, and Administration*, 12 GRAZIADIO BUS. REV. no. 3 (2009), <http://gbr.pepperdine.edu/2010/08/domestic-partner-benefits-in-the-united-states> (last visited July 9, 2016).

22. See Margaret A Knight & DeLawnia Comer-HaGans, *Domestic Partner Benefits*, 41 PUB. PERSONNEL MGMT. 493, 497 (2012).

23. See *Gay Marriage: A Must or a Bust?*, OUT/LOOK: NAT'L GAY & LESBIAN Q., Fall 1989, at 9, reprinted in LOVE UNITES US 28-39 (Leslie J. Gabel-Brett & Kevin M. Cathcart eds., 2016).

has them.²⁴ And so, if your partner works at McDonalds, [1:00:00] you're still not going to get them. And if they don't work at all, you're still not going to get them. So, it broadens it some, but I think sometimes people talk about it as [if] it's this complete opposite of the marriage conundrum and its not. It's actually a broadening of it, but I don't think it's the complete opposite. And I think it's going to be battled out a lot in the next couple of years to come.

Melissa Murray:

I'm a little more pessimistic. [*Audience laughter.*] I think things are changing and rapidly shifting. Almost immediately after the *Perry v. Hollingsworth* decision came down, a councilman in Berkeley, which was one of the first local municipalities to create a domestic partnership regime on the municipal level, proposed the abolition of that domestic partnership registry because it was obsolete.²⁵ No longer necessary. At the council meeting where the issue would be debated, this huge crowd of straight couples came in [1:01:00] to defend the domestic partnership regime on the ground that they needed it to help order their lives. To be sure, they were not getting a lot of benefits from it. It is a local municipal level scheme, so very limited benefits. But one of the benefits that they did get, which they thought was so important, was [that] they were included within the local antidiscrimination ordinance that prevented landlords from evicting them for being unmarried cohabitants, and that was important to them.²⁶

I think after *Obergefell*, things are shifting really quickly. The State Department recently announced that it was no longer going to extend domestic partnership benefits to registered domestic partners. Instead, they would only make spousal benefits available to married people.²⁷ The message is clear: forget your domestic partnership; get married. The University of Arizona system sent around an email when marriage equality came to Arizona: phasing out their domestic partnership benefits and informing everyone that if they wanted to keep

24. See generally *In Your State*, *supra* note 20.

25. See Eli Wolfe, *Berkeley to Look at Closing Domestic Partnership Registry*, BERKELEYSIDE (Sept. 30, 2013), <http://www.berkeleyside.com/2013/09/30/domestic-partnership-registry>; Murray, *supra* note 9.

26. See Scott A. Johnson, Note, *The Conflict Between Religious Exercise and Efforts to Eradicate Housing Discrimination Against Nontraditional Couples: Should Free Exercise Protect Landlord Bias?*, 53 WASH. & LEE L. REV. 351, 359.

27. See Michael K. Lavers, *Exclusive: State Department to Phase Out DP Benefits*, WASH. BLADE (Oct. 19, 2015, 9:00 PM), <http://www.washingtonblade.com/2015/10/19/exclusive-state-department-to-phase-out-dp-benefits/>.

their benefits, they had to become married by December 31st, 2014. [1:02:00]

Steven Shapiro:

So let me ask just then one other question. And maybe this can be a framing question for the entire discussion. [I]t seems to me not unreasonable to say that we talked about this as a case about equality, and what we got was a decision about marriage rather than a decision about equality. Do you think that that's a fair summation?

Eliza Byard:

I would just say . . .

Steven Shapiro:

I feel like I can cold call on people since we're in a law school. [Audience laughter.]

Eliza Byard:

I think that the thing that really strikes me in listening to all this—and I should just say I am very pleased to be part of this conversation: I think that I am the only non-lawyer in your afternoon. I'm actually trained as an historian, which gives me a slightly different perspective on things. [1:03:00] But I think the way I think about it, from a non-legal standpoint, is that we made an argument about being included in an institution rather than transforming the institution or transforming how things are organized.

And for those who think about the history of our movement, the central tension I would say of the movement all the way back is between a transformational politics and an equality inclusion politics. And the way that this marriage decision was rendered speaks to some of the most probably conservative elements of the status quo institution that same-sex couples can now be included in. So, I think you get a decision that is about admission to an existing institution rather than having yet changed the institution. I think the one kernel of hope, I would say, is that there are ways that the center may not be able to hold [1:04:00] if we continue to think explicitly about how un-gendering the couple may challenge central tenants of an institution which has deep roots in gender oppression for many, many years. So that would be my non-lawyer's response.

Kevin Cathcart:

So I agree with that, and I would just want to add one thing though. Historically in terms of this movement, the implosion arguments are not new to marriage. When I think—sometimes with a great deal of irony—about the things that I have worked on a lot over the course of my career, it has been military, the boy scouts, and marriage. And . . . when [I] set out to be a civil rights activist, I don't know if I would have picked the military, which I was never in and never wanted to be in, and the boy scouts, which I was never . . . you know.

And yet I also think that there is also a conundrum in doing this work [1:05:00] which is: what does the other side fight to hold onto? Because they give you the things that they don't much care about, and they fight for the things that—whether they really are important or not—they're the things that they think are important, that are some sort of markers of, I don't know: normalcy, decency, the good life. (Whatever combination, I'm not sure that I think that all those things are those markers)

So, I also feel, as activists for LGBT civil rights, you sort of have to go where the battles are, and pugnaciousness is part of the game. So if these are the things that they want to fight hardest to hold onto, then there's some sort of pressure point there that I want to be involved in pushing on. And none of it leads to clean answers about anything. [1:06:00]

And one other thing . . . that I'll add: when you were talking, Melissa, about Justice Kennedy's opinion, I can't disagree with any of it. It is an interesting side fact that all of the single members of the Supreme Court signed that opinion. I would love to know what their little thought balloons were, or what the discussions were in chambers if they happened, and what was really talked about; because I have no idea Maybe in twenty years we'll read a book and we'll hear what was supposedly said—and it'll be true or not—about what was supposedly said at the time. But we have to wait a long time usually for that stuff to come out. But how did that feel and what were they thinking about that because it would have been odd in so many ways? I'm left thinking: apparently that is the only way it could have been written to get Justice Kennedy, [1:07:00] and without Justice Kennedy 5-4 became 4-5. And then, now we're in politics, so that's just a curious thing.

[*To Steven Shapiro.*] Did you want to say something else?

Steven Shapiro:

I want to give Melissa one more chance [to respond] unless she is done. [*Melissa declined.*]

As Eliza is giving the historian's perspective, I'll just give the lawyer's perspective here for a moment. And that is, as Kevin said, both Kevin's organization and my organization were involved in litigating this case. And, like Kevin said, I agreed with everything Melissa said. Still, there is a part of me that thinks this is a bottom-line profession, and we won. And the way I know we won is [that] we're applying for attorney's fees. [*Audience laughter.*] And getting them. [1:08:00]

The one other thing I wanted to say by way of introducing Kevin is that one of the things I hope we will talk about is that in some ways the most immediate backlash that we are seeing to this decision is in the realm of what have come to be called religious refusals. But it's not only the story of Kim Davis in Kentucky, it is [also] the story of employers and business people seeking to opt out from what is otherwise in some places a general obligation to treat people in a non-discriminatory way. And I hope that somewhere in the context of this discussion, as we talk about challenges going forward, we can talk about the debate that is now taking place—a debate that will be back in the Supreme Court in some fashion this term, about that tension as it is developing around reproductive rights, not just LGBT rights. [1:09:00] So Kevin, let me turn it over to you with that.

