

Notes

CHAPTER ONE

1. The Stonewall Riot of 1969 is commonly considered to mark the beginning of the modern-day civil rights movement. See chapter 2 for an extended discussion of Stonewall and its impact on gay rights.

2. Because the terminology used to signify sexual orientation is so hotly debated, a discussion of my choice of terms is in order here. For the sake of brevity, I use *gay rights movement* as shorthand for the movement for lesbian, gay, and bisexual rights. While I use *gay rights* to describe the social movement, the word *gay* is not adequate to refer to lesbian, gay, and bisexual individuals. Some aspects of gay rights have historically concerned lesbians more than gay men and vice versa, while others have implicated both equally. Our terminology must take this into account. I therefore speak of gay men, lesbian women, and bisexual people as appropriate.

3. New York State Judiciary Law § 495(5).

4. *United Transportation Union v. State Bar of Michigan* (1971).

5. For in-depth analyses of the impact of sodomy laws on gay rights, see Cain 1993, 2000; Rivera 1985, 1986.

6. This term comes from March and Olson 1994.

7. As such, new institutionalism stands in contrast to what might be termed single-agent accounts of legal change, most prominently the attitudinal model. Several scholars have already addressed the limitations of the attitudinal model and laid out the rationale for new institutionalism (see especially Smith 1988; Clayton and Gillman 1999; Maltzman, Spriggs, and Wahlbeck 1999). I will not revisit that subject here.

8. I do not mean to imply here that earlier work on organized litigation never contemplated the larger world within which litigation took place. The importance of the law, the judges, and the wider political environment has commonly been noted—usually in discussions about the importance of controlling which cases to bring and when and where to bring them (Cortner 1968; Kluger 1975; Sorauf 1976; Tushnet 1987; Vose 1959; Wasby 1983). However, these other aspects have rarely been explored systematically (cf. Kobyłka 1987; Lawrence 1990).

9. Michael Lipsky (1970, 14), however, is generally credited with the insight at the heart of political opportunity structure:

We are accustomed to describing communist political systems as “experiencing a thaw” or “going through a process of retrenchment.” Should it

not at least be an open question as to whether the American political system experiences such stages and fluctuations? Similarly, is it not sensible to assume that the system will be more or less open to specific groups at different times and at different places?

10. For an excellent treatment of underlying political culture as a factor influencing social movement options, see Whittier 1995. For the argument that such factors should not be considered political, see McAdam 1996.

11. It should be noted that international tribunals have heard claims brought by peace activists hailing from the United States as well as other nations. For the purpose at hand, I simply wish to point out that the U.S. courts are generally closed to peace activists. For most American movements, access to the courts is not an all-or-nothing thing, because the majority of them make multiple sets of claims. For example, the women's movement has encompassed issues as varied as abortion, domestic violence, sexual harassment, pay equity, child care, employment discrimination, health care, racism, poverty, and school athletics, not to mention suffrage. Inability to get access to the courts in one area does not preclude access in others.

12. See, for example, Lawrence 1990; Rubin 1987. But see Epstein 1985 for an examination of groups who turned to the courts in order to retain legal rights.

13. Judges, however, are not the only legal elites. The Office of the Solicitor General of the United States, for example, is sometimes referred to as the "tenth justice" because of its influence in Supreme Court decision making; its success rate in seeking Supreme Court review varies between 75 to 90 percent (Perry 1991). Other studies have shown that the solicitor general's support of a legal claim increases the likelihood that the Court will treat that claim favorably (Segal and Spaeth 1993). That is precisely why amicus support from the solicitor general is so desirable. Although little empirical work has been done on this point, the presence of state attorneys general in a case may influence its outcome as well.

14. There is mixed evidence about the impact of amicus briefs on judicial decisions. Compare McGuire 1990 with Songer and Sheehan 1992. However, the presence of amicus briefs does increase the likelihood that the Supreme Court will decide to review a case (Epstein and Knight 1998).

15. Providing, of course, that the user was not warned of the risk.

16. Attitudinalists largely dispute this claim as it applies to the U.S. Supreme Court but agree that lower courts are constrained by precedent, at least to some extent. See Segal and Spaeth 1993.

17. See *Planned Parenthood of Missouri v. Danforth* (1976); *Thornburgh v. American College of Obstetricians and Gynecologists* (1986); *Webster v. Reproductive Health Services* (1989); *Planned Parenthood v. Casey* (1992).

18. For a discussion of alternative legal categories within which abortion rights could have been grounded, see Koppelman 1990; Regan 1979.

CHAPTER TWO

1. Official harassment of gay bars and their patrons may seem to be a relatively frivolous problem. It is important to understand, however, that gay bars

were central to the formation of lesbian and gay communities. Faderman (1991, 80) contends that lesbian bars were “the single most important public manifestation of the [working-class lesbian] subculture for many decades” (see also Kennedy and Davis 1993). From the emergence of the first recognizable lesbian and gay subcultures in the first decades of the twentieth century through the 1960s, bars served as the primary route for gay people to find each other. The role of bars in the gay community has been somewhat similar to the role of churches in the black community, providing a haven from a hostile society and a place to meet and talk with like-minded others. Harassment of gay bars in the 1950s and 1960s, then, struck at the very heart of lesbian and gay communal life.

2. Immigration and Nationality Act of 1952, 8 U.S.C. § 212(a)(4).

3. A notable exception to this trend occurred in 1952 when Dale Jennings was entrapped by a plainclothes policeman and charged with lewd and dissolute behavior. Jennings was one of the founders of the Mattachine Society, a group founded in 1951 with the purpose of transforming homosexuality from a stigma to a source of pride and communal identity (D’Emilio 1983, 58). After some internal debate, Mattachine decided to fight the charges against Jennings and to use the trial and its attendant publicity to publicize the police practice of entrapping gay men. It wrote letters and press releases and used the “informal communications network of the gay male subculture” (70) to advertise the trial and to defray legal expenses. At the trial, Jennings took the then-unheard of route of admitting his homosexuality but denying the charges. After deliberating for thirty-six hours, the jury deadlocked, an outcome the Mattachine Society viewed as a great victory.

4. *Clackum v. United States* (1960). Under Air Force regulations a person could be administratively discharged if a conviction by general court martial seemed unlikely.

5. Ultimately, she won her case, establishing the principle that service members accused of misconduct are entitled to procedural due process in discharge proceedings. The case secured a minimal level of protection for service members accused of homosexuality. See Cain 1993 for a thoughtful discussion of this and other early legal challenges.

6. “ACLU Statement on Homosexuality,” quoted in D’Emilio (1983, 156). Ironically, 1957 is also the year that the first substantive legal challenge to governmental policy was filed (*Kameny v. Bruckner*, 1960). Frank Kameny, an astronomer for the U.S. Army Map Service, was dismissed in 1957 solely on the basis of his homosexuality. Although he lost at every level, Kameny appealed his firing all the way to the Supreme Court (which denied his writ of certiorari in 1961). He took the then-unusual route of arguing for the morality of homosexuality, as well as disputing the authority of the government to police the moral beliefs of its employees. For Kameny’s own take on his litigation, see his interview in Marcus 1992 (93–103).

7. Records of homosexuality as a precipitating factor in divorce go back as far as 1908. See Rivera 1979 (879–83), as well as 78 A.L.R.2d 807 (1961).

8. *Commonwealth v. Bradley* (1952), *Immerman v. Immerman* (1959), and *Nadler v. Superior Court* (1967). What probably occurred is that many lesbian and gay parents facing custody battles gave up their children without a fight,

either through fear that their sexual orientation would become public knowledge or through the fear that their homosexuality by its very nature would be considered sufficient reason to deny them custody in any courtroom. In addition, the cases that did occur were often deliberately left unpublished (see Hunter and Polikoff 1976; Rivera 1979).

9. In further explaining its reasoning, the ALI made a discursive move that would subsequently be replicated by many others: it framed sexual activity and the interest of the state in regulating it differently based on the sexual orientation and marital status of the participants. As the institute explained in an extended comment on the subject (ALI 1962), the case for continuing to criminalize “untraditional” sexual practices between husbands and wives was the weakest. Such conduct was “anything but uncommon” and could be part of a “healthy and normal marital relationship” Moreover, criminal sanctions were “inconsistent with the social goal of protecting the marital relationship against outside interference.” With respect to unmarried heterosexual couples, “[t]he wrong, if one exists, arises from the fact of sexual intimacy out of wedlock and not from the kind of conduct with which gratification is achieved.” Such conduct was really “only a variant of adultery and fornication,” which the ALI also believed should be decriminalized. For the state to distinguish between “styles of sexual intimacy” served no legitimate purpose.

