Everyday Law for Gays and Lesbians: An Introduction

Anthony C. Infanti*
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Abstract

This is the (revised) introductory chapter of a book that I am currently writing. The book is titled Everyday Law for Gays and Lesbians, and is part of Paradigm Publishers’ Everyday Law series.

The introductory chapter - indeed, the entire book - is built upon and around the power of narrative. I begin the chapter with a personal narrative that illustrates what I refer to as the current predicament of the lesbian and gay movement. In the first part of the chapter, I survey the social and legal landscape that surrounds the movement, explain why I view the 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 the narratives of individual lesbians and gay men, told in their own words, are a radical and powerful tool for advancing us (meaning all lesbians and gay men) toward the unqualified acceptance that we seek. As I explain in the chapter, my goal in writing this book is to empower and inspire each of us to deploy these narratives in the most effective way possible.

In keeping with this view of the power of the individual narrative, I counsel against relying on others - whether straight allies or lesbian and gay rights organizations - to effect change on our behalf. I argue that it is up to each of us to draw attention to and challenge the ubiquitous privileging of heterosexuality in our society. And, the title of the book and the series notwithstanding, I further eschew overreliance on legal strategies for effecting change; instead, in the course of the book, I discuss both potential legal and non-legal avenues for effecting change.

I would greatly appreciate any comments that you might have on the chapter or any suggestions that you might have regarding coverage for the book.
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 wake, one of the teachers that she had worked with gave me her condolences and shared a number of stories about my mother. Before her retirement, my mother had worked as this teacher’s aide in a middle school special education class. The teacher told me how she was always amazed at the things my mother would say to the students, things that she herself would never dare to say (although she often would have liked to). My mother would suggest to these seventh- or eighth-grade 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 occasional 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 quite upset. When my father asked her what was wrong, she recounted a tirade that she had heard earlier in the day in the teachers’ room at school.

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. They liked having us around and always wanted us to stay for the whole weekend, not just for a few hours or even a day. So, my mother knew that this teacher’s acerbic remarks applied to me and my partner as well as the disembodied “homosexuals” that she had in mind.

Even though my mother took these remarks personally, she did not speak up or counter them in any way—she just sat there suffering through them 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 restrain that sardonic wit of hers 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 fills me with both sadness and hope: At the same time that it exemplifies the current predicament of the American lesbian and gay movement, it 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 this chapter, I set the stage—and the tone—for the remainder of the book by suggesting that our individual lesbian and gay
narratives, told in our own words, are a radical and powerful tool for advancing us toward the unqualified acceptance that we seek. The goal of this book is to empower and inspire each of us to deploy these narratives in the most effective way possible.

Deconstructing the Text of Our Lives

Measuring Our Progress: How Far We Have Come

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 step back and examine the surrounding social and legal terrain, I find us situated somewhere far short of the unqualified acceptance that we seek and only a stone’s throw from the unadulterated hostility that defines our past. This is an unpleasant, trying, and dangerous situation indeed.

To some, this assessment may sound bleak. After all, the lesbian and gay movement in the United States did not coalesce until the late 1960s and early 1970s. 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, lesbians and gay men are now considered a “niche” market by advertisers. There is no shortage of lesbian and gay characters in film and on television, and there was even a race to be the first to create a separate 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.9

With the recent, high-profile successes in the courts, the legal tide appears to be turning in favor of the lesbian and gay movement as well. In a stunning reversal of its relatively recent decision in *Bowers v. Hardwick*,10 the U.S. Supreme Court in *Lawrence v. Texas*11 struck down criminal prohibitions of sodomy on federal constitutional grounds. Not even a year later, in *Goodridge v. Department of Public Health*,12 the Massachusetts Supreme Judicial Court extended the right to marry to same-sex couples in Massachusetts on state constitutional grounds. Several other states have enacted domestic partnership or civil union regimes that provide a measure of legal recognition to lesbian and gay couples, including Vermont, Connecticut, New Jersey, California, and Hawaii.13

And, comparatively speaking, the United States must be more advanced than many other countries in terms of gay rights.14 Why else would lesbians and gay men who are persecuted in their native countries because of their sexual orientation have sought—and, in a number of cases, have been granted—refuge here?15 Moreover, many people in non-Western countries perceive gay identity and gay pride to be a threatening Western, and particularly American, export.16

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

But, having already shifted from the circumstantial to 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 the 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. As soon as we see ourselves traveling down a road, it becomes clear that this upbeat assessment of our situation privileges a backward-looking measure of progress. By this measure, whether (and how much) progress we have made is determined by looking back to see how far we have come.

This is, however, only one measure of progress; progress can also be measured by shifting to a forward-looking perspective. In other words, progress can just as easily be measured by looking ahead toward our destination to see how far we still have to go. Through the medium of this slight shift in perspective, the advances made by the lesbian and gay movement over the past several decades are cast in an entirely new light.

