

THREE

An Overview of Lambda and Its Litigation

Lambda opened its doors for business on October 18, 1973. In its first year of business it handled only three cases and raised about four thousand dollars. Its “office” was Bill Thom’s apartment, and its staff consisted of a few attorneys willing to volunteer their time to handle calls for assistance and to consider whether potential cases could and should be pursued. Much changed during the next thirty years. By the end of 2002, Lambda had handled over five hundred cases and boasted an annual budget of nearly eight million dollars. It had seventy-three people on staff and offices in New York, Los Angeles, Chicago, Atlanta, and Dallas.

Because it is both the oldest and the largest organization dedicated to litigating gay rights claims, the history of the Lambda Legal Defense and Education Fund is in no short measure the history of gay rights litigation in the United States. Lambda has involved itself in every major area of legal concern to lesbian, gay, and bisexual people. Its litigation has reflected the ever-widening spectrum of gay rights claims. Its actions have also had a major hand in shaping those claims.

In this chapter, I provide a general overview of Lambda and its litigation from its emergence in 1973 through the middle of 2003, when the U.S. Supreme Court handed down *Lawrence v. Texas*. My aim is twofold. The first is to lay the groundwork for the case studies that follow. The second is to tease out the sometimes subtle relationships between Lambda’s actions and the underlying structure of legal opportunities. I argue that Lambda’s growth over time is a product of both shifts in the LOS and the increasing capacity of Lambda and other organized litigators to recognize and respond to the opportunities created by those shifts. I also show that Lambda’s actions helped to shape the LOS. For ease of presentation, I break the material down by decade, first describing Lambda’s organizational resources and its litigation and then examining the underlying LOS.

Lambda's First Decade: 1973–82

The early years of Lambda's existence were inauspicious. The newly minted organization operated under several debilitating handicaps. One major problem was that Lambda had virtually no money. It did not even have an office until 1979, when it moved into space in the New York Civil Liberties Union. According to Thom, he "had an unrealistic notion that we'd apply to liberal foundations and partake of the same largess as other legal defense funds. That proved to be false" (LLDEF 1998, 5). Only a few foundations gave money, usually in small amounts. Lambda's money came almost entirely from individual contributions and occasional fund-raising events. A comment in Lambda's very first newsletter, published in 1976, illustrates the extremity of its financial problems. Noting that it operated "more or less on the edge of insolvency," Lambda claimed that it had "enough in the bank, barring unforeseen circumstances, for about the next 60 days" (LLDEF 1976, 2).

The organization was often forced to turn away cases for lack of money. For example, in its second newsletter, under the title "Money," Lambda noted two cases it turned down for financial reasons (1977). The first of these was *Matlovich v. Secretary of the Air Force* (1974), a military expulsion case that the ACLU had declined to pursue further after a loss in federal district court. Carrington Boggan, Lambda's chief legal counsel (and Bill Thom's law partner), chose to litigate the case privately, after Matlovich agreed to shoulder much of the out-of-pocket costs himself. The second was *Honeycutt v. Malcolm* (1977), a case involving gay prisoners. Although invited by a U.S. District Court in New York to represent the prisoners, Lambda was forced to decline when it could not find a funding source.

Lambda's financial constraints were reflected in its staffing. The organization operated entirely on a volunteer basis until 1978, when Barbara Levy was given a nominal salary as Lambda's first executive director. (Levy was the lone paid staff member until 1980, when a full-time secretary was hired.) Lambda's litigation priorities were set by a volunteer board of directors in its early years. The role of the board was to decide which cases to pursue and to locate attorneys to litigate them pro bono. Finding lawyers, however, was problematic. Few attorneys—even gay ones—were willing to litigate gay rights cases, largely because they were unwilling to risk being perceived as homosexual. As Bill Thom put it, "If you were outed at work you were out of work" (LLDEF 1998, 5). Moreover, attorneys at that time could be disbarred if their homosexuality

became known. Lambda's small board of directors comprised a large percentage of the universe of New York lawyers willing to handle gay rights cases. Founding board member Shepherd Raimi recalled that the early board was composed of "every gay lawyer or law student willing to go on the letterhead" (LLDEF 1998, 15). In practice, those board members ended up litigating most of Lambda's early cases.

Lambda was further hobbled by its limited ability to identify and track potential test cases outside the New York metropolitan area. When Lambda first opened its doors for business, the universe of gay rights litigation was ad hoc and atomistic. Litigators bringing gay rights cases worked in virtual isolation from each other, because mechanisms for communication and coordination were largely absent. Friendship networks between gay rights litigators were in their infancy. The media rarely covered gay rights issues, probably because very few reached the higher courts. And although the ACLU was taking on occasional gay rights cases, it did not have any staff members dedicated solely to the subject. As a result, Lambda was often unaware of cases in progress outside of New York City, where its small pool of volunteer attorneys was centered. In fact, in the 1970s, learning about *decided* cases was often difficult.¹ Only when cases outside the New York metropolitan area became highly visible—by appearing before a federal appeals court (*Gay Students Organization of the University of New Hampshire v. Bonner*, 1974) or through the filing of a writ of certiorari (*Enslin v. North Carolina*, 1976) or a petition for rehearing (*Doe v. Commonwealth's Attorney*, 1976) before the U.S. Supreme Court—did Lambda become aware of and involved in them. In such cases, Lambda's involvement was limited to filing amicus curiae briefs. As the foregoing might suggest, Lambda did not originate gay "rights" litigation, although it was the first organization dedicated to the task. It jumped into a parade already in progress. The mobilization of lesbians and gay men sparked by Stonewall spread rapidly throughout the nation, and much early litigation was initiated by individual gay rights activists in an ad hoc fashion.

The one resource Lambda had during its first period was potential clients. Lambda's board of directors spent much of its time winnowing down the myriad calls for legal assistance to the ones that would make the strongest test cases. Its legal criteria were straightforward. In order to be taken on, potential clients needed to show that they were being discriminated against by a governmental entity² because of their homosexuality and *only* because of their homosexuality. Most of the calls for assistance failed this test. Some were calls from people whose problems did

not have a “legal” resolution, such as teenagers kicked out of the house when their homosexuality was discovered by their parents. Others were calls from people with legal problems but whose claim was marred by bad facts.

The notion of good and bad facts can be a bit difficult to define, but perhaps the simplest way to conceptualize it is to say that good facts make the harm suffered by a potential client seem more obvious or more egregious while bad facts make the harm seem less obvious or egregious. For example, Lambda was very interested in attacking the constitutionality of sodomy laws, believing that they violated the fundamental right to privacy established by *Griswold* and its progeny. A good factual case for a sodomy challenge might involve someone arrested for engaging in consensual same-sex sex in the privacy of his own home (a place where privacy is constitutionally protected). A bad factual case, on the other hand, might involve someone arrested for sodomy whose sexual activity had occurred in a public location such as a park (where privacy is not constitutionally protected). Many of Lambda’s earliest requests for assistance fell into this latter category and so were rejected as potential test cases.

Given all the constraints it faced, it is not surprising that Lambda’s early involvement in gay rights litigation was quite limited. The organization took on only forty-two cases during its first decade, and sixteen of those originated in 1981 or 1982.³ As table 1 shows, Lambda’s early impact litigation efforts were centered in four principal areas: sodomy, family law (primarily custody but also the legal status of same-sex relationships), immigration, and first amendment litigation (primarily concerning the regulation of gay-related organizations). Lambda also fought discrimination in employment on five occasions and the military’s policy

TABLE 1. Size and Scope of Lambda’s Docket, 1973–82

Type of Case	Docket (%)	Number of Cases
Sodomy	19	8
Family	19	8
Immigration	17	7
Speech/association	14	6
Employment	12	5
Military	5	2
Youth	2	1
Miscellaneous gay	10	4
Non-gay	2	1
Total	100	42

of discharging lgb service members on two occasions. The majority of these cases occurred in and around New York City.

