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THOMAS B. STODDARD

The editors of the New York University Law Review respectfully dedicate this issue to the memory of Professor Tom Stoddard. We publish here Professor Stoddard's last work, an Essay that he was writing at the time he became ill. The Essay addresses the themes that ran through Professor Stoddard's entire career as a public interest lawyer, focusing specifically on the ways in which litigation can make social change, and its limitations in that regard. Two of Professor Stoddard's colleagues, Professors Chai Feldblum and Nan Hunter, follow his Essay with commentary that celebrates—and challenges—Professor Stoddard's vast insight into the development of social change. Three tributes to Professor Stoddard follow these essays. Professor Norman Dorsen was Professor Stoddard's mentor, Robert Murphy was one of his students, and Professor Ronald Bayer was a colleague, occasional adversary, and steadfast admirer.

BLEEDING HEART: REFLECTIONS ON USING THE LAW TO MAKE SOCIAL CHANGE

THOMAS B. STODDARD*

This Essay began as a trip to New Zealand. In April of 1996, I flew from my home in New York to Auckland, and then on to New Zealand's South Island, to speak before the Triennial Law Conference of the New Zealand Law Society, the national analogue to the American Bar Association. I was glad to go. I had never been to New Zealand, and the subject of my remarks was one that animates me: the use of litigation to promote my own (or someone's) vision of the public interest.

* [I cannot know all those whom Tom would have wished to thank, but I know he would have wanted to mention Professor Graeme W. Austin of the University of Auckland Faculty of Law, who provided valuable assistance and counsel on the section of the Essay dealing with New Zealand, and Blair Stewart and Alan Parkinson, who were generous and kind hosts during our trip to New Zealand. — Walter Rieman.]

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But I was glad for another reason. I am, in addition to being a lawyer and law teacher, a political activist—especially, although not exclusively, on behalf of lesbians and gay men. New Zealand, on paper, seemed like the Promised Land—at least by contrast to my own country.

Legal advocates for gay rights in the United States generally argue for three goals: (1) protection from discrimination, especially in employment, housing, and the provision of goods and services; (2) freedom from intrusion and harassment, particularly at the hands of the government; and (3) some degree of recognition, by the government and private institutions, of gay relationships. In the United States, while some progress has been made in all three areas, it has been modest indeed. Only nine of the fifty states specifically outlaw discrimination on account of a person's "sexual orientation"[1] (the now established term of art), with the likelihood of an overarching federal statute some years off. Government persecution of gay people still exists, most notoriously in the form of "consensual sodomy" statutes, still in place in twenty-two states, which attach criminal penalties to sexual expression between two people of the same gender.[2] Gay relationships are extended very little respect by governments and corporations; lesbians and gay men are denied the right to marry the partners of their choice in every state of the Union (although in some big cities, they may seek the largely symbolic status of "domestic partners"), and lesbian and gay parents jeopardize their parental rights if they publicly disclose their sexual orientation.

New Zealand has made much more progress. The country's antidiscrimination laws encompass the category of "sexual orientation" across the entire expanse of the country.[3] In accordance with those laws, for example, New Zealand's military no longer automatically ex-

[1] These states are California, Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, Rhode Island, Vermont, and Wisconsin. See Nan D. Hunter et al., The Rights of Lesbians and Gay Men: The Basic ACLU Guide to a Gay Person's Rights 204-08 (1992).

[2] These states are Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, North Carolina, Oklahoma, Rhode Island, South Carolina, Texas, Utah, and Virginia. See id. at 148-75. In several of these states judicial rulings have cast doubt on the general enforceability of "consensual sodomy" statutes, but as a formal legal matter, the statutes remain in effect. See id. at 119-20.

[3] See Human Rights Act, 1993 (N.Z.); Bill of Rights Act, 1993 (N.Z.). Under sections 151 and 152 of the Human Rights Act of 1993, the New Zealand government was rendered exempt from the obligation not to discriminate on certain grounds, including sexual orientation. The exemption expires on December 31, 1999. Agencies of the New Zealand Crown are currently involved in a project known as "Consistency 2000," which obliges them to scrutinize their regulations, policies, and practices in order to achieve consistency by that date with the antidiscrimination provisions of the Human Rights Act of 1993. See generally Outlaw: A Legal Guide for Lesbians and Gay Men in New Zealand (1994).

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pels lesbian and gay servicemembers—an innovation achieved with little acrimony or resistance. (As most Americans remember from the intense national debate of 1993 engendered by the election of President Clinton, the issue of lesbian and gay servicemembers is an exceedingly perplexing one for American politicians; thus, American law still asserts that homosexuality is incompatible with military service and still excludes openly gay servicemembers.[4]) New Zealand has abolished the crime of "sodomy" and related offenses used to punish gay people for sexual expression.[5] And here is the most astonishing innovation: as a matter of immigration policy, New Zealand accords residency rights in the country to the same-sex partners of New Zealand citizens and residents, if couples can show that they have been living together in a "genuine and stable relationship" for at least four years.[6] (Gay marriage does not yet exist in New Zealand—or in any other country of the world—but experience suggests that New Zealand will be in the vanguard of countries that do finally approve same-sex marriage.)

In flying to Auckland, I was eager to see how such a gay-friendly world—a world unimaginable to gay people living in the United States in 1996—would look and feel. After a few days in Auckland, I had my answer: Auckland in 1996, from the point of view of a gay man, looked and felt very much like a large American city (Washington, D.C., perhaps, or Chicago or Los Angeles) twenty years earlier. The city of Auckland, and the entire country of New Zealand, was just beginning to experience the emergence of a collective gay consciousness. It had yet to undergo the transformation already worked on my own city of New York, where a quarter century of a visible "gay liberation" movement had altered every aspect of day to day life for lesbians and gay people, from politics to publishing, from socializing to grocery shopping.

In short, New Zealand was not utopia—it merely had the formal rules that ought to govern any utopia that includes lesbians and gay men. This realization, which hit me with greater and greater force during my stay in New Zealand, caused me consternation. New Zealand had already put in place many—although certainly not all—legal reforms for which lesbians and gay men in the United States had longed from the beginning of their (our) movement to assert civil rights. Most forms of discrimination against them were now forbidden, and the system offered official and, as far as I could tell, effective

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4 See 10 U.S.C. § 654 (1994).

5 See Homosexual Law Reform Act, 1986 (N.Z.), amending Crimes Act, 1961 (N.Z.).

6 See New Zealand Immigration Instructions, published by the New Zealand Immigration Service. See generally Outlaw, supra note 3.