No longer remarkable, these advances now seem 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 different ways:

Far too many lesbians and gay men still feel the need to live in the closet because they fear the repercussions of privately or publicly declaring 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.

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 are too often stereotypes who fail to reflect the diversity of the lesbian and gay community and/or the real lives of lesbians.
and gay men.\textsuperscript{19} On the screen (big or small), physical intimacy is still a relative rarity when it takes place between members of the same-sex, and when it does occur, it is usually under less than romantic circumstances.\textsuperscript{20}

As of December 31, 2003, only fourteen states and the District of Columbia had laws in effect that prohibited employment discrimination against lesbians and gay men in both the public and private sectors.\textsuperscript{21} Although it has been asserted that relatively few employment discrimination claims have been made under these laws,\textsuperscript{22} a recent empirical study maintains that, when the raw number of complaints is adjusted to take into account the number of lesbians and gay men in the workforce, “gay rights laws are used with greater frequency than the raw numbers imply.”\textsuperscript{23} In reality, claims of sexual orientation-based employment discrimination were made at about the same rate as claims of gender-based employment discrimination.\textsuperscript{24}

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).\textsuperscript{25} 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.\textsuperscript{26} They speculated that any negative effect on wages caused by a lesbian’s or a bisexual woman’s sexual orientation might be counterbalanced by a positive effect on wages resulting from her departure from traditional gender roles (particularly marriage and child-rearing, with their real and/or perceived influence on a woman’s commitment to market labor).\textsuperscript{27}

Even those who remain in the closet in an attempt to pass as straight and thereby 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.28

In addition, 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.29 Disturbingly, it appears that anti-gay violence spikes whenever the lesbian and gay community finds itself in the spotlight. 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),30 the number of incidents of violence against gay men, lesbians, bisexuals, and transgendered individuals increased 8% from 2002 to 2003 and again increased 4% from 2003 to 2004.31 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).32 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).33

Providing support for the existence of a “spotlight” effect, there was a noticeable spike in anti-gay violence in the latter half of 2003, when the decisions in Lawrence v. Texas and Goodridge v. Department of Public Health were issued, which continued into the first half of 2004.34

Furthermore, the lesbian and gay movement’s high profile legal successes have been matched by equally high-profile failures. In response to a 1993 decision of the Hawaii Supreme Court that, for the first time, raised the specter of legalized same-sex marriage in the United States,35 Congress passed, and President Clinton signed into law, the Defense of Marriage Act.36 This legislation, with its hate-filled legislative history,37 prohibits the recognition of same-sex marriages for purposes of federal law and permits one state to refuse to recognize the same-sex marriages celebrated in another state.38 Beginning in the mid-1990s, thirty-eight states enacted their own statutory prohibitions of same-sex marriage.39 Seventeen states went further and enshrined same-sex marriage prohibitions in their constitutions.40 Thirteen of these constitutional amendments were approved in 2004—eleven of them by wide margins, ranging from 57% to 86% voting in favor.41 Compounding the damage, sixteen states have a statutory or constitutional prohibition that does not just ban same-sex marriage, but also bans other forms of recognition of same-sex relationships.42

When our legal progress is viewed from a wider, international perspective, it 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 lesbian and gay couples in the federal constitution. While Americans are generally hostile to the idea of same-sex marriage, the Netherlands, Belgium, and Canada 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 (“ECHR”) began the “development of international human rights law in the area of gay and lesbian sexuality” by holding that Northern Ireland’s sodomy law violated the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”). In the late 1980s and early 1990s, the ECHR reaffirmed its interpretation of the European Convention in finding that the sodomy laws of Ireland and Cyprus also violated the terms of the convention.

Even though not all of the ECHR’s decisions over the past quarter century concerning sexual orientation and gender identity have been positive, commentators have noted that the ECHR has become “increasingly receptive to human rights claims brought by lesbian and gay applicants” since the late 1990s. 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;\textsuperscript{52} (2) the United Kingdom’s ban on lesbians and gays serving in the military;\textsuperscript{53} (3) a Portuguese appellate court’s overturning of a lower court ruling that awarded custody of a young girl to her father because of his sexual orientation;\textsuperscript{54} (4) the criminalization of homosexual relations between more than two men in private;\textsuperscript{55} (5) the failure legally to recognize the reassigned sex of a post-operative transsexual;\textsuperscript{56} (6) the inability to marry someone of the sex opposite to one’s reassigned sex;\textsuperscript{57} and (7) denying the surviving member of a same-sex couple the benefit of a rent law, which permitted surviving life companions to succeed to decedent companions’ tenancies.\textsuperscript{58}

