

Q&A

Yesterday's Justice, Tomorrow's Equality

CATHCART'S PHOTO BY LISA ROSS
SHAW'S PHOTO BY JOHN PINDERHUGHES

On the 40th Anniversary of *Loving v. Virginia*, the groundbreaking U.S. Supreme Court case striking down laws banning interracial marriage, Lambda Legal's Executive Director Kevin M. Cathcart and the NAACP Legal Defense Fund's Director-Counsel and President Theodore M. Shaw discuss marriage equality and the role of the courts for civil rights advocates today.

TS: It's inconceivable to many that laws banning interracial marriage were enforced just 40 years ago. Sometimes people ask why it took so long and why it required the Supreme Court to overturn such laws with *Loving v. Virginia*. We need to remember that *Loving* was decided only 13 years after the Supreme Court's decision in *Brown v. Board of Education*, which broke the back of legalized racial discrimination in this country. With 335 years of either slavery or Jim Crow segregation before that, *Loving* came after *Brown* within the blink of an eye.



KEVIN M. CATHCART AND THEODORE M. SHAW

KC: The parallel I see with the *Loving* decision for the LGBT community is actually *Lawrence v. Texas*, our case overturning sodomy laws in 2003. Lambda Legal had been fighting against sodomy laws in state courts for decades. When *Bowers v. Hardwick*, the first federal challenge to sodomy laws, went to the Supreme Court in 1986, the majority of states still had sodomy laws on the books, and the Supreme Court wouldn't touch it. But 17 years later, when we went back to the Supreme Court, there were only 13 state laws left — and it was easier for the Court to do a kind of "clean-up operation." *Loving* took a similar path. California was the first state to strike down its law prohibiting interracial marriage in 1948, and by the time *Loving* got to the Supreme Court almost two decades later, other states had overturned their laws, too.

TS: Sometimes the Supreme Court is out ahead of the political processes. Other times it's following the political processes and, as you say, cleaning it up. I am not suggesting that the Court's role is to "clean up," but sometimes Supreme Court decisions decide issues that have been hotly contested in the political arena. Public opinion on LGBT rights is changing rapidly, but at the same time, you have this strong religious and conservative movement in this country — a movement that was tapped in a very cynical, political way a few years ago in an election year. Gay marriage was made into a lightning rod when there were many, many

other issues that the public needed to pay attention to that had much more impact on their immediate lives.

KC: Marriage equality certainly was made into a political football. And while there are similarities between *Lawrence* and *Loving* and how they played out politically, when it comes to marriage rights for same-sex couples, we really need to change attitudes on the ground. We need to change laws and elect new representatives in the legislatures. Lambda Legal's focus is on the courts, but we can't be oblivious to the fact that there is the potential for legislative action. Look at California: When the legislature passed a marriage law for same-sex couples, the governor said it's a matter for the courts. But in every other state where we've gone to court — Washington, New York, New Jersey — the state says it's a matter for the legislature. Okay, everybody stop pointing fingers at someone else! The responsibility has to fall somewhere.

TS: When it comes to understanding whether the courts influence public opinion or whether public opinion can influence the courts, we have this chicken and egg problem. Although lawyers are taught that courts ignore public opinion, we have learned that we have to wage our battles in the court of public opinion and the court of law. Cases like *Brown v. Board of Education* showed us that we could bring about social change through litigation. But after litigating for almost three decades, I am conscious that

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the courts are an inherently conservative instrument. Social change happens as a consequence of social and political movements. Courts can render decisions that have a catalytic effect, but courts do not lead social movements.

KC: But we can educate people on the ground about our reasons for wanting civil marriage rights, and we must. Before we can think about change on a national scale — a *Lawrence* or a *Loving* — we need to change the odds. Marriage equality is not going to happen while the states are lined up 49 to 1 with Massachusetts all by itself. The only hope we have of taking on something like the federal Defense of Marriage Act, or getting recognition across state borders, is to change these numbers. There is a lot of work to be done in the trenches first, building up from the states, before we can look to a good decision on a national level.

TS: You and I are in deep agreement about the relationship between activists and lawyers. I believe that those of us who do antidiscrimination work — though we may come to it because of our personal experiences, or because we are committed to eradicating discrimination against a particular group — eventually adopt a broader view. We come to believe that it is simply wrong morally and should be wrong legally to deprive people of the fullness of life. That includes employment, education, housing, the right to love whom you love

and live with that person with the benefits of the state’s recognition that traditionally have come through marriage — all of those rights. We believe that people deserve to celebrate not only the fullness of opportunity and humanity but also to be recognized as full human beings by others, including our governments.

KC: One of the challenges is finding ways to build bridges between the civil rights and human rights issues that we each have a primary focus on. People have put our work into all these silos, as if we were talking about completely separate groups of people. In fact, there are more camps than there are feet. We have gender and race and economics and sexual orientation — there are so many pieces to our identities. We are not dealing with discrete populations. We’re dealing with heavily overlapping groups of people. People need to understand that we are not going to win just for us. You can’t get civil rights on one issue and not on others.

TS: People don’t always connect the dots between the struggles of African Americans and LGBT people for civil rights. Often people can’t see beyond their own noses; they see only what they perceive to be their own interest. I think that when people are more thoughtful, when they rise to find the best in themselves, then they realize that we are all bound together. I think about the violence that is perpetrated on gay men and lesbians these days in many places around the country. That violence should awaken

anybody to the reality of the kind of hatred that some people direct at people in the LGBT community. In many respects, it resembles the kind of hatred that motivated violence against African Americans. It’s senseless.

KC: I agree completely. And a lot of antigay violence these days is aimed at people some would consider to be on the edges of the LGBT communities, whether its transgender people or African American LGBT people. In New York, within the last two years, some of the most public hate crimes involved people of color. Michael Sandy, an African American gay man, was killed by a group of white men. Sakia Gunn, a 15-year-old African American lesbian, was stabbed to death. These were all antigay crimes, but they also challenge us about race. We need to keep all of that on our radar and make sure people understand it’s not a coincidence. This is who is being targeted now. Maybe life has become safer for certain subsets of people in the LGBT community, but let’s not confuse safety for some with safety for all.

TS: My own personal belief is that we must follow the call to a higher sense of justice. This goes beyond what our individual interests are. If what ultimately motivates us and dictates our activism is only self interest, we don’t have a lot of hope of getting the broad consensus necessary to achieve the kind of change we all want. We have to be bigger than ourselves. **L**