The case for retaining criminal sanctions on “deviate sexual intercourse” between same-sex couples was stronger than for either married or unmarried heterosexual couples. Continued sanctions, said the institute, might be advocated “on the ground that such conduct threatens the moral fabric of society by undermining the viability of the family or on the supposition that permitting such behavior between consenting adults leads inevitably to the corruption of youth.” The ALI noted the lack of evidence or “reasoned analysis” indicating that homosexual conduct corrupted youth but found the moral question to be more problematic. Even if homosexual conduct was “a moral default for which the actor may justifiably be condemned”—a question on which the organization expressed no opinion—practical considerations warranted eliminating criminal penalties for it. The action was victimless, enforcement tactics were often unseemly, and the threat of enforcement probably deterred some people from seeking “assistance for their emotional problems.”

10. For the International Congress on Penal Law’s endorsement, see *New York Times*, August 30, 1964, 36, cited in D’Emilio 1983 (144). For a sampling of supportive law journal articles, see Gallo et al. 1966; Hughes 1962; Johnsen 1968; Lamb 1969; Schwartz 1963.

11. *Griswold*, 485–86. *Griswold*’s articulation of a fundamental right to marital privacy sparked immediate opposition within the Court itself. The 6–3 decision produced three concurrences and two dissents. Both dissenters disagreed with the wisdom of the statute (“an uncommonly silly law” in Justice Stewart’s words) but did not find it to violate any provision of the federal Constitution. Two of the concurrences found the constitutional failing of Connecticut’s statute to lie entirely within the Fourteenth Amendment rather than an amorphous privacy right located in the “penumbras” of the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

12. Although the case implicated the right to privacy, *Stanley* was brought as a First Amendment challenge. Justice Marshall's opinion for the Court goes on to state: "If the First Amendment means anything, it means that the State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds" (565).

13. *Eisenstadt* achieved this outcome through equal protection analysis.

14. *Griswold*, 498–99, citations omitted. *Poe v. Ullman* (1961) was another challenge to the constitutionality of Connecticut's ban on the use of contraceptives. The appeal in *Poe* was dismissed on jurisdictional grounds, when the Court held that the five challengers (two married couples and a physician) had failed to establish their standing to challenge the law. Justice Harlan's lengthy dissent took the Court to task for its refusal to decide the case on its merits. *Poe* shows that the parameters of access to the legal system was an important constraint on the actions of birth-control advocates (see Garrow 1994).

15. Not surprising is the fact that all three affiliates were located in places that had active lgb communities. For more on the position of the ACLU with respect to the civil liberties implications of homosexuality, see Bullough 1986.

16. See letter from then-ACLU associate director Alan Reitman to gay rights activist Frank Kameny (of *Kameny v. Bruckner* fame), May 28, 1962, General Correspondence, vol. 59, 1962, *ACLU Papers*, quoted in D'Emilio 1983 (212).

17. Letter from Reitman to E. A. Dioguardi, May 10, 1962, General Correspondence, vol. 59, 1962, *ACLU Papers*, quoted in D'Emilio 1983 (212).

18. The notion of a repertoire of litigation draws on Tilly's (1978) notion of a repertoire of contention.

19. Quoted in Bragg 1994 (13).

20. For case studies of movements that have turned to the courts to achieve their social aims, see Burstein 1991; Epstein 1985; Handler 1978; and O'Connor 1980.

21. For in-depth accounts of NAACP litigation in these areas, see Greenberg 1977; Hahn 1973; Kellogg 1967; Kluger 1975; Tushnet 1987; Vose 1959; Wasby 1983.

22. For discussions of these other groups, see especially Epstein, George, and Kobyłka 1992; Scheppelle and Walker 1991.

23. For sodomy, see chapter 4. For employment, see, for example, *McConnell v. Anderson* (1971). For military service, see, for example, *Matlovich v. Secretary of the Air Force* (1974).

24. For example, *Gay Students Organization of the University of New Hampshire v. Bonner* (1974).

25. See chapter 7 for a discussion of these and other same-sex marriage cases.

CHAPTER THREE

1. Rhonda Rivera's 1979 survey of "the legal position of homosexual persons in the United States today" was a pioneering effort to uncover cases involving homosexuality. She discussed the problems she encountered in her research,

including the fact that legal digests often did not list homosexuality under a separate topical heading (as they do now) and that cases involving homosexuality were relatively unlikely to be published in law reporters (Rivera 1979).

2. Under the law, private citizens can legally engage in many forms of discrimination that are illegal when committed by state actors. It makes sense, then, for organizations seeking to eradicate discrimination to focus their initial efforts on state actors.

3. Lambda's records for this period are extremely fragmented, probably because it relied exclusively on volunteer attorneys and lacked a location (and staff support) to maintain a centralized set of records. As a result, there is uncertainty about the exact number of cases in which the organization officially played a role. By formal role, I mean that Lambda either litigated the case or filed an *amicus curiae* (friend of the court) brief. I have been able to document Lambda's formal involvement in forty-two cases. There are a handful of other cases, however, in which Lambda's early records suggest that it *might* have played a role, although I have not found any briefs or other official court documents. If I could not be certain of Lambda's involvement in a case, I did not include it.

It may seem odd not to know for sure, but using other sources to confirm Lambda's participation is more complicated than it might appear. Legal briefs are not easily available for most non-Supreme Court cases. In addition, legal decisions (which generally are available) are inconsistent with respect to whether they report the organizational affiliation of counsel and any *amicus* participation. Computerized databases such as LEXIS/NEXIS are quite good at noting the affiliation of counsel and any *amici*, but their records are much less complete for litigation in the 1970s than they are for litigation today. *Lesbian/Gay Law Notes*—the premier legal newsletter—did not begin publishing until 1981.

4. Two cases in which sodomy laws were *not* expressly invoked were *People v. Hammel* (1978), an unpublished case involving allegations of police brutality, and *Lambda Legal Defense and Education Fund v. Con Edison* (1978), a case involving the inclusion of advertisements in a pamphlet an electric company sent out to its customers.

5. New York Penal Law § 240.35(3) was challenged in *New York v. Uplinger*. New York's highest court found the statute unconstitutional in 1983.

6. The ex-spouse custody cases were *Mueller v. Mueller* (1980) and *Matter of Clifford* (1978). The other dispute was *Matter of Brown* (1977).

7. Judges look to many "relevant circumstances" in determining a child's best interests. For example, the wishes of both the child and the (prospective) parent(s) are commonly considered, as is the relationship of the child with her (prospective) parents and any other people who might significantly affect her best interests, the child's adjustment to her living arrangements, and the mental and physical health of all involved.

8. The Gay Rights Advocates subsequently changed its name to the National Gay Rights Advocates. The Lesbian Rights Project was a product of the Equal Rights Advocates. In 1987, it severed ties with its parent group and changed its name to the National Center for Lesbian Rights.

9. While the Gay Rights Advocates collapsed in 1991, all the other organi-

zations continue to exist. In 1993 the five extant gay legal groups were joined by a sixth: the Servicemembers Legal Defense Network.

10. For example, when Abby Rubinfeld came on board as Lambda's first managing attorney in 1983, her office was located next to that of the ACLU's Nan Hunter. (Hunter, who has become one of the foremost legal theorists of gay rights, was then working on the ACLU's Reproductive Rights Project.) Rubinfeld and Hunter talked frequently about litigation strategies in ongoing cases.

11. Nan Hunter went on to head this new project.

12. These laws varied widely in their scope. Generally they provided at least a minimal amount of protection from discrimination based on sexual orientation in public employment. Several also prohibited such discrimination in public accommodations. Note that I use the word *law* loosely here, including not only legislative acts but also executive orders and other formal tools of public policy. See generally Button, Rienzo, and Wald 1997.

13. They failed, however, to repeal Seattle's ordinance, garnering only 37 percent of the vote. See Adam 1995 (113).

14. For extended discussions of the rise of the New Right movement and its impact on gay rights, see Clendinen and Nagourney 1999; Herman 1997.

15. The Democrats took the opposite tack in their platform, suggesting that legislative and administrative steps be taken to discourage state-sanctioned discrimination on the basis of sexual orientation. Although it was the first time the Democratic platform had ever alluded to homosexuality, gay rights activists widely viewed the statement as disappointing because it failed to list any concrete steps to fight antigay discrimination. See Clendinen and Nagourney 1999.

16. For more on the tensions between gay men and lesbians in early gay liberation groups, see Adam 1995; Faderman 1991.

17. The case was *LaBreque v. Bradner Smith and Company* (1989).

18. Its cosponsors were the New York City Department of Health's Office of Gay and Lesbian Concerns, New York University's Womyn's Center, and the San Francisco-based Lesbian Rights Project.

19. Although the Gay Rights Advocates and the Lesbian Rights Project were both located in San Francisco, they appear to have avoided such power struggles, largely, I think, because they divided their "turf" along gender lines.

20. Author's interview with Kevin Cathcart, July 3, 1997.

21. For example, in 1980, then-Lambda executive director Roz Richter attended a meeting coordinated by the National Gay Task Force to discuss the implication of several judicial decisions involving gays in the military and to consider future litigation strategies. See *Lambda Update* 1980 (fall–winter).

