

# Race, Same-Sex Marriage, and White Privilege: The Problem with Civil Rights Analogies

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February 2005 marked the one-year anniversary of what has been dubbed the Winter of Love.<sup>1</sup> It has been impossible for me not to ruminate a bit on what was happening in San Francisco a year ago. There have been many moments when I have been very pleased that the National Center for Lesbian Rights is based in San Francisco. One of those moments was February 6, 2004 when I got a call from Mayor Gavin Newsom's Chief of Staff informing me that on the following Monday morning the mayor was going to begin issuing marriage licenses to lesbian and gay couples in San Francisco. I would like to say that I was immediately ecstatic and supportive, but I was very concerned about the ramifications of the Mayor's action— particularly for our colleagues in Massachusetts who were then dealing with the fallout from the recent Massachusetts Supreme Judicial Court ruling.<sup>2</sup> My colleagues in Massachusetts and across the country shared my reservations and concerns, but many were also enamored with the idea. And to the legal and political activists in Massachusetts, the idea held great allure. Finally, that state would not be the lone front on which the right to marry was being contested.

It also became very, very clear to me as I was expressing my concerns to the mayor's senior staff that Mayor Newsom was going to do this no matter what. There was nothing that we would be able to do or say to stop him.

So we all know what happened. Marriage licenses were issued on the morning of February 12, 2004. The first couple to marry was Del Martin and

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1. See Lisa Leff, *S.F. Mayor to Mark Anniversary of Same-sex Weddings*, VENTURA COUNTY STAR, Feb. 5, 2005, at 5. This essay and the talk on which it is based have been influenced and informed by several key articles on race and sexual orientation and identity. The most significant include, Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002); Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 HARV. C.R.-C.L. L. REV. 255 (2002); Josephine Ross, *Cluster VII: Race, Gender, and Sexuality: A Riddle for Our Times: The Continued Refusal to Apply the Miscegenation Analogy to Same-Sex Marriage*, 54 RUTGERS L. REV. 999 (2002); Darren Lenard Hutchinson, "Gay Rights" for "Gay Whites"?: *Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358 (2000).

2. *Goodridge v. Mass. Dept. of Pub. Health*, 798 N.E.2d 941 (2003).

Phyllis Lyon, long time lesbian activist heroes—heroes to all of us and on whose shoulders we stand.<sup>3</sup> I was there for their ceremony.

Up until that point I thought of myself as a pretty jaded, radical, lesbian, feminist activist. The fight for the right to marry, while an important civil rights struggle, did not resonate with me in the same emotional way that it did for many people. I have to say that being at Del and Phyllis's wedding and being in San Francisco throughout February 2004 truly was one of the most profound experiences of my career. In the weeks after Del and Phyllis's wedding, the city of San Francisco was transformed. Gay and non-gay people alike have dozens of stories of moments where they felt deeply moved and touched by what was happening in the city.

The jury is still out to some degree as to what exactly Mayor Newsom's action will mean for the fight for the right to marry, and for marriage fairness for lesbian and gay people. But I believe history will demonstrate that Mayor Newsom's actions were spectacularly courageous and positively transformative. There is no doubt that his action accelerated the receptivity of the California courts to an affirmative marriage lawsuit. On March 14, 2005 a trial judge for the San Francisco Superior Court ruled that marriage discrimination was unconstitutional under the California constitution.<sup>4</sup> What happened in San Francisco, coming on the heels of the ruling in Massachusetts, ignited a national dialogue. The images of couples standing in line—many of them with children, parents and family members in tow—were enormously powerful.

In our conversations leading up to February 12, city officials asked what I thought the response would be once the marriage licenses began issuing. Did I think a lot of people were going to show up to City Hall? I told them we expected maybe a few hundred. Obviously I seriously miscalculated how much this issue would resonate. In those three and a half weeks before the California Supreme Court ordered San Francisco to stop issuing licenses,<sup>5</sup> over 4000 couples from all over the nation and from some foreign countries as well, were married. The images and day-by-day media coverage did much to remove the distance so many in this country have from gay lives and issues. No longer are our lives an abstraction.