Behind the Litigation: LOS in Lambda's First Decade

Legal Frames, Cultural Frames, and Judicial Perspectives

A closer examination of Lambda's docket during its first decade of existence illustrates several features of the legal and cultural frames operating at that time. For example, thirty-one of its forty-two cases involved the public sphere rather than the private sphere. Custody cases were the principal exception to this rule. Lambda's focus on governmental regulations and actions rather than the actions of private individuals was based on the legal principle of "rationality." Stated briefly, private actors may do anything that is not explicitly illegal. Private employers may, for example, fire employees for being gay unless there is a law expressly prohibiting it. Governmental regulations and the actions of public officials, on the other hand, must have, at a minimum, a rational basis. Unlike private employers, public employers may not discharge employees without a reasonable cause. In circumstances where fundamental rights—such as the right to freedom of speech—are concerned, the government must have a compelling reason for restricting the exercise of those rights.

A core reason for Lambda's focus on the public sphere in the 1970s was that laws forbidding discrimination on the basis of sexual orientation were extremely rare. Without specific laws to hang an argument on, Lambda simply had no legal recourse to offer people who had suffered harm at the hands of private individuals because of their sexual orientation. However, to the extent it could convince courts that a particular public policy—such as barring homosexuals from immigrating, excluding them from military service, or preventing them from teaching children—was *irrational*, Lambda did have legal recourse. As increasing numbers of gay rights ordinances were passed in the 1980s and 1990s, Lambda's ability to bring suit on behalf of lgb people likewise increased.

Another feature of the legal and cultural frames in operation during Lambda's first decade can be seen through an examination of the claims made by Lambda's opponents in its cases. In virtually every case Lambda involved itself in, the criminalization of same-sex sexual conduct was invoked by opposing counsel to justify the disparate treatment of the lgb litigant.⁴ In *Gay Students Organization v. Bonner* (1974), for example,

the University of New Hampshire sought to justify its denial of recognition of a newly formed gay and lesbian student group on campus in part by arguing that students attending the group's functions would be likely to engage in sodomy as a consequence.

Given the invocation of sodomy laws to justify discrimination against lgb people in myriad legal contexts, it should come as no surprise that Lambda's board of directors considered the overturning of sodomy laws to be Lambda's most important priority. During its first decade of existence the organization confronted the constitutionality of sodomy statutes head-on in seven cases, while an eighth challenged a New York statute criminalizing "loitering for the purpose of engaging in deviant sex."⁵ It had some measure of success. In 1980, Lambda won a landmark victory when New York's Court of Appeals struck down the state's sodomy law. *People v. Onofre* (1980) marked the first time a state high court had found a sodomy statute unconstitutional in the context of same-sex sexual activity.

Although Lambda chose to focus on sodomy cases, custody cases were actually the most commonly litigated gay rights concern in the 1970s (Rivera 1979). The great majority of this litigation took the form of custody disputes between ex-spouses, where one (usually the father) sued for custody based on the homosexuality of the other (usually the mother). In a variation on the standard custody proceeding, lesbian and gay parents sometimes found themselves in the position of fighting their own parents or even grandparents over the custody of children. Lambda involved itself in three custody disputes during its first decade of operation, two involving disputes between ex-spouses and one involving a lesbian mother and her mother.⁶

Given that custody disputes were a more common problem for lesbians and gay men than were sodomy arrests, why did Lambda emphasize the latter over the former? The answer partly has to do with the personal preferences of Lambda's board of directors, which determined the cases Lambda would take on. But it also had to do with the existing cultural and legal frames.

Put simply, sodomy cases seemed more winnable than custody cases to Lambda's board of directors. Many judges, they knew, thought that consensual sodomy should be decriminalized. And the constitutional right to privacy articulated in *Griswold v. Connecticut* and its progeny, they reasoned, presented a legal hook on which to hang their contention that sodomy statutes should be abolished. As we shall see in chapter 4, privacy-based arguments about the constitutionality of sodomy statutes

proved more problematic to the courts than gay rights litigators had hoped they would be. However, in Lambda's early years, such arguments seemed particularly potent.

The legal and cultural frames surrounding parents and children in the 1970s made custody cases seem much less winnable to Lambda. A legal emphasis on furthering the "best interests of the child" lies at the heart of all custody cases. The idea here is that judges are supposed to take into consideration all the "relevant circumstances"⁷ of the particular case at hand and decide that case in the manner best calculated to secure the proper care, attention, and education for the children involved.

Because the determination of a child's "best interests" is so subjective, the outcomes of these cases are necessarily more a product of a judge's sociopolitical beliefs than an objective application of legal principles. What are the qualities of a good mother or father? What does a healthy, adjusted child look like? Which influences on a child's life are proper and which are not? The answers to these questions are derived more from cultural frames than from legal ones.

While many judges believed that consensual sodomy should be decriminalized, it did not necessarily follow that they thought lesbians and gay men were proper influences on children. Hitchens and Price published a survey of lesbian custody cases in 1978 in which they identified a number of commonly held judicial beliefs about the implications of lesbian parenting. Many judges, they found, viewed lesbians as mentally ill, unpredictable, and irresponsible people who took on either "male" or "female" roles in relationships and had a propensity to molest children or at least to engage in sexual activity in front of them. Accordingly, lesbian parenting was seen as endangering children in a number of different ways. The children were perceived to be at higher risk for sexual abuse, either by their mothers, their mothers' partners, or their mothers' lesbian friends. They were also thought to be at higher risk of becoming homosexual themselves and/or becoming confused in their gender identity. Furthermore, judges were concerned about the implications of lesbian parenting on children because they believed children would grow up believing in the social acceptability of same-sex relationships. Finally, Hitchens and Price found that judges commonly believed that children would be socially stigmatized as a result of living in a lesbian household.

In short, the prevailing judicial conception about lesbian parents in the 1970s was hostile. It's not surprising that under the circumstances lesbians and gay men rarely initiated custody cases. Rather they were forced into court when ex-spouses or other parties initiated legal action seeking

to remove custody and/or restrict them from being able to see their children. Lambda was hesitant to step into cases that seemed likely to lose, especially since their fact specificity made them more expensive than many other kinds of cases to prepare.

In sum, legal frames, cultural frames, and judicial beliefs about the nature of homosexuality all affected the kinds of cases Lambda chose to litigate in the 1970s. The lack of specific statutes forbidding discrimination on the basis of sexual orientation meant that Lambda was unable to address a wide array of discriminatory actions. The ever-widening scope of the right to privacy (first encompassing contraceptive use within marriage, then contraceptive use outside of marriage, then abortion) offered a potentially potent ground to challenge sodomy statutes, one that Lambda had some success in exploiting. The “best interests of the child” standard in custody cases, by contrast, made success difficult, largely because of the cultural frames about homosexuality invoked by presiding judges. In Lambda’s second decade of operation, the legal and cultural frames surrounding homosexuality would change enormously, opening up many avenues of litigation and shutting down others.

Alliance Systems, Conflict Systems, and the Configuration of Power

When Lambda first opened its doors for business, it was the only organization in existence dedicated to litigating on behalf of gay rights. By the close of its first decade, the alliance structure surrounding gay rights litigation had changed. Lambda was joined by several other gay rights law firms, most notably the Gay Rights Advocates and the Lesbian Rights Project (both formed in 1977),⁸ GLAD (formed in 1978), and the Texas Human Rights Foundation (formed in 1979).⁹

From Lambda’s perspective, the ACLU was by far its most important ally. When Lambda moved out of Bill Thom’s apartment in 1979, it moved into the New York offices of the ACLU. Although the two organizations retained separate identities, sharing office space encouraged the formation of close working relationships between the then-tiny Lambda and the comparatively enormous ACLU. This relationship benefited Lambda in several respects as the 1970s turned into the 1980s. It gave Lambda access to the ACLU’s resources, including its litigation expertise and organizational networks.¹⁰ But the benefits of the relationship were not entirely one-sided. The ACLU also tapped into the litigation expertise of Lambda’s staff and, based in part on Lambda’s urging, launched its own gay rights project in 1985.¹¹

Just as the alliance system surrounding litigation was beginning to coalesce by the close of the 1970s, so was the conflict system. The visible successes of gay rights activists in the 1970s sparked vocal opposition among those opposed to gay rights, most notably so in the context of newly enacted gay rights laws.