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redress. According to my understanding of the gay rights movement, such a development should cause lesbians and gay men to shed their previous condition of fear and hiding, to—in the argot of our movement—"come out." But, I soon discovered, most gay people in New Zealand still did not feel safe enough to "come out," even though their laws now offered them protection. Thus, I learned, to my surprise, that none of the individuals I met in Auckland could name even one lesbian or gay lawyer who worked openly as a gay person for one of the large commercial law firms in that city. This was not utopia.

I was confounded by my discovery. As a lawyer working for social change, I had assumed—and hoped—that changes in the rules that governed a society would inevitably lead to some form of larger cultural transformation. Protecting gay people from discrimination under the law would, for example, cause gay people to cast off the centuries of persecution that are their history, at least in the English-speaking world, and promote a flowering of gay culture, whatever that may be. But my trip to New Zealand suggested that I was mistaken in my assumptions about the ways that the law acts as a catalyst for social or cultural change.

This Essay is an attempt to use my epiphany in New Zealand, if epiphany it was, to understand more deeply the interrelationship between law and culture, and more specifically the use of the law for social change. When and how, if ever, can the law change a society for the better? Are there more successful and less successful ways to make social change? Is the law an effective tool for social change? (Or should I have become a social worker instead of a lawyer?) Are there any lessons to be learned from the attempt by so many lawyers of my own generation to make social and cultural change through the formal rulemaking mechanisms of the law?

There is surprisingly little written on this subject. Many other public interest lawyers of my generation (I am forty-eight) share my instinctive attraction to public interest law as well as my delight in making change—quite a few of those lawyers entered the profession precisely to make change, and not simply to practice law—and yet very few have tried to dissect their views or experience on the enterprise of public interest law. They have just gone about the day to day business of reform. This Essay constitutes a modest effort to correct the omission.

I begin, concededly, with several assumptions. I assume, first of all, that this society needs and deserves significant change—as well as more people, including lawyers, committed to that change, according to their individual and collective conceptions of the good society. The country's problems are large and numerous, but they are not insolu-

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ble. Second, I assume that employing the law to make change—cultural as well as formalistic—is appropriate. The law is not now, and never has been, simply a set of formal rules; it is also the most obvious expression of a society's values and concerns, and it can and ought to be used to improve values and concerns.

I
THE NEW ZEALAND CONUNDRUM

I am still struggling to understand the disjunction between New Zealand's laws and its underlying culture. On paper, the country is among the most advanced nations in the world in according rights and respect to gay people. In the everyday life of the lesbians and gay men of New Zealand, however, the country is not particularly advanced. Stores that cater to gay people, for example, are rare in New Zealand, but common in most major American cities. Publications directed to gay readers are few, and the mainstream newspapers and magazines in the country seem to avoid the subject of homosexuality. New Zealand does have one member of Parliament who is openly gay, but he is most notable for his singularity. All in all, gay people in New Zealand still live in the shadows of their culture. Some are open, but most still seem to conceal their sexual orientation from their families, neighbors, and co-workers.

While in New Zealand, I repeatedly asked my new friends to account for this paradox, and received a series of explanations that are at best partial. First, I was reminded, New Zealand is a small, self-contained country very far removed from the rest of the world, and therefore less subject to social trends in other places. Moreover, New Zealanders are socially conservative and, by cultural training, polite, deferential, and conformist; "coming out" may therefore strike some New Zealanders as pushy and audacious, if not rude. Those who would otherwise test the limits of the culture may simply leave. (Sydney, Australia, has a large colony of expatriate gay people from New Zealand.)

What then explains the sympathy extended to gay people and gay issues by the law? Why wouldn't New Zealand's laws simply reflect the cultural trends noted above? How, after all, did New Zealand come to make new—indeed, daring—law on the subject of sexual orientation?

Some New Zealanders asserted, in response to my inquiries, that the answer lies partly in the country's conception of itself. New Zealand, I was told, is a nation that tries to be politically progressive. It is also a country that, throughout its short history, has sought to accommodate cultural difference, initially in resolving disputes between New

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Zealanders of European background and those of Maori ancestry, but more recently in other ways—in dealing with issues of gender, for example.

Several New Zealanders offered a further explanation: change is simply easier to accomplish in New Zealand. New Zealand follows a simplified version of the British parliamentary model of government, with the political party that controls the government also in command of the legislature, but with the legislature composed of only one chamber. What the government seeks, the government gets.

Even in accumulation, however, these arguments do not fully satisfy. New Zealand, like the United States, is an English-speaking heir to English cultural and legal traditions—including enormous hostility to homosexuality. (The very first English statute on homosexuality, enacted by Parliament in the sixteenth century under the rule of Henry VIII, made it a capital offense for two males to engage in the "'abominable and detestable vice of buggery.'"[7]) The English antecedents help to explain the tortured road of reform in the United States, but seem to have little connection to New Zealand's history of easy change for its lesbian and gay citizens.

I remain puzzled. But I know one thing: my experience in New Zealand, however brief and imperfect, has reminded me that social change and legal change do not always walk hand-in-hand. One does not always stimulate the other. Attempts to reform the law may succeed as a formal matter but have only modest effects on the larger cultural context into which they fit. When can the law make cultural change—change that is effective and enduring? What are its limitations? And what works and doesn't work?

II
A Paradigm of Reform

Lawmaking has at least five general goals:

(1) To create new rights and remedies for victims;
(2) To alter the conduct of the government;
(3) To alter the conduct of citizens and private entities;
(4) To express a new moral ideal or standard; and
(5) To change cultural attitudes and patterns.

The first three goals comprise the traditional role of the law in expressing the formal rulemaking function for a society. The law sets

[7] Perkins v. North Carolina, 234 F. Supp. 333, 335 (W.D.N.C. 1964) (quoting English statute passed in 1553). In the nineteenth century, North Carolina adopted a modified version of the statute—the words "vice of buggery" were replaced by "crime against nature, not to be named among Christians." Id. (quoting N.C. Gen. Stat. § 14-177).

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and alters rules; if it is effective, it also enforces those rules. I will call this the law's "rule-shifting" capacity. But lawyers of my generation, inspired by Supreme Court decisions like *Brown v. Board of Education*,[8] *Baker v. Carr*,[9] and *Roe v. Wade*,[10] and by the success of the African American civil rights movement and companion movements for political change, have sought to do more with the law than make rules. We have, in the last half of this century, adapted the law's traditional mechanisms of change to a newfangled end: making social change that transcends mere rulemaking and seeks, above and beyond all the rules, to improve the society in fundamental, extralegal ways. In particular, we have sought to advance the rights and interests of people who have been treated badly by the law and by the culture, either individually or collectively, and to promote values we think ought to be rights. I will call this concept the law's "culture-shifting" capacity.