KEVIN M. CATHCART

Thank you. I too am very happy to be here, and I'd like to thank the people that organized it. It's wonderful to have a chance to recognize Tom and talk about his contributions. And I'm also very glad that you [*to Melissa Murray*] brought up Paula, because I had her name right here on my paper. Because Paula—for those who don't know—is also no longer with us; and Paula and Tom, for a couple of years . . . had a kind of speaking tour that they did, debating, or one could say arguing about, marriage.²⁸ And I think it was actually a very important thing. This was in the very late eighties, early nineties. [1:10:00] . . . I think their debate was actually incredibly important for helping people in the community on all sides of the question. And at that point, there

28. Symposium, *The Evolution of Academic Discourse on Sexual Orientation and the Law: A Festschrift in Honor of Jeffrey Sherman*, 84 CHL-KENT L. REV. 379, 386–91 (reviewing the debate on same-sex marriage between Thomas Stoddard and Paula Ettlbrick).

were many people who weren't on any side of the question, because it was a new question that people were trying to think through with the political, the philosophical and the practical—as Andy said earlier. . . . So there were all kinds of things that had to be debated. I think that the debate that Tom and Paula engaged in helped to really sharpen thinking on all sides and was actually extremely important to moving things forward—whether people are happy as to where things moved forward to or not—to the work that's gone on in the last two decades or more. And so I was very glad that you brought her into the group, too, because I think that she should be here.

. . . This may touch more on the second panel, but based on something that you said, Steven, about [how] no Supreme Court case answers all of the questions of the movement—and I'm not even sure exactly where perhaps—we may have differences of opinion [1:11:00] about what questions this Supreme Court case was supposed to answer. When one of the questions that comes up a lot in the LGBT world, is that now that's over, are people going to care? Are they going to work on other things?

I'm always having to remind people: what does the word “over” mean? This year was the sixty-first anniversary of the Supreme Court decision in *Brown v. Board of Education* and the forty-third anniversary of the Supreme Court decision in *Roe v. Wade*.²⁹ Where does this notion that Supreme Court decisions make things be “over” come from? When you look at some of the cases that I think are similarly important, or similarly critical, to movements at that time, I also think it puts certain pressure on the movement to make sure that we don't allow, or that we do everything we can to stop—we may not have the ultimate choice to allow or not allow—[1:12:00] the same kind of lingering debate to continue. I won't be here in forty-three or sixty-one years to be part of the discussion on, “How did *Obergefell* play out?” but somebody will be and it would really be a sin—and I think an indictment of the movement—if things were as unresolved around LGBT civil rights and relationship recognition as they are unresolved politically in this country on some of these other very, very important questions that affect all of our lives.

So maybe twenty or forty or sixty or eighty or a hundred years ago, it wasn't as predictable that court decisions weren't going to answer the questions—I don't really know, because I'm not a historian and I wasn't there then—but now we have a lot of information about

29. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Roe v. Wade*, 410 U.S. 113 (1973).

that. And I think it puts a burden on us to make sure that that's not the case and to keep the work going and, I think, talking about things like [1:13:00] [the] Religious Freedom Restoration Act. Kim Davis is really a sideshow in my mind. This is the circus part; . . . give the people circuses and they won't look at the real issues that are out there.

And there are enormous, important questions about religious exemptions, and [the] Religious Freedom Restoration Act, and how large employers and things that fancy themselves to be religiously something or another—I always say I grew up in a simpler time when pizza parlors didn't actually have religion, [*laughter from audience*] but now pizza parlors have religion and bakeries have religion and everything has religion; I don't fully get it—but that's more important. Also when you look at history—and I think there are now thirteen counties in the United States where the issuance of licenses is still hotly contested, and actually in Kim Davis' county people can get licenses and people have gotten married, but I think there are thirteen others—and when you compare that to the pushback around [1:14:00] *Brown* or just the pushback we see today still around *Roe*, these thirteen counties, which do not have a great deal of population and some of them I think haven't been challenged because we haven't been able to find anybody in those counties who actually has standing and wants to challenge them;³⁰ compared to the opposition that many people thought we might see in the wake of a victory, it's about this big [*small gesture*].

That doesn't mean that there isn't other real—separate from the circuses—other real opposition, which is extremely frightening, which is what's going to happen in the legislature in Georgia when they go into session in January, and there is absolutely going to be a religious freedom bill again. What's going to happen in Arizona if it comes back this year and a number of [other] states? Nobody's really sure what the entire number of states is but it's a lot [more] than those. So we'll see as the year goes along.

So there's no end of things to talk about and we only have an afternoon. [1:15:00] What I'm suppose[d] to talk about is none of this, and it's interesting there's this phrase in the “next chapter for the struggle” definition about sort of second generation issues. When I read it, I [thought], “Well, actually many of the things that are listed, or all of the things that are listed as second generation issues, were issues, well before [marriage equality.]” They've been issues as long

30. See, e.g., *Marriage Comes to the South*, FREEDOM TO MARRY (June 10, 2014), <http://www.freedomtomarry.org/blog/entry/marriage-comes-to-the-south>.

as we've had marriage, which in this country has been for eleven years—and if you count Western Europe you can add another year or two on, or Canada,³¹ so they're not new to *Obergefell*. They're broader, but they were issues around domestic partnerships and civil unions: the same things about how do you dissolve things; what kind of rights does it leave people with; what benefits can they get; what benefits can they not get.

And a lot of the other work is the work that's been going on at the same time, for the entire history of the modern movement, [1:16:00] and I particularly am supposed to talk about employment so I'll use that as an example. At Lambda Legal, we have offices in five cities around the country. We have help desks—as we call them—in all of those offices. I'm old fashioned so I say we have 800 numbers, which we do have 800 numbers, but now 99% of our intake comes in on email, but the largest number of calls and requests we get for help or information, for years and years and years, has been about employment, because employment discrimination is rife in this country on the basis of sexual orientation, on the basis of gender identity and on the basis of HIV status.

As much as I am cheered by the way the world is changing for gay people in many ways and for people with HIV in many ways, I have to say that the numbers that we see about discrimination do not cheer me at all, [1:17:00] and they remain extremely sobering because things do not seem to change very much. And I think part of the issue—and maybe this is sort of what I want to talk about here today—is: what can we do with law and what do we need politics in order to achieve? And there has been this interesting disconnect, I think, in our community or in our movement where we have done extremely well in courts, even if some of the opinions are very poorly written, and we have not done extremely well in the political system.

We have twenty-two states that have employment discrimination or comprehensive civil rights laws that include sexual orientation for things like employment and public accommodations.³² Well actually twenty-one because Utah only includes employment, it doesn't include public accommodations.³³ Only nineteen of those include gender identity.³⁴ I think it's [been] seven years since the last new state

31. See *Olympics Spotlight: Which Countries Are "Gold Medal" on Marriage?*, FREEDOM TO MARRY (Aug. 1, 2012), <http://www.freedomtomarry.org/blog/entry/olympics-spotlight-which-countries-are-gold-medal-on-marriage>.

