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WORLDWIDE

## The Gay & Lesbian Review

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melodrama or existential histrionics. It is accepted as a simple fact. But alongside this fact is the tender word "honey." Hughes's ability to capture this joyful dread is one reason why he is seen by some as the poet laureate of black Americans. This dual emotion is also expressed in African-American culture in the blues and jazz musical traditions, which are both celebratory and elegiac. Here is Langston Hughes in "Summer Night":

The sounds  
Of the Harlem night  
Drop one by one into stillness.  
The last piano-player is closed.  
The last victrola ceases with the  
"Jazz Boy Blues."  
The last crying baby sleeps  
And the night becomes  
Still as a whispering heartbeat.  
I toss  
Without rest in the darkness,  
Weary as the tired night,  
My soul  
Empty as the silence,

Empty with a vague,  
Aching emptiness,  
Desiring,  
Needing someone,  
Something.

I toss without rest  
In the darkness  
Until the new dawn,  
Wan and pale,  
Descends like a white mist  
Into the court-yard.

While drawing from African-American culture, Hughes also kept moving beyond the stifling confines of race. In "Theme For English B," the narrator writes to his professor: "You are white—/ yet a part of me, as I am part of you/ That's American/ Sometimes perhaps you don't want to be a part of me/ Nor do I want be a part of you/ but we are, that's true!" Hughes understood the common grounding of the human heart and, in deceptively uncomplicated language, endeavored to share this understanding with the world.

## How the High Court Finally Came Around

**T**HE year is 2001 and chances are good that you're reading this review in the subway, at a café, or in some equally public place. You might have picked it up at a bookstore or it might have dropped through your mail slot. Either way, you're engaged in what is now a fairly unremarkable activity. But it was not always so. In January of 1958, the U. S. Supreme Court reversed a lower court prohibition, clearing the way for a magazine directed at homosexuals to go through the mail.

So begins the story outlined in *Courting Justice*, two journalists' account of the gay rights struggle as it has been fought in the Supreme Court over the past fifty years. Joyce Murdoch, a former *Washington Post* editor, and Deb Price, a lesbian columnist, have examined and reported on virtually every non-AIDS-related gay case that made its way to the Supreme Court from mid-century until the Boy Scouts case last year. They have produced an intelligent and balanced survey that takes full advantage not only of Supreme Court archives but also of interviews with many of the most important figures associated with these cases. They have examined pleadings, transcripts, and private papers; they have interviewed parties, attorneys of record, law clerks, and the family members of several justices. Ramsey Clark, the left-leaning Attorney General under Lyndon Johnson, even consented to analyze his father's papers. This is not a book that only lawyers will be able to read. On the contrary, Murdoch and Price show themselves to be sure-footed guides who can take a newcomer over difficult legal terrain.

To describe *Courting Justice* as a book about the gay rights

JO ANN CITRON

### **Courting Justice: Gay Men and Lesbians v. the Supreme Court**

by Joyce Murdoch and Deb Price  
Basic Books. 592 pages, \$32.50

struggle would be to use an imprecise shorthand, for "gay rights" is a relatively recent concept. Only twenty years before the time period covered here, any law against homosexuality was presumed to be constitutional if the legislature that passed it had a reason for doing so. But in a footnote to a 1938 case about adulterated milk (of all things), the Supreme Court said that if a law prejudiced what it called a "discrete and insular" minority,

then the court might have to take a closer look at the law. Thus, in a footnote, was civil rights law born. Beginning with race and moving through national origin, gender, and disability, the Court established certain protected categories of citizens. If a law disadvantaged someone from a protected category, then the court would scrutinize that law strictly to make sure that it was as narrowly tailored as possible to achieve its permissible purpose. Otherwise, it would be deemed unconstitutional. The problem is that for purposes of federal law, homosexuality has never achieved the status of a protected category. Murdoch and Price understand this reality as well as anyone, and explain its implications clearly and cogently. Because homosexuals comprise a despised minority, they are targeted for special treatment; and because they are not a protected category, the targeting is legal.

Throughout the 1950's and 60's, it was legal for the government to fire employees for being homosexual. (Not until 1975 would the Civil Service Commission end its ban on employing homosexuals, and in one of the book's more entertaining ironies, it was Robert Bork who, as Solicitor General, was forced to assert the change of policy and to urge the Court to vacate the ruling that had allowed the termination.) It was legal for the INS to deport homosexuals as "psychopathic personalities." The entrapment and prosecution of gay men was a standard feature of

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the landscape as the Court turned away one appeal after another. In one of these “nightstick nightmares,” police coordinated a New Year’s Eve raid on the Black Cat bar in L.A., and supported their arrests by timing the men’s kisses. Three seconds made a lewd and dissolute defendant!

