

MAKING AND UNMAKING MINORITIES: THE TENSIONS BETWEEN GAY POLITICS AND HISTORY

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Since 1969, when the Stonewall Riots in Greenwich Village gave birth to the current phase of gay and lesbian political struggles in the United States, the gay and lesbian movement has evolved from one emphasizing gay liberation to one emphasizing gay rights.¹ Within that shift in terminology lies a major alteration in social analysis, political strategy, and ultimate goals. In its gay liberation phase, the lesbian and gay movement employed a language of political radicalism. It saw itself as one piece of a much larger political impulse that strove for a complete reorganization of institutions, values, and the structure of power in American life. Gay liberation sought to achieve its aims by organizing masses of gay men and lesbians whose political activity would occur largely outside courts and legislatures. These activists viewed accepted categories of homosexuality and heterosexuality as oppressive social constructs. The movement perceived human sexuality as diffuse and polymorphous in nature, and potentially destructive of rigid social hierarchies.²

Over the last fifteen years, the movement has become exceedingly diverse. Today, gay and lesbian organizations include a host of constituencies—men and women, black, hispanic, Asian and white, young and old, entrepreneurs, middle-class professionals, and unionized workers. Homosexuals have formed political clubs, churches, synagogues, health centers, and theater companies. Although no unified vision or political strategy animates these constituencies, we can say that as Stonewall has receded into the past, the movement as a whole has become less politically and socially radical. Its portrayal by the media, the statements of many movement leaders, and the program of action of individuals and organizations convey an image of the gay movement as one in quest of equal rights. That evolution, from gay liberation to gay rights, places the political and social struggles of lesbians and gay men in a familiar, well-established equal rights framework, deeply rooted in American history.³

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1. The complex reasons for that transformation are beyond the scope of this paper.

2. See D. TEAL, *THE GAY MILITANTS*(1971); *OUT OF THE CLOSETS: VOICES OF GAY LIBERATION* (K. Jay and A. Young eds. 1972); D. ALTMAN, *HOMOSEXUAL: OPPRESSION AND LIBERATION* (1972); and T. MAROTTA, *THE POLITICS OF HOMOSEXUALITY* (1981).

3. This tradition is manifested in American equal protection jurisprudence. For a description of this tradition, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 991-1136 (1978).

This history has provided gay men and lesbians with several models of struggles employed by minorities in search of equality. Blacks, women, ethnic groups, and religious minorities seek this equality through social movements, legislative agendas, and litigation. Recommending an analogous course of action for gay men and lesbians may be tempting.

Although I would not dispute the value of either judicial or legislative protections that guarantee due process, equal protection, and equal access, I would suggest that the "traditional" minority group model raises certain problems when applied to gay men and lesbians.⁴ These difficulties emerge most clearly if one approaches the question from an historical perspective. Over the last decade, historians have done pioneering research that goes far beyond the uncovering of gay heroes. Historians have advanced toward a reconceptualization of the nature of human sexuality, and are creating theories with implications for both lawyers and social activists. My goal, therefore, is to interpret the work of gay and lesbian historians for an audience that may be unfamiliar with it.⁵

I shall begin with my own book, which is a history of the gay and lesbian movement in its formative stages — the two decades between the founding of the Mattachine Society in Los Angeles in 1950, and the Stonewall riot in 1969.⁶ The book's subtitle, "The Making of a Homosexual Minority in the United States," goes to the heart of this new conceptualization. During this period, a gay and lesbian minority emerged as a definable social group with a self-conscious sense of itself as different from the majority. This minority did not always exist; it lacks a historical presence in American society.⁷

Central to this argument is a view of human sexuality as exceedingly malleable. Sex is more than a configuration of bodies in space; it takes its definition from the values and structures of particular cultures, and from the consciousness of individuals within a society. Sexuality consists of acts with meanings. Although the acts may have a universal existence, the meanings may vary considerably. And it is through meaning, through an understanding of behavior which culture provides, that patterns of behavior take on social significance.⁸

4. When a minority group pursues equal rights by identifying itself as a minority, it may, to some extent, defeat its objectives. To accept an identity as a fixed minority may reinforce the very oppression that we seek to dispel. For a description of equal rights models, see L. TRIBE, *supra* note 3.