The fourth and fifth items on my list of lawmaking's aims reflect the conception of the law as a "culture-shifting" tool. The law has always been an instrument of change, of course, but in recent decades it has become, through the deliberate, indeed passionate, efforts of a new breed of lawyer-activists, a favored engine of change. The law has thus become increasingly "culture-shifting."

The Civil Rights Act of 1964,[11] enacting probably the most famous reform statute of the twentieth century, may be the statutory paradigm of legal reform intended to make social change. The Act established new rules of law, but it accomplished much more, and its full effects are still being felt—and I do mean "felt"—throughout the society. The new rules were simply stated. The Act banned "discrimination or segregation" in the provision of goods and services, even by private entities, on the basis of "race, color, religion, or national origin,"[12] and outlawed discrimination or segregation in employment because of a person's "race, color, religion, sex, or national origin."[13] It also forbade discrimination by the federal government on the ground of "race, color, or national origin" in any of its programs and activities.[14]

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[8] 347 U.S. 483 (1954).

[9] 369 U.S. 186 (1968).

[10] 410 U.S. 113 (1973).

[11] Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000a-2000h (1994)).

[12] Id. § 201(a), 78 Stat. at 243 (codified as amended at 42 U.S.C. § 2000a(a) (1994)).

[13] Id. § 703(a)(1), 78 Stat. 255 (codified as amended at 42 U.S.C. § 2000e-2(a)(1) (1994)).

[14] Id. § 601, 78 Stat. at 252 (codified as amended at 42 U.S.C. § 2000d (1994)).

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The new law did not represent a simple recrafting of the applicable rules and remedies. It did not merely rewrite the canons of employment law. It did not mean only that in the future, employers, merchants, and the government (if law-abiding) would have to adhere to a new set of guidelines. The Act brought into being a whole new model of conduct that, consciously and deliberately, overturned doctrines embedded in American culture—and, more widely speaking, European culture—for several centuries. These doctrines carried different articulations and emphases over time—black inferiority, "separate but equal," and "states' rights" are but three—but, when reduced to their essentials, they resulted in the basic notion of white privilege. Enactment of the Civil Rights Act of 1964 constituted a formal, national rebuke of this detestable, but time-honored concept.

The Act was, as already stated, far more than an employment manual or sales guide. It put forward new ideas about everyday relations between individuals—not only in the workplace or in stores, but, implicitly, in all aspects of human interaction. The ideas were essentially two: (1) that each human being has rights equal to any other, at least in the public realm, and (2) that segregation by race is wrong.

The Act, put into its full historical context, constituted "culture-shifting" as well as "rule-shifting," attaining simultaneously all five aims of legal reform. It gave victims of discrimination new rights and remedies. It instructed the government to promulgate and enforce new rules of conduct for itself. It altered the conduct of private entities and citizens—dramatically, in the South. It expressed a new moral standard. And—I believe, although I cannot easily document my belief—it changed cultural attitudes.

There is no sure way to measure changes in cultural attitudes. Legal and economic statistics about jobs and income may help somewhat, but they reflect external rather than internal realities—formalities rather than conceptions. Even opinion polls are not especially instructive, because respondents to such polls often are not truthful, especially when the subject is race. I offer merely my own sense of things. But I see signs of the change all around me. Perhaps the most credible monitor is television—the cultural medium that binds together more Americans than any other. On the American television screen of 1996, black and brown faces[15] are everywhere: on situation comedies, in dramas, on talk shows, on sports programs, at news desks, and in advertisements; in 1966—when I was in high school—

[15] Faces of other hues and people of other cultures (Asian Americans and Native Americans, for example) are considerably less in evidence. Television still tends to portray the diversity of late-twentieth-century America as black and white, rather than polychromatic.

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integrated depictions on television were exceedingly rare. Many forces have helped to integrate the world of television—and the world of television is admittedly not an imitation or reflection of the day to day experiences of Americans off the screen—but the change does seem attributable, at least in part, to changes in the law that sent new cultural signals, primary among them the Civil Rights Act of 1964. Americans may not yet live fully in a world of equal opportunity and integration, but their principal cultural medium suggests that they have at least embraced the ideals—the desiderata—of equality and integration. "Chicago Hope" depicts an integrated world, even if the real Chicago does not.

I cannot, as I said, prove my point about cultural change, and I realize that there is plenty of evidence to show deterioration rather than improvement of relations between blacks and whites in the United States, such as the increase in rates of poverty among African Americans. I would never contend that the Civil Rights Act of 1964, even three decades after its passage, ended discrimination or racism. (I am also, admittedly, neither a sociologist nor an historian.) But this point seems instinctively right, at least to someone who has seen the evolution of American culture over the past fifty years: cultural ideals have changed, even if cultural realities still lag. At least in part because of the Civil Rights Act of 1964[16]—the most important statutory embodiment of the ideal of racial justice—American culture, American government, and the American people have absorbed the concepts of equality and integration embodied in the Act as the proper ethical framework for the resolution of issues of race. Outright segregationists like David Duke, and genetic supremacists like William Shockley, are remarkable for their contemporary scarcity; in 1954, views similar to theirs were widely held and admired, both within and without government.[17]

Let me also suggest this: the Civil Rights Act of 1964 has had such a powerful cultural impact not just because of what it said, but also because of how it came into being. The Act was the product of a

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16 The public's general acceptance of the Civil Rights Act of 1964 made possible all of the succeeding civil rights statutes enacted by Congress, including, most prominently, the Voting Rights Act of 1965, the Fair Housing Act of 1968, and the Americans with Disabilities Act.

17 In the summer of 1996, while the Olympic Games were proceeding in Atlanta—the heart of the new South—Newt Gingrich, the conservative Republican member of Congress who serves as Speaker of the House of Representatives, called Dr. Martin Luther King, Jr., the "greatest Georgian of the twentieth century." Micheal Kranish, Republican Speakers Hit Clinton, GOP Women Lead the Attacks on His Record, Boston Globe, Aug. 14, 1996, at A17, available in LEXIS, News Library, BGlobe File. This astonishing statement, by itself, demonstrates how much the American South has changed in 30 years' time.

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continuing passionate and informal national debate of at least a decade's duration (beginning, vaguely, with the Supreme Court's decision in *Brown v. Board of Education*[18] invalidating the concept of "separate but equal" in the public schools) over the state of race relations in the United States. The debate took place every day and every night in millions of homes, schools, and workplaces. It is this debate—not the debate in the Congress—that really made the Act a reform capable of moral force. Through a continuing national conversation about race, ordinary citizens (especially white citizens) came to see the subject of race anew.

