

# EVERYDAY LAW FOR GAYS AND LESBIANS

BY ANTHONY C. INFANTI

## Chapter 1

### An Introduction

“It is easy to concede the inevitability of social injustice and find the serenity to accept it. The far harder task is to feel its intolerability and seek the strength to change it.”

—Judge David Bazelon

My mother passed away when I was thirty years old. She was the kind of woman who could embarrass you and make you laugh all at once—even after she passed away. At my mother’s funeral, a middle school teacher told me stories from the time that my mother had worked in her special education class. The teacher chuckled as she confessed her amazement at the things my mother would say to the students, things that she herself would never dare to say. My mother would suggest to the students that it might be time to take a bath or buy some deodorant, and once even asked a particularly troublesome student if he ever got sick, clearly implying that his absence from class would be a welcome occurrence.

A few years before her death, while she was still working at the school, my mother returned home from work one day visibly upset. When my father asked what was wrong, she recounted a tirade that she had heard earlier in the day in the teachers’ room. One of the teachers had been loudly disparaging lesbians and gay men. This upset my mother because, by that time, I had been out of the closet for a number of years and my partner and I had been visiting my parents most weekends. My parents liked having us around and always tried to cajole us into staying the entire weekend. So, my mother knew that this teacher’s acerbic remarks were not

meant only for the disembodied “homosexuals” that she kept assailing, but applied equally to me and my partner.

Even though my mother took these remarks personally, she did not speak up or counter them in any way—she just sat there suffering in silence. My father, who had initially had a very difficult time accepting my homosexuality, was rather surprised at my mother’s reaction (or, more precisely, lack thereof). For a few moments, he sat there shaking his head in a mixture of disappointment and disbelief. When he finally looked up at the outspoken woman that he had been married to for more than thirty years, he asked her how she could have remained silent. Why hadn’t she defended me? Why had she chosen to hold her tongue this one time, when she had never before hesitated to speak her mind—whether for good or for ill?

\* \* \* \* \*

I share this story with you because it simultaneously fills me with sadness and hope: for me, it both exemplifies the current predicament of the American lesbian and gay movement and demonstrates the potential for positive change in straight attitudes toward lesbians and gay men. To explore these themes more fully, in the first part of this chapter I survey the social and legal landscape that surrounds us, explain why I view our current situation as a predicament, and consider the source of that predicament. Then, in the second part of the chapter, I set the stage—and the tone—for the remainder of the book by suggesting that our individual lesbian and gay narratives can be a radical and powerful tool for promoting positive change in how society and the law view and treat lesbians and gay men. The ultimate goal of this book is to empower and inspire each of us to deploy these narratives in the most effective way possible.

## **The Predicament**

The *Oxford English Dictionary* defines a “predicament” as a “[s]tate of being; condition, situation, position; esp. an unpleasant, trying, or dangerous situation.” When I examine the social and legal terrain that surrounds us, I find us situated somewhere far short of the unqualified acceptance that we seek and a mere stone’s throw from the unadulterated hostility that defines our past. This proves to be an unpleasant, trying, and dangerous situation indeed.

### **Measuring Progress: How Far We Have Come**

To some, this assessment may sound bleak.<sup>1</sup> After all, you might counter, the lesbian and gay movement in the United States did not coalesce until the late 1960s and early 1970s.<sup>2</sup> In the short span of the past several decades, the movement has made remarkable strides in normalizing homosexuality. Straight society has gone from treating homosexuality as the taboo “love that dare not speak its name” to routinely talking about the increasing “acceptance” of lesbians and gay men into the “mainstream.” Once reviled, the lesbian and gay community is now considered a “niche” advertising market.<sup>3</sup> There appears to be no shortage of lesbian and gay characters in film and on television, and there was recently a race to create the first lesbian and gay cable television channel. In addition, an ever-growing number of employers are offering domestic partner benefits to their employees; many have also added sexual orientation to their nondiscrimination policies.

With high-profile successes in the courts, the legal tide likewise appears to be turning in favor of the lesbian and gay movement. In a stunning reversal of its decision in *Bowers v. Hardwick*,<sup>4</sup> the U.S. Supreme Court in *Lawrence v. Texas*<sup>5</sup> struck down the remaining state

sodomy laws. Not even a year later, in *Goodridge v. Department of Public Health*,<sup>6</sup> the Massachusetts Supreme Judicial Court extended the right to marry to same-sex couples in Massachusetts. Several other jurisdictions have enacted domestic partnership or civil union regimes that provide a measure of legal recognition to same-sex couples, including California, Connecticut, the District of Columbia, Hawaii, Maine, New Jersey, and Vermont.

And, comparatively speaking, one would expect the United States to be more advanced than many other countries in its treatment of lesbians and gay men. Why else would lesbians and gay men who are persecuted in their native countries seek—and, in a number of cases, be granted—refuge here?<sup>7</sup> Moreover, many people in non-Western countries perceive gay identity and gay pride to be a threatening Western, and particularly American, export.<sup>8</sup>

### **Measuring Our Progress: How Far We Have to Go**

Further embracing the geographic sense of “situation,” we could easily imagine ourselves to be on a journey away from a dark, suffocatingly oppressive place that gives shape to the unadulterated hostility of our past and to be traveling down a road (with all of its twists, turns, detours, and dead-ends) toward the bright hope of a future, unqualified acceptance of lesbians and gay men. But, as soon as we see ourselves traveling down a road, it becomes clear that the upbeat assessment of our situation privileges a backward-looking measure of progress; in other words, by this measure, whether (and how much) progress we have made is determined by looking back to see how far we have come.

Progress can, however, also be measured from a forward-looking perspective; in other words, whether (and how much) progress we have made can as easily be determined by looking ahead toward our destination to see how far we still have to go. Yet, this slight shift in

perspective casts our progress in an entirely different light. In this new light, the advances made by the lesbian and gay movement over the past several decades no longer seem remarkable, but fitful and slight. A great deal of hostility continues to be directed toward lesbians and gay men, and homosexuality continues to evoke feelings of shame and discomfort in both straights *and* gays. This shame, discomfort, and hostility manifest themselves in a myriad of ways:

*The Closet.* Far too many lesbians and gay men still feel the need to live in the closet because they fear the repercussions of admitting their homosexuality. James McGreevey, the former governor of New Jersey, is just one recent, notable example. McGreevey resigned his office in 2004 after announcing both his homosexuality and an extramarital affair with another man.

*The Media.* Notwithstanding the increased frequency with which lesbians and gay men are portrayed on television and in film, the lesbian and gay characters that we do see too often replicate and reinforce stereotypes. The characters also fail to reflect the diversity of the lesbian and gay community and the real lives of lesbians and gay men. Societal discomfort with homosexuality is further evidenced by the comparative rarity of on-screen physical intimacy between members of the same-sex.

*Employment.* Only eighteen states and the District of Columbia have enacted laws that prohibit discrimination on the basis of sexual orientation in both public and private employment. Although it has been asserted that relatively few employment discrimination claims have actually been made under these laws, a recent empirical study maintains that, when the raw number of complaints is adjusted to take into account the estimated number of lesbians and gay men in the

workforce, “gay rights laws are used with greater frequency than the raw numbers imply.”<sup>9</sup> In reality, claims of sexual orientation-based employment discrimination were made at about the same rate as claims of gender-based employment discrimination.

And contrary to the stereotype of lesbians and gay men as economically privileged, two recent studies have found that gay and bisexual men actually earn lower wages than other men (and significantly lower wages than married men).<sup>10</sup> These studies also found that lesbians and bisexual women earn higher wages than other women (married or unmarried); however, the authors seemed more tentative in drawing conclusions from this latter data because of the potential interaction between sexual orientation and gender in determining wages. The authors speculated that any negative effect on wages caused by a lesbian’s or a bisexual woman’s sexual orientation might be counterbalanced by positive effects due to her departure from traditional gender roles (particularly with regard to marriage and child-rearing, which are often perceived to influence a woman’s commitment to market labor).