Laws forbidding discrimination on the basis of sexual orientation were unheard of at the time of the Stonewall Riot in 1969. Ten years later, forty-four different communities—mostly large cities or college towns—had instituted laws prohibiting some forms of sexual orientation-based discrimination.¹² The passage of these ordinances sometimes sparked enormous controversy. For example, in Boulder, Colorado, the 1974 passage of a citywide gay rights law sparked such a debate between supporters and opponents of the measure that the city council finally put the ordinance on the ballot for consideration by the entire electorate. It was repealed by a nearly 2–1 margin (Button, Rienzo, and Wald 1997, 86; Keen and Goldberg 1998, 6).

When in 1977 Dade County, Florida, became the first southern city to ban discrimination on the basis of sexual orientation in employment, housing, and accommodations, a similar backlash occurred. Conservative Christian singer Anita Bryant quickly announced that she would mount a campaign to repeal the ordinance through a ballot referendum. She formed a group, “Save Our Children (From Homosexuality) Inc.,” which depicted homosexuals (especially gay men) as immoral, predatory, and especially dangerous to the physical and moral welfare of children. Bryant summed up her message in a phrase that was quoted repeatedly by her supporters: “Homosexuals cannot reproduce so they must recruit” (Shilts 1982, 156).

Bryant’s repeal effort tapped into a wellspring of public opposition to the notion of gay rights: within five weeks of the ordinance’s passage, the proposed repeal measure had garnered more than six times the number of votes needed to qualify it for the ballot. Less than six months after the gay rights law passed, Dade County voters repealed it by a margin of 78 percent to 22 percent. Buoyed by the victory, Bryant embarked on a national tour to promote the repeal of similar laws in other localities. By the end of 1978, Bryant and her supporters had utilized citizen lawmaking to repeal gay rights provisions in three additional cities—Wichita, Kansas, where the repeal referendum garnered an 83 percent majority; St. Paul, Minnesota, 63 percent; and Eugene, Oregon, also 63 percent.¹³

Attempts to repeal gay rights ordinances were part of a larger mobilization of “New Right” activists in the late 1970s and early 1980s. The New Right coalesced around what they saw as the spiritual and moral

weakening of America, as exemplified by legalized abortion, the rising divorce rate, the proposed Equal Rights Amendment, the absence of prayer in public schools, and the very notion of “gay” rights.¹⁴ The Republican party was particularly solicitous of the concerns of these activists, including for the first time a plank in its 1980 platform specifically opposing any form of governmental endorsement for gay rights.¹⁵

The election of the New Right’s favored presidential candidate, Ronald Reagan, combined with the Republican capture of the Senate, signaled that, at least in the near future, the national political system would be far more open to New Right activists than to gay rights activists. The passage of antigay legislation in Congress further emphasized the power disparity between gay rights advocates and their opponents. In 1980, for example, Congress approved the McDonald Amendment, which prevented the Legal Services Corporation from providing “legal assistance for any litigation which seeks to adjudicate the legalization of homosexuality.” Then in 1981, it voted overwhelmingly to require the District of Columbia to retain its sodomy law.

In sum, Lambda witnessed the shaping up of both the alliance and the conflict systems surrounding gay rights during its first decade. These systems would become significantly stronger in the 1980s and 1990s. Allies would begin to work in concert, increasing Lambda’s ability to mobilize resources on behalf of gay rights litigation. New Right activists would find yet another symbol of moral decay around which to mobilize: AIDS. Events in the early 1980s also highlighted the lack of opportunity for advancing gay rights in the national political realm. This inhospitality would last throughout Lambda’s second decade as well.

Lambda’s Second Decade: 1983–92

Lambda’s capacity to mobilize resources in support of its gay rights litigation grew dramatically during its second decade. In 1983 it was housed in the offices of the New York Civil Liberties Union and had an annual income of about \$133,000. By the close of 1992, Lambda’s annual income totaled over \$1.6 million, and it had its own suite of offices in New York City, as well as two regional offices: one in Los Angeles and one in Chicago. Its paid staff grew from three to twenty-two during that time period and from one full-time litigator to five.

A major engine of Lambda’s growth was the organizational and fund-

raising abilities of its staff, particularly its executive directors. For example, Tim Sweeney became Lambda's executive director at the start of 1982, a position he held through the end of 1985. A non-lawyer, he dedicated his time to building Lambda's extralegal infrastructure, engaging in continual fund-raising, and using that money to hire a public information director, organize seminars, disseminate informational materials, and increase Lambda's visibility and membership base. A year after Sweeney's arrival, the organization was finally able to hire an attorney to coordinate the development and implementation of litigation.

Abby Rubinfeld became Lambda's first managing attorney in 1983, bringing with her a voiced commitment to developing a coherent set of litigation strategies and to improving communication and coordination among the growing community of gay rights litigators. As we shall see later in this chapter, Rubinfeld was instrumental in establishing the first mechanism for bringing together the growing community of gay rights litigators and in expanding the scope of Lambda's docket. The combined efforts of Sweeney and Rubinfeld shored up Lambda's financial base, expanded its outreach to the larger lesbian and gay community, and increased the communication and coordination network among litigators. By the end of 1985, when Sweeney stepped down as executive director, Lambda's budget had increased from \$80,000 to \$300,000.

That said, Lambda's visibility in the gay rights movement was still fairly low in 1985. Hiring Tom Stoddard as executive director was a coup: telegenic and personable, Stoddard was well known in New York's gay activist circles and widely respected for his work as the legislative director of the New York Civil Liberties Union and for his coauthorship of New York City's lesbian and gay rights ordinance. Under Stoddard's leadership, Lambda's visibility rose enormously. He pushed the organization into mainstream media outlets, writing editorials and appearing on television programs. This increased visibility "legitimated Lambda in the eyes of . . . a lot of donors, including big donors" (Robert Murphy, quoted in Freiberg 1997). As a result, Lambda's organizational capacities grew immensely. During Stoddard's tenure, Lambda not only moved into its own offices for the first time (in 1987) but opened a second office in Los Angeles (in 1990). When he stepped down at the end of 1991, the organization's budget topped \$1.6 million, and there were four full-time litigators in a staff of twenty-two.

Lambda's docket likewise grew. It took on 191 new cases between 1983 and 1992. As table 2 shows, the scope and emphasis of Lambda's litigation shifted considerably in its second decade. Emphasis on AIDS is

the most striking change. About 30 percent of Lambda's new cases grappled with sociolegal repercussions of the epidemic (about which more presently). At its peak in 1989, AIDS litigation swallowed up close to 40 percent of Lambda's docket. The percentage of Lambda's docket allotted to sodomy and immigration challenges, in contrast, fell off sharply.

That the proportion of docket space allotted to these issues dropped should not be taken to mean that they were no longer priorities for Lambda. The number of cases litigated in a given area is an imperfect marker of the importance of that area. Indeed, the number of AIDS cases on Lambda's docket surpassed sodomy cases in the midst of *Bowers v. Hardwick*, one of the most important gay rights cases ever litigated. Sodomy reform simply moved from being the major concern of gay rights litigators to being one of several major concerns.

One of these new priorities was family law. Rhetoric about the "gay agenda" aside, it is more accurate to speak of multiple gay communities than of a singular entity. Gender is one obvious marker of community boundaries, and gender-based conflicts have pervaded the movement for gay rights. For example, men greatly outnumbered women in early liberation groups and tended to focus on gay male concerns such as sodomy law reform, bar raids, and police entrapment to the virtual exclusion of custody, child care, wage discrimination, and other core lesbian-feminist concerns. Lesbians were far less likely to be entrapped and/or arrested than were gay men because as a rule they were less likely to solicit virtual

TABLE 2. Comparison of Lambda's Docket in Its First and Second Decades

Type of Case	Decade 1		Decade 2	
	Docket (%)	Number of Cases	Docket (%)	Number of Cases
Sodomy	19	8	5	9
Family	19	8	20	38
Speech/association	14	6	14	27
Employment	12	5	11	21
Immigration	17	7	2	3
Military	5	2	6	12
AIDS	0	0	30	58
Legislation	0	0	2	4
Youth	2	1	<1	1
Miscellaneous gay	10	4	4	7
Non-gay	2	1	6	11
Total	100	42	101 ^a	191

^aPercentage does not equal 100 due to rounding.

strangers for sex or to engage in semipublic sexual activity; they were angry that those concerns were viewed as more central to “gay” liberation than were the issues that more directly affected their lives.¹⁶

Lambda was not immune to these tensions. Its early emphasis on sodomy-related litigation made it vulnerable to the charge of being male centered—all the more so because the group’s intake records in the early 1980s showed that requests for assistance from lesbian mothers in custody battles outnumbered any other kind of request. The group’s efforts to reach out to the lesbian community underscored the existence of gender-related tensions. Lambda formally added family issues and relationships to its list of litigation priorities in 1983. Shortly thereafter, it pointed to two new “lesbian teacher” cases as evidence of its “commitment to working more extensively on lesbian issues” (*Lambda Update* 1984, 2).