32. See generally *In Your State*, *supra* note 20.

33. See *id.*

34. See *id.*

law [1:18:00] came online—I could be off by six months one way or the other on that, but it’s about seven years—which means that we have not been succeeding in the state legislatures.³⁵ And the so-called Employment Non-Discrimination Act was pending in Congress for twenty years.³⁶ It started in 1994 and sort of disappeared in 2014.³⁷ And once during that time, it actually passed in the Senate; otherwise it had never passed anything. For people who have been studying law for too long, don’t forget about the other branches of government, passing the Senate doesn’t actually get you anywhere; you need more than that for anything to become a law.

So now we’re back to what’s now called the Equality Act, which would amend existing civil rights laws to bring in sexual orientation and gender identity.³⁸ This is very much actually like the bill that was pending in Congress between 1974 and 1994 [that] never [1:19:00] got anywhere and never got a vote. And it’s interesting—someplace here I have the numbers written down and I am not going to remember them—when the bill was introduced earlier this year, there were 171 sponsors in the House—I just found it; I didn’t remember it—and 40 in the Senate and they were all Democrats.³⁹ And the sponsors of the bill tried very hard to get bi-partisan support and were unable to do so. And one of the things that I think is likely to happen is that there is going to be a competing bill introduced at some point in the next couple of months, which is going to be the Republican bill, which is going to have much bigger religious exemptions—sort of holes you can drive a truck through—and then there are going to be two bills that compete with each other which is a great guarantee that neither of them will go anywhere. And it says something about the state of politics, obviously on the federal level, that you can’t have bipartisan interest in non-discrimination and the people have to have their own separate laws. [1:20:00] It also means you can’t pass anything.

And a lot of the state legislatures are just as deeply divided as Congress. There is some hope that Pennsylvania could pass a state-

35. *See id.*

36. *See* Jerome Hunt, *A History of the Employment Non-Discrimination Act: It’s Past Time to Pass This Law*, *CTR. FOR AM. PROGRESS* (July 19, 2011), <https://www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act>.

37. *See id.*

38. *See* Jennifer C. Pizer, *The Equality Act Continues the March Toward Justice for All*, *LAMBDA LEGAL* (July 23, 2015), http://www.lambdalegal.org/blog/20150723_equality-act-continues-march-toward-justice.

39. *See* Equality Act of 2015, H.R. 3185, 114th Cong. (2015).

wide bill this year.⁴⁰ It's not guaranteed but it actually could happen. The next most likely state after that—and I don't believe it's going to happen this year although it could happen in a couple—is Florida, which is not usually what people guess as the next one.⁴¹ And after that there isn't actually a third place. There's like [*hand motion*] and then it just drops off immensely. And so I think part of the challenge is that we as a community have become a little bit complacent. Maybe because [it] makes it sound like it's recent. It's been going on for a long time: that legal victories were providing us with so much progress—particularly, when you compare this progress against the world that Andy was describing so well in his remarks—[1:21:00] that people feel [that] we're moving forward, moving forward, moving forward. But we're not moving forward in a sort of uniform way, and so things that are not as likely to have a court solution are a real challenge.

Now there's been some very interesting work this year coming primarily out of the EEOC: both in terms of transgender-related discrimination, and now more recently on sexual-orientation related discrimination finding that this discrimination violates the sex discrimination provision of Title VII.⁴² If this were the law of the land, if the EEOC was the Supreme Court, this could be a good thing. It's a very good first step, but the EEOC is very far from the Supreme Court and it's very different than the Supreme Court. And there have been attempts: we have a number of cases in court.⁴³ The first ones are starting to hit some of the appellate courts to [1:22:00] try and get these EEOC decisions to be accepted by the courts and to carry a little bit more weight.⁴⁴

It's been a very, I'll say, slow and uneven process, and I'm overestimating the speed and success by calling it slow and uneven. It will

40. See generally *Ending Discrimination*, EQUALITY PA., <http://equalitypa.org/tag/ending-discrimination/> (last visited Aug. 1, 2016).

41. See *Florida*, LAMBDA LEGAL, <http://www.lambdalegal.org/states-regions/florida> (last visited Aug. 1, 2016).

42. See *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, U.S. E.E.O.C., https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (last visited July 9, 2016).

43. See, e.g., *Macy v. Dep't of Justice*, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012) (holding that intentional discrimination against a transgender individual violates Title VII); *Jameson v. U.S. Postal Serv.*, 2013 WL 2368729 (E.E.O.C. May 21, 2013) (holding that intentional misuse of a transgender employee's new name and pronoun may constitute sex-based discrimination).

44. See, e.g., *E.E.O.C. v. Boh Bros. Constr. Co.*, 731 F.3d 444 (5th Cir. 2013) (holding that a manager had discriminated against a male employee based on sex after learning that the employee used moist towelettes rather than ordinary toilet paper).

be a long time before anyone can imagine that this theory or these theories are going to become so common and that we're going to win at courts of appeals to the point that the Supreme Court is going to want to take the case. And frankly if the Supreme Court wanted to take one of the cases now, I'd run and stick my head in a hole, because there is no good reason why the Supreme Court, as it is currently constituted, would take any of these cases. And I don't know what the Supreme Court's going to look like in a couple of years. We have an election coming up, it's really important—about the Supreme Court, people, it is the most important issue I think on the table but I'm a sort of [1:23:00] narrow-focused attorney on that.

So if anyone thinks that the courts are going to resolve some of these questions in the near term, that's just not true. Most people in America—there's lots of polls that show this—believe that we have far more legal protections: LGBT people or at least gay people—whatever they mean by gay people, I'm not sure what people think trans people have or further down the list—then we actually have.⁴⁵ And I get into discussions sometimes where people just actively disbelieve when I say that [twenty]-eight states don't have laws⁴⁶ They [think,] “Oh, that can't be true” and I [respond,] “No, really it is.” And it's a fact: it's the sort of thing you can count. It is ascertainable. And a lot of people don't believe there isn't a federal law. [I think,] “No, really believe me. I wouldn't go around saying it if there was a federal law; I would talk about it all the time.” I feel confident [1:24:00] that Lambda Legal would try to get that word out to everybody that they have protections. So I have odd arguments with people, but that's an aside.

The other piece—and I wasn't paying attention to the time so let me start to wrap up here— . . . that ties in with this right now that's very timely was the vote in Houston last week where HERO went down.⁴⁷ And it didn't just go down: the point spread was twenty four points.⁴⁸ It was 62% against to 38% in favor, so that's not the kind of election where you say, “Well, if it hadn't been raining, and if we had made more robo-calls or whatever” Twenty four percent is a

45. See Zack Ford, *Most Americans Think LGBT People Already Have Employment Protections – They Don't*, THINKPROGRESS (June 2, 2011, 4:30 PM), <http://thinkprogress.org/lgbt/2011/06/02/234952/most-americans-think-lgbt-people-already-have-employment-protections-they-dont/>.

