

STEALTH ADVOCACY CAN (SOMETIMES) CHANGE THE WORLD

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BELOW THE RADAR: HOW SILENCE CAN SAVE CIVIL RIGHTS. By
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INTRODUCTION

Scholarship and popular writing about lawsuits seeking broad social change have been nearly as contentious as the litigation itself. In a normative mode, commentators on the right have long attacked change litigation as imperialist and ill informed,¹ besides producing bad outcomes.² Attacks from the left have likewise had both prescriptive and positive strands, arguing that civil rights litigation is “subordinating, legitimating, and alienating.”³ As one author recently summarized in this Law Review, these observers claim “that rights litigation is a waste of time, both because it is not actually successful in achieving social change and because it detracts attention and resources from more meaningful and sustainable forms of work such as mobilization, political lobbying, and community organizing.”⁴

Several particularly influential studies eschew the clear ideological position of the works just referenced; they offer what they claim is a purer empirical grounding for the conversation. These studies highlight backlash, purporting to demonstrate that many landmark decisions—among them, the U.S. Supreme Court’s *Brown v. Board of Education* and *Roe v. Wade*, the Hawaii Supreme Court’s *Baehr v. Lewin*, and the Massachusetts Supreme Judicial Court’s *Goodridge v. Department of Public Health*—have turned out to

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1. See, e.g., DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); Nathan Glazer, *Towards an Imperial Judiciary?*, PUB. INT., Fall 1975, at 104.

2. See, e.g., JEREMY RABKIN, JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY (1989); ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT (2003).

3. Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 715 (2011).

4. Alan K. Chen, *Rights Lawyer Essentialism and the Next Generation of Rights Critics*, 111 MICH. L. REV. 903, 922 (2013) (book review).

be not merely inefficacious but counterproductive, harming the very causes they aimed to assist because of the countermovements they provoked.⁵

But rights lawsuits have their defenders as well, among both advocates and scholars.⁶ Many of these defenders agree with lawsuit critics that “activists and analysts” err, badly, if they assume “that litigation can evoke a declaration of rights from courts; that it can, further, be used to assure the realization of these rights; and, finally, that realization is tantamount to meaningful change.”⁷ To use Professor Scheingold’s phrase, these assumptions are tantamount to a “myth of rights”⁸—and, like so many myths, this one does not reflect reality. A much more fruitful frame, Scheingold writes in his classic treatment, focuses on “the politics of rights,”⁹ in which a right recognized by a court is “best treated as a resource of uncertain worth” whose “value . . . will . . . depend in all likelihood on the circumstances and on the manner in which it is employed.”¹⁰ Accordingly, rights lawsuits—and the “cause lawyers” who bring them—*can* improve the welfare of their intended beneficiaries, by using litigation as a piece of a more comprehensive political strategy.

Continuing to quote Scheingold (but it could be any of a small library of consonant analyses), litigation and the rights it aims to vindicate are productive only if “useful for redistributing power and influence in the political arena.”¹¹ This can occur if litigation is used for “political mobilization

5. On *Brown* and *Roe*, the most well-known proponents of this backlash analysis are GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1st ed. 1991), and MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* (2004). More recently, both Rosenberg and Klarman also addressed backlash to marriage-equality cases, including in Hawaii and Massachusetts. MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2013) [hereinafter KLARMAN, *CLOSET TO THE ALTAR*]; GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 419 (2d ed. 2008) [hereinafter ROSENBERG, *THE HOLLOW HOPE* (2d ed.)]; Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 *DRAKE L. REV.* 795, 812–13 (2006). Klarman’s 2013 book is far less categorical in its claim of counterproductiveness than his 2005 article on the same topic, Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 *MICH. L. REV.* 431, 482 (2005) (“By outpacing public opinion on issues of social reform, such rulings mobilize opponents, undercut moderates, and retard the cause they purport to advance.”).

6. See, e.g., ALAN K. CHEN & SCOTT L. CUMMINGS, *PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE* 220–21, 521–22 (2013); JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* 214–22 (1978); GERALD P. LÓPEZ, *REBELLIOUS LAWYERING* (1992); MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994); Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 *STAN. L. REV.* 2027 (2008).

7. STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 5 (Univ. of Mich. Press, 2d ed. 2004) (1974).

8. *Id.*

9. *Id.* at 6–7 (emphasis omitted).

10. *Id.* at 7.

11. *Id.* at 8.

and . . . in this way affect[s] the balance of forces.”¹² Introducing data from her interviews with dozens of leading public interest lawyers, Professor Rhode explains:

Part of the reason public interest groups have relied heavily on lawsuits is because they can sometimes mobilize such [financial and popular] support and because other options are less available. . . . As research on social movements makes clear, lawsuits can help frame problems as injustices, identify perpetrators and responses, and reinforce a sense of collective identity, all of which build a political base for reform.¹³

Rhode further summarizes: “In describing their most effective strategies, public interest leaders most often mentioned, in addition to impact litigation, coalition building and communication.”¹⁴ And indeed, studies of the varied practices of advocates for whom litigation is an important tool find that litigation remains attractive to those advocates in large part because lawsuits provide a public focal point for organizing, possessing a “unique ability . . . to attract resources and publicity.”¹⁵

In *Below the Radar: How Silence Can Save Civil Rights*, Alison L. Gash¹⁶ adds a key insight into the mix—and in the process demonstrates that litigation theory needs substantially more sophistication to catch up with smart lawyers. Sometimes, she argues, civil rights advocates and clients succeed not by using litigation to organize or mobilize movements, but by stealth—by keeping their cases quiet, “below the radar” of public notice and therefore of opposition. Gash develops two case studies to undergird the theoretical point. The first deals with parenting-equality advocacy on behalf of gays and lesbians, the second with group homes for people with disabilities or recovering from addictions. Each is interesting on its own, and each is well told. Gash doesn’t just summarize existing evidence; she interviewed dozens of advocates, and these form the core of her account. In addition, Gash conducted several very illuminating media-analysis studies.

12. *Id.*

13. Rhode, *supra* note 6, at 2044 (footnote omitted).

14. *Id.* at 2048.

15. Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement’s Agenda*, 47 U.C. DAVIS L. REV. 1667, 1687 (2014). Professor Leachman rests this summary—which she demonstrates applies to LGBT advocacy in California over three decades—on a large array of prior work, including, for example, MCCANN, *supra* note 6, at 54–60; HELENA SILVERSTEIN, UNLEASHING RIGHTS: LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT 71 (1996); Steven E. Barkan, *Political Trials and Resource Mobilization: Towards an Understanding of Social Movement Litigation*, 58 SOC. FORCES 944, 954–55 (1980); Christopher Coleman et al., *Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest*, 30 LAW & SOC. INQUIRY 663, 668 (2005) (asserting that social movements used the law “as a rhetorical resource, as a ‘club,’ . . . an inspiration and an aspiration—to gain the upper hand in the conflict”); and Sandra R. Levitsky, *To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 145, 145–46, 158 (Austin Sarat & Stuart A. Scheingold eds., 2006).

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Part I of this Review addresses the parenting-equality case study. I summarize Gash's account and add to it the cautionary tale of the 2002 failure of stealth parenting-equality advocacy in Michigan. Part II addresses, more briefly, Gash's group-home study. In Part III, I put Gash's theoretical contribution into context. Her important and original contribution is her claim that civil rights litigation can succeed quietly, not just loudly. In evaluating this claim, I suggest that she might usefully have addressed the issue of whether stealth advocacy is really a subset of a broader category of efforts to first alter social facts on the ground, and then play defense to preserve that alteration.

I. THE FIGHT FOR PARENTING EQUALITY

Gash compares parenting-equality litigation to a more familiar struggle—for LGBT marriage equality. The basic contours of the same-sex marriage saga are familiar to anyone who has been paying attention for the past twenty years. In the 1970s and 1980s, a number of gay and lesbian couples attempted to get married, but failed. Even the few who succeeded in obtaining marriage licenses from cooperative county clerks were unable to exercise the ordinary rights concomitant with marriage. For example, Gash recounts the episode underlying an early litigation loss in which an American's visa application for his husband was denied—notwithstanding their Colorado marriage license and ceremony—with a letter from a federal immigration official that stated, “You have failed to establish that a bona fide marital relationship can exist between two faggots.”¹⁷ Scattered litigation efforts were equally unavailing.¹⁸ But that changed in 1993, when the Hawaii Supreme Court took a step toward marriage equality, holding in *Baehr v. Lewin* that under the Hawaii Constitution, a ban on same-sex marriage would pass muster only if the state could demonstrate “(a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgments of the applicant couples'

17. P. 54 (internal quotation marks omitted). It seems that the letter, but not the ruling, was rescinded. According to an *Associated Press* description of a more moderately expressed superseding document, the Immigration and Nationalization Service later explained that “while one partner in a homosexual marriage may function as a female in some ways, he cannot function as a wife by assuming female duties and obligations inherent in the marital relationship,” and that “[a] union of this sort was never intended by Congress to form a basis of a visa petition.” *Gay Pair Sue U.S. Immigration to Ward Off Man's Deportation*, *GLOBE & MAIL*, Mar. 16, 1979, at 11 (internal quotation marks omitted). This incident is also described in STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 267–73 (5th ed. 2009). The resulting litigation is reported as *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982).

18. See, e.g., *Howerton*, 673 F.2d 1036; *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1973).

constitutional rights.”¹⁹ Along with a remand to the state trial court, to determine if such a rationale existed, came a “tsunami of opposition” nationwide (p. 193).

Under the Constitution’s Full Faith and Credit Clause,²⁰ marriages lawfully celebrated in any state are presumptively valid in any other state, absent contrary congressional action.²¹ Hawaii allows nonresidents to marry; there’s no need even to spend a few days at the beach waiting for a license.²² So had Hawaii’s same-sex marriage ban failed on remand,²³ any same-sex couple could have traveled to Hawaii to marry and then demanded—and plausibly, if not certainly, received—recognition of that marriage back home. Gash quotes a pro-LGBT activist who explains that this possibility was extraordinarily threatening to same-sex marriage opponents: “There was this threat that we didn’t encounter with other issues. It’s like a virus. If you let Hawaii [*sic*] then all gays everywhere can marry. If you allow it anywhere you allow it everywhere” (p. 62).

And so opponents responded. They passed the federal Defense of Marriage Act (“DOMA”), which both defined “marriage,” for federal purposes, as “mean[ing] only a legal union between one man and one woman as husband and wife,” and authorized states to deny full faith and credit to same-sex marriages recognized in other states.²⁴ And in state after state, the opponents passed either statutes or constitutional amendments—or both—barring same-sex couples from getting married.²⁵

19. 852 P.2d 44, 67 (Haw. 1993).

20. “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” U.S. CONST. art. IV, § 1.

21. For a comprehensive analysis of the full faith and credit and choice-of-law issues relevant to state recognition of “unpopular marriages,” see Deborah M. Henson, *Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States’ Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii’s Baehr v. Lewin*, 32 U. LOUISVILLE J. FAM. L. 551, 599–600 (1994).

22. HAW. REV. STAT. §§ 572-1 to -15 (2006 & Supp. 2013), amended by Hawaii Marriage Equality Act of 2013 (effective Dec. 2, 2013); see also *Vital Records: Marriage Licenses*, HAW. ST. DEP’T OF HEALTH, <http://health.hawaii.gov/vitalrecords/marriage-licenses/> (last visited Oct. 30, 2014) (no waiting period).

23. What *did* happen on remand was the following: First, the court entered a long stay for the Commission on Sexual Orientation and the Law to make a recommendation. Then the Commission issued a recommendation in favor of marriage equality. Then the state passed a constitutional amendment. KLARMAN, CLOSET TO THE ALTAR, *supra* note 5, at 57, 63–66.

24. Defense of Marriage Act, Pub. L. No. 104–199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738C), *invalidated in part* by United States v. Windsor, 133 S. Ct. 2675 (2013).

25. ROSENBERG, THE HOLLOW HOPE (2d ed.), *supra* note 5, at 357 tbl.13.1; *History and Timeline of the Freedom to Marry in the United States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/history-and-timeline-of-marriage> (last updated Oct. 6, 2014); *Same-Sex Marriage Laws*, NAT’L CONF. OF ST. LEGISLATURES (Oct. 21, 2014), <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx>.