There was one aspect of the enormous amount of media coverage that was not positive. Almost immediately in the news stories, there were very strong and reflexive comparisons of what was happening in San Francisco to the civil right struggles of African Americans and other people of color in this country. There was a significant appropriation of African American iconography and

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3. See Leff, *supra* note 1.

4. *In re Marriage Cases*, No. 4365 (San Francisco Super. Ct., Mar. 14, 2005)<sup>5</sup>, available at <http://news.findlaw.com/cnn/docs/glrts/inremarriage31405opn.pdf>.

5. *Lewis v. Alfaro*, 2004 Cal. LEXIS 2183 (Cal. Sup. Ct. Mar. 11, 2004).

past civil rights struggles.<sup>6</sup> There were comparisons made to the Montgomery bus boycott<sup>7</sup> and to the freedom rides.<sup>8</sup> Mayor Newsom was variously compared to Martin Luther King, Jr. and Rosa Parks.<sup>9</sup> I think the reason for these comparisons may have been a failure to appreciate our own history as queer people in this country, or perhaps a fear that our own history would not resonate enough with the rest of America.

I suspect that, had there been a greater visibility of queers of color in the lesbian, gay, bisexual, and transgendered movement, or had there been a sense that we as white queers understood the intersectionality of oppressions or been more outspoken regarding injustice based on race or class, these appropriations and historical references would have been met perhaps with amusement or, at worst, chagrin. But, given that our movement exists, with our collusion, in the popular consciousness as largely white and economically privileged,<sup>10</sup> the response among many progressive African Americans in this country was irritation at a minimum. Among far right and conservative blacks the reaction was outright hostility and anger.

The events of last February illustrated in stark relief the disastrous consequences of the erasure and invisibility of queers of color in our movement, and the consequential depiction of the queer movement as privileged by race and class. No less a figure than Antonin Scalia, in his dissent in *Romer v. Evans*, captures this exact stereotype, by depicting gay people as being predominately privileged, rich, and living in cities like Key West, New York, and San Francisco—by implication, white.<sup>11</sup>

In response to the discourse surrounding the same-sex marriages in San Francisco, queer leaders and organizations of color, primarily the National Black Justice Coalition,<sup>12</sup> stepped in to fill the void and make their own

6. See, e.g., James Hawkins, *Letter to the Editor*, SAN FRANCISCO CHRON., Feb. 23, 2004, at B6.

7. See, e.g., Jim Kellogg, *For Gay Couples, A Door Cracks Open*, NEW ORLEANS TIMES-PICAYUNE, Mar. 8, 2004, at 5.

8. See, e.g., Tim Rutten, *Gay Unions Accelerate History*, L.A. TIMES, Mar. 6, 2004, at E1.

9. See, e.g., Emilie Le Beau, *Gay Newlyweds Writing History*, CHI. TRIBUNE, Feb. 17, 2004, at 2.

10. See, e.g., Darren L. Hutchinson, "Gay Rights" for "Gay Whites"?: *Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1360 (2000) (describing the erasure of gay men and lesbians of color in gay rights discourse). For a discussion of the exclusionary politics of the queer movement, and the movement's radical potential in reversing that trend of exclusion, see Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics*, 3 GLQ 437 (1997).

11. See *Romer v. Evans*, 517 U.S. 620, 646 (1996) (Scalia, J., dissenting) ("The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities . . . and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide.").

12. The National Black Justice Coalition is "a civil rights organization of Black lesbian, gay, bisexual and transgender people and our allies dedicated to fostering equality by fighting racism and homophobia." See National Black Justice Coalition, *About the Coalition*, at <http://nbjcoalition.org/about> (last visited Apr. 14, 2005).

comparisons and to talk about the parallels from a place of real legitimacy and credibility. It would be difficult to overstate the importance of these voices and organizational efforts in this dialogue.