Lambda was aided in its decision to diversity its docket by the arrival of Abby Rubenfeld as Lambda’s first managing attorney. Rubenfeld came to the position with a background in family law and pushed Lambda to take on more family law cases. She did not see this interest as taking away from the importance of sodomy law reform. In fact, she saw sodomy law reform as essential to advancing gay rights claims in the context of family law. Rubenfeld illustrated this linkage in her recounting of her first solo trial as an attorney, representing a lesbian mother in a child custody case.

I was a young lawyer, well prepared, and had a great case. There was a five year old child with cerebral palsy who could get all the services and physical therapy he needed in the public school system in Nashville, where his mother lived. The father and the grandparents wanted to bring the child back to Cleveland, Tennessee, and put him in a private school that could not offer the child any of the therapy that he needed. The school was not accessible to the handicapped, so the child could not even get into the school. To me it looked like an easy case. It turned out to be anything but easy.

I put on my case, and the other lawyer stood up and said, “But your honor, this woman is a criminal.” This was basically true. She was a violator of the state’s sodomy law. While status is not a crime, the fact is that gay men and lesbians violate the law by their sexual activity, and they are engaging in criminal acts. We are criminals in the eyes of the law and that is used against us. That is why these sodomy laws have to go; they are the nails in the closet doors. (Rubenfeld 1986, 61)

Lambda also began litigating a “new” kind of case in the 1980s, namely, ones based on the passage of laws forbidding discrimination on the basis of sexual orientation. These laws opened up additional avenues for gay rights litigation. In one case, Lambda initiated an enforcement action to try to give Wisconsin’s new gay rights law teeth, calling it “an opportunity to make precedent under the only state-wide gay rights law in the country” (*Lambda Update*, summer 1988, 10).¹⁷ In another instance, Lambda attempted to defend a new gay rights measure against backlash. In 1984 the Salvation Army, the Roman Catholic Archdiocese of New York, and Agudath Israel challenged then-New York City mayor Ed Koch’s authority to issue an executive order requiring contractors with the city to certify that they did not discriminate on the basis of various categories, including sexual orientation (*Salvation Army v. Koch*, 1985). Lambda filed an amicus brief defending the order and also coordinated the submission of a brief from a coalition of civil rights groups.

Although litigation remained at the core of Lambda’s activities during its second decade, its work was not limited to the courtroom. Tim Sweeney and Tom Stoddard both placed a lot of emphasis on public education. Lambda began engaging in myriad extrajudicial activities under their leadership. In 1983, for example, Lambda testified before a subcommittee of the House Committee on Government Operations concerning issues of confidentiality in AIDS surveillance and research. Similarly, Lambda cosponsored a day-long conference called “Lesbians Choosing Motherhood” in the fall of 1984.¹⁸ Perhaps the single most important extrajudicial project Lambda involved itself in was the creation of the Ad-Hoc Task Force to Challenge Sodomy Laws. We turn to a discussion of that group now.

Behind the Litigation: LOS in Lambda’s Second Decade

A Developing Alliance System

As noted previously, Lambda’s status as the only dedicated gay rights law firm lasted for only a few years. By the close of the 1970s, it was joined by a handful of other groups scattered across the nation. The ACLU also continued to litigate gay rights cases and in 1986 formally created the Lesbian and Gay Rights Project. These groups would form the backbone of the alliance system surrounding gay rights.

Lambda's relationship with the other gay legal organizations was a complicated one. On the one hand, the organizations competed with each other for a limited pool of money, prestige, and public recognition (see Vaid 1995). Lambda and the Boston-based GLAD frequently engaged in "turf" battles in the 1980s as each organization attempted to expand its sphere of influence.¹⁹ On the other hand, the groups quickly became intertwined with one another—trading staff, filing amicus briefs in each other's cases, and coordinating litigation processes.

The web of connections tying the groups together often led through the ACLU. When Lambda moved out of Bill Thom's apartment and into dedicated office space in 1979, it was in the ACLU's New York building. Because the prestige of the ACLU and its affiliates lent credibility to gay rights claims, gay legal groups sought out ACLU involvement or sought to piggyback on ACLU-backed cases. Staff from gay legal groups sometimes sat on the boards of regional civil liberties unions. Kevin Cathcart's recollection of the formation of the ACLU's Lesbian and Gay Rights Project illustrates the web of relationships tying the groups together.

Years ago, this is in the mid-80s . . . Lambda was in the ACLU building over on 43rd Street in New York. There was no ACLU project. And we lobbied the ACLU very hard about "Why aren't you doing more? Why don't you have a project? Why don't you create a job?" . . . [A]nd I was at that point at GLAD not at Lambda and Lambda was a much bigger player, a much, much bigger player because they were there [in New York]. Tom [Stoddard] was involved and Tom also worked at the New York Civil Liberties Union and Tom was on the ACLU National Board and when I was at GLAD I was on the board of the Civil Liberties Union in Massachusetts, so we all have lots of overlaps with the various civil liberties unions. . . . We pushed them to do this. We wanted them to do this. I don't see it as a bad thing that they do it. I don't see it as competition. I see it as: it would be shocking if the ACLU did not have a project.²⁰

The single most important connection in the alliance system surrounding gay rights litigation was forged on November 20, 1983, when, at the urging of then-Lambda legal director Abby Rubinfeld, Lambda and the ACLU hosted a nationwide meeting of gay rights litigators working on sodomy law reform. It was not the first effort to bring together the various groups working on gay rights.²¹ It differed from earlier meetings,

though, in that it led to the formation of the Ad-Hoc Task Force to Challenge Sodomy Laws, the first ongoing mechanism for communication and coordination between the myriad sodomy reform litigators across the nation. The core purpose of the Ad-Hoc Task Force was to be what one litigator called “a central place to discuss constitutional theory and litigation strategies” (quoted in *Lambda Update* winter 1985, 5). The task force’s immediate objectives included targeting a few states for sodomy challenges, creating appropriate litigation strategies, and amassing a central directory of information and resources to use in future challenges to sodomy laws (*Lambda Update*, February 1984).

The Ad-Hoc Task Force became a formal project of Lambda in 1985. In 1986, after the Supreme Court’s decision in *Bowers v. Hardwick*, the task force rechristened itself the Litigators’ Roundtable and shifted its emphasis from eradicating sodomy laws to containing the damage wrought by the decision and pursuing litigation in other areas. The Litigators’ Roundtable is widely credited among gay rights litigators as providing a forum for hashing out legal theories, considering rhetorical approaches, forging agreement between the various groups, and coordinating the process of litigating (see, e.g., Freiberg 1997; Vaid 1995).

I do not want to leave the impression that the existence of the Litigators’ Roundtable has erased intracommunity conflict. The gay rights movement has never been homogeneous: the membership of the community, the goals of the movement, and the vehicles for achieving those goals have all been matter of intense debate.²² These conflicts did not disappear with the formation of the Litigators’ Roundtable. As we shall see in subsequent chapters, significant intracommunity conflict existed over how to attack sodomy laws and antigay initiatives as well as whether to pursue the right to marry. However, it seems clear that the Litigators’ Roundtable has served as a useful tool for resolving many disagreements and for achieving intergroup consensus about legal strategies vis-à-vis divisive issues; it has also minimized duplication of effort among the various gay rights groups and facilitated the conduct of litigation.