Thus in the years following *Baehr*, same-sex marriage looked to many observers like a clear object lesson about the limits of rights litigation. “Simply put,” gay rights scholar John D’Emilio wrote in 2007, “the marriage campaign has been a disaster.”²⁶ Rosenberg, for his part, scolded LGBT advocates for their overreach:

Ultimately, the use of litigation to win the right to same-sex marriage lends further support to the argument that courts are severely limited in their capacity to further the interests of the relatively disadvantaged. . . . [S]uccumbing to the “lure of litigation” appears to have been the wrong move. . . . [A]fter 1996 it was clear that any further litigation victories would produce continued backlash. . . . By litigating when they did, proponents of same-sex marriage moved too far and too fast ahead of the curve, leaping beyond what the American public could bear. The lesson here is a simple one: those who rely on the courts absent significant public and political support will fail to achieve meaningful social change, and may set their cause back.²⁷

But Rosenberg was wrong; in fact, by the time he wrote that paragraph, the tide had turned.

DOMA delivered a hard kick in the gut to LGBT equality. But it had one useful side effect for marriage-equality advocates. Section 2 provided:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.²⁸

This language neutralized the cross-border impact of marriage equality—it meant that states were not required to recognize same-sex marriages celebrated elsewhere. And that in turn meant that marriage-equality litigation could proceed state by state, appealing to each state’s decisionmakers to think about their own state’s law or policy without worrying about spillover effects. Opposition could likewise be cabined within each state, at least in part.

Whether or not this counter to the prior expansionary force of marriage recognition was a contributing cause, in 2003 the Gay & Lesbian Advocates & Defenders (“GLAD”) won *Goodridge v. Department of Public Health* in Massachusetts.²⁹ The nation’s first authoritatively legal same-sex weddings

26. John D’Emilio, *Will the Courts Set Us Free? Reflections on the Campaign for Same-Sex Marriage*, in *THE POLITICS OF SAME-SEX MARRIAGE* 39, 45 (Craig A. Rimmerman & Clyde Wilcox eds., 2007).

27. ROSENBERG, *THE HOLLOW HOPE* (2d ed.), *supra* note 5, at 419.

28. Defense of Marriage Act § 2.

29. 798 N.E.2d 941 (Mass. 2003).

took place on May 17, 2004, creating an astounding array of feel-good images of weddings and broadcasting a joyous, deeply nonthreatening vision of same-sex marriage, as the PTA moms next door and the nice men down the street populated wedding photos that were splashed across newspapers and websites.³⁰ Evan Wolfson, one of the nation's leading marriage-equality advocates, explained that what was so important about that day in Massachusetts was “[g]etting people married, making it real. Real families, real couples, really married.”³¹ The impact of May 17, Wolfson suggested, was magnified because the legitimacy of those weddings was “unquestionable, undistracted, pure.”³²

What has triumphed over backlash in the marriage-equality campaign is the changing public will.³³ And among the pressures that induced that change was the extraordinary public nature of the fight. By now, the triumph of marriage equality seems inevitable.³⁴ As of February 2015, same-sex marriage is lawful in thirty-five states and the District of Columbia, home states

30. For a sliver of the galleries of wedding photos posted that day, see *Mass. Marks First Day of Legalized Same-Sex Marriage*, BOS. GLOBE (May 18, 2004), <http://www.bostonglobe.com/metro/2004/05/17/mass-marks-first-day-legalized-same-sex-marriage/IG0ZIOA2SG54q9Hww4IPDK/picture.html>. My view that the Massachusetts weddings and the pictures they generated were part of the normalization of same-sex marriage, and therefore very much a force for marriage equality, is not universally held. Klarman, for example, thinks the same events elicited backlash:

Even at a time when polls showed a majority of Americans supporting civil unions, focus groups still evidenced great discomfort with the idea of homosexuality and visceral revulsion toward an advertisement showing gays or lesbians kissing.

The weddings inspired by *Goodridge* elicited the same reaction as that advertisement. Though these weddings were paid for by gay rights supporters, they did the work of opponents.

KLARMAN, CLOSET TO THE ALTAR, *supra* note 5, at 175 (footnote omitted). There's no question that Election Day 2004 was a very bad day for marriage equality. See, e.g., Sarah Kershaw, *Constitutional Bans on Same-Sex Marriage Gain Widespread Support in 10 States*, N.Y. TIMES, Nov. 3, 2004, at 9, available at <http://www.nytimes.com/2004/11/03/politics/campaign/03gay.html>. But even if the hard antiequality forces were galvanized by the events in Massachusetts, so too were the proponents of equality, and the views of the previously ambivalent, skeptical middle moved toward marriage equality. See, e.g., Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC'Y REV. 151, 159–75 (2009).

31. DANIEL R. PINELLO, AMERICA'S STRUGGLE FOR SAME-SEX MARRIAGE 186 (2006) (quoting an interview with Wolfson).

32. *Id.* Similar galleries of wedding photos from San Francisco, three months prior, were also joyous, but I think less normalizing because Mayor Gavin Newsom's decision to have his city hall issue marriage licenses to same-sex couples was nonauthoritative, unlike the *Goodridge* decision. See *id.* at 73–90 (describing the San Francisco “Winter of Love”). Those marriages were later declared invalid. *Lockyer v. City & Cnty. of S.F.*, 95 P.3d 459 (Cal. 2004).

33. See Justin McCarthy, *Same-Sex Marriage Support Reaches New High at 55%*, GALLUP (May 21, 2014), <http://www.gallup.com/poll/169640/sex-marriage-support-reaches-new-high.aspx>.

34. Except as otherwise cited, the information in this paragraph is tallied from the very useful state-by-state guide posted at *States, FREEDOM TO MARRY*, <http://www.freedomtomarry.org/states/> (last updated Jan. 19, 2015).

to 64 percent of Americans.³⁵ In nine of those states, marriage equality was achieved by legislation, in three by referendum, in five by state court litigation, and in the remainder by federal litigation.³⁶ In 2013, in *United States v. Windsor*, the Supreme Court struck down DOMA's ban on federal recognition of state-sanctioned same-sex marriages.³⁷ In the two years since, dozens of state and federal trial courts around the country have found state bans on same-sex marriage unconstitutional—with only rare decisions coming out the other way, so far.³⁸ In the federal courts of appeals, the score thus far is five to one in favor of marriage equality—the Sixth Circuit stands alone.³⁹ The Supreme Court denied review in a first round of petitions for certiorari, but granted review of the Sixth Circuit's cases in January; arguments will likely occur in April.⁴⁰ Even if the Court, against current predictions, agrees with the Sixth Circuit, the next stage of the march toward equality is aided by public opinion: 55 percent of the American public—and 78 percent of people from ages 18 to 29—support same-sex marriage.⁴¹

The account just provided is, at this point, close to conventional wisdom. (I lay a bit more stress than some other observers on the positive impact of the weddings in May 2004.) But Gash has a good deal to add.