22. For discussions of membership in the movement see Altman 1971; Halley 1989; Phelan 1989; Stychin 1998; and Taylor and Whittier 1992. For discussions of movement goals, see Ettelbrick 1989; Stoddard 1989; Sullivan 1995; and Vaid 1995. For discussions of the proper vehicles for attaining those goals, see Kramer 1989; Signorile 1994; and Sullivan 1995.

23. For in-depth discussions of the emergence of AIDS in the United States, see Altman 1986; Shilts 1987.

24. The hotline reported receiving some two hundred calls a day after Hud-

son's announcement, which works out to over four thousand calls a month. Although New York City had about 33 percent of the AIDS cases in the nation in 1985, heterosexual panic was not limited to AIDS epicenters. An AIDS hotline in Boston, for example, reported receiving thirty-four hundred phone calls in the month of August.

25. The archetypal example of this contagion fear was the book by Masters, Johnson, and Kolodny (1988) titled *Crisis: Heterosexual Behavior in the Age of AIDS*. The book received widespread media coverage (including a *Newsweek* cover article by the same name) but was also widely discredited by other experts. As Fumento (1990) shows, media emphasis on contagion fear decreased markedly after this point.

26. For AIDS arguments in the context of gay rights organizations, see, for example, *Gay Student Services v. Texas A&M University* (1984). For such arguments in the context of parenting, see, for example, *North v. North* (1994) and *In re Charles B.* (1990). In the context of employment, see, for example, *Leckelt v. Board of Commissioners* (1990).

27. The case involved a coop building's attempt to evict Dr. Joseph Sonnabend from his office space in the building, because he treated people with AIDS (*People of the State of New York, Joseph Sonnabend, M.D., et al. v. 49 West 12 Street Tenants Corporation*, 1993).

28. Then-executive director Tom Stoddard made this connection explicit in a 1987 *New York Times* article, when he noted that, "Without AIDS, Lambda would not be getting grants from mainstream foundations" (Shipp 1987).

29. The legal impact of *Bowers* is discussed in chapter 4.

30. Author's interview with Evan Wolfson, June 27, 1997.

31. *Ibid.*

32. For more on the immediate political response to *Bowers*, see Barker and Wheeler 1987; Dunlap 1994; Finder 1986.

33. *Bowers*, in fact, continued to figure in Lambda's solicitation materials until the Supreme Court finally struck down the decision in *Lawrence v. Texas* (2003).

34. The firms were Skadden, Arps, Wathcell Lipton, and Nizer, Benjamin. See Shipp 1987.

35. The midwest office was directly the product of a bequest. While most bequests had no strings attached, some were dedicated to specific ends. One such bequest was conditioned on the opening of an office in Chicago by the close of 1992.

36. These numbers exclude the value of donated legal services. In 2002, donated services were valued at approximately \$1.5 million.

37. For examples of second-parent adoption cases, see *In re Adopt of BLVB & ELVB* (1993) and *Matter of Dana/Matter of Jacob* (1995). For same-sex coparent custody disputes, see *Alison D. v. Virginia M.* (1991) and *V.C. v. M.J.B.* (2000). For donor insemination disputes, see *Thomas S. v. Robin Y* (1994) and *Leckie v. Voorhies* (1994).

38. These cases and their aftermath are discussed in chapter 7.

39. This phrase comes from the 1993 Colorado Supreme Court decision in *Romer v. Evans*.

40. *Romer* and other cases arising from antigay measures are discussed in chapter 6.

41. One assault was so vicious that the boy required surgery to repair the damage. The school eventually settled the case for nearly \$1 million after Lambda procured a ruling in the Seventh Circuit Court that held that the school had deliberately denied the boy protection from years of vicious abuse because he was gay.

42. See, for example, *East High Gay/Straight Alliance v. Salt Lake City Board of Education* (1999) and *Colin v. Orange Unified School District* (2000).

43. *Brandon v. Richardson County* (2002). The film *Boys Don't Cry* recounted Teena's story.

44. *In Matter of Estate of Marshall G. Gardiner* (2002). The validity of the Gardiner marriage was challenged by Marshall Gardiner's son after Gardiner died. (J'Noel had undergone sex reassignment years before the marriage and had successfully changed all her legal documentation to reflect her status as a postoperative female; her husband knew all about it.) The Kansas Supreme Court ultimately set aside the marriage, ruling that J'Noel remained a man for marriage purposes and that two men could not marry.

45. The report is titled "Youth in the Margins" and is available from Lambda.

46. For more information on the gay rights positions of presidential candidates, see Egan 1992; Schmalz 1992.

47. This is not to say that Clinton was an ideal ally. To the contrary, he quickly proved inconstant. Immediately after his election, Clinton used the agenda-setting capacity of his position to open a political debate about homosexuality and military service. He announced his intention to follow through on a campaign promise to rescind the ban on military service. However, this announcement sparked opposition among many members of the public, opposition that received a boost when the joint chiefs of staff announced that they opposed Clinton's plan and Senator Sam Nunn, chairman of the Senate Armed Services, commenced hearings on the issue.

Gays in the military blossomed into the first crisis of Clinton's young presidency, and by May of 1993 he was trying to distance himself from his promise to overturn the ban and to lay the groundwork for a political compromise. In July 1993, this compromise was announced. The new policy was dubbed "Don't Ask; Don't Tell." Under it, lgb people would be allowed to serve in the military, so long as they did not reveal their sexual orientation publicly and did not otherwise violate military law (which, among other things, prohibited sodomy without respect to the gender of the participants).

48. This is discussed in greater detail in chapter 7.

49. Lambda had previously filed an amicus brief in the case.

50. This ruling was based on the 1998 passage of a constitutional amendment giving the Hawaii legislature the authority to restrict marriage to opposite-sex couples. See chapter 7 for more details.

51. *Goodridge* succeeded where earlier litigation had fallen short. In November 2003, Massachusetts's Supreme Judicial Court ruled that same-sex couples

had the right to marry under the state's constitution; on May 17, 2004, the first such marriages took place. As *Baehr* had earlier, *Goodridge* set a number of wheels into motion. Within a few months of the decision, state legislatures across the nation began to consider constitutional amendments refusing recognition to same-sex marriages validly performed in other jurisdictions. President George W. Bush endorsed a proposed amendment to the U.S. Constitution that would restrict marriage to opposite-sex couples. San Francisco, Oregon's Multnomah County, and other localities scattered around the nation began issuing marriage licenses to same-sex couples until ordered to desist by courts, state attorneys general, and other authoritative interpreters of state law. And Lambda began litigating marriage challenges in three additional states: California (*Proposition 22 Legal Defense and Education Fund v. Martin et al.* in progress), New York (*Hernandez v. Robles*, in progress), and Washington (*Andersen v. Sims*, in progress). It is quite clear that the shift in legal frames surrounding marriage that began with *Baehr* is still in progress and will occupy the center of the battle over gay rights for the foreseeable future.

52. These states were California (1992), Connecticut (1991), Hawaii, (1991), Maryland (2001), Massachusetts (1989), Minnesota (1993), Nevada (1999), New Hampshire (1997), New Jersey (1992), New York (passed in 2002, took effect in 2003), Rhode Island (1995), Vermont (1992), and Wisconsin (1982). Maine passed a comprehensive law in 1997, but it was repealed by a ballot measure in 1998.

53. These states were Colorado (1990), Delaware (2001), Illinois (1996), Indiana (2001), Montana (2000), New Mexico (1985), Pennsylvania (1988), and Washington (1985). An Ohio executive order issued in 1983 was rewritten in 1999 to exclude lgb employees. Executive orders issued in Ohio and Iowa in 1999 were repealed in 2000. For more information on states with gay rights laws, see van der Meide 2000.

54. In 1998, for example, the Alabama Supreme Court upheld a trial court's change of custody from a lesbian mother to a heterosexual father, despite undisputed evidence that the child was happy and well adjusted living in her mother's care. The court was greatly disturbed that the women had "established a two-parent home environment where their homosexual relationship is openly practiced and presented to the child as the social and moral equivalent of a heterosexual marriage" (*Ex parte J.M.F.*, 14–15).

55. These states were Iowa, Maryland, Massachusetts, Minnesota, Nevada, Oregon, and Washington.

56. These cities were Atlanta, Baltimore, Boston, Chicago, Los Angeles, Madison, New York, Portland, San Francisco, and Seattle.

57. A small sampling of religious figures and organizations includes the Rt. Rev. John Shelby Spong, Bishop Walter Righter, the American Friends Service Committee (Quakers), the Association of American Hebrew Congregations, and the Unitarian Universalist Association. For a more complete listing of prominent individuals and groups supporting the Marriage Project, see the Lambda Legal Defense and Education Fund web site at www.lambdalegal.org.

58. The three cities were Ithaca, New York; and Los Angeles and West Hollywood, California. Politicians included Rep. John Lewis (D-GA) and Mayor Willie Brown (D) of San Francisco.