Even those who remain in the closet in an attempt to pass as straight and avoid the adverse impact of sexual orientation-based employment discrimination might find themselves suffering the effects of indirect discrimination. It has been

pointed out [that] passing [as straight] may require a conscious effort to avoid potentially awkward social interactions that contribute to job satisfaction or advancement for other workers. The isolation involved in many passing strategies could lead to higher absenteeism and job turnover, and the energy devoted to passing might reduce productivity. In this case, the behavior is not an intrinsic characteristic of the worker but an effect of indirect discrimination within a workplace perceived as threatening. Two individuals with equal productive

abilities would have differential productivity and, therefore, differential wages because of the work environment's effect on the gay individual's productivity.<sup>11</sup>

*Bias crimes.* Anti-gay violence persists at high levels. When adjusted for population size, lesbians and gay men report higher rates of bias crimes than do African-Americans or Jewish people, and they report significantly more crimes against the person than either of those groups.<sup>12</sup> Consider, by way of example, the years 2003 and 2004: in the geographic area covered by the National Coalition of Anti-Violence Programs (which includes less than 30% of the national population), the number of incidents of violence against gay men, lesbians, bisexuals, and transgender individuals increased 8% from 2002 to 2003 and again increased 4% from 2003 to 2004.<sup>13</sup> Although there was a 4% decrease in the number of victims suffering injuries in 2003, the number of victims suffering serious injuries rose 3%, and the number of murder victims rose 80% (from 10 in 2002 to 18 in 2003). Again in 2004, despite a 2% decrease in the number of victims suffering injuries, the number of victims suffering serious injuries rose an astounding 20%, and the number of murder victims rose 11% (to 20 in 2004). Disturbingly, it appears that anti-gay violence spikes whenever the lesbian and gay community finds itself in the spotlight. For instance, there was a noticeable spike in anti-gay violence in the latter half of 2003—when the *Lawrence* and *Goodridge* decisions were issued—which then continued into the first half of 2004.

The ability to physically menace and even kill lesbians and gay men with such impunity stems from the fact that these crimes often go unreported out of the victim's fear of being outed or harassed by the police. Even when these crimes are reported, advocacy groups find it necessary to press for the investigation of complaints. According to the National Coalition of Anti-Violence Programs, in 2004, there was an 82% increase in the number of bias crime

complaints that police refused to take, and 66% of the bias crime complaints that were taken resulted in no arrest. It should come as little surprise then to hear reports of reactionaries calling for an “open season” on lesbians and gay men.<sup>14</sup>

*Legal Troubles.* The lesbian and gay movement’s high profile legal successes have been matched by equally high-profile failures. To take a recent example, the same-sex marriage movement was dealt a significant series of blows in July 2006. Over the span of just a few short weeks, the New York Court of Appeals, which has a reputation for being progressive, held that New York law effectively bans same-sex marriage and upheld that ban against constitutional attack; the Washington Supreme Court upheld its same-sex marriage ban against constitutional attack; the Georgia Supreme Court upheld its state constitutional ban on same-sex marriage against a procedural attack that had been successful in a lower court; the Massachusetts Supreme Judicial Court ruled that, should it pass all of the necessary steps for approval, a voter-initiated amendment to the state constitution could prospectively ban same-sex marriage; and the U.S. Court of Appeals for the Eighth Circuit found that Nebraska’s state constitutional ban on recognizing same-sex marriages, civil unions, domestic partnerships, or any other legal relationship between same-sex partners did not violate the federal constitution.<sup>15</sup>

*An International Perspective.* When our legal progress is viewed from a wider, international perspective, it also becomes clear that the United States is far from being a leader (and, in fact, is only slowly becoming a follower) in recognizing and remedying lesbian and gay rights issues. In 1996, South Africa became the first country to include an explicit ban on sexual orientation discrimination in its constitution, providing a stark contrast to current attempts in the United States to enshrine discrimination against same-sex couples in the federal constitution.

While Americans are generally hostile to the idea of same-sex marriage, the Netherlands, Belgium, Canada, South Africa, and Spain have all extended the right to marry to same-sex couples. A number of other countries (including Denmark, Norway, Sweden, Iceland, Finland, France, Germany, and Great Britain) have put in place quasi-marriage regimes, which afford almost all of the rights and obligations of marriage, or semi-marriage regimes, which afford a limited selection of the rights and obligations of marriage.

More than twenty years before the U.S. Supreme Court's decision in *Lawrence v. Texas*, the European Court of Human Rights began the "development of international human rights law in the area of gay and lesbian sexuality"<sup>16</sup> by holding that Northern Ireland's sodomy law violated the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>17</sup> In the late 1980s and early 1990s, the ECHR reaffirmed its interpretation of the European Convention when it found that the sodomy laws of Ireland and Cyprus also violated the convention.<sup>18</sup>

Over the past quarter century, the ECHR's decisions concerning sexual orientation have not been uniformly positive; however, commentators have noted that the ECHR has become "increasingly receptive to human rights claims brought by lesbian and gay applicants" since the late 1990s.<sup>19</sup> For example, the ECHR has held the following to constitute violations of the European Convention: (1) employing different ages of consent for heterosexual and homosexual relations, (2) the United Kingdom's ban on lesbians and gay men serving in the military, (3) a Portuguese appellate court's overturning of a lower court ruling that awarded custody of a young girl to her gay father, (4) the criminalization of homosexual relations between more than two men in private, and (5) denying the surviving member of a same-sex couple the benefit of a rent law that permitted surviving life companions to succeed to decedent companions' tenancies.<sup>20</sup>

The United Nations Human Rights Committee has on several occasions considered the

application of the International Covenant on Civil and Political Rights to sexual orientation discrimination.<sup>21</sup> In 1994, nearly a decade before the decision in *Lawrence v. Texas*, the Committee found that Tasmania's sodomy law violated the ICCPR.<sup>22</sup> In that decision, the Committee also noted that the references to "sex" in the provisions of the ICCPR that guarantee equal protection of the law without regard to status also cover sexual orientation. The Committee later reaffirmed this interpretation of the ICCPR in another case brought against Australia.<sup>23</sup> In that case, the Committee held that Australia's denial of pension benefits to the surviving same-sex partner of a veteran violated the ICCPR where those same benefits would have been provided to the surviving opposite-sex partner of a veteran, whether or not the two had been married.

In a case brought against New Zealand, the Committee held that the ICCPR does not obligate states that have ratified the treaty to extend the right to marry to same-sex couples.<sup>24</sup> This interpretation was based on language in the ICCPR that guarantees "[t]he right of men and women of marriageable age to marry."<sup>25</sup> The Committee noted that, in contrast to the other provisions of the ICCPR, this "is the only substantive provision in the [ICCPR] which defines a right by using the term 'men and women', rather than 'every human being', 'everyone' and 'all persons'."<sup>26</sup> Two members of the Committee wrote an opinion concurring in this interpretation, but at the same time issued a warning that the opinion "should not be read as a general statement that differential treatment between married couples and same-sex couples not allowed under the law to marry would never amount to a violation of [the ICCPR]."<sup>27</sup> They continued to explain that, where same-sex couples are not offered the choice to marry, "a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under [the ICCPR], unless otherwise justified on reasonable and objective criteria."<sup>28</sup>

## Seeing the Predicament in Our Progress

But privileging this forward-looking measure of progress is equally misleading. The true measure of our progress cannot be found at either extreme; rather, it lies somewhere in between, in a blending of these two opposing perspectives. Likewise, the true picture of our predicament emerges from that same hodgepodge of hostility, shame, discomfort, and normalization.