Two Sudden Shifts in Cultural and Legal Frames: AIDS and *Bowers*

Although evidence of the existence of AIDS in the United States can be traced back to the early 1970s, it escaped medical attention until the early 1980s.²³ The general public paid it little attention until June 24, 1985—the

day actor Rock Hudson announced he had AIDS. Hudson's illness ignited a panic about AIDS among heterosexuals. New York City's AIDS hotline, for instance, reported a fivefold jump in daily calls after Hudson's announcement, largely from anxious heterosexuals (Rimer 1985).²⁴ "Contagion-fear" among heterosexuals mounted through 1988. Much of the media coverage during this time was alarmist, emphasizing the crossover of AIDS from the gay male population to the heterosexual population.²⁵

The emergence of the AIDS epidemic had myriad effects on the course of the gay rights movement. One of them was to increase the prominence of litigation. In fact, by 1990, AIDS had stimulated more litigation than any other disease in the United States, in absolute numbers and across all time (Gostin 1990, 1961). Much of this litigation related only indirectly to gay rights per se, involving instead questions of blood banks' liability for transfusion-related AIDS, the legality of insurance caps on AIDS-related medical payments, and the rights and responsibilities of health-care workers vis-à-vis AIDS. But because of the association of AIDS with male homosexuality in the United States, litigation around AIDS and gay rights was inevitably intertwined. As Nan Hunter (1993, 1706) noted, "Although legal and social reaction ostensibly focused on the disease, the disease itself was so closely associated with gay men in the first years of the epidemic that much of the reaction seemed a euphemism for opinions of male homosexuality."

Opponents of gay rights forwarded the theoretical possibility of HIV transmission as a reason to deny a variety of gay rights claims. As we shall see in chapter 4, opponents of sodomy reform used AIDS to argue that homosexuality posed a public health threat, arguing that sodomy laws were necessary to stem the spread of the epidemic. But gay rights opponents also raised the specter of AIDS—often successfully—in cases not directly involving sexual activity. Among other things, they pointed to the syndrome as a reason to prevent gay men and lesbians from forming gay rights groups, working with the public (especially in the food and health-care industries), and securing custody and visitation rights to their children.²⁶ In 1985, Lambda's then-executive director Tim Sweeney phrased the impact of AIDS on gay rights this way: "There is no question that AIDS now puts a veneer over the top of every civil rights issue I see. Last month a Vermont legislator tried to make it a felony for a gay man to give blood" (Specter 1985, 4).

AIDS clearly acted as a critical event in refocusing Lambda's litigation priorities. Lambda became actively involved in the area at its outset: in

1983 it litigated the first AIDS-related discrimination lawsuit in the country.²⁷ By the mid-1980s Lambda was confronting an avalanche of requests for help from gay men encountering AIDS-related discrimination in housing, employment, insurance, and a host of other areas. According to the group's intake records, for example, requests for AIDS-related assistance increased 300 percent between 1984 and 1985. Lambda responded to this outpouring of need by incorporating AIDS-related litigation into its mission, a route that its sister organizations by and large did not take.

One of the most important effects of this decision was that it dramatically improved Lambda's ability to raise money. Mainstream foundations that had previously shied away from underwriting gay rights efforts donated money for Lambda's AIDS-related work.²⁸ The impact these grants had on Lambda's bottom line can be seen in table 3, which itemizes Lambda's annual income from 1980 through 2002. Table 3 also shows what is perhaps the most symbolically resonant impact of AIDS on Lambda's organizational growth: the addition of bequests as a revenue source in the late 1980s.

Of course, AIDS was not the only generator of income for Lambda. If AIDS was a long-term critical event stimulating lesbian and gay mobilization, the 1986 Supreme Court decision in *Bowers v. Hardwick* was a suddenly imposed grievance.²⁹ In a scathingly worded opinion written by Justice Byron White, the Supreme Court found the claim of a "fundamental right to engage in sodomy" to be "at best, facetious." Chief Justice Warren Burger took the additional step of writing a concurrence to emphasize his abhorrence of homosexuality, based on what he described as "millenia of moral teaching."

Lambda attorney Evan Wolfson, who drafted Lambda's amicus brief in *Bowers*, referred to *Bowers* and AIDS as "the two towering paradigm shifters of the '80s."³⁰ Wolfson described *Bowers*'s impact thus: "It energized a grass-roots movement and tapped into a deeper anger and politicized people. Lambda mushroomed after [*Bowers*], as did a number of other groups. [*Bowers*] had a whole galvanizing effect [in addition to its legal effects]."³¹

Lesbians and gay men were clearly angered by the Court's ruling. Within hours of its announcement, small protests erupted in several cities across the nation. The largest of these occurred in New York City, where more than one thousand protestors marched on a federal court house, clashing with police during the process. The case was also a major impetus for the 1987 March on Washington for Lesbian and Gay Rights, which drew over half a million participants. A prominent feature of the

march was a mass protest on the steps of the Supreme Court building in which some 600 people were arrested, making it the largest single act of civil disobedience in the United States since the anti-Vietnam War demonstrations.³²

Lambda moved quickly to capitalize on the anger *Bowers* provoked within the lgb community. Solicitation letters were mailed out within a week of the decision and *Bowers* became the cornerstone of Lambda's fundraising appeals for the next year.³³ Using favorable and unfavorable court decisions is a tried-and-true method for raising funds. Although there is no way to know for certain how much additional funding Lambda was able to leverage out of *Hardwick*, the threefold increase in

TABLE 3. Breakdown of Lambda's Income by Source, 1980–2002^a

	Individual Contributions	Bequests	Grants	Special ^b Events	Other ^c	Total ^d
1980	18,625	—	6,000	8,519	522	33,666
1981	46,981	—	—	5,716	326	53,023
1982	38,518	—	23,500	13,994	3,515	79,527
1983	64,308	—	41,500	24,458	3,207	133,473
1984	116,893	—	60,000	13,452	5,323	195,668
1985	181,239	—	52,800	39,705	26,110	299,854
1986	553,402	—	—	49,933	16,379	897,814
1987						1,019,642
1988	475,343	49,102	187,107	135,615	50,647	897,814
1989	688,525	87,740	276,181	193,217	77,704	1,323,367
1990 ^e	630,966	145,670	177,050	162,862	46,940	1,163,488
1991	943,565	124,890	277,580	263,053	69,744	1,678,832
1992	907,951	223,514	278,399	162,473	46,957	1,619,294
1993	968,542	387,611	197,955	211,460	52,019	1,817,587
1994	1,102,422	194,354	280,406	398,073	191,395	2,166,650
1995	1,303,486	864,170	322,941	477,680	124,738	3,093,015
1996	1,393,475	2,196,843	217,612	486,415	141,471	4,435,816
1997 ^f	1,500,000	1,500,000	348,000	512,000	388,000	4,300,000
1998	1,940,477	783,705	397,348	722,026	168,522	4,062,078
1999	2,266,070	934,162	623,919	832,768	291,569	4,948,488
2000	2,205,828	1,193,486	890,102	980,181	187,479	5,457,076
2001	2,682,167	924,792	949,618	1,063,173	(271,317)	5,348,433
2002	2,797,824	2,326,910	1,448,372	1,139,023	119,636	7,831,765

^aData collected by author from Lambda's audited financial reports. Categorical data for 1987 unavailable.

^bFund-raisers of various types.

^cAttorney fees, speaking engagements, publications, interest, and other miscellany.

^dExcluding the value of donated services. In 2002, donated services were valued at over \$1.5 million.

^e1990 figures are for nine months only, because Lambda switched from calendar to fiscal year accounting.