46. See generally *In Your State*, *supra* note 20.

47. See Katherine Driessen, *Houston Equal Rights Ordinance Fails by Wide Margin*, HOUS. CHRON. (Nov. 4, 2015), <http://www.chron.com/politics/election/local/article/HERO-results-6608562.php>.

48. See *id.*

number that you can't bridge by just a little bit better organizing. It's an indication that our message has not gotten through and that the other side's messages—however ugly, repulsive and untrue they are—have actually touched a nerve for a lot of people. Now, I think there's a lot of fear, [1:25:00] and I think there should be concern, but I think it's a little overblown, about [whether] this mean[s] that the other side—which is certainly feeling their oats about this—is going to march through and repeal all the other laws that exist, which I've already said there aren't that many of. I don't think that's going to happen.

Houston was in some ways a curious place in that, for one thing. It's very easy to get initiatives on the ballot in Houston. You only need . . . for example, you need signatures from 10% of the number of people who voted in the last election.⁴⁹ There are people from Houston who are talking now about trying to challenge the Dallas law that's been in effect for fifteen years. In Dallas, you need 10% of registered voters to sign the petitions; and there's an enormous difference, since voter turnouts are very low and particularly the last election—which was the baseline for Houston voter turnout—was extremely low.⁵⁰ So the number of signatures needed was extremely low: the number of signatures needed in Dallas [1:26:00] is significantly higher in a town that has a much lower population.⁵¹ So in addition to lessons learned from the campaign, there're just basic legal barriers about what can or cannot get on the ballot.

But the challenge with referenda, no matter how unlikely they are, is [that] they drain enormous time, energy, and money from the community. And all the time, and energy, and money that is used to fight rear-guard actions to keep status quo ordinances—which frankly aren't all that strong anyway, but they're as good as you're going to get in Texas, right now—is time, energy, and money that isn't spent on pushing forward for positive things that would actually help and improve more people's lives. And so I actually think that some of the rightwing stuff—some of those people are smart, whether or not they're just hateful—is that they can tie us up with rear-guard actions and it drains energy and people and therefore we're not able to push

49. See Matt Dempsey, *Voter Turnout Highest Since 2003*, HOUS. CHRON. (Nov. 3, 2015), <http://www.houstonchronicle.com/politics/election/local/article/Voter-turnout-highest-since-2003-6609254.php>.

50. See Chris Siron, *Dallas County Voter Turnout Down from 2014 Election*, DALL. MORNING NEWS (Nov. 4, 2015), <http://trailblazersblog.dallasnews.com/2015/11/dallas-county-voter-turnout-down-from-2014-election.html/>.

51. See generally HOUS., TEX., CHARTER art. VIIIb, § 2; DALL., TEX., CHARTER ch. XVIII, § 11.

[1:27:00] forward on other things. So I don't want to minimize the HERO vote too much, but I also think some people are like overreacting to it as if the conditions in Houston exist in lots of other places and this could all happen.

So the last thing—and then I'm going to, I really will stop someday—I want to mention HIV, which I don't know that it's as much on the printed materials, but I think it ties in immensely to any discussion about the years ahead for LGBT equality or civil rights or justice. You know, 63% of new HIV infections in the United States today are among men who have sex with men.⁵² More than half of all people living with HIV in the United States are gay or bisexual men.⁵³ 44% of new infections are in the African American community, which is about 12% of the population.⁵⁴ 21% are in the Latino community, which is about 16% of the population.⁵⁵

Andy was mentioning [1:28:00] Barney Frank a couple times earlier, and my favorite Barney Frank line of all times—which he used to use a lot and was always a great zinger—is . . . , “Well, yes, life is unfair and the unfairness is unfairly distributed.” And I think that is particularly true with the HIV epidemic as it is evolving in this country. People who get HIV tend to be young. They tend not to have insurance. They tend to face discrimination around insurance, around employment, around housing, around all sorts of things. And frankly we are nowhere, as a society, in dealing with this, despite some medical breakthroughs and the Affordable Care Act and many good things, but not having an impact on the epidemic. And it does tie in with my employment topic, because there is so much employment discrimination.

So I will circle back, let me just glance on my list and say . . . [1:29:00] the last thing I'll say about the movement going forward is I think, that particularly now as we're facing more referenda: it's not like we didn't face referenda before. People, some of you will remember, and some of you may have read about this, but, you go back fifteen years and we lost vote after vote after vote in states on marriage, and sometimes by point spreads that made [us] wish we had

52. See *HIV Among Gay and Bisexual Men*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/group/msm> (last updated Sept. 29, 2015).

53. See *id.*

54. See *HIV Among African Americans*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/group/raciaethnic/africanamericans> (last updated Feb. 4, 2016).

55. See *HIV Among Hispanics/Latinos*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/group/raciaethnic/hispaniclatinos> (last updated Oct. 15, 2015).

only lost by twenty four points.⁵⁶ We lost much bigger. Often in state constitutional referenda. All of these are in the last fifteen, eighteen years.⁵⁷ And I would just say: well, we have marriage equality nationwide today so that shows that you can slow things down with referenda but they're not necessarily the last word even if you're drawing off a lot of resources and stuff. But it also challenges us as a community, I think, to think about civil rights more broadly, to think about coalition politics more broadly.

Four percent of the population [1:30:00]—and we can quibble, is it 6%, is it 10%, is it, whatever it is—I'm going to say it's 4%, but whatever number it is, can't win elections on its own. And I have interesting—they're not really interesting, they're annoying conversations that make me want to bang my head on the table sometimes—conversations with people in the community who will say two different things to me. This has come up a lot around Houston: “Well, how could we have lost Houston so badly?” Okay, that's a fair question. And then they say, “Why does Lambda get involved in voting rights work?” [Audience laughter.] Okay, wait a minute. Can we go back to question one? Can we link these in some way? So I think there's a lot of just curious thinking about the notion that you can have a narrow civil rights movement. . . . There's a lot of silos: narrow civil rights movements, so you can have them—the fact is they're all going to lose. [1:31:00].

When I say we, I mean primarily the LGBT civil rights movement because that's the one, that's the silo I'm in all the time, but . . . we're going to lose, the voting rights people are going to lose, the immigration people are going to lose. Everybody's going to lose because nobody has the numbers to win against the opposition; and if we don't do a better job of broadening this—whether we're talking about again, immigration, employment or anything else—then we're just going to repeat this over and over. And on many of these things, the courts are not available to step in to save us.

Steven R. Shapiro:

Thank you, Kevin. Let me just ask one question that maybe links your comments with Melissa's and that is: I'm curious to what extent people think that the decision that we got last June affects the larger political discussion that you have just been describing and in what

56. See *Winning at the Ballot*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/Winning-at-the-Ballot> (last visited July 9, 2016).

57. See *id.*

way it affects it? [1:32:00] Especially given what we know to be the fact . . . that most people are never going to read the decision; they're just going to read the headline that the Supreme Court says same-sex couples can now marry. So, sort of merging the legal discussion of the opinion with the larger political context, how do you think those two link up?