First, she describes a parallel advocacy effort, to assist gay and lesbian parents. This story is far less familiar than the high-visibility marriage campaign. Gash's account begins fifty years ago, when lesbian and gay parents fought for custodial access to their own children that their divorcing spouses sought to deny them (pp. 97–98). Cases prior to the 1960s were, she explains, “largely unsupportive of gay and lesbian parents.”⁴² Beginning in the mid-1960s, however, “the tides against gay and lesbian parents seemed to (at least marginally) shift” (p. 98). A key precedent, Gash explains (p. 98), was *Nadler*

35. *Id.*

36. *Id.*

37. 133 S. Ct. 2675 (2013).

38. *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014); *Borman v. Pyles-Borman*, No. 2014CV36, 2014 WL 4251133 (Tenn. Cir. Ct. Aug. 5, 2014).

39. Compare *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (upholding state bans on same-sex marriage), *cert. granted*, 83 U.S.L.W. 3315 (U.S. Jan. 16, 2015) (No. 14-571), with *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014), *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014), and *sub nom. McQuigg v. Bostic*, 135 S. Ct. 314 (2014), *Kitchen v. Herbert*, 755 F.3d 1193, 1223 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014), and *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014) (all striking down state same-sex marriage bans or nonrecognition of out-of-state same-sex marriages).

40. *DeBoer*, 772 F.3d 388, *cert. granted*, 83 U.S.L.W. 3315 (U.S. Jan. 16, 2015) (No. 14-571).

41. See McCarthy, *supra* note 33.

42. P. 98. Gash cites, for example, *Commonwealth ex rel. Bachman v. Bradley*, 91 A.2d 379, 380–82 (1952), in which the court denied even limited visitation to a divorced father because of his “homosexual tendencies,” which would risk exposing “children in [his] custody . . . to improper conditions and undesirable influences.”

v. Superior Court, in which a California trial court held that “[t]he homosexuality of plaintiff as a matter of law constitutes her not a fit or proper person to have the care, custody and control of . . . the minor child of the parties hereto.”⁴³ In 1967, the California Court of Appeal reversed, emphasizing that custodial judgments about children’s best interests were *not* a matter of law but of fact.⁴⁴ Lesbian mothers and gay fathers, in other words, must have a chance to demonstrate their fitness as parents (p. 98).

For the next two decades or even longer, an important aspect of representing lesbians (especially) and gay men⁴⁵ was trying to use the space that *Nadler* and subsequent cases created to help those clients maintain custody of their children. Gash argues that this posture “required the parenting movement to adopt three approaches” (p. 99):

First, the very nature of these disputes—individual spousal disputes involving children, which were handled in family court on a case-by-case basis—helped to keep even the victories off the public radar. . . .

Second, these early cases placed homosexuality on trial. Typically at issue in these trials is the simple contention that either a gay or lesbian parent cannot properly perform their parental duties *because* of their homosexuality, or that exposure to homosexuality would harm the child. . . . To defend their clients . . . in many cases, advocates encouraged judges to look beyond their client’s sexual orientation to see their skills and contributions as a parent. . . . [A]dvocates focused on establishing the irrelevance [of] a parent’s sexual orientation when determining questions of custody. . . .

Third, and relatedly, the risks associated with these cases—that a parent-child relationship could be legally severed—in some ways contained and constrained legal advocates to use arguments that had previously been made in other parenting arenas. . . . [A]dvocates attempted to base their arguments on family law doctrines established in cases involving heterosexual parents. In downplaying, for instance, the relevance of sexuality, advocates relied on the more universal application of the “best interest of the child” standard. . . . Cases concerning parents in interracial relationships . . . provided precedent in some instances for courts to reject categorical arguments of social opprobrium when resolving custody disputes, and instead employ a case-by-case approach to determine the best interests of the child. . . . In many ways, the structure of family law—its implicit case-by-case philosophy, its focus on privileging children’s welfare above all other interests, and the considerable discretion granted to family and other lower

43. *Nadler v. Superior Court*, 63 Cal. Rptr. 352, 353 (Ct. App. 1967) (per curiam) (internal quotation marks omitted).

44. *Id.* at 354.

45. Parenting by LGBT persons has long been concentrated among women; even today, women comprise 72 percent of the LGBT adults who are raising children. Gary J. Gates, *LGBT Parenting in the United States* 4 (2013), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf> (reporting results from the Gallup Daily Tracking Survey, June–September 2012).

court justices in considering how to determine the “best interests of the child”—make it an ideal platform for expanding the rights of an unpopular minority group without awakening an intense public countermovement. (pp. 99–102)

The next phase of parenting advocacy began in the mid-1980s, as same-sex people and couples sought to formalize their parenting arrangements using single, joint, and second-parent⁴⁶ adoptions (p. 102). This was, Gash argues, “stealth” advocacy: adoptions “were legalized in intimate family court settings with little attention beyond family and friends” (p. 102). Sometimes even other judges didn’t know what was occurring. A same-sex parenting advocate and scholar told Gash that, in Vermont, “[m]any of the family court judges in the state kept the decisions to themselves without realizing that their colleagues were granting them as well. It was only during an annual retreat that a few of them admitted to recognizing the adoptions” (p. 102). Between 1985 and the early 2000s, Gash recounts, second-parent adoptions were approved in many states—today, at least thirty states support same-sex parenting (p. 131), but it remains hard to tally “because these cases occur largely outside of public view” and sometimes county by county (p. 95).