^f1997 figures are rounded.

individual contributions in 1986 compared to 1985 suggests that Lambda was reasonably successful in using a litigation defeat to mobilize support. A comparison of the organization's budgeted and actual income in 1987 is also suggestive. Lambda projected an income of \$500,000; its actual income was twice that. The increased visibility that both AIDS and *Bowers* gave the gay rights movement likewise resulted in increased giving from corporations and other organized entities. For instance, in 1987, three prominent law firms held a then-unprecedented fundraiser for Lambda, raising more in one evening (about \$50,000) than Lambda had raised in the first four years of its existence.³⁴

Lambda was able to take the money it raised in the aftermath of AIDS and *Bowers* and expand its organizational base. The group opened a western regional office in Los Angeles in 1990, followed by a midwestern regional office in 1992.³⁵ It was also able to increase its litigation capacity. Much of this increased capacity was dedicated to AIDS-related litigation, of course. But Lambda also expanded its litigation in its more "traditional" areas—including family law, employment law, and military challenges—utilizing the funds generated from *Bowers* and AIDS. Ironically, AIDS and *Bowers* often made it harder for Lambda to litigate successfully in those areas, a subject explored in more detail in chapter 4.

In the end, the emergence of the AIDS epidemic and the Supreme Court decision in *Bowers v. Hardwick* radically impacted both the legal and the cultural contexts of gay rights. AIDS opened up a vast new sphere of litigation even as *Bowers* brought a decade of litigation efforts to a screeching halt. Both served as rallying points for a massive lesbian and gay mobilization. And both increased the sociopolitical visibility of homosexuality in the United States, garnering new support from heterosexual allies even as they emboldened gay rights' opponents. In Lambda's third decade, the battle over gay rights would only grow larger. And litigation would be at the heart of the fray.

Lambda's Third Decade: 1993–2002

Lambda exploded in size during its third decade. It opened two new regional offices, one in Atlanta, the other in Dallas. Its annual income nearly quadrupled, from \$1.6 million in 1992 to \$7.8 million in 2002.³⁶ Its staff grew from twenty-two to seventy-three; the number of litigators from five to fifteen. Lambda was far and away the dominant player in gay rights litigation by this point, in terms of both the size of its litigation

staff and its financial wherewithal. Table 4 compares Lambda's budget and staffing figures in 1996 to those of the other organized gay rights litigators. (There is nothing special about the year 1996 for the purposes of this table. It is simply the year for which comparative data were most readily available.) As it shows, the relative positions of Lambda and the ACLU had decisively switched by this point in time; Lambda out-massed the ACLU's Lesbian and Gay Rights Project by a fourfold margin. Lambda retained its size advantage even factoring in spending by the ACLU's state affiliates on gay rights litigation. Matt Coles, the executive director of the ACLU's Lesbian and Gay Rights Project, put affiliate spending on gay rights in the realm of \$1.5 million in 1996, bringing the ACLU total up to some \$2.2 million—only two-thirds of Lambda's spending (Freiberg 1997).

As in its second decade, a major engine of Lambda's growth in its third decade was the organizational and fund-raising abilities of its staff, particularly Kevin Cathcart, its executive director. Although Tom Stoddard's leadership had helped to propel Lambda into the center of the gay rights movement, day-to-day management of the organization was not his strong suit. When Cathcart took over as executive director in 1992, organizational management was a core priority; Lambda grew exponentially under his leadership.

The size of Lambda's docket grew along with its organizational resources. During its third decade, Lambda took on 269 cases (table 5). A perusal of these cases reveals that gay rights claims broadened

TABLE 4. Comparison of Lambda with Other Gay Legal Groups, 1996

Organization	Year Founded	Budget ^a	Legal Staff ^a
Lambda Legal Defense and Education Fund	1973	\$3.1 million	12
ACLU National Lesbian and Gay Rights Project	1985	\$700,000	3
ACLU state affiliates		\$1.5 million	
Gay and Lesbian Advocates and Defenders (GLAD)	1978	\$650,000	3
National Center for Lesbian Rights (NCLR) ^b	1977	\$500,000	2
Servicemembers Legal Defense Network (SLDN)	1993	\$448,000	3

^aBudget and staffing data come from Freiberg 1997 (21).

^bFormerly the Lesbian Rights Project, a project of the Equal Rights Advocates.

significantly in the 1990s. Lambda’s “family” litigation is illustrative of this trend.

While litigation arising from the AIDS epidemic continued to occupy a prominent place on Lambda’s docket during the years between 1993 and 2002, it was superseded in numerical prominence by litigation centered on the familial relationships of lgb people. About a quarter of Lambda’s family docket involved custody disputes between formerly married parents, a kind of case Lambda had been litigating since its inception. A handful of cases concerned openly lgb people attempting to adopt or foster children as single parents, another issue that Lambda had been litigating for some time. But much of Lambda’s family docket involved “new” legal claims.

For example, Lambda’s docket included a dozen second-parent adoption cases, where the same-sex partner of a biological or adoptive parent was attempting to establish formal legal ties with the children of the relationship. It also included about a dozen same-sex coparent custody disputes, where people in a dissolved same-sex relationship battled over custodial and visitation rights to the children of that relationship.³⁷

The “new” cases on Lambda’s family docket that garnered the most public attention, though, concerned marriage. In its third decade, Lambda became a major proponent of the legal theory that same-sex couples had a constitutional right to marry. It advanced this position in a

TABLE 5. Comparison of Lambda’s Docket in Its Second and Third Decades

Type of Case	Decade 2		Decade 3	
	Docket (%)	Number of Cases	Docket (%)	Number of Cases
Sodomy	5	9	6	17
Family	20	38	30	82
Speech/association	14	27	5	13
Employment	11	21	11	29
Immigration	2	3	3	7
Military	6	12	2	6
AIDS	30	58	22	58
Legislation	2	4	9	23
Youth	<1	1	5	12
Miscellaneous gay	4	7	5	13
Non-gay	6	11	3	9
Total	101 ^a	191	101 ^a	269

^aPercentages do not equal 100 due to rounding.

number of high-profile cases, including Hawaii's *Baehr v. Lewin*, Vermont's *Baker v. Vermont*, and New Jersey's *Lewis v. Harris*.³⁸

Increased diversity of gay rights claims can also be seen in other areas of Lambda's litigation. In the 1980s, for instance, Lambda took cases to enforce recently enacted gay rights measures. It also confronted a new variation on lawmaking targeted at lgb people, namely, measures designed to "fence gay people out"³⁹ of the political process by prohibiting the future enactment of gay rights laws. It initiated a handful of suits designed to derail these measures, most famously *Romer v. Evans*.⁴⁰

By the mid-1990s, Lambda also began to take cases that gay rights groups had tended to avoid in prior years: cases involving lgb children. Some of its cases were designed to force schools to protect lgb students from antigay violence. For example, one of Lambda's first cases in this area involved the refusal of school officials to intervene to protect an openly gay boy from constant harassment and beatings by his fellow students, despite the boy's repeated requests for help (*Nabozny v. Podlesny*, 1996).⁴¹ Lambda also began to bring cases to force schools to allow lgb student groups to meet.⁴² In a related vein, Lambda also filed suit to force the Boy Scouts to accept openly gay scout leaders. In the most well-known of these cases, *Boy Scouts of America v. Dale* (2000), Lambda convinced the New Jersey Supreme Court that the Boy Scouts should be viewed as a public accommodation and hence subject to New Jersey's law prohibiting antigay discrimination in public accommodations. On appeal to the U.S. Supreme Court, however, this ruling was overturned on the basis of the Boy Scouts' First Amendment right to freedom of association.

Lambda also involved itself in a handful of cases dealing with the rights of transgendered people during its third decade. For example, it represented the mother of Brandon Teena in a case arising from his brutal rape and murder when Teena's status as a biological female had been discovered.⁴³ It also filed an amicus brief in a case dealing with the validity of a marriage between a man and a postoperative transsexual woman.⁴⁴

The contours of Lambda's litigation broadened in yet another way in the 1990s. It began to immerse itself more heavily in the earlier stages of litigation rather than entering cases in the appeals stage or filing an amicus curiae brief. All things being equal, organized litigators generally prefer to be a part of cases from their inception rather than joining them at a later stage or acting as amicus curiae. By acting as counsel from the inception of a case, litigators can shape the factual issues and legal theo-

ries that are presented to the court. The drawback to this approach is its burden on a group's financial and staff resources.