5. See J. KATZ, *GAY AMERICAN HISTORY* (1976), and *GAY/LESBIAN ALMANAC* (1983); J. WEEKS, *COMING OUT: HOMOSEXUAL POLITICS IN BRITAIN FROM THE NINETEENTH CENTURY TO THE PRESENT* (1977); and J. STEAKLEY, *THE HOMOSEXUAL EMANCIPATION MOVEMENT IN GERMANY* (1975).

6. J. D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970* (1983).

7. *Id.*

8. See J. WEEKS, *COMING OUT* (1977); *THE MAKING OF THE MODERN HOMOSEXUAL* (K. Plummer ed. 1981); J. H. GAGNON & W. SIMON, *SEXUAL CONDUCT: THE SOCIAL SOURCES OF HUMAN SEXUALITY* (1973); and Padgug, *Sexual Matters: On Conceptualizing Sexuality in History*, 20 *RADICAL HIST. REV.* 3 (Spring/Summer 1979).

This view of human sexuality as socially constructed has led many historians, on the basis of the evidence uncovered thus far, to conclude that sexual identity — in particular, a social world divided into homosexuals and heterosexuals — is a fairly recent historical invention. To phrase it more baldly, the reason a gay political movement did not exist before the post-World War II era was not because gay men and lesbians were slower to recognize injustice than were blacks or women, nor because the oppression was so severe that protest was too dangerous. Rather, the explanation lies in the fact that until the modern era, a gay and lesbian “minority” did not exist.⁹ Many contemporary Americans take for granted that sexual orientation is a fixed category that indicates an essential difference in human beings. Yet, in the mid-18th century, or even mid-19th century, American society did not label people as heterosexuals or homosexuals.

Jonathan Katz’s book, *Gay/Lesbian Almanac*, illustrates this conceptual distinction.¹⁰ Katz divides his book into two parts: “The Age of Sodomitical Sin, 1607-1740,” and “The Invention of the Homosexual, 1880-1950.”¹¹ By examining in detail two eras separated by more than a century, Katz highlights the sharply distinctive sexual characteristics of each. In the former period, sodomy and sodomitical behavior were punished and excoriated as sin and crime.¹² Clerics and magistrates were preoccupied with certain proscribed behaviors, with discrete sexual acts. Sodomy was but one of many sexual activities prosecuted under the law. Others were adultery, fornication, rape, buggery, and public lewdness.¹³ Sodomy was not an offense unto itself, a category that demarcated one type of individual from another. Instead, it represented a capacity for sin inherent in everyone.¹⁴

Katz describes a profoundly different social reality during the years 1880-1950. In medical writing, in literature, and in the testimony of men and women themselves, one finds an effort to redefine the meaning and the experience of homosexual behavior into a distinctive identity.¹⁵ Sex becomes the distinguishing characteristic that describes the essential nature of some men and women. No longer simply an act, homosexual behavior instead serves as a marker of identity.¹⁶ That identity encompasses personality, emotional state, sexual desire, and even, according to some, physical characteristics.¹⁷ The homosexual can exist apart from any sexual activity: if one feels that one is a homosexual, that is sufficient. Colonial Americans would have found such assertions incomprehensible. To them, a sodomite was someone who had

9. *Supra* note 8.

10. J. KATZ, *GAY/LESBIAN ALMANAC* (1983).

11. *Id.*

12. *Id.* at 23-65.

13. *Id.* at 66-133.

14. *See generally* D’EMILIO, *supra* note 6; WEEKS, *supra* note 5; *see also* KATZ, *supra* note 10.