You may recall that “predicament” especially connotes “an unpleasant, trying, or dangerous situation.” That our current situation is unpleasant and dangerous should be self-evident: two of the ingredients in our hodgepodge are hostility and shame, and I have already amply illustrated their effects (e.g., the anti-gay tirade that my mother silently endured that day at school, the continuing need for many of us to remain in the closet, and the ever-present threat of financial or physical harm due to employment discrimination or anti-gay violence). To understand why these times are so trying—the last in the trio of adjectives and the one most in need of further elaboration—we can draw on the discomfort and normalization that complete our hodgepodge to explain the enervating uncertainty that is a natural concomitant of society’s grudging toleration of homosexuality.

In American society, there are people, like my mother, who sympathize with the lesbian and gay movement in its battle to inch toward unqualified acceptance. Shortly after I graduated from law school, my mother asked me whether I was gay. I answered her truthfully, and in spite of appearing initially troubled by my answer, she ultimately took the news well. My sexual orientation—though obviously not what she preferred it to be—was not going to change how much she loved me. People like my mother sympathize with lesbians and gay men because they see us as human beings and not as some disembodied and dehumanized “other” that can be vilified and scapegoated for society’s problems. They are deeply troubled by anti-gay violence

and other extreme manifestations of sexual prejudice (more commonly called “homophobia”).<sup>29</sup> That’s why coming out has proved to be such a powerful process for lesbians and gay men—studies have found a correlation between contact with lesbians and gay men, particularly close and frequent contact, and positive general attitudes toward lesbians and gay men.<sup>30</sup>

Yet, there are limits to every straight person’s sympathy for lesbians and gay men; the boundaries for each may be different, but they are boundaries nonetheless.<sup>31</sup> Notably, a study of the trends in public opinion concerning lesbians and gay men found that, “[o]ver the past thirty years, American public opinion regarding gay people, gay rights and homosexual sex has moved unambiguously toward acceptance and tolerance. However, Americans remain deeply uncomfortable with gays as compared to other demographic groups, and their support for gay rights does not extend as strongly to the domains of sexuality and relationships.”<sup>32</sup> At some point, even straight people who think of themselves as tolerant cannot help but fall prey to—or just cynically exploit—the shame that our society ingrains in each of us concerning the subject of homosexuality.

Consider, for example, former President Clinton and Democratic presidential candidate John Kerry. In 1996, Clinton, who is generally considered to be a friend of the lesbian and gay community, signed the Defense of Marriage Act into law to prevent the Republicans from using the issue against him in his re-election campaign. Compounding the damage, Clinton then used his support for this law, which his own spokesman had earlier labeled “gay baiting,” in an advertisement that was designed to garner votes from religious conservatives. As for John Kerry, in his campaign for the presidency, he likewise rejected the idea of same-sex marriage; however, Kerry would not go so far as to support a constitutional ban on same-sex marriage, even after Clinton advised him that announcing support for the measure would be politically expedient.

As these two examples illustrate, the contours of straight limited sympathy for lesbians

and gay men vary from individual to individual. The boundary of my mother's limited sympathy was clear. She was bothered by what she heard that day at school, but was clearly too ashamed to speak up. She did not want to challenge the teacher's caustic remarks because doing so might entail an implicit or explicit public acknowledgement that she had a gay son. Despite being troubled by my mother's hesitance to respond to an open attack on lesbians and gay men, I didn't blame her for remaining silent. After all, how could I when I had lived in the closet for years because of the same shame? But, while I could understand the existence of this boundary and could forgive my mother for crossing it, I have not found it quite so easy to forget the disappointment that I felt when she told me this story.

Unfortunately, such disappointment is an unpleasant, though unavoidable, by-product of society's grudging toleration of lesbians and gay men. Because the limits of straight sympathy for lesbians and gay men vary from individual to individual, it is exceedingly difficult to tell who the enemy is or, worse, when someone who appears to be an ally will reach her limit and suddenly transform into the enemy (or into an acquiescing accomplice, which is really no better). This difficulty is exacerbated by the nature of sexual orientation as a generally non-obvious characteristic, or "concealable stigma."<sup>33</sup> In our heterosexist society, people are assumed to be straight absent some clear evidence or indication to the contrary. This unspoken presumption effectively renders the coming out process never-ending; it requires us to re-invent our identities each time we come into contact with someone, whether that person is a new acquaintance or an old friend and, due to internalized anti-gay hostility and oppression, whether that person is straight or gay. I long ago stopped counting the number of times that I felt put upon to answer what many straight people would consider to be the most banal of questions: Are you married? Do you have children? What did you do this weekend?

Whenever a response may reveal your sexual orientation or require you (directly or

indirectly) to talk about your already-revealed sexual orientation in more detail, you must decide how candid you safely can be when answering. How can you know whether a full and honest answer will be met with shock, disgust, or some level of sympathy? It is this constant, nagging uncertainty that makes these times so trying for lesbians and gay men.

### **The Roots of the Predicament**

According to the *Online Etymology Dictionary*,<sup>34</sup> the first recorded instance of “predicament” taking on the meaning of an “unpleasant situation” did not occur until 1586. Interestingly, while this modern negative connotation of the word is redolent of the current state of the lesbian and gay movement, the word’s Latin roots may suggest why we find ourselves in a most unpleasant, trying, and dangerous situation. The word “predicament” has its roots in the Latin verb *prædicare*, which means to “assert, proclaim, [or] declare publicly.” That verb, in turn, is derived from a combination of the Latin *præ-* (“forth, before”) and *dicare* (“to proclaim”). As this etymology denotes, the current predicament of the lesbian and gay movement is firmly rooted in what has been proclaimed before—in Western society’s long-standing tradition of sexual prejudice.

Professor Byrne Fone documents the history of Western sexual prejudice in his book, *Homophobia: A History*.<sup>35</sup> Fone traces the roots of sexual prejudice back to ancient Greece. In retrospect, Greece is often viewed “as a utopia in which homosexual love flourished without blame or censure”;<sup>36</sup> however, Fone notes that the only homosexual activity accepted in ancient Greek society was that which conformed to, and reinforced, the primacy of the adult male citizen. Accordingly, “the adult male had the unquestioned right to penetrate and dominate his presumably weaker, usually younger, and socially inferior partner,”<sup>37</sup> who might be a younger

man, but not an underage boy. In contrast, it was not socially acceptable for an adult male to be effeminate, to accept the passive role in homosexual sex, or to engage exclusively in homosexual sex. Similar conventions prevailed in Roman society.

Nearer the end of Antiquity, even this limited acceptance of homosexual activity began to erode as attitudes toward homosexuality changed with the rise of anti-sexual asceticism. This erosion “culminate[d] in the legal prohibition of homosexual acts in an edict of 390 C.E. and the subsequent declaration by the Church that such acts were sinful because they were unnatural.”<sup>38</sup> Referring to the biblical punishment of Sodom and Gomorrah, the edict directed that the offender was to “ ‘expiate his crime in the avenging flames.’ ”<sup>39</sup> In 533 C.E., as part of his codification and revision of Roman law, the emperor Justinian formally applied the death penalty to homosexual acts. In the ensuing 500 years, civil and ecclesiastical attempts to control homosexual activity expanded significantly, and homosexual acts generally came to be viewed as “heinous and occasionally [were] described as the worst of all sins.”<sup>40</sup>

By the late Middle Ages, sodomy was no longer a sin that could be repented; it had become a sin without forgiveness. In the early thirteenth century, the Church called for civil (as well as ecclesiastical) punishment of sodomy. Civil punishments were enacted in Italy, France, Spain, and England during the thirteenth century. The extent to which homosexual activity was persecuted during that period remains unknown, which may be due, in part, to the fact that sodomy was considered such a horrible crime that the records of sodomy trials “were sometimes burned with the guilty sodomite.”<sup>41</sup> Nonetheless, records of executions do go back as far as 1292, when a man was burned alive for committing sodomy.