The resulting backlash, Gash emphasizes, was minimal—but not for lack of trying by opposition groups. Significant anti-LGBT-parenting efforts took place between 2004 and 2006 in particular, but those efforts limited parenting access in only a few states (pp. 92–94). As Gash summarizes, “[d]espite dire predictions” about 2006, little changed:

Legislation died in committee. Proposed initiatives never made it to the ballot. All the while family, appellate, and state supreme courts continued to grant adoptions to and recognize the parental rights of gay and lesbian parents. To be sure, aggressive campaigns were mounted, and some came close to enactment. But few ultimately succeeded. (p. 92)

The public simply could not be roused against parenting equality in the way that it was temporarily mobilized against marriage equality.

Gash attributes the absence of parenting-equality backlash in part to the application to more recent parenting cases of “‘below-the-radar’ strategies” (p. 97) honed in the custody dispute cases of the 1970s and described above. The determined effort to avoid publicity, essential in divorce-related custodial disputes, was equally helpful in other parenting contexts. The consistent framing of sexual orientation as irrelevant to parenting likewise continued to be much more attractive than rights-based arguments. Gash quotes a lawyer from a high-profile gay rights organization: “There are many cases where we don’t even put our name on the brief. We don’t want them to misapprehend that this is a political issue—with the name of a major gay rights group on the cover. It is solely the best interest of the child” (p. 120).

46. Second-parent adoptions allow one member of a couple to adopt a child who is already the legal son or daughter of the other member of the couple.

Advocates scrupulously avoided shiny constitutional claims in favor of “very technical” appeals, using, for example, “statutory interpretation of adoption laws and the history of their interpretation” (p. 114; internal quotation marks omitted). In addition, Gash suggests, “[i]nitially, when adoption advocates first started advancing rights for gay and lesbian parents—and when gay rights groups took up the issue—the goal was to keep the issue at the lower court level to reduce public attention” (p. 114).

In fact, although Gash does not comment on this point, she quotes one lawyer explaining that advocates’ efforts were much more fine-grained than simply trying to stay in trial courts.

I make huge efforts to keep it on the down low—I go and talk to the judge who does adoptions, explain the theory, and see if the judge would be comfortable. The one time the judge wouldn’t do that, he ruled against me and we had to appeal it. I do that in counties where I am not familiar. . . . That makes a really big difference. You have to take steps to keep it under the radar. I make sure to tell these judges that this is not a test case. We are not going to put you on the spot. I appreciate that you are an elected judge and I am not going to do something that will hurt you. (p. 117; internal quotation marks omitted)

Gash fails to develop this insight, but it is an important one. It’s true that uncontested adoptions are particularly suited to avoiding appellate review—if the petitioning parent is approved to adopt, there’s nobody to appeal. But efforts to stay below the radar are only part of the story; gay and lesbian parents seeking to adopt have often picked not just the level of the courts in which they appear but the actual judges they petition. Gash’s informant explained that she aimed to “see if the judge would be comfortable” (p. 117). Presumably, if the answer were no, at least sometimes the response would be to avoid pressing the point, or simply try to find a different judge—for example, by temporarily renting a house or apartment in a county with LGBT-friendly judges in the relevant court.⁴⁷

In any event, Gash emphasizes that the careful advocacy and its stealth quality were not the product of unconsidered or individual decisionmaking: “The decision to employ below-the-radar strategies when pursuing same-sex parenting litigation was not the product of a few lone advocates operating in isolation. Instead, advocates nationwide shared their strategies with each other through word-of-mouth correspondence with scholars, advocates, and judges” (p. 111). The National Center for Lesbian Rights “eventually” facilitated “more organized events and channels” (p. 111). This approach was motivated by the “hope [of] incrementally develop[ing] positive precedent without politicizing their efforts” (p. 111).

These efforts had been underway for many years before 2006, “when the opposition . . . launched their full-scale attack against same-sex parenting” (p. 111). And so by the time parenting-equality opponents really got started,

47. Interview with adoptive lesbian parent from Georgia (Aug. 25, 2014) (describing friends who pursued adoptions in Clarke County, Georgia, by means like these).

they had lost the facts on the ground: thousands upon thousands of children were being raised in families ratified by thousands upon thousands of adoptions approved by hundreds of trial courts as serving the best interests of the children in question.

Of course, this kind of low-visibility and individuated litigation has its downsides. Consider what happened in Michigan—an incident Gash briefly mentions.⁴⁸ In 1993, Nancy Wheeler (then Nancy Francis), a Washtenaw County trial judge, was presiding over the court where adoptions are ratified. She began to grant second-parent adoptions to same-sex couples who were foster parents.⁴⁹ She explained years later:

I thought that it was an outrage that we encouraged and, in fact, had a lot of gay and lesbian foster parents, but didn't allow both parties to adopt the children. So, these children had been in foster care with these same parents sometimes for a number of years and then they were adopted by one.⁵⁰

Judge Wheeler decided that, as paraphrased by a reporter, “if one person could be an adoptive parent, then two could.”⁵¹ When Judge Donald Shelton succeeded her, he continued to approve second-parent adoptions.⁵² In 2002, however, Chief Justice Maura Corrigan of the Michigan Supreme Court decided to put a stop to second-parent adoptions by unmarried couples. She contacted the chief judge of Washtenaw's county court and directed him to end the practice.⁵³ Judge Archie Brown complied, issuing a memo declaring, “Effective immediately the Washtenaw County Trial Court and in particular, the Juvenile Division staff, shall no longer process petitions for second parent adoptions, including any petitions that are currently pending.”⁵⁴ Judge Brown cited a “legal opinion from an adoption specialist” interpreting the

48. For documents and additional detail, see *In the Matters of Unmarried Couple Adoptions*, CIV. RTS. LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/detail.php?id=14052> (last visited Oct. 30, 2014).

49. Memorandum from Judge Nancy Francis to the Adoption Staff of Washtenaw Cnty. Probate Ct. (Sept. 26, 1993), available at <http://www.clearinghouse.net/chDocs/public/PB-MI-0007-0006.pdf>.

50. Lester Graham, *How Judges Were Stopped from Granting Two-Parent Adoptions to Gay and Lesbian Parents*, Mich. Radio (June 11, 2013, 7:00 AM), <http://michiganradio.org/post/how-judges-were-stopped-granting-two-parent-adoptions-gay-and-lesbian-parents> (internal quotation marks omitted).

51. *Id.*

52. See Supplemental Brief in Support of Motion to Disqualify Judge at 4, *In re Adoption Cases* (Washtenaw Cnty. Trial Ct. Fam. Div. July 31, 2002), available at <http://www.clearinghouse.net/chDocs/public/PB-MI-0007-0003.pdf>.