Kevin M. Cathcart:

Well, so you already said what my first point would be, but I want to emphasize it. I think it is important to discuss the challenges of the opinion and the problems with it and this is like insider baseball . . . a million times over. Because the vast majority of people I would say—including lawyers, and lawyers are not the vast majority of people in this country, although we all think so because it's what we know, but they're not—have never read this opinion and never will. When I think of the Supreme Court decisions I've never read, it's sort of embarrassing so [1:33:00] I can't even criticize people for not having read this. So people have headline news information about what happened.

In this case, maybe that's a good thing in some ways—I don't know, but—they think we won. And then the risk is that they think the victory is bigger than the victory [actually] is because they . . . believe—and you know I'm sort of sympathetic to this, that the received wisdom for many years was well—you can't get marriage equality in states where you don't have employment protections yet. And in the very early years that was true, that marriage seemed to always follow in states that had employment protections, and then it sort of burst out all over and employment was stalled and marriage wasn't. A lot of people don't seem to understand how that could happen, and I understand how it doesn't seem to make sense. We always thought employment was easier for people: it didn't touch on the family; it didn't touch on religion. Now it turns out, it does because pizza parlors have religion, but it didn't used to touch on religion. And [1:34:00] so I think the challenge now is how do you celebrate good news, and yet at the same time remind people of all of the work that is not done *and* sound plausible to people who think, “But that's crazy, how could you be able to get married and you could be fired from your job? It doesn't make any sense.” Well, you're right it doesn't make any sense and yet it's true. So that's a very tricky messaging opportunity, . . . but a challenge at the same time. And I don't know that we have figured it out.

And the last thing I'll say about it because someday I have to stop, is that it has been very difficult, if not impossible for decades now, to—seemingly—to motivate large numbers of people to fight hard for employment protections. They're not that interesting, I guess. It's not sexy, it doesn't affect the family, [1:35:00] the very things that people thought would make marriage harder, actually drew a lot of people in. And the things that maybe should make employment protections easier actually cause people to yawn and turn back to their magazine. Nobody has figured out how to create a movement around employment protections. I certainly haven't but I know a lot of people at a lot of other organizations, political as well as legal, that have tried and tried and tried and it has not taken off—and that's why for seven years we haven't been able to add another state and we need to be able to do that.

Steven R. Shapiro:

So, Melissa, what's your instinct on the intersection between law and politics here?

Melissa Murray:

So I thought it was really interesting when Kevin brought up HERO in Texas, because I've watched a lot of the advertisements that were issued on behalf of the opposition to HERO, [1:36:00] and all of them are straight out of the Anita Bryant playbook, which is to say that they rest on this fear of child molestation or pedophilia. I actually think there's not that much distance between the work that children are doing in HERO and the work that children do for Justice Kennedy in *Obergefell*, I just think they're different types of appeals.

In *Obergefell*, it is the integrity of children's relationships with their parents that does a lot of the work in advancing marriage equality—this idea that children will be harmed if their parents are not married. The marriage equality movement at least for many years laid the groundwork for that argument with what I have termed the “illegitimacy as injury” argument:⁵⁸ the idea that to be illegitimate is an injury that the exclusion from marriage puts on the children of gay men and gay women. I think there's a lot in that you have to [1:37:00] unpack and unpeel because they're flip sides of the same coin.

You can get an ad in HERO that galvanizes support on anti-discrimination protections because it preys on fears about child molesta-

58. See Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387 (2012) (considering nonmarriage and illegitimacy).

tion and the very same impulse can then inspire the decision that you see in *Obergefell*. This insistence that children be afforded the kind of integrity—that family status—that children born in marriage enjoy. It’s animated by the same place, the same impulse, the desire to do well by your children. You see it play out in very different ways. I think that’s sort of the dark side of what can happen, but also perhaps, might suggest there are lots of opportunities for coalition-building and making common cause of some of these issues.

I don’t know what to say about employment discrimination protections because that is baffling to me, but one thing seems clear is that it perhaps is an opportunity [1:38:00] for the mainstream LGBT rights movement to . . . make common cause with traditional civil rights groups that for years have been trying to sort of think about employment security for African American men and women, and women’s rights organizations. Maybe these are all places where common cause can be found, but I don’t think what’s happening is because of a kind of disjunction. I think it’s the same kind of impulse driving in different directions.

Steven R. Shapiro:

I’m going to give Eliza an opportunity if she wants to answer that question in the context of her broader remarks, so we’ll just turn over the mic. Let me just say one thing by way of additional introduction. GLSEN—which is the organization that Eliza directs and [that] the ALCU works closely with in many places around the country—is really a terrific organization doing enormously important work on behalf of vulnerable kids. [1:39:00] And, if you don’t know anything about it, you want to learn more about it. I guess the version of the question for you is: so a decision like this comes out, what does that mean to today’s ten year old Andy Tobias who feels like he’s the only kid in school?

ELIZA BYARD

. . . I think I’ll come to that in the course of my remarks. I just want to come back to the HERO question just for a second to say that I think one of the themes of all of this—starting with your remarks, Melissa—is about the undermining of the idea of “public-ness” and public responsibility. And I think that the victory in Houston is also the by-product of a broken public system, in the sense that only ten

percent of the eligible voters even turned out to vote.⁵⁹ And I think that the role of the Supreme Court decision in that was a sense of urgency frankly. When the decision came down, [1:40:00] people in other countries called me—my friends living abroad, straight people, mostly straight people actually—called me to congratulate me personally just that this had happened and now everything was better. And in a movement sense, when you need people to turn out, you need them to feel that something great is at great risk.

I think in the wake of people's perceptions, not understanding what the decision does and doesn't do, and the absence of a larger analysis, undermines the urgency, which is an essential ingredient for political progress, especially on a difficult issue. I promise I'll get to how this turns up in the life of a ten-year-old, but to say, as a non-lawyer in this conversation—I was trained as a historian actually—and as a historian, my job is to think about how [1:41:00] change actually happens. As the executive director of an LGBT movement organization, my job is to organize resources: people, and money, and public opinion, and a sense of urgency to actually make that change happen. And it's been an unbelievable privilege to have that job.

I also, again, want to just gesture . . . to both Tom Stoddard and Paula Ettlbrick, who I had the privilege of knowing . . . personally, as another movement executive director. She was an incredibly important figure in my career and life, and in my intellectual life, as well. Tom Stoddard was more of an abstraction. I came of age politically and literally in the 1980s as a kind of baby dyke hanger-on to ACT UP in many of these wonderful, queer moments of exploding inspiration and protest. [1:42:00] Particularly, my high school graduation present was *Bowers v. Hardwick*.⁶⁰ The Supreme Court decided that [it] would be a good time to let us all know that it was okay to outlaw homosexuality. In thinking about this panel, the part of the question that I latched onto in the description of the panel are the issues that continue to pose challenges for the LGBT community in the wake of this decision. And I would say the two that I want to call to your attention are privatization and privilege. Privatization and private-ness and the lack of public institutions, I think, as we've started talking about, and I'll talk about a little more as we go on.

Thank you for your introduction of GLSEN. For those of you that don't know GLSEN, we're celebrating our twenty-fifth anniversary

59. See Matt Dempsey, *Voter Turnout Highest Since 2003*, HOUS. CHRON. (Nov. 3, 2015), <http://www.houstonchronicle.com/politics/election/local/article/Voter-turnout-highest-since-2003-6609254.php>.

60. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

this year. GLSEN exists to transform K-12 education in order to do a couple of things. [1:43:00] Our job as an organization is to try to eliminate current harms; to reduce the bias and violence that LGBT people face in our schools both across the country and around the world; to promote respect for all people; and to create school environments where difference is valued for the positive contribution it makes to a diverse and healthy society. So in our work within education systems, . . . you can, as someone once said to me, we were having a conversation about bullying prevention, one small aspect of what GLSEN does, and he says “Well, yeah, you can end bullying with martial law.” So let’s just be clear about what our project is about. Our project is about promoting respect for all and promoting learning environments where difference is valued as we eliminate the bias and violence that LGBT people face [1:44:00] in K-12 schools. So in doing that we are both—we do policy work, and we do kind of public education and direct service, but ultimately we’re trying to change a massive system.

We live in the place where you try to effect a translation of litigation and legislative progress into actual daily, lived experience. A couple of examples of how that works: so first in the marriage example. Back in 2000, my then-girlfriend, partner, whatever we called each other then, we decided that we were going to run off to Vermont and get a civil union because we had this right. We had won this victory to be able to do something, but my experience of what that victory meant was [that] we went off to Vermont. We drove into Vermont, and there were signs everywhere, up in the tress, that said “Repeal.” [1:45:00] There was a measure to repeal the right to have a civil union—that was the first experience. Then we went to the town clerk to get our license. And you had to wait twenty-four hours between getting your license and then going to a Justice of the Peace and actually having a civil union.

And so the clerk pulled out this list of Justices of the Peace in the area and he said, “Okay, so here’s your license, tomorrow you can go: don’t go to him; don’t go to her; oh, don’t go to him; don’t go to her. *She’ll* do it: call her.” So we called the *one* Justice of the Peace in the area that he said would actually perform the ceremony. We called her, and she said “Wonderful, come on over but when you get here, please pull into the garage before you get out of your car, so none of my neighbors will know that two women are coming to have a civil union at my home and that I’m actually going to perform this civil union service and officiate this for you.” So, there’s a lot of work between winning the right [1:46:00] and living it in a way that actually feels like you’ve won something.

In schools every single day—one of the practical ways you see this play out—is that—how many of you have heard of Gay Straight Alliances, or Gender and Sexuality Alliances, as they’re called? [*Audience members raise hands.*] Okay, so, GSAs have had a legal right to meet since their inception in 1990 because in 1986, Orrin Hatch worked really hard to get something passed called the Equal Access Act.⁶¹ Do you know the Equal Access Act? Okay, so the Equal Access Act is to say that if you create a limited public forum and you have any non-curricular clubs at your school, students can create a Gay Straight Alliance.⁶² But today that right has been true since the first Gay Straight Alliances began to come into being, and today students say that when they go to try to start a [1:47:00] club, one of the hardest, hardest, *hardest* things to do is to find a member of the faculty who is actually willing to be your advisor to make that right a reality. Because in twenty-eight states, if they’re perceived to be gay or they are LGBT or perceived to be, they could lose their job; or maybe they think they could face stigma. So, we do a lot of work that’s about making sure that the actual rights that you have [are] turned into a real experience for you.

How do we do this? Well, GLSEN actually works on a number of levels to effect this change within the system. At the core, I would say, is that . . . we have a research capacity: our original name is actually the Gay and Lesbian Schoolteachers’ Network. GLSEN was founded by teachers and parents and students who came together to say, “This is what we know to be true in schools, and we want it to change.” So we take insights from research and insights from [1:48:00] experience and try to understand what changes in schools—policies, programs, and practice: all the dimensions of the system—are actually going to make that system change. Then, we try to get the legal and policy infrastructure in place to enable those things to happen. There are two pieces of legislation pending in Congress, we’ve worked to get bullying prevention legislation, to authorize or require certain kinds of policies in schools. Then we get to school programs and practice—what people actually do in terms of their teaching, their administrating, what’s in the curriculum, how teachers are trained, how school staff learn they should behave with students. And then we try to mobilize school stakeholders to actually demand that these changes take place and point out when they’re not actually happening.

61. See *The Equal Access Act and “Gay-Straight Alliance” Groups*, OUTFRONT MINN., <https://www.outfront.org/safeschools/gsa> (last visited July 9, 2016).

62. See *id.*

Ultimately, everything we do is about making sure that there are LGBT-supportive interventions—things that we know make a difference in the life of a young person—actually in place in schools [1:49:00]. All of our programs are designed, and . . . there are actually four of them, very practically speaking: LGBT-inclusive anti-discrimination, anti-bullying, and other policies at the school level; supportive faculty and staff; supportive adults in the school environment; the presence of a GSA; and actually accurate and appropriate and positive inclusion of LGBT people history and events throughout the curriculum. Those four things correlate with concrete improvements in LGBT student experience.

We've been tracking this every two years since 1999. And how are we doing? . . . I'll start you off with a basic fact. When I started at GLSEN on the staff in 2001, 96% of LGBT youth faced physical, verbal, sexual harassment at school on a regular basis.⁶³ [1:50:00] Beginning in about 2011, we could discern a concrete and statistically significant downward trend.⁶⁴ We're actually beginning to chip away, and we can actually correlate that downward trend with moments where you see the number of supportive staff has gone up tremendously.⁶⁵ The presence of GSAs has gone from about 20% to 50% of LGBT youth have GSAs in their schools; the presence of statewide laws protecting them have increased; but today, about 82% are still experiencing these things—more than 4 out of 5—are still experiencing this in schools.⁶⁶ And, the fact is that when LGBT lives are subject to debate when they show up on the front page, they show up in the hallways.

So the practical effect of this is every time there is a victory, the conversation [1:51:00]—it's like the hallways, the water cooler of the pre-college set—this shows up, and it becomes the subject of conversation. And again, just thinking—I am so struck. I am still sitting with that image of single justices—women justices who are single, who are signing a decision that is about how awful it is to be single. That had not even crossed my mind, and that's a very powerful thought.

63. See *Doing the Math: What the Numbers Say About the Harassment of Gay, Lesbian, Bisexual, and Transgender Students*, ACLU, <https://www.aclu.org/doing-math-what-numbers-say-about-harassment-gay-lesbian-bisexual-and-transgender-students> (last visited July 9, 2016).

64. See GAY, LESBIAN & STRAIGHT EDUC. NETWORK, 2013 NATIONAL SCHOOL CLIMATE SURVEY: EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS 108-09, 123 (2014).

65. See *id.* at 113.

66. See *id.* at 108.

Kevin M. Cathcart:

Well statistics are right on that, it was—

Eliza Byard:

It's crazy. So just to say, as a high school student a number of years ago now, I sat through an ethics class where the conversation was about whether or not LGBT—lesbian and gay people at the time—whether lesbian and gay people should be allowed to adopt children. So thinking about what it feels like [1:52:00] to sit in an environment where your rights—your right to exist, your right to be—is being debated, even in a moment when the highest court in the land is affirming that—is locally very, very dangerous or internally difficult. Basically, the most important thing to remember is that when rights are won nationally, they lead to flash points locally.