59. These states were Alabama, California, Idaho, Nebraska, South Carolina, South Dakota, and Virginia.

60. These states were Alabama, California, Colorado, Georgia, Idaho, Michigan, Mississippi, Missouri, Nebraska, South Carolina, and South Dakota.

CHAPTER FOUR

1. This occurred despite the fact that the great majority of sodomy statutes were gender neutral on their face, prohibiting particular acts without respect to the gender of the actors. As Janet Halley has noted (1993, 1737) sodomy has come to constitute a “rhetorical proxy” for homosexuality.

2. *Lawrence* raised an equal protection claim in addition to the privacy claim. It also asked the Supreme Court to overturn its ruling in *Bowers*.

3. Illinois repealed its sodomy statute in 1961.

4. In 1990, an entry-level court in Michigan ruled the state’s sodomy law unconstitutional (*Michigan Organization for Human Rights [MOHR] v. Kelly*). By refusing to appeal the lower court’s decision, the state’s attorney general limited the holding of the court to one county and threw the enforceability of the statute into a sort of legal limbo. In figure 1, I treat Michigan as maintaining its sodomy law. Justice Kennedy’s majority opinion in *Lawrence*, conversely, treats Michigan as a “reformed” state. *MOHR* is discussed in more detail in chapter 5.

5. The other four were treason, murder, witchcraft, and “willful and proposed burning of ships houses” (Katz 1983, 74).

6. The two remaining states may have had prohibitions against sodomy and/or buggery; the record is unclear. (Ironically, one of the states in which the record is unclear is Georgia, the state that would give birth to *Bowers*.) See Goldstein 1988.

7. For example, *Glover v. State* (1913) and *State v. Stuart* (1913).

8. The states were Colorado (1972), Oregon (1972), Delaware (1973), Hawaii (1973), and Ohio (1974).

9. The states were Montana (1973), Texas (1973), Kentucky (1974), Arkansas (1977), Missouri (1977), and Kansas (1983).

10. The great majority of sodomy charges are brought in cases where there are also allegations of rape or aggravated assault. (Because consent is not a defense to sodomy, it is often easier to prove than rape or assault.) For a discussion of the criminal enforcement of sodomy statutes, see *Harvard Law Review* 1989 (vol. 102).

11. See *Virginia v. American Booksellers Ass’n* (1988, 392–93).

12. For more details about the circumstances surrounding Hardwick’s arrest, see Harris 1986; Irons 1988.

13. Author’s interview with Kathleen Wilde, who served as lead counsel for Hardwick until the case was accepted by the Supreme Court.

14. For a fascinating study of the Court’s agenda-setting process, see Perry 1991.

15. Justice Douglas had retired from the Court shortly before *Doe* arrived. He was replaced by Stevens.

16. For an extensive analysis of the precedential value of summary affirmances and reversals, see Phillips 1978.

17. See *Kelly v. State* (1980) and *People v. Masten* (1980).

18. For example, *Petition of Nemetz* (1980), involving immigration, and *Childers v. Dallas Police Department* (1981), involving public employment.

19. *People v. Onofre* (1980), *Commonwealth v. Bonadio* (1980), and *Baker v. Wade* (1982). *Baker* was subsequently reversed by the Fifth Circuit (1985).

20. *People v. Onofre* (1978). The trial court's decision is not reported but is included in the petition for a writ of certiorari filed by the state of New York in the case.

21. For example, *State v. Pilcher* (1976) and *State v. Saunders* (1977).

22. The quotations in this paragraph are all drawn from the 1982 federal district court opinion.

23. Baker's suit was financed primarily by the Texas Human Rights Foundation, a gay rights group that had organized primarily to support his suit. Lambda was not involved with *Baker* during its initial phase of litigation, although, as I detail later, it became very involved in later phases of the case.

24. The testimony of Dr. James Grigson, reported in *Baker*, 1132–34.

25. Several cases were in the litigation pipeline when *Bowers* came down. For example, *State v. Walsh* (1986), a challenge to Missouri's sodomy law, was awaiting decision by the state's high court when *Bowers* was announced. Two weeks after the announcement, the Missouri Supreme Court upheld the statute, relying largely on *Bowers*. Lambda subsequently withdrew a sodomy challenge it had in progress in Louisiana. Other gay rights litigators did the same with their pending challenges.

26. Recall that the right to privacy articulated in *Griswold* and elaborated in *Stanley*, *Eisenstadt*, and *Roe* served as a legal linchpin for the decisions in *Onofre* and *Baker*.

27. The exception is Antonin Scalia. Technically, he filled Rehnquist's seat when Rehnquist became chief justice in Burger's stead. Although a vocal conservative voice on the Court, Scalia's voting record in civil liberties cases has been somewhat more liberal than Rehnquist's—roughly equivalent to Burger's record.

28. It is interesting that her nomination raised the ire of pro-lifers, because as an Arizona state legislator she had cast several votes in opposition to pro-life bills. In 1974, for example, she voted against a proposal urging Congress to pass a constitutional amendment overturning *Roe v. Wade* (Witt 1986). However, Reagan's advisors assured pro-life leaders that O'Connor "was personally opposed to abortion" and she "believe[d] abortion to be a legitimate matter for legislative regulation" (Abraham 1985, 332).

29. For example, she dissented in *Akron v. Akron Center for Reproductive Health* (1983), the first abortion-related case to come before the Court during her tenure, attacking the trimester framework of *Roe v. Wade* and arguing that the nature of the fundamental right recognized in *Roe* was limited rather than absolute. O'Connor's harsh attack on the trimester framework of *Roe v. Wade* in *Akron* in turn sparked a renewed emphasis by pro-life groups on attacking the legal grounding of the right to abortion (Epstein and Kobylka 1992, 248).

30. *Baker* offers a wonderful example of the impact of elections on the process of litigation. The federal civil rights complaint Baker filed in 1979 named Dallas district attorney Henry Wade (of *Roe v. Wade* fame) and Dallas city attorney Lee Holt as defendants. (The state of Texas intervened in the case via its attorney general.) To ensure that the district court ruling would be binding on every jurisdiction in Texas, Baker also named “all district, county and city attorneys in the State of Texas” as defendants in the case (*Baker*, 1982, 1125). The ninety-five-odd attorneys were all notified of the suit and of their right to intervene in the case. None chose to do so. Wade and Holt were then certified by the district court as representatives of the entire class of defendants. All the defendants were duly notified when Baker prevailed in U.S. District Court.

Between Baker’s initial filing in 1979 and his court victory in 1982, however, Danny Hill had been elected as Potter County’s district attorney. When he was notified of the outcome of the case, he promptly filed an appeal to the Fifth Circuit. Texas’s attorney general also filed a Fifth Circuit appeal, but a few days later he lost his bid for reelection. His successor, Jim Mattox, took office in January 1983 and after reviewing the particulars of *Baker* chose to withdraw the appeal. When Hill learned of Mattox’s action, he petitioned the Texas Supreme Court to *compel* the attorney general to continue the appeal. When the Texas high court refused even to hear the petition, Hill filed concurrent motions in both the U.S. District Court and the Fifth Circuit to set aside the judgment and substitute himself as the class representative.

Much of the appeals litigation concerned whether Hill had standing to pursue an appeal (either in his official or private capacity), even though his predecessor had chosen not to intervene in the case and Texas’s attorney general had chosen as a matter of public policy not to pursue the case further. The question of Hill’s standing bounced up and down the federal court ladder for several years. See *Baker* (5th Cir. 1985, 291–92) for a further discussion of Hill’s involvement with the case.

31. The existing statute (Tex. Pen. Code. Ann. § 21.06) prohibited *most* same-sex sexual intimacy, but not all: lesbians and gay men were not prohibited from “kissing, hugging, or sexually stimulating their partners with hands or fingers” (*Baker*, 1982, 1151). The current statute classified sodomy as a Class C misdemeanor bringing a \$200 fine. Under HB 2138, a first offense would be classified as a third-degree felony, bringing imprisonment of two to ten years and a \$5,000 fine. Subsequent offenses would be second-degree felonies, warranting imprisonment of two to twenty years and a \$10,000 fine.

32. Ceverha and Hill were also connected directly: Ceverha joined Hill’s petition to compel the attorney general to appeal *Baker*.

33. Cameron has been a key champion of the argument that lgb people pose threats to children, family stability, and public health. His suggested policies toward gay men in the face of AIDS have included quarantine, facial tattooing, and extermination (Pietrzyk 1994), though he has noted that the last is “not politically or socially acceptable at this time” (Pietrzyk 1994, 10–11). Cameron’s credibility as a scientist has been roundly attacked by gay rights advocates, who point to the fact that Cameron resigned from the American Psychological Association to avoid investigation into charges of his unethical conduct as a psychologist.

These charges included Cameron's continuing misrepresentation of research on the origins and nature of homosexuality.