Notwithstanding a “rediscovery of classical writings [that] prompted a cautious reexamination of male eros,”<sup>42</sup> the Renaissance saw the criminalization of sodomy throughout Europe and the enactment of truly horrific punishments for homosexual acts—ranging from

castration to death by decapitation, hanging, or burning. During this period, “nearly sixteen thousand people were tried for sodomy . . . [and] about four hundred men and women are known to have been executed” in Spain, Portugal, France, Italy, and Geneva alone.<sup>43</sup> During the colonial period in New England, sodomy was also punishable by death. There are records of men being executed as well as records of men being severely whipped, burned with a hot iron, and then made permanent outcasts for engaging in homosexual activity.

But, by the late eighteenth and early nineteenth centuries, many Western European nations had decriminalized sodomy; however, this decriminalization “did not mean that intolerance of sodomites also disappeared.”<sup>44</sup> In any event, England bucked the trend toward decriminalization, retaining the death penalty for sodomy until 1861 and criminal sanctions for homosexual activity into the twentieth century. The United States likewise ignored the trend toward decriminalization, with many states abolishing the death penalty for homosexual activity but retaining criminal prohibitions of sodomy—in some cases into the twenty-first century.

In a series of articles, law professor William Eskridge has documented the history of the legal treatment of homosexuality in the United States from the late nineteenth century through the early 1980s.<sup>45</sup> In late nineteenth- and early twentieth-century America, arrests and convictions for “crimes against nature” rose, as did the use of other laws (e.g., those relating to disorderly conduct, vagrancy, loitering, indecent exposure, and solicitation) to regulate same-sex “degeneracy.” Eskridge describes the chilling, practical effects of this regulation of homosexual activity:

More important, the consequences of arrest and more certain conviction of crimes associated with homosexuality often had tragic collateral consequences: jail time (several years if convicted of sodomy), incarceration and physical torture in a

mental institution under a sexual psychopath law, loss of one's job and even livelihood if the arrest were publicized, court-martial or (more typically) administrative separation from the armed forces, deportation if one were a noncitizen, and continued surveillance and harassment by police officers and detectives. The homosexual was not only a sexual outlaw, but one who by World War II had clearly caught the eye of the government.<sup>46</sup>

Tracking the medical discourse of the period, American social understanding of homosexual activity shifted from “the *sinful sodomite* to the *degenerate invert* . . . [and then] from the *degenerate invert* to the *psychopathic homosexual*.”<sup>47</sup> While the invert was considered a threat for challenging traditional gender roles (an invert might today be called a “gender-bender”), the psychopathic homosexual was considered even more of a threat because he “was sexually out of control and even predatory.”<sup>48</sup> In view of the threat to society posed by homosexuality, the government sought to “expunge homosexuality from the nation’s public culture . . . [through] censorship of homophile publications, theatrical productions, and movies that depicted ‘sex perversion’; disruption of homosexual socialization by state raids on homosexual haunts and by regulation of liquor sales; and finally direct interrogation, treatment, and exclusion during World War II.”<sup>49</sup>

In the post-war years, homosexuals were the object of witch hunts at the federal and state levels. As anti-homosexual panics swept cities from Boise, Idaho to Miami, Florida, vice squads vigorously pursued homosexuals through spying, decoys, and raids. In addition, an increasing number of states enacted sexual psychopath laws that permitted indefinite detention and psychiatric treatment of homosexuals—treatment that included lobotomies, electric shock aversion therapy, pharmacological shock (induced vomiting when homoerotic images were

shown), and the injection of hormones. At the same time, the federal government attempted to eliminate homosexuals from civil service employment and military service, and it further attempted to exclude alien homosexuals from entering the United States. These federal witch hunts had a broader impact, because the government shared information with private employers, who often blacklisted individuals discharged for being homosexual. Whether on their own or cued by the federal government, the states also began witch hunts for homosexuals.

In the 1940s and 1950s, the federal government surveilled and harassed both individual homosexuals and homosexual organizations, while state and local governments attempted to suppress homosexual socialization by raiding gay bars and revoking their liquor licenses. During this period, the federal and state governments censored homosexual publications. Films were subject to several layers of censorship: the federal government impounded foreign films dealing with homosexuality, the motion picture industry adopted a voluntary censorship code that prohibited reference to homosexuality in films distributed domestically, and state and local licensing laws prohibited films dealing with homosexuality.

This barrage of police persecution, government employment discrimination, exclusion of homosexual aliens, suppression of homosexual socialization, and censorship of homosexual materials did not abate until the 1960s and 1970s.

## **Extricating Ourselves from the Current Predicament**

### **Finding Reason to Hope**

With literally thousands of years of fear, prejudice, and persecution behind us, there is little wonder that shame, discomfort, and hostility toward homosexuality seem to be encoded in our

cultural DNA.<sup>50</sup> But simply because these attitudes are deeply entrenched cannot mean that they are wholly unchangeable. There must be hope that societal attitudes can change and that human progress is possible. For one, I see that hope in the vignette that opened this chapter. Through the veil of disappointment at my mother's failure to stand up for all lesbians and gay men (and, vicariously, for me), I witnessed a sign of an amazing transformation that had occurred in my father, an opening wide of the boundaries of his sympathy for lesbians and gay men.

My father was a first-generation American whose parents had emigrated from Italy a few years before he was born. He had been brought up in a highly traditional, patriarchal home where the husband/father ruled. Our home had been run exactly the same way. My father's word was law: doing something without his permission or contrary to his views was not to be tolerated. After he found out about my sexual orientation, my father excoriated me for doing "this" to my family, as if I was intentionally trying to hurt or defy him. After I refused to speak with him for several months and failed to return home for the holidays, my father realized that I was not going to change or go back into the closet to make him happy. My father, a man who did not care to read much more than the morning paper, began to take trips to the library to do research on homosexuality and to learn more about a part of who I am. Eventually, he called to apologize for the way that he had treated me and we reconciled.

For someone who had found it so difficult at first to accept a gay son, my father quickly became one of my strongest supporters. That day when my mother came home from school upset, I realized just how much he had changed. He did not worry about people finding out about my sexual orientation; what was important to him was protecting his son from a vituperative attack. Instead of directing his disappointment and displeasure at my being gay, he was now directing it at my mother for not speaking up in my defense. If someone so headstrong and set in his ways as my father could change his attitude toward lesbians and gay men, it gives me hope

that broader change in societal attitudes is possible.

