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LOS and the Emergence of Gay Rights Litigation

A cursory glance at the legal treatment of (suspected) homosexuals before the formation of Lambda indicates that Bill Thom was right: gay men and lesbians needed legal representation, and they needed it badly. Prior to the 1970s, every state in the nation except Illinois criminalized sodomy, and although almost all laws prohibited *both* opposite-sex and same-sex sodomy, enforcement activities were directed primarily at gay men. Police surveillance of locations where “known homosexuals” congregated was not uncommon. Bars were especially susceptible; patrons were regularly arrested and liquor licenses often revoked. John D’Emilio has estimated that tens of thousands of lgb people were arrested each year during the 1950s (D’Emilio 1986, 919).¹

Of course, the legal problems of lgb people went far beyond bar raids. Under the Immigration and Nationality Act of 1952,² for example, homosexuality was considered to reflect a “psychopathic personality” and constituted a ground for deportation—a policy upheld by the Supreme Court in 1967 in *Boutellier v. Immigration and Naturalization Service* (1967). Lesbians and gay men were also barred from many jobs in government. Governmental documents show that nearly five thousand people were discharged from military or other governmental employment because of their homosexuality in the years between 1947 and 1950, while an additional seventeen hundred applicants for governmental positions were refused employment because of their homosexuality (Adam 1995). In the early 1950s, the military discharged some two thousand lgb people a year; by the early 1960s, the figure rose to an average of three thousand a year (D’Emilio 1983). The military policy was particularly problematic, because those suspected of homosexuality were subject to court-martial and discharge under “other than honorable” conditions.

The McCarthy hearings in the 1950s made the reasons for this policy explicit: homosexuals were unsuitable for government service because the criminality of sodomy both revealed their “low morality” and made

them susceptible to blackmail. In the words of then-senator Kenneth Wherry: "You can't hardly separate homosexuals from subversives. . . . Mind you, I don't say every homosexual is a subversive, and I don't say every subversive is a homosexual. But [people] of low morality are a menace in the government, whatever [they are], and they are all tied up together" (quoted in Faderman 1991, 143).

Despite—and perhaps because of—the pervasive climate of hostility, lgb people rarely challenged the treatment they received at the hands of police, employers, and government in general. Those swept up in police raids, for example, rarely contested their arrests.³ As one defense lawyer practicing during the 1950s and 1960s noted, "Most of the gay men who were arrested were so ridden with guilt and so afraid of exposure that they couldn't imagine facing a jury trial" (quoted in Marcus 1992, 148). And even when lesbians and gay men fought for their rights in court, they tended to raise procedural rather than substantive challenges to the legality of governmental actions. For instance, when Frannie Clackum was dishonorably discharged from the Air Force in 1952 on the basis of her alleged lesbianism, the Air Force refused to inform her of the specific charges against her and refused to allow her a trial by court-martial so she could defend herself.⁴ Clackum subsequently challenged the *way* she was discharged rather than the *right* of the military to discharge her. (In fact, she consistently denied allegations of lesbianism.)⁵

To make matters even more difficult, those lgb people willing to fight for their rights often had a difficult time finding lawyers willing to take on cases involving homosexuality. Whether this was because of personal distaste, legal analysis, or the fear of being thought gay themselves is unknown. Even the ACLU regularly refused to take on gay rights cases, arguing that there was no constitutional right to "practice homosexual acts." A policy statement the group issued in 1957 supported the constitutionality of sodomy statutes as well as federal security regulations excluding homosexuals from employment.⁶

As this overview shows, lesbians and gay men faced myriad legal consequences because of their sexual orientation. By emphasizing the kinds of concerns that appeared in court, however, I do not mean to imply that these were the only issues of legal consequence. Like gender and race, sexual orientation deeply affects individual living experiences in a wide variety of contexts. Prior to the 1970s, many of the core sociolegal concerns of lesbians and gay men had never been addressed by the courts. The range of issues *not* litigated included discrimination in private employment, housing, and public accommodations. With the notable

exception of divorce, family law matters were virtually absent as well.⁷ In her comprehensive survey of the civil cases dealing with homosexuality, Rhonda Rivera (1979) uncovered only three custody cases involving parental homosexuality.⁸ Questions of marriage or other mechanisms for protecting same-sex partnerships were certainly never raised, nor were adoption, foster care, or guardianship.