53. *Id.*

54. Memorandum from Judge Archie C. Brown to Juvenile Div. Staff (June 4, 2002) [hereinafter Brown Memo], available at <http://www.clearinghouse.net/chDocs/public/PB-MI-0007-0004.pdf>.

Michigan adoption statute.⁵⁵ Judge Shelton, however, pushed back, taking the position that his chief judge lacked the authority to dictate on a matter of law.⁵⁶ At this point, Judge Brown took advantage of his procedural powers as chief judge and reassigned all the pending cases to himself.⁵⁷ Second-parent adoptions were dead in Washtenaw County. Two years later, Michigan Attorney General Mike Cox issued an opinion stating that the statute disallowed joint adoption by unmarried couples.⁵⁸ Such adoptions apparently continued in at least one other location,⁵⁹ but the Washtenaw episode at least greatly reduced their number in Michigan and perhaps all but shut them down—even though the antiadoption statutory argument is far from iron-clad⁶⁰ and similar statutory language has been read in other states to allow unmarried same-sex couples to jointly adopt children.⁶¹ No appeals were

55. *Id.* MCL § 710.24(1) provides in pertinent part: “[I]f a person desires to adopt a child . . . that person, together with his wife or her husband, if married, shall file a petition.” Mich. Comp. Laws Ann. § 710.24(1) (2012 & Supp. 2014). Judge Brown opined that “[t]he language of the statute, under any reasonable construction, cannot refer to two or more individuals unless they are married to one another.” Brown Memo, *supra* note 54.

56. Supplemental Brief in Support of Motion to Disqualify Judge, *supra* note 52, at 6.

57. Reassignment Order, *In re Unmarried Couple Adoptions* (Washtenaw Cnty. Trial Ct. Fam. Div. June 20, 2002), available at http://www.clearinghouse.net/chDocs/not_public/PB-MI-0007-0001.pdf; see also *In re []*, a minor, No. 02-143-AO/02-0144-RB (Washtenaw Cnty. Trial Ct. Fam. Div. June 21, 2002), available at <http://www.clearinghouse.net/chDocs/public/PB-MI-0007-0005.pdf>.

58. Validity of Out-of-State Same-Sex Marriages in Michigan, Mich. Att’y Gen. Op. No. 7160 (Sept. 14, 2004), available at <http://www.ag.state.mi.us/opinion/datafiles/2000s/op10236.htm>, and at 2004 WL 2096457, at *3. The opinion was chiefly about the validity in Michigan of same-sex marriages celebrated in Massachusetts. But it included a bare two sentences on the adoption issue:

The Michigan Adoption Code, 1998 PA 474, MCL 710.21 *et seq.*, provides in section 24 that adoption shall be by a person or a married couple. The Michigan Court of Appeals confirmed that “it has been held inconsistent with the general scope and purpose of adoption statutes to allow two unmarried persons to make a joint adoption.” *In re Adams*, 473 N.W.2d 712, 714 (Mich. Ct. App. 1991).

Id. In fact, *In re Adams* dealt with a very different question: whether two persons each married to someone else could jointly adopt a child. 473 N.W.2d 712 (Mich. Ct. App. 1991).

59. See *Usitalo v. Landon*, 829 N.W.2d 359 (Mich. Ct. App. 2012) (describing one such adoption in Shiawassee County in 2005 and declining to undo it).

60. My view is that Judge Brown’s reading of the statute is not the best one: the text as written seems designed not to express by negative inference that unmarried couples cannot jointly adopt children but rather to make spouses necessary parties to adoption petitions, thereby avoiding situations in which one spouse adopts a child against the other spouse’s desires.

61. See, for example, Del. Code Ann. tit. 13, § 903 (2009 & Supp. 2012), which states that “[a]n unmarried person or a husband and wife jointly, who are not legally separated or who are not living apart from each other, or a divorced or legally separated person,” may petition to adopt, and *In re Hart*, 806 A.2d 1179, 1185 (Del. Fam. Ct. 2001), which held that “the term ‘unmarried person’ though stated in the singular can be read to include the plural ‘unmarried persons.’” See also William C. Duncan, *In Whose Best Interests: Sexual Orientation*

pursued in the Washtenaw cases because that would have only solidified the precedent given the expected outcome in the Michigan Supreme Court.⁶²

Gash explains that below-the-radar gains can be easily undermined by “lapses in legal judgment” (p. 197). And while she omits to mention it, it’s obvious that less stealthy interventions often benefit from ordinary procedural protections unavailable to below-the-radar litigation so reliant on individuated judicial discretion. For this and other reasons, it’s clear that parenting-equality advocacy did not achieve unmitigated progress.⁶³ But much of the theorizing about social-change litigation suggests that, in forgoing the opportunity to use litigation as an organizing tool, lawyers give up on the very modality by which litigation can actually accomplish something. The parenting-equality study falsifies this hypothesis.

In fact, not only have the below-the-radar (and forum-shopping) strategies worked, to a very large extent, for parenting equality—but this parenting-equality progress is in turn proving vitally important to marriage-equality advocacy. With moral or religious disapproval of LGBT persons or same-sex sex ruled out as a justification,⁶⁴ opponents of same-sex marriage have struggled to articulate the appropriate governmental purpose on which same-sex marriage bans must be founded in order to satisfy constitutional scrutiny. Arguments based on children’s welfare were the best options available. For example, in *Windsor*, the party’s brief filed in opposition to same-sex marriage offers three state interests purportedly justifying state choices “either to expand the traditional definition [of marriage] to include same-sex couples or retain the traditional definition.”⁶⁵ All three focused on the best interests of children: (1) “Providing a Stable Structure to Raise Unintended and Unplanned Offspring”; (2) “Encouraging the Rearing of Children by Their Biological Parents”; and (3) “Promoting Childrearing by Both a Mother and a Father.”⁶⁶

and Adoption Law, 31 CAP. U. L. REV. 787, 801–02 (2003) (describing and challenging several courts’ similar decisions).