The arena of change may also have influenced the scope and power of the result. Imagine that the new rules enacted by the Civil Rights Act of 1964 had, instead, emanated from a ruling of the U.S. Supreme Court. (Such a decision, even under the Warren Court, would have seemed unlikely, but not completely implausible. The Court could arguably have relied on a Thirteenth Amendment theory, because the Thirteenth Amendment, unlike the Fourteenth Amendment, is not limited in scope to state action,[19] or it could have turned alternatively to the principle relied on by the Court in *Shelley v. Kraemer*[20] to invalidate restrictive covenants in housing—the idea that the government must not be an accessory to private discriminatory schemes.) Imagine further no substantial difference between the provisions of the Civil Rights Act of 1964 as enacted and the holdings of one or several hypothetical decisions from the Supreme Court. Would American history have evolved in the same way? Would the

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[18] 347 U.S. 483 (1954).

[19] The Thirteenth Amendment, added to the Constitution in 1865, abolished "slavery" and "involuntary servitude" in the United States. See U.S. Const. amend. XIII, § 1. In 1968, in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968), the Court ruled that the Thirteenth Amendment conferred on Congress the authority to regulate the conduct of private entities, at least in the sale and rental of property. The Fourteenth Amendment, enacted three years later, promises "equal protection of the laws," among other things, but is explicitly limited to abridgment by "States." See U.S. Const. amend. XIV, § 1.

[20] 334 U.S. 1 (1948). The Court wrote in *Shelley*:

> We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms.

Id. at 20 (footnote omitted); cf. Palmore v. Sidoti, 466 U.S. 429, 433-34 (1984) (holding that Florida's denial of parental custody to white mother on ground she had married black man violates Equal Protection Clause).

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difference in the forum of decisionmaking have resulted in a different public reaction to the new rules of law?

I think history would have been different. The new rules of law were widely disliked, especially by whites in the South, but the opponents of the Civil Rights Act of 1964 never rose in rebellion, either formal or informal, against enforcement of the statute. If the new rules had come down from on high from the Supreme Court, many Americans would have probably considered the change of law illegitimate, high-handed, and undemocratic—another act of arrogance by the nine philosopher-kings sitting on the Court. Because the change emanated from Congress, however, such sentiments of distrust (whether grounded in principle or in simple racism) never came to affect the legitimacy of this stunning change in American law and mores. The Civil Rights Act of 1964 came into being because a majority of the members of the national legislature believed it represented sound policy and would improve the life of the country's citizens as a whole; the ideas motivating the Act must therefore have validity behind them. In general, then, not only did the historical fact of the continuing national debate on race facilitate the public's acceptance of the Civil Rights Act of 1964, even in the South, but so did the additional (I believe crucial) fact that the change came through legislative consideration rather than judicial or administrative fiat—lending it "culture-shifting" as well as "rule-shifting" power.[21]

The astonishing effectiveness of the Civil Rights Act of 1964—the breathtaking sweep of its cultural tailcoats—suggests that it should be a model for social change in other settings. It also indicates that how change is made matters almost as much as what is, in the end, done.

III
WHEN "RULE-SHIFTING" BECOMES "CULTURE-SHIFTING"

Most forms of law, statutory, judicial, or administrative, do not have social and cultural resonance. They merely set forth governing rules. Those rules affect conduct, individual and institutional, perhaps even in a way that is important and widespread, but they do not reverberate throughout the society, as did the Civil Rights Act of 1964. Nor do they mark a shift in fundamental values or concerns. They

[21] Perhaps one factor also facilitating the public's acceptance of the Civil Rights Act of 1964 was the fierce battle throughout the South in the 1950s and 1960s between the federal government and the southern establishment over implementation of the Supreme Court's ruling in *Brown v. Board of Education* and the other decisions requiring desegregation of the public schools that preceded the debate over the Civil Rights Act. The opponents of civil rights for African Americans may have spent their special fury on the issue of desegregation in public education.

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touch only specialized audiences, or constitute incremental variations on established themes, or both. Lawyers notice and care, bureaucrats notice and care, and accountants notice and care, as do other discrete and insular audiences, but most people neither notice nor care, and the overall tone of the society remains largely undisturbed. "Culture-shifting" laws, by contrast, alter basic principles, and alter them in ways that are inescapable—indeed, transformational. They remake culture.

The Civil Rights Act of 1964 is different from most forms of law in this way. Part of its effect emanated from the importance of its underlying theme and the history of that theme. At bottom, the Civil Rights Act of 1964 concerned a subject that is one of the central themes of this country's culture and history: racism. Part of its effect stemmed from the sheer size of the shift in rules; the Act overturned centuries of personal habits and customs, as well as set rules. It influenced every person in the United States in some fashion—not just African Americans, not just Southerners, and not just employers and shopkeepers. It set a new standard of conduct for the nation as a whole in the transaction, moment by moment and day by day, of the ordinary affairs of ordinary people.

My analysis of the Civil Rights Act of 1964 and other "culture-shifting" forms of law suggests that four factors determine when "rule-shifting" becomes "culture-shifting" as well. For "culture-shifting" to take place, all four factors must be engaged. The four factors are these:

(1) A change that is very broad or profound;
(2) Public awareness of that change;
(3) A general sense of the legitimacy (or validity) of the change; and
(4) Overall, continuous enforcement of the change.

In general, "culture-shifting" requires all four; anything less amounts to a form of "rule-shifting."

A. The Breadth of Change

Some forms of "rule-shifting" are so grand or so pervasive that they cannot be ignored. Some affect so many people in such fundamental ways that they seem inherently "culture-shifting." Thus, while the breadth of change is not by itself dispositive, the very scope of a new law may by itself create the potential for "culture-shifting."

The Civil Rights Act of 1964 is such a form of lawmaking. It did not merely change the applicable rules; it transformed basic beliefs about relations between people of different races across the United States, and it did so in a way that no American (except hermits and

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misanthropes) could escape. Even other civil rights statutes, regardless of their value and importance, do not necessarily entail "culture-shifting." During a recent impromptu discussion on civil rights laws, I asked a very bright, vocal class of law students to relate the importance of the most recent civil rights statute enacted by Congress—the Civil Rights Restoration Act of 1991. Not one hand went up, even though this was a group of elite future practitioners of the law, even though they all professed interest in the subject of civil rights, and even though the statute was of recent vintage. They would almost certainly have been able to answer an analogous question about the significantly older Civil Rights Act of 1964. One statute, however, was "culture-shifting," and the other was not.

Anti-smoking laws represent another form of broad lawmaking. Such measures typically influence in some fashion so many categories of people that, in the end, everyone is affected: smokers, nonsmokers, employers, employees, restauranteurs, diners, shopowners, shoppers, taxi drivers, taxi riders, and on and on. When the New York City Council enacted a broad anti-smoking ordinance called the Clean Indoor Air Act,[22] forbidding smoking in most public places in the city, the change was constant, ubiquitous, and obvious. So much of day to day life was altered for so many people that the change in rules by itself made likely the "culture-shifting" potential of the new law. The very scope of the new law meant that it would receive attention.