### **Reconsidering How We Go About Realizing This Hope**

Thus far, the lesbian and gay movement has largely focused its efforts to realize this potential for change on advancing the legal rights of lesbians and gay men. The attraction of this approach is quite natural:

For many of us who have suffered oppression or discrimination in any form it is easy to understand the attraction of rights-based approaches. Civil rights initiatives have an immediate, concrete appeal. They promise to secure the basic constitutional rights that lesbians and gay men have previously lived without: freedom from discrimination in areas such as housing, employment, child custody, military service, legal marriage, and spousal benefits. For individuals who live in a country that ostensibly provides these protections to all of its citizens, yet in practice denies them to particular groups, the simple granting of such rights often seems like the ultimate luxury: all we can hope for and, at the same time, too much to hope for.<sup>51</sup>

Despite the attractiveness of this approach, we must recognize that the ability to effect positive change through the legal system is (and always has been) limited. The ability to effect social change through legislation or court decisions has been the subject of intense academic debate.<sup>52</sup> Even setting aside debates over cause and effect, the courts, to whom we turn most often for vindication of our rights, are an inherently limited tool for effecting change. A recent

empirical study of appellate court decisions confirmed anecdotal evidence<sup>53</sup> that state courts are far more receptive to the claims of lesbian and gay litigants than are federal courts.<sup>54</sup> Indeed, a commentator has characterized this study as indicating that “federal courts not only were less receptive than state courts to gay rights claims, but that they were *systematically* hostile” to such claims.<sup>55</sup> As a practical matter, this hostility significantly limits the places where civil rights claims may be brought with some chance of success, and it simultaneously increases the costs of litigation by necessitating, in many cases, fifty separate state battles in lieu of a single federal battle. The chances of success are further limited by the possibility, which exists in every case, that sexual prejudice will influence a judge’s or a jury’s decision in a case brought by a lesbian or gay man.<sup>56</sup>

Even more discouraging, however, is the need for lesbians and gay men to conform to the expectations of the legal system. To obtain a certain result, lesbian and gay litigants may feel constrained to make arguments that will help them win in the short-term, but that may do long-term harm. Moreover, rather than telling their own stories in their own words, lesbian and gay litigants may be forced to tell only a partial, stylized version of their stories that fits what the legal system wants to hear. As my colleagues Richard Delgado and Jean Stefancic have remarked, “[t]he story you end up telling is not your own, not the one you would recount if you were telling it to a friend. You do not feel that comfortable with it; it is not you, in a way.”<sup>57</sup> And this censorship does not come from the legal system alone; lesbian and gay rights organizations are complicit in this silencing whenever they discourage individuals from pursuing their legal rights for fear of suffering a loss in court or choose a plaintiff for a test case in the belief that he embodies characteristics that will make him sympathetic to a court.<sup>58</sup>

## Changing Everyday Law Through Our Radical Everyday Lives

Given these questions and limitations, it seems unwise to place so much of our focus on rights-based strategies—that is, on lobbying for (or against) legislation when we think we can win an incremental victory (or stave off defeat) and on seeking to bring that “right” case before a court at the “right” time in the hope of establishing favorable legal precedent. We would be better served by shedding our tendency to view legal change as an end in itself in favor of recognizing that legal change is no more than a single means of working toward our ends. For, in reality, the relationship between law and society is not unidirectional; rather, the relationship is more complex because the legal and social realms influence—and are influenced by—each other. Thus, legal decisions can create opportunities for social change, just as social change can alter how legal decisions are made.<sup>59</sup>

In place of our current, largely rights-based approach, we need to strike a more appropriate balance between pursuing legal and non-legal avenues for change. In part, this will require us to shift the locus of action away from centralized efforts, which rely on the national civil rights organizations (e.g., the Human Rights Campaign, the National Gay and Lesbian Task Force, and the Lambda Legal Defense and Education Fund) for direction and guidance, toward a broader effort that enlists each of us to do all that we can to effect change in our daily lives. Indeed, I will close this introductory chapter and open the remainder of the book by suggesting that our individual lesbian and gay narratives—the stories of our everyday lives—are a radical and powerful tool for enhancing our ability to effect favorable legal *and* social change.

A quick story will serve as an apt prelude to this discussion. During the early 1990s, I lived in San Diego, California for a year while clerking for a federal judge after graduating from law school. Early in that year, I purchased a T-shirt from the ACT UP booth at a local event.<sup>60</sup>

The T-shirt was emblazoned with the words “SILENCE = DEATH.” On the back of the T-shirt, these words were translated into a number of different languages, behind which was an image of the globe. I felt strongly about HIV-prevention and the message on the T-shirt because I had spent my last year of law school working at an AIDS law clinic to help people with HIV (almost all of whom were gay men, and many of whom had already advanced to full-blown AIDS) to obtain Social Security disability benefits and to prepare wills, living wills, and powers of attorney for them.

Later in the year, I was at the grocery store standing in the check-out line when an attractive, impeccably-dressed elderly woman tapped me on the shoulder. She had noticed my T-shirt and was wondering what the message meant. I explained to her that, for me, the message meant that failing to talk about HIV/AIDS would only lead to more deaths from the disease—progress in fighting the disease could only come from speaking out, talking about the disease, raising awareness, and demanding a cure. I am not sure that this elderly woman quite knew how to respond, but, after she reflected for a moment, she acknowledged that the message was valuable.

The message on that T-shirt is not only applicable to HIV/AIDS; it applies equally to the larger lesbian and gay movement. Each time that we choose to pass as straight or to cover our sexual orientation because we believe that it will make someone else (e.g., a judge, an employer, a parent, or a friend) feel more comfortable, we contribute to our own death—that slow and painful death of our individual and collective identity that my mother had a taste of in the teacher’s room that day at school. And similarly juxtaposed with the adverse effects on us of silence are the benefits of speaking out: recall that studies have demonstrated a correlation between contact with lesbians and gay men, particularly close and frequent contact, and positive general attitudes toward lesbians and gay men. Our experience with HIV/AIDS should counsel

us to take every opportunity, in court and out of court, to speak out—to tell our stories and to make sure that those stories are told in our own powerful and empowering words.<sup>61</sup>

At stake here is not only the self-identity of lesbians and gay men as such but also the ability to tell our stories and share our lives. The ability to speak of oneself in one's own terms, to tell the story of one's life, marks the difference between existence and nonexistence, community and isolation, pride and shame. Both our self-images and the images others have of us depend on our freedom to share our stories. The importance of stories in changing others' attitudes cannot be overestimated, for "our stories hold the power of persuasion. We must counter disinformation with the truth of our lives."<sup>62</sup>

The more lesbians and gay men who tell their individual stories—stories of discrimination and subordination, of love lost and found, of the banalities of daily life with partners, parents, children, and friends—the harder it will be for members of the heterosexual majority to view us as an undifferentiated "other" that can be marginalized, demonized, stigmatized, or just forgotten. They will begin to see us as both the same and different, in a myriad of ways. Our stories—*all* of our stories—are a woefully underutilized tool for eliminating the boundaries of straight sympathy for lesbians and gay men. Our stories hold the promise of moving straight people beyond sympathy and toward empathy; in other words, our stories may convert what is really no more than a form of pity into an understanding of what it is really like to be a lesbian or gay man living as an outsider in a generally hostile society. This understanding may shake straight people out of the complacency that their heterosexual privilege affords them, and may help to extricate us from our current predicament and move us closer to the unqualified

acceptance that we seek.

There is an additional advantage to telling our own stories in our own words. The cramped, two-dimensional stories that have been told in the legal realm have too often privileged the experience of those who most closely mirror the members of the majority who will be passing judgment on us. It would be to our advantage to enrich the overall lesbian and gay narrative with the many individual stories that compose the diverse rainbow that we have adopted as the symbol of our movement. In this way, we can help others to see us not as “homosexuals” or “gays” (terms that tend to bring to mind gay men and to obscure lesbians), but as multi-dimensional people. By telling a multiplicity of stories, we can be seen not just through the single lens of our sexual orientation (and not just through a single lens of sexual orientation), but as a complex amalgam of the characteristics and experiences that contribute to who we are as individual human beings, including those relating to our race, class, gender, religion, ethnicity, and physical ability (to name a few).<sup>63</sup> Through these stories, we can work to break down stereotypes, those “logjam[s] of overgeneralization inherent in arguments based on assumptions about a group identity.”<sup>64</sup>

Naturally, this strategy involves risks and costs. It will require a conscious effort on all of our parts not just to “come out,” but to “be out.” As mentioned earlier, the coming out process is on-going and never-ending. In our everyday encounters, we will have to strive not to take the easy road and to allow the prevailing presumption of heterosexuality to mask or cover who we are. Talking about what you did over the weekend with your partner, your vacation together, or the everyday obstacles that you encounter as a lesbian or gay man might not seem as important as protesting a bias crime, an instance of employment discrimination, or the inability to marry—*but it is.*

Over the long history recounted above, anti-gay fear, prejudice, and persecution have

become well-entrenched in our society—to the point where heterosexuality is tacitly privileged in nearly every area of our lives. Because this privileging is an unspoken assumption upon which our society is built, the only way to combat its effects is to draw attention to the privileging and challenge it wherever and whenever we meet it. We cannot limit ourselves to speaking out only in “important” situations, when redress is required for some wrong that has been done, because these wrongs are not the problem—they are no more than manifestations of the problem. To effect lasting, positive change, we must attack the problem itself—the heterosexual hegemony that makes it so difficult for straight people to embrace and understand our point of view—by engaging in an active overturning and destabilizing of the privileging of heterosexuality that undergirds so much of our social structure.