Participation as an *amicus curiae* enables a group to advance its concerns and forward legal theories in a less expensive fashion. Limiting involvement to *amicus* status allows a group to spread limited resources across more issue areas, while still allowing it to leverage the case at hand to mobilize adherents and educate the public. Its major drawback as a strategy concerns the control, or lack thereof, of a case's progress. An *amicus* can offer additional sociolegal arguments, but it cannot control the issues, facts, or venue. It is, in Joseph Kobylka's words, "fixing its argument to a wagon of someone else's design" (1987, 14).

Lambda has always pursued a blend of direct involvement and *amicus* participation. Even in the cases in which it has directly involved itself, however, the group has traditionally waited until after the trial stage, entering only on appeal. This approach reflects the tension between depth and breadth. The trial stage is generally the most expensive and labor-intensive part of litigation. By waiting to join promising cases that have already made it past the trial stage, Lambda has sought to conserve its limited resources. In the 1990s, Lambda altered the relative allocation of its resources somewhat, developing an increasing number of legal challenges from scratch. This shift in litigation strategy largely reflected Lambda's increasing ability to absorb the costs involved.

Lambda's increasing organizational capacity also allowed it to alter the parameters of its mission. One key change instituted during Lambda's third decade was the expansion of its extrajudicial activities. Lambda created several programs—including the Marriage Project, the Foster Care Initiative Project, the Youth and Schools Project, and the Education and Public Awareness Department—whose emphasis was more on fostering sociopolitical change and public education than on litigation *per se*.

The Foster Care Initiative Project is illustrative of Lambda's expanded focus. Supported by a Ford Foundation grant, Lambda examined the foster care policies and services of fourteen states as they pertained to the needs of lesbian, gay, bisexual, and transgendered (lgbt) youth.⁴⁵ Based on its findings, Lambda developed several proposals for reform and then shopped them around to relevant state agencies and institutional actors. It also created a toll-free number for lgbt youth in foster care to report discrimination and distributed posters containing this number to foster care agencies across the nation.

The scope and direction of Lambda's actions during its third decade

both reflected and shaped the structure of legal opportunities surrounding gay rights. Since chapters 5 through 7 explore the interaction of LOS and gay rights litigation in the specific contexts of sodomy, antigay initiatives, and marriage, I limit my discussion here to a few brief highlights.

Behind the Litigation: LOS in Lambda's Third Decade

The 1992 Elections

If the 1980 elections signaled the increasing prominence of the New Right in American politics, the 1992 elections announced the arrival of gay rights at the center of political discourse. Every Democratic presidential candidate actively courted the gay vote. Opposition to gay rights was a key feature of the Republican national convention.⁴⁶ An article published in the *New York Times Magazine* at the height of the presidential election campaign, titled "Gay Politics Goes Mainstream," explored the context of the political debate over gay rights.

For some political strategists, especially those in the Presidential race, this is a game, with the gay issue to be manipulated from state to state for maximum electoral advantage. But for many on both sides of the sexual-orientation divide, it is a holy war—an inevitable confrontation of two forces that have been building strength for a decade. And it is ugly. The religious right and some other conservatives push the fear button, linking homosexuality to child molesting, while homosexuals tug at compassion one minute, invoking AIDS, then spew venom the next, outing conservative gay Congressmen and the gay and lesbian children of Government officials and right-wingers.

Strictly speaking, this is a battle about specific issues, like whether homosexuals have a right to equal job opportunities or to serve in the military. (Clinton stresses that his commitment to gay rights ends there.) But it is really a bigger and more complex fight over whether America can accept homosexuality, over whether it is O.K. to be gay. (Schmalz 1992, 18)

With Clinton's election, lgb people gained their first presidential ally. Lambda sought to benefit from this turn of events. Shortly after Clinton's election, Lambda attorneys met with high-ranking White House officials

to discuss matters related to gay rights and AIDS (Cathcart 1993). Such access to administration officials had been unavailable to gay rights advocates under prior administrations. Throughout the Clinton years, Lambda and other gay rights organizations sought to take advantage of the relative openness of the administration to press their claims.⁴⁷

Notwithstanding the importance of Clinton's election in shifting the configuration of power with respect to gay rights, other aspects of the 1992 elections proved equally, if not more, important to Lambda. Measures on the ballots of two states (Oregon and Colorado) and two cities (Portland, Maine, and Tampa, Florida) were designed to tap into the reservoir of public opposition to gay rights. While the measures in Oregon and Portland failed, the measures in Colorado and Tampa passed. Of the latter, Colorado's was the more significant because it amended the state's constitution to invalidate all existing state and local provisions barring discrimination on the basis of sexual orientation and to prohibit the future enactment of any such legislation.

The passage of Colorado's Amendment 2 prompted Lambda to turn its focus to defeating antigay ballot measures. Together with the ACLU and the Colorado Legal Initiatives Project, Lambda filed suit to block the implementation of Colorado's Amendment 2. Lambda also began preparing for the onslaught of copycat measures that antigay activists were attempting to place on ballots across the nation. Over the next few years, Lambda filed myriad preelection challenges designed to disqualify antigay measures from making it onto ballots. It encouraged get-out-the-vote campaigns and other sorts of political activism designed to defeat those measures that made it to the ballot. And it litigated the constitutionality of antigay ballot measures that passed. Lambda's activism in this areas continued unabated through 1996, when the U.S. Supreme Court ruled in *Romer v. Evans* that Colorado's antigay measure was unconstitutional. At that point, attempts to pass antigay measures slowed to a trickle and Lambda was able to focus more heavily on its other gay rights concerns. Among these, the most prominent was clearly same-sex marriage.

A Radical Shift in Legal Frames: Baehr and Its Aftermath

Were one to try to rank the most important shifts in the LOS surrounding gay rights during the 1990s, the 1993 decision by the Hawaii Supreme Court in *Baehr v. Lewin* would have a strong claim to the number one

spot. In ruling that Hawaii's ban on same-sex marriage constituted sex discrimination under the state's constitution and remanding the case for a trial to determine whether this discrimination was permissible, the Hawaii Supreme Court fractured a long-standing judicial consensus that marriage was solely the province of opposite-sex couples.

This decision had widespread repercussions both for Lambda and for the larger movement for gay rights. For one thing, it hijacked Lambda's agenda. Prior to the 1993 decision in *Baehr*, Lambda had been struggling internally with the question of whether to pursue equal marriage rights for same-sex couples.⁴⁸ The Hawaii Supreme Court effectively silenced this debate, because the stakes had become too high for Lambda to ignore. Lambda added marriage to its formal list of priorities and became cocounsel in *Baehr*.⁴⁹ It also developed the Marriage Project, taking the unusual step of dedicating several staff members to work full-time on political organizing around marriage. Lambda's reasons for doing so reflected its recognition that the door opened by *Baehr* could be closed again through the legislative process.

And indeed, realizing that the legal scales had shifted against them, opponents turned to state and federal legislatures. Dozens of bills to deny recognition to same-sex marriages were introduced in states across the nation. Lambda expended much energy mobilizing opposition to those bills when its calculations suggested that they might be defeated. And although many of them were deflected, over thirty states and the federal government had passed laws denying recognition to same-sex marriages by the time the Hawaii Supreme Court issued its final decision in *Baehr* in 1999. Ironically, the court ultimately ruled that there was no right for same-sex couples to marry in Hawaii.⁵⁰

The final ruling in *Baehr* did not end the conflict over same-sex marriage, because by the time it came down copycat suits had been filed in several other states. One of these cases, *Baker v. State of Vermont*, resulted in a decision that came down nine days after the final ruling in *Baehr*. In counterpoint to *Baehr*, *Baker* held that the state of Vermont was required to grant same-sex couples all the rights and benefits it provided to married couples. Although the decision stopped short of saying that same-sex couples had the right to marry it came closer than any other court in the nation had.