15. KATZ, *supra* note 10, at 137-74.

16. *Id.*

17. *Id.* at 175-653.

committed the sin of sodomy.¹⁸

The distinction between homosexual acts and homosexual identity represents more than playing with words. The concepts describe two profoundly different forms of homosexual expression, rooted in different social contexts. The process of creating a sexual identity involves a complex dialectic between external labeling and self-definition. In the century since the 1880s, the medical profession, courts, legislatures, government agencies, the mass media, educational institutions, and religious bodies have articulated a system that both describes and controls the social category they helped to create. In tandem with this categorization process, men and women have elaborated complex, diverse ways of living based upon their sexual desires. They have adopted distinctive styles of dress, have evolved an argot of their own, and have carved out social spaces — private friendship networks, public cruising areas, bars, bathhouses, clubs, and most recently, political organizations — that have allowed this sexual identity to take shape. Along the way, communities of mutual interest and experience have evolved. This reinforcing process of social labeling and individual self-definition has created a homosexual minority in the last half century.¹⁹

Although there seems to be a fair consensus among gay and lesbian historians that a homosexual minority has come into being in the modern era,²⁰ fewer of these historians agree about precisely why this phenomenon occurred. One hypothesis is that the emergence of American industrial capitalism in the late 1800s provided an opportunity for individual autonomy that was a precondition for the development of a gay identity.²¹

Throughout the United States diverse gay and lesbian identities and communities developed. These communities emerged among female faculty of women's colleges, among the single working women and prostitutes of boardinghouse districts in large cities, among entertainers in Harlem, and along the fringes of bohemian communities in places such as New York City's Greenwich Village. As time went on, they interacted with one another and were all subject to the external forces of social control in ways that may not have homogenized them, but that did nonetheless create commonalities among them: blacks and whites crossed paths in the clubs and cabarets of Harlem; college-educated social workers and prison administrators encountered prostitutes and other working-class lesbians in the courts and in penal

18. *Supra* note 14.

19. See D'Emilio, *Capitalism and Gay Identity* at 100-13 in *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* (A. Snitow, C. Stansell, and S. Thompson, eds. 1983).

20. *Supra* note 14.

21. See, e.g., LILLIAN FADERMAN, *SURPASSING THE LOVE OF MEN* (1981); E. GARBER, *T'Ain't Nobody's Bizness: Homosexuality in 1920's Harlem*, in *BLACK MEN/WHITE MEN: A GAY ANTHOLOGY* 7-16 (Michael J. Smith, ed., 1983); and Chauncey, *Christian Brotherhood or Sexual Perversion: Homosexual Identities and the Construction of Sexual Boundaries in the World War One Era*, 19 *J. SOC. HIST.* 189 (Winter 1985).

institutions. Distinctive subcultures were forming, but the lines between them were sometimes blurred.

Before moving on to suggest some of the implications that this historical analysis has for contemporary legal and political strategies, let me add one more word about history. What many historians are saying about sexuality departs from common folk belief in another significant way. Popular wisdom might summarize the history of sex as follows: first, there were moralistic Puritans, then repressed Victorians, followed by liberated moderns. Individuals, the story goes, have become sexually freer since the 1920s.

In contrast, historical writers have argued that this repression/freedom model misses the essential nature of the last two centuries of change in Western attitudes toward sex. Sexual activity has gradually, though not completely, been detached from a reproductive, gender-based matrix, and has been reconstituted as an entity in itself. Sexuality has been elevated in importance; it has become, for heterosexual and homosexual alike, a marker of personal identity. Our happiness and our sense of self-worth often revolve around our sexuality, and the emotional relationships that attach to it. Perhaps this elevated importance of sexuality is a sign of freedom. But, it has also amplified the possibilities for public intervention in personal life and for new methods of social control.²²