Opportunities to overturn and destabilize this privileging abound. We encounter them each time that we feel (internal or external) pressure to keep silent—to pass as straight or to cover our sexual orientation. We can choose to give in to that pressure and suffer the re-affirmation of the privileging as it is painfully re-inscribed over our identity. Alternatively, we can choose to tell our stories in our own words, to call attention to the privileging of heterosexuality, and to challenge and subvert it. This latter alternative will require a very trying effort. We will not always be met with sympathy or understanding; indeed, each time that we speak out, we risk being met with unabashed verbal (or even physical) hostility. While it would be truly unwise to speak out when we are certain that our physical safety would be jeopardized, we should recognize that the difficult situations will often be the ones where our stories have the potential to move someone to recognize and question (and maybe someday reject or abandon) a privileging that she had never noticed before.

For example, simply talking about our lives in the same matter-of-fact tone and way that straight people speak about their own lives is often viewed as a threatening, radical act.

Undoubtedly, when we do so, we may be accused of “flaunting” the “private” matter of our (homo)sexual orientation. Such a reaction should not be viewed as a mark of benign ignorance—it should be viewed as a mark of our oppression by straight society and the clearest evidence of every straight person’s (witting or unwitting) sanctioning of it and participation in it. Instead of being cowed by this reaction, we should take it as an opportunity to point out the many ways in which the presumption and privileging of heterosexuality permeate our society and suffuse the words of straight people with (not-so-hidden) meaning. Their ability to speak freely about matters that implicate their (hetero)sexual orientation—whether it be about parents, grandparents, and grandchildren; dating, relationships, marriage, and divorce; or trying to get pregnant, the birth of children, and the ups and downs of raising children—stems from, and simultaneously reinforces, the presumption and privileging of heterosexuality. Furthermore, the flaunting of heterosexuality comes not only through speech; we also see it in symbols: the wedding rings that are visible on so many hands, the pictures of family on desks at work, the station wagon or minivan in the driveway, and the political metonym of the soccer (now security) “mom” and the NASCAR “dad.” Unless and until the straight majority hears our perspective, we cannot expect them to question their own unspoken, unconscious privileging of heterosexuality in all that they say and do.

And, in keeping with a multi-dimensional view of the lesbian and gay community, we must recognize that different members of our community experience coming out and being out differently. Because of the intersection of sexual orientation with other characteristics (e.g., ethnicity, race, gender, or class), some members of our community may pay a higher price than others for pursuing a strategy of destabilizing outness.<sup>65</sup> As a result, we must also take the next step of engaging in a dialogue to see how the costs and burdens of coming out and being out can be lessened, and to see how we can work together to combat the other privilegings in our society

that affect members of the lesbian and gay community.<sup>66</sup> One way in which the inherent risks and costs of this strategy can be mitigated is if we are not the only ones undertaking the task. If done carefully and with sensitivity, those who care about us, our straight family, friends, and colleagues, can themselves begin to identify and challenge the privileging of heterosexuality in our society as well.<sup>67</sup>

In the following pages, my goal is to highlight some of the many areas in which the privileging of heterosexuality manifests itself and to empower and inspire each of us to identify and challenge that privileging—to tell our own stories, in our own words, and in the most effective way possible. Thus, the title of this book notwithstanding, the remaining chapters will not focus narrowly on legal strategies or legal solutions to problems. Knowing our legal rights is important, but it is equally important to know when and how most effectively to press those rights and to know when and what non-legal avenues of relief might be more appropriate alternatives. With these tools, we must engage in a constant overturning from within, a subversion through narrative of the privileging of heterosexuality in our society. Of course, we should expect to meet with both success and failure along the way, and progress will often be incremental at best. Nonetheless, to paraphrase the epigraph with which this chapter began, we can neither accept our current predicament nor rely on others to extricate us from it—we must undertake the far harder task that is “to feel its intolerability and seek the strength to change it.”

#### Notes

1. See, e.g., Susan J. Becker, *Many Are Chilled, But Few Are Frozen: How Transformative Learning in Popular Culture, Christianity, and Science Will Lead to the Eventual Demise of Legally Sanctioned Discrimination Against Sexual Minorities in the United States*, 14 AM. U. J. GENDER SOC. POL'Y & L. 177 (2006).

2. Elizabeth Armstrong has provocatively challenged the conventional wisdom that the 1969 Stonewall uprising was the catalyst for gay liberation. ELIZABETH A. ARMSTRONG, *FORGING GAY IDENTITIES: ORGANIZING SEXUALITY IN SAN FRANCISCO, 1950–1994*, at 56–80 (2002).
3. M.V. LEE BADGETT, *MONEY, MYTHS, AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN* 101–32 (2001); David M. Skover & Kellye Y. Testy, *LesBiGay Identity as Commodity*, 90 CAL. L. REV. 223 (2002).
4. 478 U.S. 186 (1986).
5. 539 U.S. 558 (2003).
6. 798 N.E.2d 941 (Mass. 2003); *see also* Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).
7. *E.g.*, Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005); Hernandez-Montiel v. Immigration & Naturalization Serv., 225 F.3d 1084 (9th Cir. 2000); Pitcherskaia v. Immigration & Naturalization Serv., 118 F.3d 641 (9th Cir. 1997). *But see* AMNESTY INT’L, *ACT 40/016/2001, CRIMES OF HATE, CONSPIRACY OF SILENCE: TORTURE AND ILL-TREATMENT BASED ON SEXUAL IDENTITY* (2001) (including a number of occurrences in the United States among examples of torture and ill-treatment of individuals based on their sexual orientation).
8. Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 98–102 (2002).
9. William B. Rubenstein, *Do Gay Rights Laws Matter? An Empirical Assessment*, 75 S. CAL. L. REV. 65, 68 (2001).
10. Dan A. Black et al., *The Earnings Effects of Sexual Orientation*, 56 INDUS. & LAB. REL. REV. 449, 463 (2003); John M. Blandford, *The Nexus of Sexual Orientation and Gender in the Determination of Earnings*, 56 INDUS. & LAB. REL. REV. 622, 628 (2003).