All of this was possible because every state but Illinois criminalized sodomy. *Bowers v. Hardwick* was presaged in 1970 when the Supreme Court let stand a decision allowing a Civil Service employee to be fired for having consensual sex in his bedroom. By the time of *Hardwick* (1986), the Court had not released a full, signed opinion since 1967, when it had made every homosexual deportable by branding all of them as psychopaths. The facts of *Hardwick* are now well known: a police officer entered Michael Hardwick’s house without a warrant, found his way to the bedroom, discovered Hardwick having sex with another man, and arrested him for violation of Georgia’s sodomy statute. Lewis Powell was the swing vote on the Court, so Larry Tribe pitched his oral argument directly at Powell; but the argument failed. (After retiring from the Court, Powell recanted and said that he thought *Hardwick* had been wrongly decided.) Less well known is that Powell had originally voted to strike down the infamous sodomy statute and that Chief Justice Burger, in a highly unusual move, applied pressure on him to change his vote. Powell was being pressured in the same direction by his most conservative law clerk.

Murdoch and Price offer humane and intelligent portraits of the justices that place their decisions on gay cases in the context of their overall intellectual development—or lack thereof. Powell is portrayed as vacillating and weak, easily swayed by one of his conservative clerks and by Burger’s unusual letter. Powell had hired more gay clerks than any of his colleagues, yet claimed never to have known a homosexual. Murdoch and Price find ample drama in the man’s struggle without styling him as the villain. They point to his squeamishness in dealing with gay cases and to his naïveté, portraying him as an exhausted old man who nipped half a beer out of a paper bag during solitary Saturday lunches.

One strength of this book is the prominent place assigned to the justices’ law clerks, such as Michael Mosman, who relentlessly urged Powell to side with the state of Georgia, and to Pam Karlen, who’s generally credited with writing Blackmun’s eloquent dissent. The clerks can be a journalist’s dream. We learn from one of them that Powell referred to Burger as “the Great White Doughnut” because he had white hair with a bald spot in the middle, signifying nothing inside. Such details present a lively picture of the Court’s inner workings, showing how tangled were the internal politics, how forceful the homophobia of justices like Burger and Rehnquist in the earlier days, and of Thomas and Scalia and Rehnquist now. The authors pay close attention to the many cases the Supreme Court declined to hear, locate these cases firmly within the Court’s internal politics, and explain the legal and political implications of refusing to hear a case. They understand the nature of impact litigation, those cases that are carefully chosen and meticulously crafted with the purpose of making new law. They have a keen historical sensibility and understand how gay rights have suffered as a result of language in the early privacy decisions dealing with contraception. And they are alert to the power of a dissent.

Trial judges listen to live testimony and find facts: they get the

human part of a case. Supreme Court justices hear legal arguments necessarily stripped of their human component. It’s not hard to find drama in the stories of lives threatened, disrupted, or ruined in ways that force a person to become a plaintiff (they’re not called “pleadings” for nothing). *Courting Justice* succeeds at the more difficult task of finding drama within the marble walls. The overarching narrative here takes the court from saying repeatedly that the term “homosexual” is coterminous with “criminal” to being able, finally, to use the word “gay” and to opine that gay citizens are among the people to whom constitutional protections apply. The authors capture well the drama of *Romer v. Evans*, the case that struck down Colorado’s infamous Amendment 2. Murdoch and Price do us a great favor by sharing the highlights of Supreme Court arguments as well as the justices’ private papers. To wit: during oral argument in *Romer*, Justice Stevens questioned Colorado’s solicitor general, who had been arguing that Amendment 2 simply declined to offer homosexuals “special rights.” “What is the ‘special preference’ that a homosexual gets?” Stevens inquired. That state’s circular response was that anti-bias laws create “a cause of action on the basis of a characteristic that’s not available to the general population at large.”

*Courting Justice* has an excellent index and a useful, if selective, bibliography. But a spellcheck must have substituted for proofreading, allowing “intimate” for “intimidate,” “as” for “has,” and so on. And the volume continues the deplorable recent practice of dumping all the notes at the end. The citations are organized by chapter but appear with no numbers in the back or in the text. Such notes serve only the most determined reader and do a disservice to a serious book.

## THE PHILADELPHIA STORY

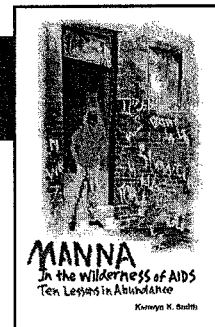
### MANNA IN THE WILDERNESS OF AIDS

*Ten Lessons in Abundance*

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