34. Lambda became involved in *Baker* and *Texas A&M* when DDAA did. Lambda's primary role in both cases was to counter DDAA's "AIDS-threat" arguments. It did so through a multipronged strategy. It arranged for medical experts to file amicus briefs exploring the public health implications of AIDS. It relied on those experts to argue that sodomy statutes impaired public health rather than promoting it, because they caused individuals to conceal or distort relevant information about their sexual practices and inhibited effective public education efforts. Lambda also argued that the rapid state of evolution in scientific understandings about AIDS made it unwise for courts to rush to judgment on the constitutional questions raised by the epidemic.

35. The quote comes from Lambda's *Onofre* brief and cites Richards 1979 (1003–4).

36. Okla. Stat. Tit. 70, § 6–103.15 (A) (2).

37. Dicta are expressions in a court's opinion that are not essential to deciding the specific case at hand. They are not legally binding but can be useful indicators of how a court might approach future cases.

38. Letter to William B. Rogers (ACLU of Oklahoma), Leonard Graff (GRA), and Lucia Valeska (NGTF), dated August 3, 1982.

39. Faced with the inevitability of a Tenth Circuit ruling, Lambda and the national ACLU both filed amicus briefs in the case. Lambda's records offer no explanation for the organization's decision to file an amicus brief, but two likely reasons present themselves. The first highlights a common problem facing social movement litigators: their inability to always control the initiation and progress of cases. Given Lambda's inability to convince the GRA to halt *NGTF*, Lambda was faced with two real options: do nothing or add its voice to the case and hope, by doing so, to sway the Tenth Circuit by its presence and its arguments. Lambda's decision to join *NGTF* may alternately have reflected its desire to protect its position as a litigator within the gay rights movement. By joining the case as an amicus, Lambda would be able to "claim" the case as its own and point to it as evidence of the important work done by the organization.

40. Justice Powell, the tie-breaking vote in *Bowers*, did not participate in *NGTF* because he was recovering from surgery.

41. Hardwick's sex partner, in contrast, chose not to join the case, apparently because of concerns over his job (he was a teacher) and his marriage. See Harris 1986.

42. The ACLU, like Lambda, farms out much of its day-to-day litigation to a network of cooperating attorneys who volunteer their services pro bono.

43. Wilde, interview.

44. The groups were GRA, GLAD, the Lesbian Rights Project, the Texas Human Rights Foundation, and a Pennsylvania group called Custody Action for Lesbian Mothers (CALM). As one participant at this gathering said to me, "it was the first time gay legal activists got together in one room to talk and plan."

45. A critic might suggest that building two cases was more than the task force could handle and that by dividing its energies in this fashion the task force diminished its ability to litigate either one of the cases effectively. This criticism is misguided. First, while the task force played an important role as a mechanism of

intracommunity communication and coordination, the ACLU actually sponsored *Bowers*, while the Texas Human Rights Foundation sponsored *Baker*. The ACLU's pockets were more than deep enough to adequately fund its case, and it commonly handled multiple suits at the same time.

Second, the task force did an excellent job of mobilizing allied support in support of Michael Hardwick. It coordinated the submission of seven amicus briefs on behalf of twenty-three organizations and two states. Three came from members of the task force and also had other signatories. Lambda's brief was cosigned by GLAD, two lgb bar associations, and a national lgb political group. The Lesbian Rights Project submitted a brief joined by a host of women's rights groups. The National Gay Rights Advocates contributed a brief that was cosigned by four California-based legal advocacy groups. The task force also coordinated the submission of an amicus brief from a consortium of religious groups that argued that the criminalization of private consensual sodomy had no legitimate basis in contemporary morality. A brief submitted by the American Psychological Association and the American Public Health Association argued that sodomy statutes furthered neither personal nor public health. Impressively, the state of New York also submitted a brief on Hardwick's behalf, drawing on *Onofre*; the state of California signed the brief as well.

46. Hardwick's litigation team changed for the Supreme Court phase of the case. Up until the Supreme Court granted Georgia's petition for a writ of certiorari, Wilde served as Hardwick's lead counsel. At this point, constitutional scholars Laurence Tribe and Kathleen Sullivan entered the case, and Tribe became Hardwick's lead counsel. (Wilde continued on as one of the team of attorneys working on the case.) Although memories are no longer clear on the subject, it appears that the notion to bring in Tribe and Sullivan was initially voiced by members of the task force.

47. Quoted in Garrow 1994, 660–61. *Robinson v. California* is a 1962 case in which the Supreme Court held that the Eighth Amendment barred convicting a defendant due to his "status" as a narcotics addict, since that condition was "apparently an illness which may be contracted innocently or involuntarily" (*Robinson*, 667).

48. See *Bowers*, 1985, Brief of Appellants on Appeal, 33 (on file with Lambda).

49. About 73 percent of the respondents knew about the Supreme Court decision. Of this group, 47 percent disapproved and 41 percent approved.

50. Author's interview with Evan Wolfson, June 27, 1997.

51. Stoddard and then-legal director Abby Rubinfeld supplemented written appeals for mobilization with a bevy of interviews and speaking engagements; both also wrote law review articles attacking *Bowers*. See Rubinfeld 1986 and Stoddard 1987.

52. The Eleventh Circuit issued its decision on May 21, 1985. Rock Hudson's illness became public knowledge on June 24, 1985. The Supreme Court granted certiorari on November 4, 1985.

CHAPTER FIVE

1. Letter to Abby Rubinfeld, July 7, 1986 (on file with author).
2. Ky. Rev. State. Ann. § 510.100. "Deviate sexual intercourse" was defined

as “any act of sexual gratification involving the sex organs of one person and the mouth or anus of another” (Ky. Rev. State. Ann. § 510.010).

3. See especially *People v. Lino* (1994). If MOHR is understood to mean that Michigan effectively eradicated its sodomy statutes in 1990, then the beginning of stage 4 should move up from 1992 to 1990. The ambiguity of this temporal boundary highlights the fact that shifts in the structure of legal opportunities do not always occur at discrete points in time.

4. Amici included the American Friends Service Committee, the American Public Health Association, the Presbyterian Church (USA), the Union of American Hebrew Congregations, the Unitarian Universalist Association, and the United Methodist Church.

5. These were not the only constitutional challenges to sodomy laws to occur. Scattered individuals arrested and/or convicted of sodomy also challenged the law. Of those cases, only *Miller v. State of Mississippi* (1994) made it as far as a state court of last resort. Miller was convicted of committing “unnatural intercourse” with a seventeen-year-old male employee of the restaurant he managed, after first getting him drunk; he was sentenced to ten years in jail. He appealed, challenging his conviction on a number of grounds, including that Mississippi’s law (Miss. Code Ann. § 97–29–59 [1972]) violated state and federal guarantees of privacy. The Mississippi Supreme Court relied on *Bowers* to dismiss Miller’s federal privacy claim. It declined to address Miller’s state claim, because the case did not involve consenting adults. Said the court, “Clearly, no right of privacy attaches to sexual acts committed with children, who have been illegally supplied with alcohol” (*Miller*, 394).

I do not address *Miller* and similar sodomy law challenges because they were not part of any concerted effort to eradicate sodomy laws. Moreover, they were often poorly argued. (Miller’s attorneys, for example, cited only one earlier Mississippi case in support of their state privacy argument, and that case was only tangentially related to their claim.)

6. See, for example, *Campbell v. Sundquist* (1996), *Gryczan v. State* (1997), and *State v. Powell* (1998).

7. The ACLU also argued that the solicitation statute violated Christensen’s free expression rights to the extent that it criminalized discussions about engaging in private, consensual, noncommercial sodomy.

8. Arrests for private, consensual opposite-sex sodomy were likewise rare. As in *Powell*, virtually all arrests and convictions came in cases where sodomy was a lesser included charge to a sexual assault of some kind.

9. There are some limitations to this claim. The state can impose time, place, and manner restrictions, for instance, so long as those restrictions advance a legitimate governmental purpose.

10. These cases were *State of Louisiana v. Baxley* (1994), *Sawatzky v. Oklahoma City* (1995), *Christensen v. Georgia* (1996), and *City of Topeka v. Movsovit* (1998).

11. The exceptions were *State of Texas v. Morales* and *Louisiana Electorate of Gays and Lesbians v. Louisiana* (2002).

12. The exception to this trend was *Sanchez v. Puerto Rico* (2002).

13. *Doe v. Ventura* (2002), citing *Lefler v. Lefler* (1999, 422).

14. The amicus brief submitted by Concerned Women for America advanced

the argument that sodomy laws were necessary to prevent the spread of AIDS by promiscuous gay men, some of whom actively sought to catch and/or transmit the disease (27–28).

15. Poll results from Gallup and Princeton Survey Research Associates (PSRA) differ significantly from the ANES. According to Gallup and PSRA data, more than eight out of ten respondents favored equal employment rights for lesbians and gay men by the mid-1990s (see Yang 2000, 6–9). Differences in the Gallup/PSRA and ANES findings are probably a product of question wording. The ANES asked respondents whether they favored or opposed *laws* to protect homosexuals against job discrimination. Both Gallup and PSRA phrased their questions as one of “equal rights . . . in terms of job opportunities.” There is a difference between favoring the abstract notion of equal rights and supporting laws designed to protect members of specific groups against job discrimination, and it is not surprising to find more support for the former than the latter.