From this perspective, it is perhaps easier to understand why public conflicts over sexuality have become so significant in the last century. From the seventeenth through the mid-nineteenth century, one searches in vain for a politics of sexuality in America. As long as social and economic conditions kept sexual expression deeply embedded in a procreative family-centered context, neither motive nor opportunity existed for social battles to rage around sexual issues. Since the Civil War, however, sex has generated political controversy of growing intensity and scope. Issues such as obscenity, birth control, prostitution, homosexuality, and abortion have proven capable of mobilizing vast numbers of Americans.²³ In this century, sexual issues have situated themselves nearer to the center of political concerns. At times, the leading edge of sexual politics seems to represent "freedom," while at other times the forces of "repression" appear to have the upper hand. Yet, both sides are united in the magnified importance that they attach to sexuality. If we have more sexual freedom than the Victorians had, that freedom is at best double-edged.

Are there ways in which this historical interpretation can clarify political

22. See M. FOUCAULT, *THE HISTORY OF SEXUALITY* (R. Hurley trans. 1978); J. WEEKS, *SEX, POLITICS, AND SOCIETY: THE REGULATION OF SEXUALITY SINCE 1800* (1981).

23. See, e.g., L. GORDON, *WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA* (1977); J. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900* (1978); J. WALKOWITZ, *PROSTITUTION AND VICTORIAN SOCIETY: WOMEN, CLASS, AND THE STATE* (1980); M. THOMAS CONNELLY, *THE RESPONSE TO PROSTITUTION IN THE PROGRESSIVE ERA* (1980); and K. LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984).

strategies and tactics, especially in relation to the law? My comments about the present will not be as neat as my historical analysis. But let me at least describe some of the tensions and problems that arise when we place history alongside contemporary politics.

Take, for instance, the possibility of moving the courts to rule that gay men and lesbians deserve judicial intervention to guarantee equal protection under the law, *i.e.*, that we are a minority subject to discrimination. To achieve this, one would at least have to demonstrate convincingly a history of discrimination. This task is feasible if we restrict ourselves to the last generation. Unquestionably, gay men and lesbians have been subject since the 1940s to pervasive, systematic discrimination in many spheres of public life.²⁴ The military moved from simply court-martialing and discharging personnel who engaged in proscribed sexual behavior to excluding a whole class of men and women, regardless of their sexual activities, on the basis of their sexual inclinations — in other words, on the basis of their sexual identities.²⁵ The federal government banned the employment of gay men and lesbians, and many state governments and private employers followed suit.²⁶ Urban police forces arbitrarily conducted mass arrests at gay bars; probably tens of thousands of men and women were arrested every year.²⁷

For the pre-World War II generations, however, there is little courtroom-ready evidence of discrimination. Homosexuality was a far less visible phenomenon. Society did not so clearly categorize on the basis of sexual orientation. The laws and public policies of a later time had not yet taken shape. Unlike blacks, against whom discriminatory laws stretch back to the seventeenth century, the “gay minority” has captured legislative attention only recently. A minority must exist before it can be oppressed, but a socially-defined, self-conscious homosexual minority simply does not exist very far back in the nation’s past. In addition, some discriminatory practices, such as the ban on civil service employment, have already been abolished. Given this historical record and the recent Supreme Court decision in *Bowers v. Hardwick*,²⁸ what is the likelihood federal courts will consider gay men and lesbians in need of protection?

As another example, consider a key item of a gay rights agenda — the modification of municipal, state, and federal civil rights statutes to include sexual preference. Clearly it is desirable to prohibit discrimination in housing, employment, and other areas of life. Yet central to the oppression of lesbians and gay men, and to society’s ability to shape and enforce it, are the homosexual and heterosexual categories themselves. The identity and the oppression are bound together. Is it not deeply ironic and troubling that a strategy which

24. See D’EMILIO, *supra* note 6, at ch.3.

25. *Id.*

26. *Id.*

27. *Id.*

28. 106 S. Ct. 2841 (1986) (Georgia’s criminalization of consensual sodomy held constitutional).

relies on civil rights laws is a strategy which strengthens the categories that allow a system of oppression to continue? Is it possible that other approaches — litigation based on the freedoms of speech and assembly or legislative proposals that blur gender-based distinctions — might be both more successful and be more consistent with the history we have uncovered?