And the important thing for anyone in the business of social change is trying to make sure that the local is ready to handle the flashpoint. Teachers are prepared. The adults are there in a compassionate way; whatever they believe, they are going to be there for all the students who are there, [and] they are going to make sure the conversation happens in a good way. Or, if they are not, there is a public authority responsible for making sure that they do. In our universe, that is the Office of Civil Rights: either Department of Justice or the Department of Education. And since 2008, incredible strides [1:53:00] have been made in translating the protections from Title IX and Title VI into guidance for schools that actually has given us some leverage to try to make sure that the local is ready to protect and support children, LGBT youth particularly, when the national shows up in the hallway.⁶⁷ But, when it comes to remaining issues, I continually think back to a question I was asked by a reporter about three years ago—standard question at the beginning of the school year—and the question was what is the greatest threat facing LGBT youth right now as everyone goes back to school. And my answer I think was kind of surprising because my answer was that the greatest threat to LGBT youth—and I contend that this remains the case—is the systematic undermining of public education and the privatization of education functions. [1:54:00] Because you are taking this process and you're taking that local moment out of anyone's jurisdiction and you're leaving it up to local discretion, community norms, whatever it is at the local level, and you no longer have access to try to support that happening except through very roundabout . . . it is not impossible, it is

67. *See id.* at 3.

just a very different project to try to affect it. Because as Kevin was saying, as we focus on winning these rights victories, we don't have resources going into sustaining our capacity to mobilize, creat[ing] a sense of urgency, and get[ting] people to act. And that is the kind of thing LGBT institutions outside of litigation exist to try to do. Overall in 2008, we came to this moment thinking about the trajectory of the marriage victory and the incredible progress [1:55:00] in the last several years.

One of the things that was really remarkable with the election of President Obama was that we finally got to this moment where many things that had been pent up, legal and administrative ideas that had been in the making for a very long time, suddenly could actually be enacted. There had been people under Bill Clinton; there were the beginnings of work in OCR, the Department of Education to apply Title IX to LGBT people.⁶⁸ But finally once you got to 2008, you had members of the Administration who would turn that idea, that legal idea, into policy and practice reality throughout the country and actually enforce it. But, I remember a meeting in 2008 with the heads of other LGBT organizations where we had this moment of saying: we have this incredible moment right now, but we also face this problem that we are reaching [1:56:00] the apex of our influence with public institutions at exactly the moment when their capacity, ability, resources to actually enforce any of these rights is being systematically undermined, and that remains a challenge to this day.

Within all of that, however, I come back to that thing I hadn't thought about before coming here, though, about the issue of rights for the gay and protection for the queer. And by queer, I actually simply mean the different. And I come back to the core of GLSEN's commitment to what schools should be about. We have rights for same-sex couples to get married, but that's undermining, as [was] pointed out before, the rights of people who wish to live differently to do so with protections, legal protections from the public in order to live the way they want to live. But, I take great heart actually [1:57:00] from the ways that right now we're beginning to see that inclusion in the core institutions is creating situations where the center cannot hold. And I see this in Black Lives Matter. I see this in what's happening in Mizou and Columbia and Yale right now.

In the sense that all of a sudden, with the election of an African American president, with a modicum of inclusion and rights for LGBT

68. See Mathew S. Nosanchuk, *The Endurance Test: Executive Power and the Civil Rights of LGBT Americans*, 5 ALBANY GOV'T L. REV. 441, 465 (2012).

people, we are having this moment where some people are saying, “Oh, wait a minute, we meant rights for everybody but not really rights for everybody. What were we actually — what have we done? This is falling apart.” And people saying, “No, these places have to adapt now that we are here. These places need to examine how privilege has shaped the experience of being here.” And I think that, for youth organizing today in schools, across lines of being LGBT students of color, [1:58:00] being disabled, there is a new approach to saying that now that we are more fully here, this institution needs to adapt to what we need to really belong. There is a big difference.

There is a wonderful saying: there is a difference between being tolerated, being included, and belonging. Because by the time that you belong people actually miss you when you are not there because the place has been changed to fully include you. And I think that if we keep pressing the point that inclusion in the existing institution is not enough, we will be able to work together to actually transform it in ways that makes it serve everybody. And I think for LGBT youth today, who don’t understand the decision, who aren’t thinking about these distinctions, the thing I want to preserve for them, and when I talk with them, I will preserve the sense of victory because that’s what emboldens them to do the next wave of surviving and fighting. [01:59:00]

STEVEN SHAPIRO

. . . I am just looking at the organizers here. I believe we have fifteen minutes for questions from the audience. I am going to stand up just because I cannot see the entire audience when I sit down. I want to open it up for questions or comments from anybody.

Audience Member #1:

This is a question for Eliza, just to sort of pick up where you left off, in school settings which are heavily policed, and I don’t mean that in a metaphorical way . . .

Eliza Byard:

A literal way, yes.

Audience Member #1:

I mean that in a very literal way. How do you navigate your goals and methods that you have through and around the policing?

Eliza Byard:

Sure, a couple of literal ways. One is that when we seek policy recommendations with respect to violence prevention we are very [02:00:00] explicit about no zero tolerance policies and reparative justice approaches to resolving disputes so that none of the policy language that we enact or get written in actually provides another reason to criminalize behavior or to respond with policing to behavior. The other thing is that we actually train—a couple of other things—we track differential experiences of school discipline for LGBT youth and LGBT youth of color, we are pushing OCR actually to include LGBT-based incident reporting in the civil rights data collection, and in incident reporting we actually train school resource officers to think about their role and their responses to LGBT youth, particularly LGBT youth of color. [02:01:00]

Audience Member #2:

In the intersection between both the law and the politics that all of you have talked about one way or another, I wanted to ask you if you wanted to comment at all on the “perfect plaintiff” problem. To say that, I just wanted to tell a little tiny story which is that I came to this institution as a student in 1989. The year before that in 1988, there had been a gay man who was admitted who said he could only attend—because it was so expensive to live in New York City—he could only attend if he could live in the dorms, and asked to live in married student housing with his male partner and he was denied, and therefore enrolled happily at Cornell. So when I arrived with my partner, we had been together for quite some time (in fact Eliza attended a ceremony we had. I think you attended, is that right?)

Eliza Byard:

Y[es], I did.

Audience Member #2:

We were asked to be plaintiffs, essentially suing. We weren’t going to sue, but we were going to go through a procedure here at the law school to say, [02:02:00] “No, you have to let gay people in.” There were two problems: one is, we had been together for a long time, we are both white, reasonably privileged, we are both enrolled in all sorts of graduate schools. We said, “No, no, we’re exactly . . . ,” and people said, “You’re perfect,” and we said, “That’s the problem.”

And the other issue is that we had a political fight with some of the people who wanted to bring that suit. They wanted to say, “Gay people only, because gay people cannot get married, and as soon as we can get married, we do not need this.” And we wanted to say, “No, this is about people’s right not to do it.” So we didn’t choose to bring that case, and we didn’t choose to be their plaintiffs, but we do know that we have succeeded politically when we have the perfect poster child and we still see a lot of the perfect poster children out there.