16. The question wording was as follows: “Do you think homosexuals should be allowed to serve in the United States Armed Forces or don’t you think so?” Data provided for analysis by the Inter-University Consortium for Social Research.

17. The question wording was as follows: “Do you think gay or lesbian couples, in other words homosexual couples, should be legally permitted to adopt children?” Data provided for analysis by the Inter-University Consortium for Social Research.

18. It is intriguing that all of these issues seeped into the public consciousness as a result of Lambda-backed court cases.

19. The Defense of Marriage Act is discussed further in chapter 7.

20. The ACLU raised federal equal protection and establishment of religion claims in *Sawatzky*; it raised federal privacy and equal protection claims in *Mousovitz*. GLAD and the ACLU of Rhode Island filed amici briefs in *State v. Lopes*, which involved a heterosexual man, and raised federal privacy and equal protection claims.

21. These states were Arkansas, Kansas, Maryland, Missouri, Oklahoma, and Texas.

22. As noted in chapter 3, this sort of lawyer swapping occurs commonly.

23. The factual underpinnings of *Sanchez* were in many ways as compelling as sodomy reform litigators could hope for, given that none of the plaintiffs in the case had been arrested. Rev. Margarita Sanchez had been threatened by a government official with prosecution under Puerto Rico’s sodomy law as a consequence of her exercise of the right to free speech. In 1997, Sanchez had testified before a committee of the Puerto Rico House of Representatives in opposition to a bill banning same-sex marriage. She was the only witness to testify against the bill. During her testimony she was questioned about her sexual activity, unlike any of the other witnesses. A legislator then threatened her with criminal prosecution as a result of her sexual orientation and sexual activity. The Puerto Rico Department of Justice subsequently announced that it intended to enforce the sodomy law if police brought them evidence of violations.

24. Michael Hardwick and his unidentified companion were held for over twelve hours. John Lawrence and Tyrone Garner were held for over a day.

25. That Kennedy authored the majority opinion in *Lawrence* had a touch of poetic justice to it: Kennedy had been tapped to fill Powell's seat.

26. This number includes Michigan for reasons discussed earlier in this chapter.

27. *United States v. Marcum* was before the U.S. Court of Appeals for the Armed Forces. Article 125 of the Code of Conduct prohibits consensual sodomy, regardless of the gender of the participants. Sodomy is defined to include oral and anal sex.

28. The subject of same-sex marriage will be discussed at length in chapter 7. It should be noted here, however, that GLAD (the organization behind the case) never expressly raised *Lawrence* as a rationale for its argument that the Massachusetts constitution required the recognition of same-sex marriages. *Lawrence* is a federal constitutional case. *Goodridge* was based entirely on state constitutional arguments.

29. Justice Kennedy's opinion in *Lawrence* had specifically noted that the case did not involve minors.

30. This is ironic in that Justice Kennedy declined to rule on the equal protection claim in *Lawrence* because he felt that the privacy claim was the more fundamental of the two and that a ruling on the merits of the latter would inevitably implicate the former. He wrote:

As an alternative argument in this case, counsel for the petitioners and some *amici* contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants. Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. (*Lawrence*, 2482)

31. The Republican leadership in the Senate has used *Lawrence* to argue the need for a federal constitutional amendment to ban same-sex marriage. See United States Senate Republican Policy Committee 2003.

CHAPTER SIX

1. The laws targeted by these measures varied widely in their scope. Most commonly, they provided at least a minimal amount of protection from discrimination based on sexual orientation in public employment. Many also prohibited discrimination in public accommodations. A few addressed other gay rights concerns, such as family and medical leave, health benefits, and domestic partnership. (Note that I use the word *law* loosely here to include not only legislative acts but also executive orders and other formal tools of public policy.)

2. This table excludes measures designed to prevent same-sex couples from legally marrying each other. See chapter 7 for a discussion of ballot measures in this context.

3. This success rate stands in stark contrast to the larger universe of popularly generated ballot measures, which succeed about 33 percent of the time (see Gamble 1997). However, it parallels the success of ballot measures concerned more specifically with civil rights. Gamble (1997) examined ballot measures in five different areas: housing and accommodations, school desegregation, English-language laws, AIDS, and gay rights. She found that civil rights protections were rolled back at the ballot box about three-quarters of the time.

4. *Citizens for Responsible Behavior v. Superior Court* (1991); *Romer v. Evans*; *In re Advisory Opinion to the Attorney General* (1994); *Morris v. Hill* (1996); *Equality Foundation of Greater Cincinnati v. City of Cincinnati* (1997); *Lowe v. Keisling* (1994); *Rose v. Keisling* (1996). The notable exception to this trend is *Equality*, which will be discussed subsequently.

5. For in-depth examinations of the electoral strategies of antigay rights activists, see Adams 1994; Lewin 1993; McCorkle and Most 1997.

6. See Schattschneider 1960 for further discussion of the impact of expanding the scope of conflict.

7. This is not to say that twenty-six states never utilize the initiative/referendum process. Most states, for example, require that proposed constitutional amendments be voted on by the electorate. *Legislatively* generated ballot measures, however, are different from *popularly* generated ballot measures. For an extended conversation about the use of referenda and initiatives, see Butler and Ranney 1978.

8. During this time, state legislatures enacted gay rights laws in seven states: Wisconsin, Massachusetts, Connecticut, Hawaii, New Jersey, Vermont, and California. Executives in ten states issued executive orders: Pennsylvania, California, New York, Ohio, New Mexico, Rhode Island, Washington, Minnesota, Oregon, and Louisiana. California is the only state to have both a legislatively originated and an executively originated gay rights policy.

9. It should be noted here that most states permit popularly initiated ballot measures in *local* elections (Eule 1990). Whether local gay rights laws generally face repeal efforts is a question beyond the scope of this study. Information is scattered and more difficult to obtain. Unlike statewide repeals, local repeal efforts rarely generate much nationwide publicity. Lambda keeps records of most measures that *qualify* for the ballot but rarely notes repeal *attempts*.

10. For more on the requirements for putting proposed measures onto the ballot, see Kehler and Stern 1994; Mabley 1984; Witt and McCorkle 1997.

11. California, Florida, and Oregon all have single-subject requirements for ballot initiatives.

12. Alaska, Florida, Idaho, Michigan, and Idaho all have title and/or summary requirements for proposed ballot measures.

13. *In re Advisory Opinion to the Attorney General* (1994). For other examples of successful preelection challenges to antigay measures, see *Collins v. Commonwealth* (1990), blocking a referendum to repeal Massachusetts's newly enacted gay rights law on subject-matter grounds; *Faipeas v. Anchorage* (1993),

blocking a referendum to repeal the sexual orientation clause of Anchorage's public employment and municipal contractor law because of its misleading title; and *Iorio v. Citizens for a Fair Tampa* (1995), blocking a referendum to repeal a Tampa, Florida, ordinance barring discrimination based on sexual orientation, based on postsignature changes in the wording of the ballot measure.

14. For other examples of courts rejecting preelection challenges, see *Privacy Right Education Project v. Moriarty* (1993), ruling that a challenge to a Missouri antigay initiative still in the signature-gathering phase was premature; *Lowe v. Keisling* (1994), ruling that a proposed statewide initiative did not violate Oregon's single-subject rule; and *Wagner v. Secretary of State* (1995), ruling that a proposed statewide measure in Maine was a permissible statutory initiative rather than an impermissible constitutional initiative and that the language of the measure was not misleading.

15. Executive Summary, Human Rights Ordinance, part 3, article 5, chapter 1, part 3, sections 1-5-301 through 1-5-321.

16. One wonders, in fact, *why* the Human Rights Commission of Colorado Springs proposed to include sexual orientation in the first place.

17. The membership of CFV shook itself out a bit as the group got rolling. Marco, for example, left the group after a few months, although he remained an important advisor. See Herman 1997 (143–44) for an fuller discussion of the membership of CFV.

18. Quoted in *Romer*, 1996, Brief for the NAACP Legal Defense and Educational Fund, Inc., the Mexican American Legal Defense and Educational Fund, and Women's Legal Defense Fund as *Amici Curiae* in Support of Respondents, 13, 18. One of these "facts" was that "Lesbians are now having babies conceived by homosexual semen."

19. The source for this and all other campaign materials is Gerstmann 1999 unless specifically stated otherwise.

20. Quoted in *Romer*, 1993, Plaintiffs-Appellees' Answer Brief, 11.

21. *Ibid.*, 11–12.

22. For extended discussions of attitudes toward civil rights laws in the context of gay rights, see Button, Rienzo, and Wald 1997; Schacter 1994.

23. For more on the use of symbols in politics, see Sears 1993.

24. The lineup changed a bit over the course of litigation. The plaintiff with AIDS died. A few individual plaintiffs dropped out, citing fear of adverse consequences in their personal lives. Two individual plaintiffs joined the case, as did the Boulder Valley School District.