My personal evidence, admittedly anecdotal, suggests that in response to the New York City anti-smoking law, a significant number of smokers decided to give up smoking, because the law made smoking at work sites and in restaurants and shops either impossible or laborious. A significant number of my friends and acquaintances, at any rate, gave up smoking. Recent polls reinforce this impression, since they show that the number of smokers in the United States has decreased notably over the past thirty years, especially the past decade, with the disturbing exception of teenagers.[23] The New York City anti-smoking law, like its analogues across the country, thus appears not only to have limited smoking in public, but to have lessened smoking in general, thus promoting "culture-shifting" as well as "rule-shifting."

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[22] See 1989 N.Y. Laws 244.

[23] According to the Centers for Disease Control, in 1991, 27.5% of American high school students smoked, and in 1996, that figure had grown to an astonishing 34.8%. Some commentators have suggested that the increase is actually attributable in part to anti-smoking laws and other expressions of adult disapproval of smoking; they see smoking as a means for teenagers to express their sense of rebellion and individuality. See Laura Mansnerus, Don't Smoke. Please. Pretty Please., N.Y. Times, Sept. 15, 1996, §4, at 5.

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The passage of the anti-smoking law in New York did not, for all its significance, mean that the law would be automatically adhered to, of course, but it did create a greater likelihood of adherence. Whether adherence actually takes place—and on what scale—is ultimately dependent on the other three factors. Changes, however broad, must be known, accepted, and enforced to have "culture-shifting" potential.

B. Public Awareness of Change

"Rule-shifting" cannot possibly become "culture-shifting" without public awareness both that a change has taken place, and that that change will affect daily life. Ordinary citizens must know that a shift has taken place for that shift to have cultural resonance. Most lawmaking—legislative, judicial, or administrative—takes place quietly, influencing a limited universe of the interested and connected. In order for "rule-shifting" to become "culture-shifting," however, a change must be generally discerned and then absorbed by the society as a whole.

Even many obviously important changes in law lack this element of public knowledge. In 1983 the New York State Board of Regents, which has legislative power over all the schools, public and private, in the state, promulgated a new regulation forbidding corporal punishment in schools. The change had potential for "culture-shifting." It made a fundamental—indeed, daring—change in rules that affected (at least hypothetically) all families in the state with children of school age, and it dealt with a subject of universal concern—whether children should be disciplined by bodily force, or not. Yet the new regulation received little attention, perhaps because it came through the speedy and quiet deliberations of a body that is itself little known or understood. A measure with "culture-shifting" potential became a mere shift in rules. Teachers and administrators took note of it, as did some interested parents, but the public by and large overlooked the change. What might have been the occasion for a statewide discussion of child-rearing was lost.

Changes that occur through legislative deliberation generally entail greater public awareness than judicial or administrative changes do. Public awareness is, indeed, a natural concomitant of the legislative process. A legislature—any legislature—purports to be a representative collection of public delegates engaged in the people's business; its work has inherent public significance. Judicial and administrative proceedings, by contrast, involve private actors in private disputes. Those disputes may or may not have implications for others, and they are often subject to the principle of *stare decisis*, but they are not public by their very nature. (Administrative rulemaking is a dif-

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ferent animal, akin—at least in theory—to legislative activity, but it is still typically accorded less attention than the business of legislatures.)

Legislative lawmaking is, by its nature, open, tumultuous, and prolonged. It encourages scrutiny and evaluation. Thus, it is much more likely than other forms of lawmaking to promote public discussion and knowledge. For that reason alone, such lawmaking possesses a special power beyond that of mere rulemaking. Indeed, the real significance of some forms of legislative lawmaking lies in the debate they engender rather than the formal consequences of their enactment.

Between 1971 and 1986, the New York City Council had before it every year a bill that would amend the city's human rights laws to protect lesbians and gay men from discrimination in employment, housing, and public accommodations. The bill failed each year until 1986, principally because of the personal opposition of the council's majority leader. (In 1986, the majority leader retired, and the election of a new majority leader allowed the measure to emerge from committee and then attain the approval of the entire council.) As a perennial lobbyist for the gay rights bill, and a gay man to boot, I publicly bemoaned the bill's failure year after year. However, in hindsight, I am not unhappy that enactment of the bill took fifteen years.

Over those fifteen years, the city council and the citizens of New York more generally had to confront continually the issue of discrimination against lesbians and gay men. They had to hear again and again the assertions made by my colleagues and by me that gay people exist; that gay people encounter constant scorn, disapproval, and prejudice; and that gay people deserve protection from discrimination in the basic necessities of life. The city council, for a full decade and one-half, became a city-wide civic classroom for a course on sexual orientation discrimination—an intracity teach-in, if you will. If we had our platform during the fifteen years of the bill's pendency, so did our opponents, but in many ways the other side's comments (especially the more rancorous observations) bolstered our advocacy, for the comments prolonged the discussion—and also helped to demonstrate our claims of the existence of prejudice.

Immediate passage of New York City's gay rights bill as early as 1971 or 1972 would have afforded immediate political gratification to me and my colleagues (I would have been very gratified indeed), but immediate passage would also have deprived the city and its residents of the extended exploration of the subject of gay people and their rights. And, I am now convinced, it is the city-wide debate of the subject, rather than mere passage itself, that has helped to open eyes and hearts. Mere passage would have added up to "rule-shifting"

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when "culture-shifting" is what this controversial and often misunderstood issue really required. Mere passage would have given lesbians and gay men who suffered discrimination (and who could prove their assertions) a form of redress, and it would probably have led some especially principled employers to adopt implementing guidelines, but enactment of the gay rights bill would have eluded the attention of many, if not most, non-gay New Yorkers. The fifteen years of struggle, however, made the subject ultimately inescapable to New Yorkers—and led to genuine and deep "culture-shifting."[24]

From my experience on the gay rights bill, and my experience as an activist more generally, I harbor a bias in favor of legislative reform. Legislative reform makes real change—"culture-shifting"—more probable, since it is much more likely than other forms of lawmaking to engage the attention of the public. "Rule-shifting" has its merits and advantages, but it is simply less potent than "culture-shifting" in accomplishing the things I want to accomplish.

C. *The Legitimacy (Validity) of Change*

Awareness of change is never enough to assure compliance with a new law, whether that law has "rule-shifting" or "culture-shifting" capacity. Awareness must be accompanied by public acceptance—which must inevitably be grounded in a sense of legitimacy or validity.