As Lambda's third decade drew to a close, a new wave of copycat litigation was under way. GLAD, which was cocounsel in *Baker*, promptly challenged the constitutionality of Massachusetts's ban on same-sex mar-

riage (*Goodridge v. Dept. of Public Health*, 2003). Lambda instituted a parallel challenge to New Jersey's law in 2002 (*Lewis v. Harris*, in progress.) Activists in Indiana and Arizona similarly initiated lawsuits seeking to compel their states to recognize marriages among same-sex couples.⁵¹

Legal Frames and Judicial Perspectives

Shifts in the legal frames surrounding gay rights extended far beyond *Baehr* and *Baker*. A key reason Lambda was able to broaden the contours of its litigation in the 1990s was the increased availability of helpful legal frames in general. By the close of 2002, thirteen states had passed reasonably comprehensive gay rights laws.⁵² Eight additional states had measures prohibiting antigay discrimination in public employment.⁵³ Hundreds of localities had instituted similar provisions. By one estimate, over one-third of the U.S. population lived in an area that had a state or local gay rights law in 1999 (van der Meide 2000). The existence of these laws increased Lambda's ability to raise several kinds of gay rights claims, mostly involving employment but also including issues such as housing and access to public accommodations.

The increased availability of legal frames was not limited to legislative and executive enactments. Case law also began to become more favorable. Nowhere is this more evident than in Lambda's custody and adoption cases. By the 1990s, judges were increasingly unwilling to say that lgb parents were unfit per se to raise children. An evolving majority rule required a showing of some nexus between parental homosexuality and harm to children. One study indicated that less than one-third of American jurisdictions in the 1990s presumed that parental homosexuality was harmful to children, while more than two-thirds required affirmative proof of any allegations of harm to children based on parental homosexuality (Stein 1996). While courts in some states continued to react with hostility to the concept of lgb parents,⁵⁴ other courts were increasingly willing to place a judicial stamp of approval on homes headed by lgb parents. For example, in 1999, the Illinois Court of Appeals had this to say about two pairs of lgb parents seeking second-parent adoptions: "Petitioners in both of these cases came to our state court system in order to be allowed to adopt children, children with whom they had already formed a loving relationship over a period of time. A higher purpose cannot be imagined" (*In Matter of Petition of C.M.A. / In Matter of Petition of M.M. & J.S.*, 1068).

Alliance and Conflict Systems

The alliance and conflict systems surrounding gay rights grew much larger in the 1990s. The breadth of these systems can be seen clearly in the political battles and litigation surrounding antigay initiatives and same-sex marriage. In both instances, one of Lambda's major goals was to build alliances with a wide range of non-gay actors and organizations. Civil rights groups and religious groups were seen as particularly desirable allies.

Lambda's alliance-building efforts in the context of antigay initiatives were largely focused on soliciting amicus briefs in *Romer v. Evans*. By the time *Romer* came before the U.S. Supreme Court, more than three dozen organizations had signed on to amicus briefs supporting Lambda's position. Included among them were several groups representing the interests of other minority groups, such as the NAACP Legal Defense and Educational Fund, the Puerto Rican and Asian American Legal Defense and Education Funds, the National Council of La Raza, and the National Organization for Women. Also represented were a number of religious groups, including the Union of American Hebrew Congregations, the Anti-Defamation League, and the United Church Coalition for Lesbian/Gay Concerns. Other prominent amici included the American Psychiatric and Psychological Associations and the National Association of Social Workers. The crown jewel of Lambda's coalition-building efforts, however, can be seen in two amicus briefs. Seven states and the District of Columbia joined together to submit an amicus brief opposing Amendment 2.⁵⁵ Ten cities likewise submitted a joint brief.⁵⁶

Lambda's alliance-building efforts in the context of marriage differed somewhat from its efforts in the context of antigay initiatives. Although it sought amicus support, it placed heavy emphasis on gathering signatories for its "Marriage Resolution," a document setting forth reasons why same-sex couples should be permitted to marry. Lambda used the "Marriage Resolution" for several purposes: stimulating discussion and public education around the issue of same-sex marriage, mobilizing potential adherents, and demonstrating the breadth of support for same-sex marriage. Over the course of several years, Lambda garnered the signatures of a wide range of non-gay actors and organizations, including a number of religious figures and denominations.⁵⁷ Three cities signed on, as did the state Democratic parties of California and Washington and several politicians.⁵⁸

Lambda was not alone in forging alliances. The opposition system

surrounding gay rights also grew stronger during the 1990s and focused heavily on same-sex marriage. Preventing same-sex marriage became a rallying cry that mobilized conservatives and religious groups to political activism (see especially Goldberg-Hiller 2002; Herman 1997; Patton 1997). Among the most prominent of these groups were the Church of Latter Day Saints (Mormons), the Lutheran Church (Missouri Synod), Agudath Israel of America, the Catholic Church, and Focus on the Family. Seven states joined together to file an amicus brief supporting Colorado's antigay amendment in *Romer*.⁵⁹ Eleven states filed an amicus brief opposing same-sex marriage in *Baehr*.⁶⁰

In sum, Lambda's actions during its third decade came about largely in response to consequential events in the public sphere. New laws and policies—and in some cases the *possibility* of new laws and policies—catapulted the subject of gay rights into the center of public discourse. Tensions over homosexuality were played out in the ballot box and in the halls of Congress and dozens of state legislatures, as well as in the Supreme Court and the high courts of many states. The alliance and conflict systems surrounding gay rights broadened. The configuration of power shifted. And once again, changing legal and cultural frames opened up some areas of litigation and shut down others.

Conclusion

Shifts in the structure of legal opportunities may open spaces for legal challenge, but unless movements have the capacity to recognize and respond to such opportunities, they will pass unnoticed (Sawyers and Meyer 1999). In this chapter, I have argued that Lambda's growth is a product of both shifts in the LOS and the increasing capacity of Lambda and other organized litigators to recognize and respond to new opportunities.

I wish to be clear here that shifts in the LOS did not automatically translate into increased resources for Lambda, nor did they account for all of Lambda's growth. Shifts in the legal structure provide *opportunities* for action, not the action itself. That depends on the agency of social movement actors. In the case at hand, Lambda recognized these shifts as opportunities for mobilization and worked to translate the opportunity into the reality. For example, Lambda chose to involve itself in AIDS-related litigation from the outset of the epidemic, unlike some other groups, which drew a sharp division between AIDS and gay rights. Lambda (and the ACLU) also made a conscious decision to bring

together the various organizations and individuals involved in sodomy litigation. Similarly, Lambda chose to respond to the decision in *Baehr* by engaging in political as well as legal activism around the right to marry.

I also wish to be clear that Lambda's actions in turn helped shape the structure of legal opportunities in which it operated. The notion of LOS implies a balancing of agency between state and social movement. Social movement organizations like Lambda are not merely passive entities forced to wait for opportunities to arise; they can actively help to produce them. As just one example, Lambda helped engineer the shift in legal opportunities created by *Bowers*, *Romer*, and *Baehr*. Of course, the fact that actors such as Lambda can produce changes in the LOS does not mean that those changes will always be desirable ones. The very notion of social movement agency necessarily implies that actors may make poor choices as well as smart ones. We shall pursue this theme in greater detail in chapter 4 when we explore the decisions Lambda and other organized litigators made in their efforts to eradicate sodomy laws.

A related feature of LOS is that it is often multidimensional. *Bowers* is a good example of this feature. While the case clearly presaged a closing of *legal* space for action, Lambda was able to take this legal loss and use it as an agent for lgb mobilization. *Romer* also shows the multidimensionality of LOS. The passage of Colorado's Amendment 2 presaged a closing of space for *political* action but opened up space for *legal* action; by turning to the courts Lambda was able to subvert a localized political loss into a nationwide legal gain. *Baehr* too illustrates the multidimensionality of LOS. The 1993 Hawaii Supreme Court ruling initiated a cascade of both legal and political opportunities. It served as an agent for lgb and antigay mobilization. Legal opportunities, in short, may be available to multiple actors operating in multiple domains.

An obvious implication of this is that legal opportunity and legal change do not flow unproblematically from each other. Shifts in the LOS do not necessarily provide clear road maps for action. They are subject to multiple interpretations, and movement actors responding to them may misinterpret them, miss them, or be outmaneuvered by countermovement actors also responding to them. Unfortunately for social movement litigators, the value of any particular shift in legal opportunity, like Schrödinger's cat, exists only as a wave of probabilities until the box is opened, that is, until movement actors attempt to capitalize on it. In the next four chapters, we examine the relationship between legal opportunity structure and litigation success.