25. There was significant dissension among the legal team over the timing of the legal challenge. Both Lambda and the ACLU thought the best legal strategy was to seek to prevent Amendment 2 from ever going into effect. Dubofsky thought the better strategy was to wait and gather evidence of the harmful effects of the law and then bring suit to declare it unconstitutional. Lambda and the ACLU ultimately prevailed. For a recounting of intralitigator tensions in *Romer v. Evans* see Keen and Goldberg 1998 (17–22).

26. For more on the impact of member turnover, see Schwartz 1988; Epstein and Kobyłka 1992.

27. For restrictions on the franchise, see *Kramer v. Union Free Sch. Dist. No.*

15 (1969) and *Cipriano v. City of Houma* (1969). For reapportionment, see *Reynolds v. Sims* (1964) and *Davis v. Bandemer* (1986). For minority party rights, see *Illinois State Board of Elections v. Socialist Workers Party* (1979) and *Norman v. Reed* (1992).

28. *Romer*, 1996, Brief for Respondents, 17.

29. *Romer*, 1996, Brief for Amici Curiae Asian American Legal Defense and Education Fund et al., 18–19.

30. *Ibid.*, 21.

31. *Romer*, 1996, Brief for Respondents, 41.

32. *Romer*, 1993, State of Colorado Trial Brief, 69.

33. In the context of owner-occupied rental housing, such an exception is sometimes referred to as the “Mrs. Murphy’s Boarding House” exception. See Anderson 1997.

34. *Romer*, 1993, State of Colorado Trial Brief, 72, citing *Pierce v. Society of Sisters* (1925) and also referencing Aldous Huxley’s *Brave New World* (1932).

35. *Ibid.*, 75.

36. *Romer*, 1996, Brief for Respondents, 45.

37. Of course, nothing prevents them from *becoming* legal standards in the future, should a court or legislature choose to invest them with legal meaning.

38. There are myriad examples of the legal system operating as an obstacle to, rather than a facilitator of, social reform in the context of other movements (e.g., Forbath 1991; Haines 1996). The movement to outlaw child labor is one classic example. Here, Congress was far more receptive to the claims of movement activists than were the courts. In fact, the Supreme Court twice overturned congressional legislation designed to end child labor, effectively blocking social reform in the area for several decades (Paul 1960).

39. For a more in-depth examination of the use of litigation to advance gay rights claims in the context of employment, see Achtenberg 1996; Leonard 1993.

40. Cf. Olson 1990.

CHAPTER SEVEN

1. For accounts of such “secret” same-sex marriages, see Eskridge 1996; Faderman 1991.

2. See, for example, *Jones v. Hallaban* (1973); *Singer v. Hara* (1974); *Jennings v. Jennings* (1974); *Slayton v. State* (1982); *Adams v. Howerton* (1982); *De Santo v. Barnsely* (1984); *In re Succession of Bacot* (1987); *Gajovski v. Gajovski* (1991).

3. Compare Eskridge 1996; Mohr 1995; Sullivan 1995; and Wolfson 1994—arguing for same-sex marriage—with Duclos 1991; Foster 1998; Hunter 1991; and Polikoff 1993—arguing against the pursuit of same-sex marriage.

4. As Ettelbrick saw it, seeking marriage ran contrary to the goals of gay liberation. These goals, she said,

must simply be broader than the right to marry. Gay and lesbian marriages may minimally transform the institution of marriage by diluting its

traditional patriarchal dynamic, but they will not transform society. They will not demolish the two-tier system of the “haves” and the “have-nots.” We must not fool ourselves into believing that marriage will make it acceptable to be gay or lesbian. We will be liberated only when we are respected and accepted for our differences and the diversity we provide to this society. (Ettelbrick 1989, 8)

5. Hawaii, like many other states, has an equal rights amendment in its constitution, making discrimination on the basis of gender subject to strict scrutiny.

6. Hawaii Revised Statute 572–1.

7. Article IV, section 1, of the U.S. Constitution states that “Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.”

8. See generally the Restatement (Second) of Conflict of Laws § 283 (1988).

9. See chapter 3 for a small sample of supporters. For a more complete listing of prominent individuals and groups supporting the Marriage Project, see the Lambda Legal Defense and Education Fund web site at www.lambdalegal.org.

10. Utah passed its legislation in 1995. Alaska, Arizona, Delaware, Georgia, Idaho, Illinois, Kansas, Michigan, Missouri (struck down in 1998 by the Missouri Supreme Court), North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Tennessee passed legislation in 1996.

11. Defense of Marriage Act (DOMA) 2(a), 28 U.S.C.A. 1738C (West Supp. 1998). DOMA is particularly notable because Congress rarely regulates domestic relationships, which are generally viewed as falling within the sphere of the states. For a fuller discussion of DOMA, see Butler 1998.

12. Senator Richard Lugar did not endorse the rally. Patrick Buchanan appeared in person, while Senator Bob Dole, former governor Lamar Alexander, and Steve Forbes sent written letters of support. See Dunlap 1996.

13. The name of the case had become *Baehr v. Miike* by this point. It took over three years to work its way to trial because the trial court judge (Judge Chang) postponed the proceedings in order to give the Commission on Sexual Orientation and the Law time to study and report on the legal inequities facing same-sex couples.

14. 1997 Haw. Sess. Laws 2786, Act 383.

15. Opinion of the Attorney General, No. 97–05 (1997).

16. 1997 Haw. Sess. Laws 2883, H.B. 117.

17. Approximately \$1.5 million was spent by each side during the campaign. The Mormon Church was the largest donor to the proamendment side. The Human Rights Campaign was the largest donor to the anti-amendment forces. See Eskridge 2002 for a more in-depth discussion of the subject.

18. The case at this point was known as *Baehr v. Anderson*.

19. These states were Arkansas, Florida, Indiana, Maine, Minnesota, Mississippi, Montana, North Dakota, and Virginia.

20. Alabama, Iowa, Kentucky, Washington, and, of course, Hawaii passed mini-DOMAs in 1998. In addition, Alaska passed a second mini-DOMA.

21. These states were California, Colorado, Nebraska, and West Virginia.

For a more extended exploration of the introduction, progress, and outcomes of anti-same-sex marriage bills, see the Lambda Legal Defense and Education Fund web site at www.lambdalegal.org.

22. 1996 Alaska Stat. § 25.011(a) and 25.05.013(e).

23. S.J. Res. 42, 20th Leg., 2d Legis. Sess. (Alaska 1998).

24. Although the campaign in Alaska received far less national media attention than the campaign in Hawaii, organized interests spent a lot of time and money attempting to influence the outcome. See Clarkson, Coolidge, and Duncan 1999.

25. For more on the origin of *Baker* see Eskridge 2002.

26. In this way, *Baker v. State* had a very different relationship to the universe of organized gay rights litigators than did *Storrs v. Holcomb* (1996). *Storrs* was a same-sex marriage suit brought in Ithaca, New York, by a gay male couple without the involvement of any gay rights organizations. The case raised numerous claims, including ones based on the U.S. Constitution. This frightened Lambda and the other litigators fighting for same-sex marriage because they had worked to *avoid* raising federal constitutional claims in order to ensure that the presumptively unfriendly U.S. Supreme Court would not be able to overturn a state court decision upholding the right to same-sex marriage. In the American system, state cases that do not raise federal claims cannot be heard by the U.S. Supreme Court. *Storrs* was ultimately dismissed by the New York courts, because the plaintiffs had made a procedural error by failing to include a necessary party (the New York State Department of Health). Robinson and Murray did not wish to seem like “renegades” (Robinson’s word, spoken in a telephone interview with me on May 19, 2002) and so worked assiduously with Mary Bonauto of GLAD to ensure that the major groups were consulted and involved in decision-making processes.

27. *In re Adopt of BLVB* (1993). Second-parent adoptions allow both parents in a dual-adult household to establish legal relationships with the children of the household.

28. The Common Benefits Clause reads as follows: “That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or set of persons who are a part only of that community” (VT Constitution, Ch. 1, Art. 7).

29. The state actually laid out seven rationales for banning same-sex marriage, but the court found all but one to be “absurd.” See Eskridge 2002.

30. It is not uncommon to dispense with trials in civil cases when the court determines that there are no significant matters of factual dispute.

31. Amicus briefs for the plaintiffs were filed by more than fifteen organizations, including Lambda, the ACLU, and the National Organization for Women. The state’s position also drew a number of supporting briefs, including ones from the Christian Legal Society, Agudath Israel of America, and the Roman Catholic Diocese of Burlington, Vermont.

32. This part of the ruling commanded a 4–1 majority. The lone dissenter, Denise Johnson, argued that the court’s own logic compelled it to order marriage licenses to same-sex couples.