62. Telephone Interview with Jay Kaplan, Staff Attorney for the LGBT Project, ACLU of Mich. (Sept. 2, 2014).

63. See pp. 94–96 (describing setbacks for parenting equality in Alabama, Kansas, and North Carolina).

64. See *Romer v. Evans*, 517 U.S. 620 (1996); William N. Eskridge Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275, 321–22 (2013) (“The unmistakable message of *Romer* was that TFV [traditional family values] zealots who insisted on demonizing gay people ran the risk that judges would strike down their proposals based on *Romer*’s rejection of anti-gay ‘animus’ as a defensible basis for modern legislation or, as in *Romer*, voter initiatives. The politics of disgust, at least as applied to LGBT people, was thus rendered unconstitutional.”).

65. Brief on the Merits for Respondent The Bipartisan Legal Advisory Group of the U.S. House of Representatives at 43, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), available at <http://www.clearinghouse.net/chDocs/public/PB-NY-0017-0015.pdf>.

66. *Id.* at 44, 47–48 (emphasis omitted).

Each of these arguments is premised on two empirical claims: that barring same-sex marriage leads to children being raised by different-sex couples, and that different-sex couples are better parents. Progress in the parenting-equality project—including decades of judicial best-interest and parental-fitness findings—suggests that both are factually implausible. Gash puts it this way:

Lower court rulings, then, established critical data points. The existence of a growing population of LGBT-headed families, legitimized by courts, directly challenged anti-marriage and parenting campaigns that characterized same-sex couples as either unlikely or unacceptable parents. The increasing prevalence of gay couples raising kids also elevated advocate appeals about the welfare costs and rights impingements for children if LGBT parenting or marriage opponents prevailed. (p. 34)

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In addition, parenting-equality progress has increased both the number and salience of a far less hypothetical group of children—those already being raised by same-sex couples. Consider the language Justice Kennedy used in his opinion for the Court in *United States v. Windsor* striking down DOMA:

DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. . . . The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.⁶⁷

Over decades, parenting-equality efforts have rendered implausible the children's welfare arguments offered in service of same-sex marriage bans, and prioritized much more logical proequality welfare arguments. As Gash puts it, "Low-visibility gains for gay and lesbian parents . . . were used to leverage marriage equality victories" (p. 48).

II. GROUP HOMES AND THE FIGHT FOR NEIGHBORHOOD ACCESS

The second story Gash tells is about group-home siting. She examines the siting practices of many of the organizations that run small congregate homes for people with developmental disabilities or mental illness, for re-

67. *Windsor*, 133 S. Ct. at 2694 (citation omitted).

covering addicts, and so on. Some organizations, Gash finds, attempt a “collaborative” approach with their prospective neighbors:

Collaborative organizations work closely with city officials and community residents to make sure that all stakeholders involved in the siting decision are comfortable. These organizations go out of their way to notify neighbors of their intention to locate in their neighborhood. Collaborative organizations will also work closely with zoning officials prior to purchasing or renting the property to secure all permits, variances, and exemptions. Collaborative organizations employ a variety of tactics to gain the support of community residents, ranging from informal meetings with community members to gather feedback and provide information, to more official public hearings. (p. 174; footnote omitted)

On the opposite end of the spectrum are “stealth” organizations:

Stealth organizations will purchase or rent their properties before contacting neighbors and zoning officials. . . . [S]ome stealth operators are willing to apply for variances if required, but will only do so after securing the property. Some operators simply skirt the zoning process altogether, arguing that the requirements are discriminatory. If forced to apply for zoning, these operators head straight to court. (p. 176)

The “stealth” playbook was pioneered by Oxford House, a network of “self run, self supported addiction recovery houses,”⁶⁸ which has explicitly explained its own policy: “As a matter of practice, Oxford House does not seek prior approval of zoning regulations before moving into a residential neighborhood. It considers itself no different from a biological family and its members just move into any suitable house.”⁶⁹ The organization’s lawyer elaborated in a court hearing:

[P]ublic hearings before zoning boards has [sic] a very deleterious and detrimental effect upon the recovery of the residents. It’s been our experience that neighbors who object to the presence of a group of unrelated recovering addicts and alcoholics come and forcibly object their—voice their objections to this. The residents are then singled out for I think what would be unfair public scrutiny. Many times if they are required to testify they must identify themselves. . . . And it has been our experience that when having to apply for a special use permit it creates a great deal of uncertainty and anxiety about what the future of their home will be, and the relapse rate increases as a result of those⁷⁰

What Gash calls “cooperative” operators fall somewhere in between.

68. OXFORD HOUSE, <http://www.oxfordhouse.org/userfiles/file/> (last visited Oct. 30, 2014).

69. *United States v. Vill. of Palatine*, 37 F.3d 1230, 1232 (7th Cir. 1994) (quoting Oxford House, Inc.’s stated policy) (internal quotation marks omitted).

70. P. 181 (quoting *United States v. Vill. of Palatine*, No. 93-C-2154, 1993 U.S. Dist. LEXIS 13814, at *20 (N.D. Ill. Sept. 29, 1993)).

Gash sees the stealth approach as a below-the-radar strategy like the parenting-equality tactics she describes in earlier chapters. In the group-home setting, the goal is to minimize and manage NIMBY-type opposition to particular group homes, depriving opponents of tactics like attempting to dissuade house sellers. And, as in the parenting-equality setting, the approach has been quite successful. Gash reports several studies indicating that stealth operators, who notify neighborhoods only after they open a home, encounter much less opposition to their homes than organizations that notify neighborhoods in advance (p. 181–82). To that research base Gash adds her own study, which relies on newspaper accounts of group-home siting attempts. Her data convincingly demonstrate that stealth operators are far more successful at opening homes⁷¹:

TABLE 1.
SITING SUCCESS RATE BY GROUP-HOME
DISCLOSURE STRATEGY

Strategy	N (houses)	% success
Collaborative	88	48%
Cooperative	91	75%
Stealth	98	87%
Total	277	70%

III. THEORIES OF LAWYERING FOR MINORITY RIGHTS

As I pointed out in the Introduction, a generation of scholarship has counseled lawyers seeking to bring about social change to use litigation as a mobilizing and organizing tool. Many lawyers themselves have grown to understand that courtroom victories are more likely to serve the values they proclaim if those victories are used to promote high-visibility politics. Indeed, as Gash explains:

Visibility has come to define our understanding of modern civil rights battles. . . . Through images, narratives, and protests the “haves” can be shaken from a stupor of complacency and become so moved by these injustices that they are willing to give up their privileged status and be catalyzed into action. . . .