I have already mentioned New York City's Clean Indoor Air Act of 1988 and its apparent impact on the smoking habits of New Yorkers. The new law seems—seems—to have reduced the incidence of smoking overall in New York, although other factors (such as reports from the U.S. Surgeon General) have probably played a part in the metamorphosis. New York's experience on this score offers an instructive contrast to that of another world city: Paris.

The Government of Paris recently put into effect an anti-smoking law similar to New York's. Like New York's ordinance, the Parisian measure limits or bans smoking in most public places, including restaurants, and requires the posting of notices alerting smokers of its provisions. Unlike New Yorkers, however, Parisians seem disinclined to abide by the new law. During my most recent visit to Paris, in May of 1996, I ate in more than a dozen restaurants. Each restaurant had a sign designating a portion of the establishment as an "espace non-

[24] The astonishing degree of "culture-shifting" on the subject of gay people and their rights emerges from a report in the *New York Times* on the tenth anniversary of the passage of the bill. In preparing the report, the *Times* asked 11 of the 14 legislators who had voted "no" on the bill in 1986 to indicate how they would vote on the same bill in 1996. With one exception, they all said they would now vote "aye." See Joyce Purnick, Looking Back at a Conflict on Gay Rights, N.Y. Times, Mar. 21, 1996, at B1.

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fumeur" or "zone non-fumeuse" and in each such "espace" or "zone" sat at least one—usually many—smokers. Moreover, never once did I see a patron ask to be seated in the "espace non-fumeur" or complain about others' smoking in that section. The designation "no-smoking area" was entirely perfunctory and universally disregarded.

Parisians, unlike their New York cousins, have, it seems, decided generally to resist the new law—to consign it to a meaningless formalism. The result is an utter lack of compliance, aggravated by a corresponding want of enforcement. Parisians have, in short, refused to acknowledge the legitimacy of the new law, denying it both "rule-shifting" and "culture-shifting" capacity. For reasons of culture or practicality or both, they have, through their passive resistance, simply annulled the law.

Why is New York different? Why have so many New Yorkers altered their habits to conform to their city's new anti-smoking law, while Parisians have balked? I suspect the answer lies in cultural differences between New York and Paris and, more generally, between the United States and France. French culture exalts the idea of pleasure, especially pleasure connected to dining. American culture by and large does not. Moreover, the French view official regulation of pleasure as a foreign, "Anglo-Saxon" idea, while Americans are accustomed to a government that engages in the paternalistic regulation of health. Furthermore, for thirty years, Americans have been repeatedly told by their government that smoking causes lung cancer and other diseases. Warnings by the French government have been only intermittent and unpersuasive.

Whatever the explanation, Parisian smokers chose to resist their city's new law, while New York smokers chose to relent. Parisian smokers, en masse, came to regard their city's law as culturally illegitimate and overwhelmingly disregarded it, while New York smokers by and large obeyed their law even if they complained about it.

"Culture-shifting" can never take place in an atmosphere of resistance. It requires, at a minimum, an aura of moral and cultural legitimacy to sustain widespread adherence to any new code of conduct.

The Civil Rights Act of 1964, as noted already, encountered surprisingly little public resistance, even though it overturned centuries of well settled law, custom, and habit. Why is that? The Supreme Court's decision ten years earlier in *Brown v. Board of Education*, by contrast, provoked widespread defiance among southern whites and the state and local governments purporting to represent them; southern officials tried to stop implementation of *Brown* and subsequent federal decisions requiring integration of the public schools, and

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southern parents withdrew their children from public schools and enrolled them in newly created private schools for white students alone. Why such a difference between the public reception of the two events when both, at bottom, concerned the same subject—integration?

There can be no single or definitive answer. Yet, one instance of lawmaking—the Civil Rights Act of 1964—carried an aura of legitimacy that fostered public acceptance, while the other—the Court's decision in *Brown*—did not. I see at least three explanations for the aura of legitimacy that accompanied the Act that help to illuminate the different contexts of the two related developments.

One element is timing. The Act came ten years after *Brown*, and during the decade between the two events, the entire country had an opportunity, in part because of *Brown* itself, to examine and reflect upon the issue of integration. The Act was able to gestate before its birth. This period of gestation allowed individuals, in the South and elsewhere, to reflect upon the subject and accommodate themselves to imminent realities.

Secondly, the African American civil rights movement, over the decade from 1954 to 1964, was especially active and effective at influencing public opinion against Jim Crow laws and other expressions of discrimination. Through continual demonstrations, protests, and public statements, Dr. Martin Luther King, Jr., and his colleagues and allies, forced the American public to face up to the question of racial inequality. Dr. King and the movement not only kept the issue on the front page of the country's newspapers, but also repeatedly framed it in a way that highlighted its moral dimensions. Statements like Dr. King's *Letter from the Birmingham Jail*[25] appealed to the largest possible audience—whites as well as blacks, Northerners as well as Southerners—by making universal assertions about the civil rights of all people, not just black Americans. The deliberate universality of his declarations greatly enhanced the sense of legitimacy that accompanied the civil rights movement and, inevitably, the laws attendant on its success, like the Civil Rights Act of 1964.

The fact that the Act emanated from Congress rather than the Supreme Court may also have enhanced its legitimacy and promoted its public acceptance. To many white Southerners, *Brown* seemed thrust on them suddenly from above. They were not prepared for it, and they had little opportunity to participate in its formulation or implementation. The Act, however, came about only after much debate

[25] Martin Luther King, Jr., Letter from Birmingham City Jail (1963), reprinted in A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr. 289-302 (James M. Washington ed., 1986).

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at all levels of government, in all segments of the society, and in every region of the country. And it came about only after a formal vote of the one body that can lay claim to be representative of the nation as a whole—the Congress. White Southerners had a chance to enter into both the debate and the vote; they could make their claims and express their views. In the end, those views were examined and rejected by the country overall.

By virtue of timing, context, and method of enactment, then, the Civil Rights Act of 1964 carried a presumption of democratic legitimacy (one might say "validity") that was absent from *Brown*, at least in the imaginations of some white Southerners. This sense of legitimacy fostered public acceptance, even in the South, and made possible the Act's "culture-shifting" potential.

Commentators for 200 years, from John Locke[26] to Robert Bork[27]—especially those, in recent years, identified with conservative politics—have asserted the superiority of legislative change. (Locke portrayed the legislature as the "supreme power of the commonwealth . . . sacred and unalterable in the hands where the community have once placed it."[28]) I find, after twenty years of work as a lawyer purporting to promote the public interest, that I have come to share the partiality for legislative lawmaking—but for reasons different from those of most other observers. I prefer legislative lawmaking because I view it as the avenue of change most likely to advance "culture-shifting" as well as "rule-shifting"—the method of lawmaking most likely to lead to absorption into the society of new ideas and relationships.