It was not until the late 1960s and early 1970s that litigation began to assume any sort of prominent role as a tactic to advance the interests of lgb people. The ACLU was the first organized entity to enter the fray, when in 1967 it reversed its policy stance and started challenging governmental regulation of homosexuality across a number of fronts, including police harassment, employment, and immigration. Lambda filed its incorporation papers in 1972. By the end of the decade, the New York-based Lambda was joined by several other groups dedicated to litigating on behalf of lgb people, including the Gay Rights Advocates (GRA) and the Lesbian Rights Project—both based in San Francisco—the Boston-based Gay and Lesbian Advocates and Defenders (GLAD), and the Texas Human Rights Foundation.

Why did organized litigation on behalf of gay rights appear when it did? In the following pages, I show that the emergence of this litigation was precipitated by several changes in the LOS, including shifts in both the legal and the cultural stock and the increased visibility of elite divisions over the criminalization of consensual sexual behavior.

Conflicts among Legal Elites: The Model Penal Code

The American Law Institute (ALI) is an organization of some fifteen hundred legal scholars and practitioners whose work in drafting model laws has influenced the development of many different legal areas. In the 1950s, it began drafting a Model Penal Code, designed to standardize and simplify the myriad laws of the fifty states. A draft was published in 1955 and the code was completed in 1962. Part of the document made what its drafters called a “fundamental departure from prior law” in decriminalizing all “deviate sexual intercourse” performed in private by consenting adults as well as adultery and fornication (ALI 1962). By *deviate intercourse* the ALI meant all forms of anal and oral sex, as well as mutual masturbation and penetration by inanimate objects.

The organization’s primary reason for departing from prior law concerned the distinction between civil and religious responsibilities. As the

ALI saw it, adultery, fornication, and “atypical” sexual practices performed in private by consenting adults fell under the provenance of spiritual rather than civil authorities because they did not harm the secular interests of the community. Moreover, the ALI argued, individuals were fundamentally entitled to protection against state interference in their personal affairs so long as they were not hurting others.⁹

The proposal to decriminalize deviate sexual intercourse sparked controversy within the ALI’s own ranks. Its Advisory Committee was the first to consider the recommendations made by the committee in charge of drafting the Model Penal Code; after consideration, it endorsed the code and sent it on to the Governing Council. The council, however, endorsed continued criminalization in a sharply divided vote that pitted two influential federal judges against each other. Judge Learned Hand of the U.S. Court of Appeals (Second Circuit) led the push for decriminalization. Judge John H. Parker of the U.S. Court of Appeals (Fourth Circuit) pushed for the continued criminalization of such conduct, seeing it as either the symptom or cause of moral decay. Parker’s position prevailed, garnering support both from members of the council who agreed with his reasoning and from members who feared that the decriminalization provision might engender enough opposition in state legislatures to endanger acceptance of the Model Penal Code as a whole. The council’s vote to uphold sodomy laws was in turn overruled by the membership as a whole at the ALI’s 1955 meeting.

The ALI’s adoption of the Model Penal Code revealed the existence of significant conflict among legal elites with respect to sodomy statutes and the numerical dominance of the decriminalization camp. That a number of lawyers and jurists supported the reform of laws pertaining to sodomy was further indicated by the endorsement of the ALI’s stance by the International Congress on Penal Law and by the steady flow of supportive articles in legal journals.¹⁰

Shifts in the Legal Stock: *Griswold* and the Right to Privacy

The Model Penal Code was not the only indication that judicial elites were grappling with matters of sexual privacy. In 1965, the Supreme Court handed down a landmark decision articulating the notion of a fundamental right to privacy. *Griswold v. Connecticut* concerned a Connecticut statute prohibiting the use of contraceptives by married couples. Justice Douglas, writing for the Court, found that the statute operated

“directly on an intimate relationship of husband and wife” (*Griswold*, 482), thereby violating a fundamental right of privacy that existed in the penumbras of various guarantees of the Bill of Rights. “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?” he queried. “The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”¹¹

Over the next several years, the Supreme Court extended the parameters of the right to privacy significantly. In *Stanley v. Georgia* (1969) the Court ruled that the possession of obscene materials in the home was constitutionally protected, even though it could be criminalized outside the home.¹² In *Eisenstadt v. Baird* (1972) the Court expanded *Griswold*’s ruling to protect the rights of single people to use contraceptives.¹³ The next year, the Court developed the contours of the right to privacy in sexual matters even more in the controversial *Roe v. Wade* (1973), which held that the right to privacy encompassed a woman’s decision whether or not to terminate her pregnancy.

Griswold and its progeny opened the door to some potentially useful legal arguments for lgb people. The cases made it clear that at least some aspects of sexuality were protected by the right of privacy. But just how far did the right to sexual privacy extend? If the right of privacy included the *outcomes* of sexual activity, might it not also include the activity itself?