Whatever the legislative goals we choose to pursue, however, I am certain of two things. First, the issue that gay men and lesbians are facing is not simply one of a minority struggling for civil rights or equality. The issue is sex and its place in society and individual lives. The call for minority rights is simply one way of framing part of this larger issue — an issue that taps into the deepest layers of human and social irrationality. Secondly, whatever our short-term goals, we need to frame arguments for them consistent with the core of historians' discovery that sex is a malleable social construct. In this way we will achieve an educative goal beyond our immediate aim.

Let me illustrate this second point with a personal experience. About three years ago, I found myself in a debate concerning gay rights. On one side were a congressman and a retired Navy admiral; a representative of a prominent national gay rights organization and I were on the other side. The congressman made statements to the effect that homosexuals are willful, perverse sinners violating biblical law. In response, my partner declared that all the best medical evidence demonstrated conclusively that there was no choice involved, and that sexual identity is determined long before puberty.

Now, there was nothing new or startling about that statement. It is an argument made frequently in courts and legislatures, and articulated by many of our most committed activists and allies. But I heard it more clearly during this debate than I ever had before. It is a sincerely held viewpoint that squares well with the gut-level feelings of most of us. It also seems to promise political benefits; surely you will not punish us for something we cannot help.

This statement, however, ignores several valid arguments. Magnus Hirschfeld and other German activists used a variant of this argument earlier in the century when they claimed that homosexuality was not a willful perversion, but a congenital condition.²⁹ The argument did not deter Nazi persecution. Secondly, at a psychological level, there is something dreadfully wrong about basing a political movement on individual and collective helplessness. Do we really expect to bid for real power from a position of "I can't help it"? And thirdly, what if the argument is simply not true?

A fatal weakness attends any gay political movement which defines itself as a fixed minority in quest of equal protection based on its minority status.³⁰ To do so implies acceptance of a sexual paradigm that itself shapes and strengthens the oppression we are battling. To argue that our identity, our sexuality, is in effect an accident of birth or of early conditioning is to embrace a sexual ideology that negates the choices we have made. So long as we accept

29. See generally J. STEAKLEY, *supra* note 5.

30. See *supra* note 3.

these pre-set terms we have lost much of our freedom of choice. Fifteen years ago we supposed the terms of gay oppression to be that gay was bad, sick, and criminal. So the movement proclaimed that gay is good. Now it is clear that the terms of that proclamation are the acceptance of the mutually exclusive categories of heterosexuality and homosexuality.

All of us have made sexual choices throughout our lives. This phenomenon exists for heterosexuals and homosexuals alike. Because the hegemonic models of sexuality offer only two possible self-definitions, we have retrospectively interpreted our activities as the unambiguous manifestation of our one true being. Francis Matthiessen, as a young gay man in the 1920s, illustrates this process in a comment he made after reading Havelock Ellis: "How clearly," he said, "I can now see every act and friendship of my boyhood interpreted from my proper sexual temperament."³¹ Many of us have likewise experienced a moment when we said, "This is who I am" — and in the process homogenized and flattened the complexity of our lives.

A century ago, certain American men and women were making radical personal choices, pursuing untrodden paths of sexual desire. The paths they marked became the outlines both of new sexual definitions, and of new oppressions. In many ways, we are still traveling those same paths. It is time to carve out new personal and political paths, to lay claim to the possibility of choice, to embark on new journeys of sexual definition. In doing so, we will challenge not merely the particular inequalities which a minority faces, but also the meaning, the structure, and the place of sexuality in our society for everyone. A multifaceted movement which takes on that task, in its own community and in society, will provide lawyers and lobbyists with a social and political context that can radically reshape our legal and legislative strategies.

31. RAT AND THE DEVIL: JOURNAL LETTERS OF F.O. MATTHIESSEN AND RUSSEL CHENEY 47 (L. Hyde, ed. 1978).