My appeal however, is to white lesbian, gay, bisexual, and transgendered folks in this country. We must understand that the depictions of our movement in the popular culture are not just wrong as a matter of demographics, but fundamentally counter-productive and undermining to our liberation. There is a natural and powerful alliance between the queer movement—dominated by queers of color and middle and working-class queers—and other moderate and progressive non-gay constituencies who also suffer marginalization.<sup>13</sup> But the muscularity of those alliances has not been tested and has not been exploited. Gay liberation—including the right to marry—will remain illusory unless white queers actively challenge and combat the rich, white stereotype. Given the culture we live in, the imagery is seductive, but it is inaccurate and ultimately unhelpful.

The power of the *gay equals white and rich* imagery to undermine is abundantly evident in its use as a rhetorical strategy of far right, anti-gay activists. This strategy was deployed most famously in the coining of the phrase “special rights”<sup>14</sup> to denote anything that gay people were seeking in this country and was virulently but powerfully depicted in the still widely screened movie, *Gay Rights, Special Rights*. The film depicts queer folks as white men who wear leather and are into sadomasochism, bondage, and discipline. This footage is juxtaposed against archival footage of African Americans during the 1950s and 60s civil rights struggles in the South.<sup>15</sup> The imagery makes it profoundly clear that these two groups could not be more dissimilar from one another. The framing is obvious: Gay equals white and privileged, and therefore a civil rights framework for gay liberation is illegitimate.

We are vulnerable to this construction because of racism that still exists in our own movement and our failure as white queers to fully acknowledge white privilege and to acknowledge passing privilege.<sup>16</sup> There may not be a single white queer person in this country that does not have many stories of passing privilege. Although it happens to me constantly, I will share just one example of my own. When I was in Utah in law school, I was not out as a lesbian despite the fact that I was in a relationship and helping to raise my partner’s

13. For a discussion of these potential alliances, see Cohen, *supra* note 10.

14. See generally Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 300-07 (discussing deployment of “special rights” rhetoric in gay rights struggles).

15. GAY RIGHTS, SPECIAL RIGHTS: INSIDE THE HOMOSEXUAL AGENDA (Jeremiah Films 1993).

16. For a discussion of this passing privilege and its effect on the gay rights movement, see Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 642 (1997) 642 (encouraging scholars to explore “‘differences’ in gay and lesbian experiences supplied by racial and class hierarchies”).

daughter. This was not that long ago—the mid 1980s. People who knew me, of course, knew. But I was not out and I knew I could not be out. I did not feel safe to be out. My secrecy and deception was rewarded. I got a job in Salt Lake City at what was then the largest firm in the state. There was not one openly gay attorney or administrative support staff in the entire firm. If they had known I was a lesbian I would not have been hired. This is the way passing privilege works, and for white queers it can be deployed over and over again. I am not saying it is not deployed without some internal damage or loss of integrity. Yet we deploy it again and again, sometimes intentionally but most times not.

This undeserved privilege, that is deployed repeatedly, creates between white queers and others marginalized by race or class, a social contract. At a minimum, the social contract requires an appreciation of the intersectionality of oppression and also requires support for issues that may not explicitly be challenging our own identity, but nevertheless, exploit or oppress based on some other identity characteristic. Obvious, but by no means exclusive, examples include affirmative action, the criminalization of immigration, and the limiting of reproductive options. Linkages and alliances are essential to the liberation of all queers. Of course marriage is a piece of that liberation. The politics of oppression, insult, and shame are a legacy that we have inherited and that all who live at the margins of what is culturally approved have inherited.

There is a promise in the Fourteenth Amendment, a promise that assures that we are all entitled to justice and fairness under law. That promise remains unfulfilled. Not just for queers, and not just when it comes to the right to marry. Realizing the promise for ourselves will require fighting for the promise for all.