Unfortunately for gay rights advocates, some of the language of *Griswold* seemed to specifically exclude homosexuality from the right to privacy. As Justice Goldberg wrote in his concurrence:

Finally, it should be said of the Court’s holding today that it no way interferes with a State’s regulation of sexual promiscuity or misconduct. As my Brother Harlan so well stated in his dissenting opinion in *Poe v. Ullman*:

Adultery, homosexuality and the like are sexual intimacies which the State forbids. . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State must not only allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality . . . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.¹⁴

Although this language pointedly excluded lgb relationships from the zone of sexual privacy protected by the Constitution, its potential damage to gay rights claims was tempered by the fact that it was a concurring rather than a majority opinion and therefore had no force of law. It was further tempered by *Eisenstadt*, which specifically expanded *Griswold* to cover the use of contraceptives outside marriage, thereby chipping away at the distinction between marital and nonmarital sexuality.

Despite its shortcomings, the right to privacy articulated in *Griswold* and expanded in subsequent cases sparked interest in using the courts to advance gay rights claims. Nowhere is this more evident than with the ACLU. The organization's 1957 policy supporting the constitutionality of sodomy statutes and employment restrictions had provoked some dissent among ACLU affiliates, more notably the Washington, D.C., New York, and southern California branches, all of which supported and occasionally litigated gay issues.¹⁵ They lobbied the national organization to change its policy position vis-à-vis homosexuality, and by the early 1960s the national ACLU began to signal a reconsideration of its earlier position.¹⁶ *Griswold* was influential in this regard. The national ACLU was involved in the case and recognized its potential significance with respect to the wider sphere of sexual behavior. As then-ACLU associate director Alan Reitman wrote during the course of the litigation, "Once we have the high court's opinion in [*Griswold*], we will be in a position to determine our policy on the civil liberties aspect of a variety of sexual practices, including homosexuality."¹⁷

Organizational deliberation within the national ACLU began in earnest after the 1965 victory in *Griswold*. Two years later, in 1967, the ACLU formally reversed its stand on homosexuality. The criminalization of private, consensual sexual activities between adults, it said, constituted an impermissible infringement on the fundamental right to privacy. It added sexual privacy cases to its pantheon of interests.

Griswold and its progeny altered the LOS surrounding gay rights in two important ways. The articulation of a right to sexual privacy offered a new legal ground upon which to base rights claims, especially in the context of sodomy. As we shall see in later chapters, privacy-based arguments would become a staple in what might be called the repertoire of litigation around gay rights.¹⁸ In addition, it garnered the first powerful ally for lgb people. For years to come—until it was surpassed by Lambda itself—the ACLU would be the most important litigator of gay rights concerns.

Shifts in the Cultural Stock: Stonewall as a Critical Event

So I was drinking at the [Stonewall Inn], and the police came in to get their payoff as usual. . . . I don't know if it was the customers or if it was the police, but that night everything just clicked. Everybody was like, "Why the fuck are we doing all this for? Why should we be chastised? Why do we have to pay the Mafia all this kind of money to drink in a lousy fuckin' bar? And still be harassed by the police?" It didn't make any sense. The people at them bars, especially at the Stonewall, were involved in other movements. And everybody was like, "We got to do our thing. We're gonna go for it!" When they ushered us out, they very nicely put us out the door. Then we were standing across the street in Sheridan Square Park. But why? Everybody's looking at each other. "Why do we have to keep putting up with this?" Suddenly, the nickels, dimes, pennies, and quarters started flying. . . .

To be there was so beautiful. It was so exciting. I said, "Well, great, now it's my time. I'm out there being a revolutionary for everybody else, and now it's time to do my own thing for my own people." I was like, "Wow, we're doing it! We're doing it! We're fucking their nerves!" The police thought that they could come in and say, "Get out," and nothing was going to happen. . . . So we're throwing the pennies, and everything is going off really fab. The cops locked themselves in the bar. It was getting vicious. Then someone set fire to the Stonewall. The cops, they just panicked. They had no backup. They didn't expect any of this retaliation. But they should have. People were very angry for so long. How long can you live in the closet like that? (Rey Rivera, quoted in Marcus 1992, 191–92)

Changes in the structure of legal opportunities can open (or close) space for legal claims making by social movements. Such opportunities will go unrealized, however, without internal movement frames and organizational forms that allow them to be perceived and acted upon (see Snow et al. 1986). The Stonewall Riot facilitated the generation of new movement frames and forms that allowed lgb people to recognize and respond to the opportunities around them.