33. Fifteen Vermont Statutes Annotated § 1204 (2000).

34. It is intriguing that statistics from the Vermont Department of Vital Statistics show that the majority of civil unions have been performed for couples who do not reside in Vermont. In 2000, nearly 80 percent of the 1,702 civil unions joined together non-Vermont couples. This statistic suggests that the majority of couples seeking civil unions are interested in its symbolic and/or political value rather than its monetary and personal benefits.

35. Lambda has already litigated cases involving interstate recognition of civil unions, with mixed results. For example, a Georgia court refused to recognize a woman's civil union to her partner as the equivalent of a marriage for purposes of determining custody (*Burns v. Burns*, 2002). Susan Burns and her ex-husband had entered into a consent decree prohibiting either parent from having their child in the home when an unrelated adult was staying overnight. Burns had argued that her civil union made her legally related to her same-sex partner and that the consent decree was therefore not applicable. The court disagreed, finding that it was not authorized to consider a civil union the equivalent of marriage, and that the state's prohibition of same-sex marriage would render the question moot in any respect. A New York court, in contrast, recently recognized a civil union as the legal equivalent of marriage for purposes of New York's wrongful death statute, allowing a gay man to sue a hospital for malpractice in the death of his partner (*Langan v. St. Vincent's Hospital*, 2003). Said the court, "in Vermont, John Langan is the spouse of Neal Spicehandler and is entitled to recover for his wrongful death. The issue remains, whether under full faith and credit, or principles of comity, he will be recognized as a spouse in New York, as would a spouse in a sister state common law marriage. . . . New York will recognize a marriage sanctioned and contracted in a sister state and there appears to be no valid legal basis to distinguish one between a same-sex couple" (*Langan*, 418).

36. "A Historic Victory: Civil Unions for Same-Sex Couples—What's Next!" was published on July 6, 2000. It can be accessed at www.lambdalegal.org.

37. Nebraska Constitution Art. I, § 29 (2001).

38. In Hawaii, proposed constitutional amendments may also be placed on the ballot by a majority vote of each house at each of two successive sessions.

39. Alaska Constitution Art. XIII, § 1.

40. Hawaii Constitution Art. XVII, § 3.

41. Vermont Constitution § 72.

42. Although without direct influence on the legislative process in Vermont, both of its senators (then–Republican James Jeffords and Democrat Patrick Leahy) also praised the decision for its fairness and flexibility.

43. Robinson, Murray, and the other gay rights activists lobbying the legislature were also unhappy with the committee's decision to support civil unions rather than same-sex marriage. However, they quickly decided to throw their support behind the civil union legislation because they came to believe that marriage was not politically feasible and that dissent within the lgb activist community might well torpedo the civil unions proposal. In effect, they decided that half a loaf was better than none. Robinson (2001) discussed this decision-making process in a speech to law students reprinted in the *Seton Hall Constitutional Law Journal*.

44. The vote in the senate was 19–11.

45. Personal interview with Beth Robinson, May 19, 2002.
46. It is worth noting here as well that although this chapter has focused on the effect of legal “wins” on the real lives of lgb people, a legal opportunity perspective is equally useful in helping to understand the effect of legal “losses.”
47. For example, the television shows *Roseanne* (1995), *Friends* (1996), and *Mad About You* (1998) have all featured same-sex weddings.
48. Lambda keeps a running tally of religious organizations supporting same-sex marriage. See the Marriage Project at www.lambdalegal.org.

CHAPTER EIGHT

1. These states were Arizona, Indiana, Massachusetts, and New Jersey.
2. For more information about judicial perceptions of homosexuality in the context of custody cases, see Benkov 1994; Katz 1988; Rivera 1986.
3. The latter formulation should occur rarely, if at all. As Meyer and Staggenborg (1996) have noted, social movements almost always generate opposition because they create political openness on their issues of concern.
4. See chapter 5.
5. See especially the Lambda case *Able v. United States* (1998).
6. See chapter 5. See also Gerstmann 1999.

AFTERWORD

1. As noted in chapter 7, second-parent adoptions allow both parents in a dual-adult household to establish a legal relationship with the children of the household. Massachusetts’s decision came down less than three months after Vermont’s parallel determination in *In re BLVB* (1993).
2. Gen. L., Ch. 151B, § 3(6) (11/89).
3. Massachusetts Laws, Ch. 207 § 11.
4. Not surprisingly, GLAD immediately set its sights on the 1913 law. *Cote-Whitacre v. Dept of Public Health* claimed that the law’s application violated equal protection rights under the state constitution. A trial court rejected that argument, ruling that the law applied equally to same- and opposite-sex couples. The decision of the Supreme Judicial Court of Massachusetts is pending as this update goes to press.
5. The marriage question was worded as follows: “Would you favor or oppose a law that would allow homosexual couples to legally get married, or do you not have an opinion either way?” Twenty-four percent favored the law, 53 percent opposed it, and 23 percent had no opinion. The civil union question was: “Would you favor or oppose a law that would allow homosexual couples to legally form civil unions, giving them some of the legal rights of married couples, or do you not have an opinion either way?” Thirty-four percent favored the law, 41 percent opposed it, and 25 percent had no opinion.
6. See, e.g., *Smelt, et al., v. County of Orange, California, In re Kandu, Wilson v. Ake*. It is worth noting that none of the attorneys pursuing these cases were

affiliated with any of the organized gay rights litigators.

7. Beth Robinson, personal interview, May 19, 2002.

8. The trial court ruled against Lambda's claim just a few weeks before the SJC handed down *Goodridge*. The intermediate court of appeals likewise ruled against Lambda. The New Jersey Supreme Court heard the appeal in February 2006; the decision was pending as this edition went to press.

9. These survey results also reflect the fact that the proposed ballot measures force voters into making choices that may imperfectly reflect their actual preferences. For example, a March 2005 University of Massachusetts, Lowell, poll surveyed four hundred Bay State voters and found that 56 percent of respondents favored allowing same-sex couples to marry, 37 percent opposed it, and 7 percent remained undecided. But when respondents were asked how they would vote on the then-live legislative amendment to ban marriage but create civil unions for same-sex couples, 45 percent said they would support it, 45 percent said they would oppose it, and 10 percent said they had not yet formed an opinion (Helman and Phillips 2005). The disparity in responses may indicate voter confusion. It may instead (or additionally) indicate that some voters were engaging in a complicated political calculus: willing to trade off their preferred option (whether marriage or no legal recognition) for a second choice (civil unions) in order to minimize the likelihood of an eventual outcome in which their least preferred option (whether no legal recognition or marriage) prevailed.

10. It is worth noting that in each instance petition organizers were able to gather far more signatures than necessary to place the initiatives on the ballot. Organizers in Michigan, for example, submitted 475,000 signatures, far more than the 317,000 needed by law.

11. As of February 2006. Several states, including Arizona, California, and Colorado are in the midst of citizen petition drives that, if successful, will result in additional measures on the ballot in 2006.

12. Opinion No. 7171, issued March 16, 2005.

13. Justice O'Connor announced her retirement in the summer of 2005; Chief Justice Rehnquist died shortly thereafter. Because Rehnquist reliably opposed gay rights claims when they came before the Supreme Court, replacing him with another conservative should do little to change the balance of the Supreme Court vis-à-vis gay rights claims. O'Connor is another matter. Her position was somewhat more favorable; she voted to uphold Georgia's sodomy law in *Bowers v. Hardwick* but voted to strike down Texas' sodomy law in *Lawrence v. Texas* and also to strike down Colorado's antigay amendment in *Romer v. Evans* (see chapters 4, 5, and 6). Replacing her with a justice more inclined to vote along the lines of Rehnquist may well shift the balance of the Court in a direction unfavorable to gay rights claims.

14. Both John Roberts and Samuel Alito have appellate court records that suggest they will be among the more conservative members of the high court, unlikely to read the Constitution in a way favorable to most gay rights claims.

15. Newsom's chief stumbling block was that California's Proposition 22 expressly limited marriage to opposite-sex couples. Newsom eventually claimed that California's equal protection clause gave him the right to disregard the plain meaning of Proposition 22. The law unconstitutionally discriminated against

same-sex couples, he argued; by disregarding it, he was actually following the constitution.

16. Political elites in a number of localities likewise took steps to promote the equal treatment of same- and opposite-sex marriages in the aftermath of *Goodridge*. The San Jose City Council, for instance, voted in March 2004 to recognize the same-sex marriages of city employees. Seattle's mayor issued the same policy via executive order. And several cities in New York State, including New York City, announced that they would recognize same-sex marriages and civil unions performed in other jurisdictions for all purposes of local law.

17. California's law (AB 205) took effect on January 1, 2005. It gives registered domestic partners the same legal treatment as spouses in most areas of state law. New Jersey's domestic partnership law (N.J.S.A. 26:8A-6) is much more limited in scope, but it does give registered domestic partners several important rights, including hospital visitation rights and the ability to make medical decisions for each other. It took effect on July 10, 2004.

18. In 1999, California passed a limited domestic partnership law (AB 26) that entitled registered domestic partners to visit each other in the hospital and provided domestic partner benefits to certain state employees.