71. This information is adapted from Table 6.2 in *Below the Radar* (p. 183).

... In the absence of vivid photographs and video footage of white police officers using billy clubs, fire hoses, and attack dogs against young student protesters, Jim Crow would have likely persisted. (p. 187)

Gash's theoretical contribution—and it is a significant one—is to add low-visibility tactics to this literature of the politics of rights. Her basic claim is compelling: “By omitting instances of low-visibility advocacy from studies of civil rights, we both underestimate how activists control public awareness in order to advance civil rights claims and overemphasize the potential for public opposition to hinder these goals” (p. 192).

The case studies on parenting equality and group-home siting demonstrate both that “below-the-radar strategies are a fixture of civil rights legal advocacy” and that they can be very effective (p. 197). Gash is persuasive, as well, in arguing that what she calls “institutional pluralism” is a key feature of the environment, and one that has received insufficient attention in the scholarship (p. 205):

The decision to litigate, for instance, is typically reached within an environment marked by institutional diversity. Rarely does one venue offer the exclusive and final word on a particular policy position. Advocates develop their legal strategies knowing full well that legal action will likely prompt a legislative, regulatory, or popular response. Likewise, from a bird's eye view, low-visibility and high-profile advocacy strategies combine—doctrinally, temporally, geographically, or institutionally—to produce a range of policy possibilities. Advocates may be able to pursue low-profile strategies and achieve meaningful gains because of public preoccupation with other policy debates. And high-profile wins may be scored on the shoulders of hidden, but no less significant, advocate battles. (pp. 7-24 to -25)

The many lawyers Gash describes in her case studies have a thicker playbook than the theorists who have studied their work report.

And yet even while Gash expands and complexifies the theoretical framework she has inherited, there remains a crucial gap in her account—a failure to deal with one key feature both of her case studies share. For both parenting-equality and group-home advocacy, a key strategy was to change the status quo before offering justifications. This approach is common enough to summon up a number of clichés: lawyers (and many others) talk about *faits accomplis*, facts on the ground, possession being nine-tenths of the law, seeking forgiveness rather than permission, and so on. The underlying point is the same: both factually and legally, it's easier to defend than to attack. As a result, parties about to enter a conflict work hard to lay claim to the status quo—the defensive position.

This insight applies in a variety of settings—and it can lead to some counterintuitive results. Consider, for example, Professor Hochschild's study of three decades of school desegregation decrees. Hochschild finds that incremental and participatory desegregation methods tend to fail, first by scaring white families into finding alternatives to desegregated schools and then

by giving them time to put those alternatives in place.⁷² Rapid and extensive desegregation orders, by contrast, changed the facts on the ground, increasing the cost, in money and disruption, of white flight to white families and demonstrating at least to some of those families that the new status quo was more attractive than they had feared.⁷³ Accordingly, less incremental decrees substantially outperformed more incremental ones, in terms of actually integrating public schools.⁷⁴

The “facts-on-the-ground” insight sheds additional light on both of Gash’s case studies. Changing the facts on the ground obviously describes the basic approach of the “stealth” group-home operators; one of them even told Gash that “it is much better to ask for forgiveness than to beg for permission” (p. 166). Buying property on the quiet is a time-honored way to improve one’s bargaining position as to that property’s use. And by moving in, group-home residents become real neighbors, potentially far less threatening than hypothetical people with disabilities, addictions, or similar issues. In other words, it may be *possession*, not stealth, that decreased backlash for these homes.

In the parenting-equality case study, the facts-on-the-ground point appears similarly vital. First, one contributor to LGBT successes seems to have been that those seeking parental rights were already acting as parents, whether as parents of their own biological children seeking to avoid custodial loss or as de facto parents of their foster children or their partners’ children.⁷⁵ Second, Gash tells us that advocates worked hard to stay out of appellate courts because such courts are higher profile than district courts (p. 49). There are, however, other reasons to avoid appellate courts. Compared to trial courts—and especially compared to trial courts where litigants have some ability to pick their judges, as in the courts that hear adoption matters—appellate courts are not just more conspicuous. They are also more dangerous and less predictable. Appellate judges are chosen from a broader pool, with judge-selection practices far less susceptible to odds-enhancing techniques. Accordingly, Gash’s informants found it prudent to risk appellate review only after the accumulation of proadoption trial court practice—and only after thousands of children were being raised by court-approved gay and lesbian adoptive parents (p. 114–15). Gash explains that in Vermont, for example, the state supreme court addressed second-parent adoption only “because one probate court judge strategically refused to grant an adoption petition filed by a lesbian couple in order to encourage its review

72. JENNIFER L. HOCHSCHILD, *THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION* 46–91 (1984).

73. *Id.*

74. *Id.*

75. *See* p. 103.

(and its validation) by the state's highest court. The judge felt the timing was right."⁷⁶

Similarly, Gash quotes one attorney in California who recounted the movement's approach as working "to keep it quiet and get as many granted at the trial level before getting an appellate decision. In California, this was twenty years after gays had been adopting. Approximately 20,000 kids would be impacted" (p. 115; internal quotation marks omitted). Thus, another way of characterizing Gash's evidence on appeal-avoidance would be to emphasize not the potential for backlash if the public found out what was going on but advocates' efforts to gain a status-quo advantage before risking their cause in front of a *judicial* audience that might well be less friendly.

A final way in which the facts-on-the-ground lens sharpens the parenting-equality case study is that, as Gash explains but does not really theorize, the parenting-equality victories changed facts that proved crucial in decision of the marriage-equality cases. These parenting-equality victories demonstrated the parental fitness of same-sex couples and increased the number and salience of children raised by such couples.

For all its keen insights, *Below the Radar* would have been enriched by some analysis of the interaction between stealth tactics and facts-on-the-ground tactics. For example, are stealth tactics useful only when they can contribute to a *fait accompli*? And how are they different from other similar efforts to gain a status-quo advantage, such as the very public decrees that Hochschild champions? And so on. This point should not detract from the book's real achievement, however. *Below the Radar* tells two important, interesting, and little-known stories, and it uses those stories to make an important theoretical contribution to a major scholarly debate. Gash brings stealth out into the open.

76. P. 115. The case in question must have been *In re Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271 (Vt. 1993).