11. M.V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 INDUS. & LAB. REL. REV. 726, 728 (1995).
12. William B. Rubenstein, *The Real Story of U.S. Hate Crimes Statistics: An Empirical Analysis*, 78 TUL. L. REV. 1213 (2004). It is worth noting that Rubenstein's analysis uses the bias crime statistics compiled by the Federal Bureau of Investigation. *See infra* note 13 for a discussion of the limitations of these statistics.
13. NAT'L COALITION OF ANTI-VIOLENCE PROGRAMS, ANTI-LESBIAN, GAY, BISEXUAL AND TRANSGENDER VIOLENCE IN 2004 (2005); NAT'L COALITION OF ANTI-VIOLENCE PROGRAMS, ANTI-LESBIAN, GAY, BISEXUAL AND TRANSGENDER VIOLENCE IN 2003 (2004). The Federal Bureau of Investigation also reports bias crime statistics, including those motivated by sexual orientation bias; however, these reports significantly underreport the level of anti-gay violence in the United States. The FBI report for 2003, which covers a geographic area including nearly 83% of the national population, only reported 1,239 incidents of violence motivated by sexual orientation bias, which is far below that reported by NCAVP with respect to a far smaller portion of the national population. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS: 2003, at 1, 9 (2004). The FBI's underreporting of sexual orientation-motivated bias crimes has been attributed to a number of factors, including the victim's desire not to be outed and lesbians' and gay men's general distrust of the police due to a history of harassment at their hands. DONALD ALTSCHILLER, HATE CRIMES: A REFERENCE HANDBOOK 27–28 (2d ed. 2005).
14. Bob Hague, *Voicemail Message Suggests "Open Season" on Gays* (Wis. Radio Network Dec. 6, 2005), <http://www.wrn.com/gestalt/go.cfm?objectid=E78DA9DB-FA31-41FE-835BAA01D956B977&dbtranslator=local.cfm>; *see also* Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ., 258 F. Supp. 2d 667, 670 n.1 (E.D. Ky. 2003) ("One example of the

harassment includes students in . . . English class stating that they needed to take all the fucking faggots out in the back woods and kill them.”); AM. CIVIL LIBERTIES UNION, 2006 WORKPLAN 6 (2006) (indicating that the same “school’s Model United Nations once adopted a resolution declaring an ‘open hunting season’ on gay students”).

15. Citizens for Equal Prot., Inc. v. Bruning, 455 F.3d 859 (8th Cir. 2006); Perdue v. O’Kelley, 632 S.E.2d 110 (Ga. 2006); Schulman v. Att’y Gen., 850 N.E.2d 505 (Mass. 2006); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006); Andersen v. King County, 138 P.3d 963 (Wash. 2006).

16. Kristen L. Walker, *Evolving Human Rights Norms Around Sexuality*, 6 ILSA J. INT’L & COMP. L. 343, 344 (2000).

17. Dudgeon v. United Kingdom, App. No. 7525/76, 4 Eur. H.R. Rep. 149, 167–68 (1981).

18. Modinos v. Cyprus, App. No. 15070/89, 16 Eur. H.R. Rep. 485, 492 (1993); Norris v. Ireland, App. No. 10581/83, 13 Eur. H.R. Rep. 186, 201 (1988).

19. Laurence R. Helfer, *International Decision: Salgueiro da Silva Mouta v. Portugal; A.D.T. v. United Kingdom*, 95 AM. J. INT’L L. 422, 422 (2001); *see also* Kristen Walker, *Sexuality and Human Rights in Europe: An Update*, 26 N.Y.U. REV. L. & SOC. CHANGE 169, 185 (2000).

20. B.B. v. United Kingdom, App. No. 53760/00, 39 Eur. H.R. Rep. 635 (2004); Karner v. Austria, App. No. 40016/98, 38 Eur. H.R. Rep. 528 (2003); SL v. Austria, App. No. 45330/99, 37 Eur. H.R. Rep. 799 (2003); L & V v. Austria, App. Nos. 39392/98 & 39829/98, 36 Eur. H.R. Rep. 1022 (2003); ADT v. United Kingdom, App. No. 35765/97, 31 Eur. H.R. Rep. 803 (2000); Lustig-Prean v. United Kingdom, App. Nos. 31417/96 & 32377/96, 29 Eur. H.R. Rep. 548 (1999); Smith & Grady v. United Kingdom, App. Nos. 33985/96 & 33986/96, 29 Eur. H.R. Rep. 493 (1999); Salgueiro da Silva Mouta v. Portugal, App. No. 33290/96, 31 Eur. H.R. Rep. 1055 (1999).

21. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. In contrast to the European Convention, the United States is a party to the ICCPR. However, the United States ratified the ICCPR subject to a declaration that its operative provisions would not be self-executing, which effectively prevents an action from being brought under the ICCPR in U.S. courts until such time as implementing legislation is enacted. 138 CONG. REC. 8068–71 (1992).

In addition, the United States has not ratified the optional protocol to the ICCPR that would allow the Committee to accept individual complaints concerning U.S. compliance with the ICCPR. *See* Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302, 302 n.1 (entered into force on Mar. 23, 1976); Office of the U.N. High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, <http://www.unhchr.ch/pdf/report.pdf>.

22. Toonen v. Australia, U.N. Human Rights Comm., Communication No. 488/1992, Doc. No. CCPR/C/50/D/488/1992 ¶¶ 8.3, 8.6, 9 (Apr. 4, 1994).

23. Young v. Australia, U.N. Human Rights Comm., Communication No. 941/2000, Doc. No. CCPR/C/78/D/941/2000 ¶ 11 (Sept. 18, 2003).

24. Joslin v. New Zealand, U.N. Human Rights Comm., Communication No. 902/1999, Doc. No. CCPR/C/75/D/902/1999 ¶ 8.3 (July 30, 2002).

25. ICCPR, *supra* note 21, art. 23(2).

26. *Joslin*, *supra* note 24, ¶ 8.2.

27. *Id.* app. (citations and footnotes omitted).

28. *Id.*

29. The word “homophobia” was coined by the psychologist George Weinberg in the late 1960s. Gregory M. Herek, *The Psychology of Sexual Prejudice*, 9 CURRENT DIRECTIONS IN PSYCHOL. SCI. 19, 19 (2000) [hereinafter Herek, *Sexual Prejudice*]. This term has proved to be an effective rhetorical device for lesbians and gay men because it stands “a central assumption of heterosexual society on its head by locating the ‘problem’ of homosexuality not in homosexual people, but in heterosexuals who were intolerant of gay men and lesbians.” Gregory M. Herek, *Beyond “Homophobia”: Thinking About Sexual Prejudice and Stigma in the Twenty-First Century*, 1(2) SEXUALITY RES. & SOC. POL’Y 6, 8 (2004) [hereinafter Herek, *Beyond “Homophobia”*]. Notwithstanding both its rhetorical power and usefulness in drawing attention to anti-gay hostility, scholars and psychologists have criticized the term because of its imprecision and ability to mislead. Herek, *Sexual Prejudice*, *supra*, at 19; *see also* Colleen R. Logan, *Homophobia? No, Homoprejudice*, 31 J. HOMOSEXUALITY 31, 32 (1996); Tony White, *Homophobia: A Misnomer*, 29 TRANSACTIONAL ANALYSIS J. 77, 77–79 (1999). To remedy these problems, research psychologist Dr. Gregory Herek has broken anti-gay hostility down into three different categories: sexual stigma (i.e., “the shared knowledge of society’s negative regard for any nonheterosexual behavior, identity, relationship, or community”), heterosexism (i.e., “the cultural ideology that perpetuates sexual stigma by denying and denigrating any nonheterosexual form of behavior, identity, relationship, or community”), and sexual prejudice (i.e., “heterosexuals’ negative attitudes toward homosexual behavior; people who engage in homosexual behavior or who identify as gay, lesbian, or bisexual; and communities of gay, lesbian, and bisexual people”). Herek, *Beyond “Homophobia,” supra*, at 15–17.

In view of this criticism of the term “homophobia,” I will eschew its use in this book except where another author employs the term. In its place, I will use broad terms such as “anti-gay hostility” or “anti-gay oppression” or one of Herek’s more precise terms, where appropriate.