There’s a couple right now in a southern state who just lost their foster child, who are, “Oh my god are they perfect,” sympathetic, lovely, wonderful human beings, and that is great, but then how do we succeed for people who are not. And you guys have touched on that but I wondered [02:03:00] if you wanted to say a little bit more about how we transition from the perfect to the real.

Melissa Murray:

I’ve thought a fair amount about the perfect plaintiffs.⁶⁹ I understand that the plaintiff selection strategy is borne out of simple expediency. It is a winning formula, and you’re lawyers and you want to win, so I understand that. But litigation choices are still choices that we make, and we have to live with their costs—even when we win. It is really telling that in *Lawrence v. Texas*, by virtue of the fact that the anti-sodomy law was not being prosecuted regularly, gay rights lawyers had to take what they could get.⁷⁰ And what they got was this interracial couple, who were not actually a couple, and in fact there might have been a third guy with a video camera, and they never said anything about it! [02:04:00]

In their briefs, the lawyers for [plaintiffs] Lawrence and Garner take care to be circumspect about the pair and what happened that night in Houston. They played it straight—“This is what happened,” “It violated the law,” “The law itself is unconstitutional.” They did not try to make Lawrence and Garner into something they were not. Indeed, it is Kennedy’s opinion that frames them as though they are on their way to Crate and Barrel to register for silverware.⁷¹ It is Kennedy who makes them out to be “like married.” That’s not how Lawrence

69. See Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 58 (2012).

70. See DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *Lawrence v. Texas* 158 (2012).

71. See Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1305 (2008) (“Although there was scant evidence for it, Kennedy’s opinion speaks of Lawrence and Garner as though they are long-term partners sharing a life in common.”).

and Garner are presented in the briefs. To be clear, the lawyers for Lawrence and Garner are not upfront about the nature of their relationship; indeed, they avoid discussing the men's relationship to one another. They are not lying, but they are not trying to present the two men as respectable paragons of virtue. Their respectability is certainly in question, I think, in the briefs. It is in the pages of the opinion that they are rendered completely respectable.

[In] *Goodridge*, on the other hand, I think you really do see a shift and more of a culling and a cultivating of a kind of plaintiff model, and it's a winning formula and it gets replicated. Cynthia Godsoe, who is Liz Schneider's [*gesturing toward an audience member*] colleague at Brooklyn Law School has just written a wonderful piece in the [02:05:00] *Yale Law Journal Forum* about this very phenomenon and about *Obergefell* and the selection of plaintiffs. It's certainly worth reading.⁷² These are choices. It's about the politics of respectability, and I think you make decisions about how you play into them and how you don't. And I understand why those choices are made, but you kind of have to live with the consequences of them in the aftermath and I think some of the consequences are really severe. [02:06:00]

Kevin M. Cathcart:

So, I just want to say something about that too, since we're in the perfect plaintiff business at Lambda Legal, and sometimes they are and sometimes they aren't. Sometimes the perfect plaintiffs get divorces halfway through the case and you move onto plaintiffs number two. But I think our goal is to win, and I actually think our duty to our donors is to spend their money in the ways that are most likely to move the questions forward. And I think part of the problem is not just that if you don't win, you don't win, but if you don't win, you lose, and if you lose you create bad precedent that makes it sometimes harder to go forward the next time. And so we really feel a duty not to create further barriers that will make it harder for future people to win.

With that, I don't think that that means that you have to end up with the kind of plaintiffs [2:07:00] that . . . I think that there are differences sometimes between the plaintiffs that the legal organizations put together and the plaintiffs that private attorneys put together. There may be more focus on this sort of thing. And I think that part of the pressure is, if you have quote-unquote "perfect plaintiffs," and

72. See Cynthia Godsoe, *Perfect Plaintiffs*, 125 *YALE L.J. F.* 136 (Oct. 12, 2015), <http://www.yalelawjournal.org/forum/perfect-plaintiffs>.

none of these, they're not perfect but some of them can survive cross-examination better than others, then I think the challenge is to make sure that at the outcome you have the kind of policy changes or law changes that affect other kinds of people. So some of this is just, "What's going to get it done sooner?" or "What's going to get it done at all?" or "What's going to make it harder to get it done in the long run?"

And I would just say, since we did the *Lawrence* case, I don't actually believe that the plaintiffs in the *Lawrence* case lied. I think there are books about the *Lawrence* case [2:08:00] where I think law professors have told stories that I'm not sure are true; and I think there are a lot of books about the marriage movement now that I would question the truth of. But you know, everyone has their truth. I guess that's the nicest way I can put it. And I'm sure that all of these books represent somebody's truth. But I have serious questions about some of the truths that are . . . and someday I'll write a book and somebody will have serious questions about mine because we're sitting in different places.

While I think it is a dilemma and it can make it harder to bring certain kind[s] of cases, I actually think that to me, the *Lawrence* case illustrates perhaps—and I'm going to say this in the nicest way because I'm here from Lambda Legal—but it illustrates . . . while I will say we look for the best possible plaintiffs, they don't have to be perfect and I don't think that John [Lawrence] and Tyron [Garner] were the perfect plaintiffs in sort of anybody's definition of perfect plaintiffs. [2:09:00] I don't think John and Tyron would have said that they were the perfect plaintiffs, but they were. And there is a difference too: they were arrested.⁷³ So, this wasn't like a theoretical challenge about something they would like to do someday. They were hauled down to the police station, dragged out of the house, and taken down and booked. And so that changes the dynamics some because [it wasn't that we could] wait for the perfect people to be arrested. No, these people were arrested. . . . Sometimes I feel like I get criticism about, "Well, you're always looking for perfect plaintiffs," and I think, "John and Tyron? I don't know?"

Depending on the situation and who presents and what has happened, would we have used those same people for if it was a challenge on some Texas regulation about something that was sort of annoying but not the same thing as being arrested? We probably would have looked more: I don't know. That wasn't the situation that came up, but

73. See *Lawrence v. Texas*, 539 U.S. 558, 563 (2003).

when [2:10:00] real people were dragged out by the police, we work with the real people. And I will say, we didn't lie in the briefs. People have lied in some of the books, and this isn't the first time we have noted that the Supreme Court decisions can be fanciful. Perhaps there was some of that in this, or trying to make it into something else. But the lawyers for the case didn't try to make it into that. We didn't go out of our way to stress that they don't really know each other and this and that.

Melissa Murray:

I don't think that you lied about it. I just sort of . . .

Kevin Cathcart:

I didn't say you said it. There are people out there. I don't even think they're here. [*Audience laughter.*]

Melissa Murray:

Let's definitely talk about them because they're not here. [*Audience laughter.*]

Steven Shapiro:

Let me just end, because time is short, with one indisputable truth. The vote in *Obergefell* was 5 to 4 and from where I sit, 5 to 4 is always better than 4 to 5. [2:11:00] Also I can't be at an event honoring Tom without reciting this Martin Luther King quote that Tom always recited: "The moral arc of the universe is long, but it bends towards justice." *Obergefell* did not get us to justice, but it bends towards justice.

And then, there is a final quote that I heard yesterday at a different conference from the Chief Justice of the Supreme Court of Texas, who said—and I like this, "unless we have justice for all, we do not have justice at all." Let me just end with that and please join me in thanking the three panelists. [*Audience applause.*]