Judicial lawmaking, however, ought not to be abandoned by public interest lawyers like me. Like so many of my colleagues, I do not always trust legislatures, and I would certainly not want them to have sole lawmaking authority in this or any other legal system—but judicial lawmaking ought to be employed with greater cunning and precision. Lawsuits are effective at highlighting problems. They may be effective at forcing government to face up to problems. But they are often ineffective at the long-term resolution of issues with deep cultural roots, for they focus on rules rather than the culture that sustains

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[26] See John Locke, Two Treatises of Government 183-90 (J.M. Dent & Sons 1975) (1690).

[27] Bork is so wedded to his preference for majoritarian lawmaking, and so hostile to judicial lawmaking, that he has proposed a constitutional amendment "making any federal or state court decision subject to being overruled by a majority vote of each House of Congress." Robert H. Bork, Slouching Towards Gomorrah: Modern Liberalism and American Decline 117 (1996).

[28] Locke, supra note 26, at 183-84.

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those rules, and as a result frequently fail to engage or connect with the public.

D. *Enforcing Change*

The fourth prerequisite for legal change that accomplishes "culture-shifting" as well as "rule-shifting" is overall and continuous enforcement of the new rule by the government. Rules that are not enforced, particularly if they are dramatic or controversial, will simply be disregarded by all or part of the public.

I use the word "enforcement" in its broadest possible sense. "Enforcement" to me is not simply the imposition of penalties, civil or criminal. It is also the systematic notification—or lack of notification—of the new rule, and the provision of civil remedies to aggrieved individuals. Effective enforcement of a new law ought to incorporate mechanisms to promote public awareness and adherence as well as provide appropriate punishment; "culture-shifting" may be impossible without multiple systems of enforcement.

Consider again the New York City Clean Indoor Air Act of 1988. The drafters of the Act recognized that their ordinance would never accomplish its purpose without the dissemination throughout New York City of the news of the new law, and some opportunity for ordinary New Yorkers to understand its precise provisions. The ordinance therefore incorporated a range of methods of enforcement, some punitive and some merely instructive or informative; it provided for penalties and for a special "administrative tribunal" to consider alleged violations, but it did much more, in recognition of the reality that penalties by themselves do not assure compliance. The ordinance required each employer with more than fifteen workers to adopt and "make known" a written smoking policy implementing the new ordinance, a policy that was then to be posted in a prominent place and distributed within three weeks to all employees. It directed the "prominent" and "conspicuous" posting of "no smoking" signs in public places where smoking was now prohibited. And it instructed the city's department of health to engage in a "continuing program" of public education on the new law and, more broadly, on the dangers of smoking generally, and also to report back to the City Council within twelve months on the effectiveness of the new law.

These nontraditional methods of enforcement made more likely the "culture-shifting" impact of the New York City Clean Indoor Air Act. The Act became more than a set of new rules, obeyed on most occasions by well mannered citizens but ignored at other times by the ignorant or recalcitrant. The Act not only established a new standard

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of conduct for New Yorkers, it also put in place mechanisms to make the change genuine as well as universal.

"Culture-shifting" cannot come about without enforcement—enforcement that is multifaceted, realistic, and continuous. Enforcement does not ensure "culture-shifting," of course, but it greatly enhances the likelihood.

IV
"CULTURE-SHIFTING" IN THE ABSENCE OF "RULE-SHIFTING"

"Rule-shifting"—the formal adoption by government of new rules to govern all or part of a society—is not always a prerequisite to "culture-shifting," in my experience. In unusual circumstances, "culture-shifting" may take place even without a formal change in rules.

In 1993 the Supreme Court of Hawaii, in *Baehr v. Lewin*,[29] issued the startling ruling that the equal protection clause of the state's constitution appeared to compel the state government to issue marriage licenses to lesbian and gay couples as well as heterosexual couples. It remanded the case to the trial court for that tribunal to consider justifications offered by the state government for the distinction between homosexual and heterosexual couples. The state would have to show, said the supreme court, that the distinction between couples furthered "compelling state interests" and, in addition, was "narrowly drawn to avoid unnecessary abridgements of constitutional rights."[30]

This decision was the first of its kind in the United States—indeed, the entire world. To me and to many (but not all[31]) of my colleagues, it was enormously cheering: the high court of one of the fifty states had opened the way for same-sex marriage. What a breakthrough!

Yet this breakthrough, if that is what it was initially, was very rapidly transformed into an audacious step backwards. In response to the decision of the Hawaii Supreme Court, conservative legislators in statehouses around the country offered bills to deny recognition to same-sex marriage licenses that might eventually be issued by Hawaii (or any other state).[32] And then, one by one, states began to enact those bills—even though the litigation in Hawaii had not yet reached

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29 852 P.2d 44 (Haw. 1993).

30 Id. at 68.

31 See, e.g., Paula Ettelbrick, Since When Is Marriage a Path to Liberation?, Out/Look, Fall 1989, at 9, reprinted in William B. Rubenstein, Cases and Materials on Sexual Orientation and the Law 721-25 (1997).

32 See David W. Dunlap, Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar the Door, N.Y. Times, Mar. 6, 1996, at A13.

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a definitive resolution, and no state, including Hawaii, had yet to extend marriage licenses to male-male or female-female couples. Utah was the very first to act, in 1995.[33] In its wake came South Dakota and several other states.[34]

The litigation in Hawaii, which was initially so cheering to me, also affected national politics. It provoked a "marriage protection" rally in Des Moines, Iowa, on the eve of that state's presidential caucuses, an event that attracted candidate Patrick Buchanan in person and the support of three other candidates—Bob Dole, Steve Forbes, and Lamar Alexander—in writing.[35] Even more disturbingly, it led to the introduction in both houses of Congress of a federal bill to limit the validity of same-sex marriages that might ultimately be accorded recognition by Hawaii. This bill, given the sanctimonious title of the "Defense of Marriage Act" (DOMA), declared that no state would be required to "give effect to any public act, record, or judicial proceeding, or tribe respecting a relationship between persons of the same sex that is treated as a marriage."[36] The bill also asserted that under federal law the word "marriage" would mean "only a legal union between one man and one woman."[37]

The House of Representatives approved the Defense of Marriage Act on July 12, 1996, by the overwhelming margin of 342 to 67.[38] The Senate followed suit, by a vote of 85 to 14, on September 10, 1996.[39] And President Clinton, despite his professed support of equal rights for gay people, signed the bill shortly afterwards.[40] (The White House did, however, express regret that he had been presented with such a measure.[41])

In short, one encouraging judicial decision in only one of the fifty states—a decision that was merely tentative, since the case in which it was issued was still unresolved—touched off a national political and legal avalanche with horrifying consequences for gay people. One tentative, halting step toward same-sex marriage had incited a nationwide political riot against same-sex marriage. As a formal matter and

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[33] See id.