30. E.g., Anne M. Bowen & Martin J. Bourgeois, *Attitudes Toward Lesbian, Gay, and Bisexual College Students: The Contribution of Pluralistic Ignorance, Dynamic Social Impact, and Contact Theories*, 50 J. AM. C. HEALTH 91 (2001) (students at two residence halls of a single university); Gregory M. Herek & John P. Capitanio, “Some of My Best Friends”: *Intergroup Contact, Concealable Stigma, and Heterosexuals’ Attitudes Toward Gay Men and Lesbians*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 412 (1996) (national telephone survey); Gregory M. Herek & Eric K. Glunt, *Interpersonal Contact and Heterosexuals’ Attitudes Toward Gay Men: Results from a National Survey*, 30 J. SEX RES. 239 (1993) (national telephone survey); Donald W. Hinrichs & Pamela J. Rosenberg, *Attitudes Toward Gay, Lesbian, and Bisexual Persons Among Heterosexual Liberal Arts College Students*, 43 J. HOMOSEXUALITY 61 (2002) (students at six liberal arts colleges in the Northeast and Midwest).

At this juncture, it is worth noting that women and people of color may experience coming out differently from gay white men and have questioned the centrality of coming out to gay identity. ARMSTRONG, *supra* note 2, at 136–37, 150. This topic will be discussed further in the closing section of this chapter.

31. I have chosen to use the term “sympathy” rather than “empathy” here because straight people generally do not identify with and understand the experiences of lesbians and gay men. Ingrained societal discomfort with homosexual sex makes it difficult for heterosexuals to truly put themselves in the place of lesbians and gay men. See, e.g., Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763, 777, 783–84 (2004) (discussing

the desexualized euphemisms employed by straight society to describe the members of a same-sex couple; for example, “friend,” “special friend,” “partner,” or “significant other”). The correlation between contact with lesbians and gay men and positive attitudes toward us can most plausibly be explained as instances of straight sympathy (and not empathy). These individuals likely feel an affinity toward lesbians and gay men whom they know personally (as opposed to truly understanding what their lives are like); as a result, these individuals naturally deplore any unjustified treatment of their lesbian or gay family and friends.

32. Nathaniel Persily et al., *Gay Marriage, Public Opinion and the Courts* 11 (Univ. of Pa. Law Sch. Pub. Law & Legal Theory Research Paper Series, Research Paper No. 06-17, 2006)

(footnote omitted).

33. Herek & Capitanio, *supra* note 30, *passim*.

34. <http://www.etymonline.com>

35. BYRNE FONE, *HOMOPHOBIA: A HISTORY* 7 (2000).

36. *Id.* at 17.

37. *Id.* at 26–27.

38. *Id.* at 62.

39. *Id.* at 114–15.

40. *Id.* at 131 (footnote omitted).

41. *Id.* at 174–75.

42. *Id.* at 180.

43. *Id.* at 214.

44. *Id.* at 266.

45. William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880–1946*, 82 IOWA L. REV. 1007 (1997); William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946–1961*, 24 FLA. ST. U. L. REV. 703 (1997); William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961–1981*, 25 HOFSTRA L. REV. 817 (1997).
46. Eskridge, *Law and the Construction of the Closet*, *supra* note 45, at 1068–69 (footnote omitted).
47. *Id.* at 1054.
48. *Id.*
49. *Id.* at 1069.
50. See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1280 (1992); Richard Delgado & Jean Stefancic, *The Racial Double Helix: Watson, Crick, and Brown v. Board of Education (Our No-Bell Prize Award Speech)*, 47 HOW. L.J. 473, 487 (2004).
51. DIANE HELENE MILLER, *FREEDOM TO DIFFER: THE SHAPING OF THE GAY AND LESBIAN STRUGGLE FOR CIVIL RIGHTS* 140 (1998).
52. See, e.g., PATRICIA A. CAIN, *RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT* 5–9 (2000); MILLER, *supra* note 51, at 145–48; Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 53 (1996); Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861 (2006).
53. See CAIN, *supra* note 52, at 233–41; William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599 (1999).

54. DANIEL R. PINELLO, *GAY RIGHTS AND AMERICAN LAW* 105–17, 145–46 (2003). For a critique of this study, see Nan D. Hunter, *Federal Courts, State Courts and Civil Rights: Judicial Power and Politics*, 92 *GEO. L.J.* 941 (2004) (reviewing PINELLO, *supra*).
55. Hunter, *supra* note 54, at 942.
56. See Drury Sherrod & Peter M. Nardi, *Homophobia in the Courtroom: An Assessment of Biases Against Gay Men and Lesbians in a Multiethnic Sample of Potential Jurors*, in *STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS* 24 (Gregory M. Herek ed., 1998).
57. Delgado & Stefancic, *The Racial Double Helix*, *supra* note 50, at 474; see also MILLER, *supra* note 51, at 142–45; Massaro, *supra* note 52, at 55.
58. *E.g.*, ELLEN ANN ANDERSEN, *OUT OF THE CLOSETS & INTO THE COURTS* 85–86, 128–29, 186–87 (2005); Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 *UCLA L. REV.* 1467, 1505–17; Anthony C. Infanti, *Homo Sacer*, *Homosexual: Some Thoughts on Waging Tax Guerrilla Warfare*, 2 *UNBOUND: HARV. J. OF THE LEGAL LEFT* 27, 44–45 & n.87 (2006); cf. Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 *OR. L. REV.* 629, 661 n.117 (2002) (indicating that during her time at Lambda Legal Defense and Education Fund an effort was made to obtain a diverse group of plaintiffs).
59. ANDERSEN, *supra* note 58, at 140–42, 199–202, 210–13; see also Tonja Jacobi, *Sharing the Love: The Political Power of Remedial Delay in Same-Sex Marriage Cases*, 15 *TUL. J.L. & SEXUALITY* 11, 28–38 (2006); Persily et al., *supra* note 32, at 43–44.
60. For those unfamiliar with the organization, “ACT UP is a diverse, non-partisan group of individuals united in anger and committed to direct action to end the AIDS crisis. We advise and

inform. We demonstrate. WE ARE NOT SILENT.” ACT UP: AIDS COALITION TO UNLEASH POWER, <http://www.actupny.org>.

61. For a description of the ways in which an individual’s story may be better told in court, see Goldberg, *supra* note 58, at 661.

62. MILLER, *supra* note 51, at 152 (quoting Urvashi Vaid, *After Identity*, NEW REPUBLIC, May 10, 1993, at 28).

63. *E.g.*, ETHNIC AND CULTURAL DIVERSITY AMONG LESBIANS AND GAY MEN (Beverly Greene ed., 1997); QUEERLY CLASSED (Susan Raffo ed., 1997); WILLIAM B. RUBENSTEIN ET AL., SOME DEMOGRAPHIC CHARACTERISTICS OF THE GAY COMMUNITY IN THE UNITED STATES 16 (2003), at <http://www.law.ucla.edu/williamsinstitute/publications/GayDemographics.pdf>.

64. Massaro, *supra* note 52, at 105.

65. See Beverly Greene, *Ethnic Minority Lesbians and Gay Men: Mental Health and Treatment Issues*, in ETHNIC AND CULTURAL DIVERSITY, *supra* note 63, at 216, 233, 234; Althea Smith, *Cultural Diversity and the Coming-Out Process: Implications for Clinical Practice*, in ETHNIC AND CULTURAL DIVERSITY, *supra* note 63, at 279, 288; Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 283–85 (2002); see also *supra* note 30.

66. See Kate Kendell, *Race, Same-Sex Marriage, and White Privilege: The Problem with Civil Rights Analogies*, 17 YALE J.L. & FEMINISM 133, 137 (2005).

67. See IAN AYRES & JENNIFER GERARDA BROWN, STRAIGHTFORWARD: HOW TO MOBILIZE HETEROSEXUAL SUPPORT FOR GAY RIGHTS (2005); Devon W. Carbado, *Straight out of the Closet*, 15 BERKELEY WOMEN’S L.J. 76, 108–24 (2000).