In the early morning hours of June 28, 1969, the police raided the Stonewall Inn, a gay bar in New York City's Greenwich Village. As I

noted earlier, raids of this sort were not uncommon at the time. What *was* uncommon was that the patrons fought back, sparking three nights of rioting. That a new and distinctively gay militancy was in the offing quickly became apparent. On the second night of the riot, over two thousand people converged on Greenwich Village, clashing violently with the police and shouting slogans ranging from the overtly political (“Gay Power Now”) to the quintessentially campy (“We are the Stonewall girls / We wear our hair in curls / We wear our dungarees / Above our nelly knees”).¹⁹ In one memorable incident, police were confronted with an impromptu chorus line—and promptly wielded their nightsticks to disperse it. By the third day, “gay power” graffiti was scrawled all over Christopher Street, where the Stonewall Inn was located, and gay liberation “manifestos” were appearing around Greenwich Village.

Why Stonewall occurred when it did and why it had the effect that it had are questions that have received considered attention by many other scholars (see especially Altman 1971; Duberman 1993; Teal 1971). Whatever the reasons, Stonewall’s impact on the politics of homosexuality was extraordinary. Within weeks of the riot several “gay liberation” groups formed, an organizational mobilization that continued for the next several years. While this mobilization was centered in New York City, it extended across the nation. By way of comparison, approximately fifty gay-related organizations existed nationwide at the time of Stonewall; four years later such organizations numbered in excess of eight hundred (D’Emilio 1983).

It is important to recognize here that Stonewall did not occur in a vacuum. It came on the heels of a cycle of protest that swept through the United States and the other industrialized democracies in the 1960s, a cycle that encompassed activism around civil rights, the Vietnam War, and women’s liberation. Many of the people mobilized in Stonewall’s aftermath had initially cut their activist teeth in one or more of these other movements. When they turned their attention to the societal treatment of lgb people, they brought the organizational templates and collective action frames they had acquired from those other movements with them.

Of these, the most significant was the invocation of legal conventions and discourses. Social movements throughout American history have drawn on the concept of legal rights to reframe existing social conditions as unjust. As Stuart Scheingold noted in his seminal book *The Politics of Rights* (1974), movements that can cast their social goals in terms of legal rights lend legitimacy to those goals, because rights connote entitlement.

The invocation of rights can thus initiate and sustain mobilization around particular social movement concerns. Not surprisingly, movements framing their claims in terms of rights commonly turn to the courts to advance their goals, whether directly—by winning cases and developing precedents—or indirectly—by mobilizing potential adherents, generating public support, and/or countering antagonists.²⁰

The NAACP and its Legal Defense and Educational Fund are the prototypic example of litigation as a social movement tactic. Formed in 1909 in response to the rising tide of white violence against blacks, the NAACP turned to litigation early on, generally in defense of black men accused of attacking whites. In the late 1920s, however, the NAACP began to use the courts proactively to attack discriminatory social practices. Although it continued to respond to white violence as necessary, it initiated legal challenges to restrictive housing covenants, exclusionary voting practices, and segregated schooling.²¹ Its evident successes in these areas—most notably *Brown v. Board of Education* (1954)—in turn caught the attention of myriad other social change movements, resulting in a proliferation of “legal defense funds” and other public interest litigation.²²

Because of their involvement with civil rights and other movements, many of the activists newly mobilized around gay-related issues were acutely aware that rights talk and the litigation it implied could be used to ameliorate the social conditions faced by lgb people. The courts quickly became a locus of activism. Willingness to challenge sodomy-related arrests increased, as did willingness to contest the legality of gay-related firings and military discharges.²³ Activists likewise began filing suits to force the recognition of lgb organizations, most notably in the university context.²⁴ The cases that most symbolized Stonewall’s impact on lgb consciousness, however, concerned same-sex marriage. Within five years of the riot, litigants in three different cases raised a previously unheard of claim: the right to marry their same-sex partners.²⁵

Conclusion

Organized litigation on behalf of gay rights emerged when it did for several reasons. Changing legal frames opened an opportunity for litigation on behalf of gay rights, as did the existence of conflicts among legal elites vis-à-vis criminal regulation of consensual same-sex intimacy. Stonewall, finally, lit a match to the kindling of legal opportunity, facilitating the development of movement frames and forms that allowed lgb people to

recognize and respond to the opportunities surrounding them. Given the myriad legal consequences of homosexuality, the burst of organizational mobilization in the aftermath of Stonewall, and the rights-based framing utilized successfully by earlier social movements, it was only a matter of time before the formation of an organization dedicated specifically to litigating on behalf of gay rights. According to Bill Thom, the idea was “in the air . . . even overdue” in 1972, when he made the decision to form Lambda in order to work “through the legal process, to insure equal protection of the laws and the protection of civil rights of homosexuals” (LLDEF 1998, 4). In the next chapter, we turn to an examination of Lambda and its litigation.