[34] See id.

[35] See id.

[36] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C.A. § 1738 and 1 U.S.C.A. § 7 (1996)).

[37] Id. § 3(a), 110 Stat. at 2419 (codified at 1 U.S.C.A. § 7 (1996)).

[38] See Jerry Gray, House Passes Bar to U.S. Sanction of Gay Marriage, N.Y. Times, July 13, 1996, at A1.

[39] See Eric Schmitt, Senators Reject Both Job-Bias Ban and Gay Marriage, N.Y. Times, Sept. 11, 1996, at A1.

[40] See Alison Mitchell, Clinton Signs Bill Denying Gay Couples U.S. Benefits, N.Y. Times, Sept. 21, 1996, at A8.

[41] See id.

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from a national perspective, *Baehr v. Lewin*—regardless of the ultimate outcome in Hawaii—seemed a complete disaster.

Yet, while acknowledging the technical losses in Congress and the various statehouses, I am still heartened by the developments to date overall—because of their profound "culture-shifting" potential. DOMA and its state analogues did not really change the rules applicable to would-be same-sex marriages; they merely fortified the existing rules, since no jurisdiction in the United States has ever permitted such marriages. And, despite the formal defeat they represent, they helped, I believe, to herald a world in which same-sex marriages will eventually be lawful and commonplace.

The subject of same-sex marriage is novel to the public at large. Until the lawsuit in Hawaii, the issue was no more than a political curiosity, except to advocates and troublemakers like me. *Baehr*, however, in conjunction with the reaction in Washington and other legislative centers, legitimated the issue, making it fit for general discussion. Whether two men or two women should have the right to marry was—at last—accorded serious attention in the country's newspapers and political journals.

The vote in Congress was a loss. I do not pretend otherwise. But it was a loss containing the seeds of eventual victory. If nothing else, the issue was finally worthy of discussion in the national legislature.

That DOMA might have a silver lining is suggested by another congressional development that took place on the very same day as the vote in the Senate on DOMA. In response to DOMA, Senator Edward Kennedy threatened to move on the floor to amend the bill to incorporate a gay rights measure known as the Employment Non-Discrimination Act (ENDA), which would prohibit discrimination in employment on account of a person's "sexual orientation."[42] The Republican leadership of the Senate initially fought against such a tactic, but then offered Kennedy a separate floor vote on a free-standing ENDA.[43] That vote took place in tandem with the vote on DOMA, and—startlingly—the Senate came within a hair's breadth of adopting ENDA. Nearly half the Senate—forty-nine Senators—voted in favor of ENDA, with fifty in opposition.[44] One additional vote in favor would have led to approval by the upper house of the United States Congress for the very first time of a measure extending basic civil rights to lesbians and gay men.

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[42] See Schmitt, supra note 39.

[43] See id.

[44] See id.

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The heartening vote on ENDA was a direct byproduct of the disheartening vote on DOMA. The two were yoked together in substance as well as procedure. Explained Senator James M. Jeffords, a moderate Republican from Vermont, "People don't want to go too far on changing marriage and traditional relationships. But the feeling is when someone wants to work someplace, they ought to be able to get a job."[45]

The rules have not shifted on same-sex marriage. The old rules have been fortified. Yet DOMA and its state analogues have prepared the public for future "rule-shifting." The debate on DOMA has, I believe, begun the process of "culture-shifting."

I have stated in this Essay a personal preference for legislative change, since in general I believe that legislative activity is more likely than judicial or administrative lawmaking to lead to "culture-shifting" in addition to "rule-shifting." The story of *Baehr v. Lewin*, however, demonstrates the power and value of litigation to make social change, when that litigation is cunningly prosecuted. *Baehr* brought national attention to an issue previously overlooked or belittled. It began the "culture-shifting" necessary for ultimate success.

V
Back to New Zealand

In New Zealand and afterward, I puzzled over the disjunction between that country's formal protections for gay people on the one hand, and its limited cultural integration of gay people on the other. Now I am considerably less puzzled. In enacting legal protections for lesbians and gay men, New Zealand changed the applicable rules of law, but did not alter in any significant way the underlying culture—in short, New Zealand engaged in "rule-shifting" but not "culture-shifting." I remain uncertain of the reasons for New Zealand's formal embrace of gay rights protections, but I think I now better understand the possible disjunctions between law and culture.

On reflection, I should not have been surprised by the disjunction. Most legal changes entail "rule-shifting" without "culture-shifting." In only a minority of instances does a legal change have cultural resonance. As already stated, in general such a change must involve the following four elements:

(1) A change that is very broad or profound;
(2) Public awareness of that change;
(3) A general sense of the legitimacy (or validity) of the change; and

[45] Id.

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(4) Continuous, appropriate enforcement of the change.

Typically, the absence of any one of these factors will forestall the possibility of "culture-shifting," although, as the story of DOMA indicates, there are exceptions.

I have already expressed my view that in most circumstances, change through the legislature is more likely to engender "culture-shifting" than change through a court or an administrative agency, and that legislative change is therefore—in general—preferable to other forms of change. It is deeper and lasts longer. Conversely, it is also harder to attain, since legislatures are rambunctious places that operate slowly, untidily, and often illogically. Legislative change certainly does not assure "culture-shifting," but it does make it more feasible.

Many of my colleagues seeking social justice have deliberately avoided legislatures in recent decades, both because of the difficulty of making change there and because of the perception that politicians will not be receptive to their claims. They have turned by and large to the courts. While applauding the changes these lawyer-activists have helped to bring about, and while acknowledging the shortcomings and frustrations of legislative change, I submit that those of us in the business of "culture-shifting" should upend our traditional preference for judicial activity and embrace the special advantages of legislative change.

E.M. Forster appended to the title page of his novel *Howard's End* the enigmatic aphorism: "Only connect . . ."[46] It is an apt injunction to lawyers like me. If we lawyer-activists truly seek deep, lasting change, we have to "connect" with the public. We have to accord as much attention to public attitudes as we do to the formal rules that purport to guide or mold those attitudes. That means thinking as concertedly about process as we do about substance. Process matters. How a new rule comes about may, in the end, be as important as what it says.

The world yearns for change—and for changemakers. But those of us who try to make change ought to think more systematically about what we do and why. For the world deserves effective change, not just new rules.

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[46] See E.M. Forster, Howard's End 1 (Penguin Books 1986) (1910).

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