The United Nations Human Rights Committee has on several occasions considered the application of the International Covenant on Civil and Political Rights (“ICCPR”) to sexual orientation discrimination.\textsuperscript{59} In 1994, nearly a decade before the decision in \textit{Lawrence v. Texas}, the Human Rights Committee found that Tasmania’s sodomy law violated the ICCPR.\textsuperscript{60} In that decision, the Human Rights 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 include sexual orientation within their ambit.\textsuperscript{61} The Human Rights Committee later reaffirmed this interpretation of the ICCPR in another case brought against Australia.\textsuperscript{62} In that case, the Human Rights 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).\textsuperscript{63}

In a case brought against New Zealand, the Human Rights Committee held that the ICCPR does not obligate states that have ratified the treaty to extend the right to marry to same-sex couples.\textsuperscript{64} This interpretation was based on language in the ICCPR that guarantees “[t]he
right of men and women of marriageable age to marry.”65 The Human Rights 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 using the term ‘men and women’, rather than ‘every human being’, ‘everyone’ and ‘all persons’.”66 Two members of the committee wrote an opinion concurring in this interpretation of the ICCPR, 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].”67 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.”68

**Bedeviling Contextuality**

These two perspectives—backward-looking and forward-looking—provide antithetical accounts of the lesbian and gay movement’s progress over the past several decades. While each perspective accurately describes events, neither perspective by itself provides an accurate measure of our progress. The true measure of our progress (and the true picture of our predicament) lies in an amalgamation of these two perspectives—in a hodgepodge of hostility, shame, discomfort, and normalization.

As I mentioned earlier, the *Oxford English Dictionary* defines “predicament” as a “[s]tate of being; condition, situation, position; esp. an unpleasant, trying, or dangerous situation.” In
view of the anti-gay tirade that my mother silently endured at school that day, the continuing need for many of us to remain in the closet, and the potential employment discrimination and anti-gay violence to which all of us (closeted and uncloseted) remain subjected, it should come as no surprise that the current situation is both unpleasant and dangerous for lesbians and gay men.69

What makes these times so trying is the enervating uncertainty that is a by-product of society’s grudging toleration of homosexuality.70 In American society, there are people, like my mother, who sympathize with the lesbian and gay movement in its constant 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 a bit upset by my answer, she took the news well. My sexual orientation, although not what she preferred it to be, was not going to change how much she loved me or how proud she was of me (as every mother ought to be).

People like my mother sympathize with lesbians and gay men because they see us as human beings, not as some disembodied and dehumanized “other” that is entirely too easily vilified and used as a scapegoat for society’s problems.71 They are deeply troubled by anti-gay violence and other extreme manifestations of sexual prejudice (or, more commonly, “homophobia”).72 That is why coming out has proved to be such a powerful process73 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.74

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.75 At some point, even...
straight people who think of themselves as tolerant can’t help but fall prey to the shame that our society ingrains in each of us when it comes to speaking about or dealing with homosexuality.76 Consider, for example, former President Clinton and Democratic presidential candidate John Kerry. In 1996, President Clinton, who is generally considered to be a friend of the lesbian and gay community, signed the Defense of Marriage Act into law, “blunting an election-year issue the Republicans had hoped to use against him.”77 A few weeks later, President Clinton used his support for this law, which a spokesman had earlier called a form of “gay baiting,” in an advertisement that was designed to garner votes from religious conservatives.78 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.79 As these two examples illustrate, the contours of straight limited sympathy for lesbians and gay men vary from individual to individual: some straight people are quite tolerant, others are less tolerant, and some are wholly intolerant of lesbians and gay men. Collectively, the limits of straight toleration of all things homosexual remain quite low.80

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 didn’t want to challenge the teacher’s caustic remarks because doing so would likely have entailed an implicit or explicit public acknowledgement that she had a gay son. Despite being troubled by my mother’s hesitation to respond to an open attack on lesbians and gay men, I didn’t blame her for remaining silent. How could I? For how many years did I live in the closet because of this same shame?

Though I can understand the existence of this boundary and can 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 unavoidable concomitant 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 of toleration and suddenly transform into the enemy—or into a passive accomplice, which is really no better.

This difficulty is exacerbated by the nature of sexual orientation (in contrast with race or gender) as a generally non-obvious characteristic, or “concealable stigma.” In our heterosexist society, people are assumed to be straight absent some evidence or indication to the contrary. This unspoken presumption effectively renders the coming out process never-ending, and requires lesbians and gay men to re-invent their identities each time they come into contact with someone—whether 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? When asked these or other questions entailing a response that either reveals your sexual orientation or requires you (directly or indirectly) to talk about your already-revealed homosexuality in more detail, you are forced to decide how candid you safely can be in answering. How can you know whether a full and honest answer will be met with shock, disgust, or some level of sympathy?

The Roots of the Predicament
According to the Online Etymology Dictionary, the first recorded instance of “predicament” taking on the meaning of an “unpleasant situation” did not occur until 1586. Interestingly, while this somewhat recent, 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 this 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. Byrne Fone, an emeritus professor of English at the City University of New York, documents the history of Western sexual prejudice in his book, *Homophobia: A History*. In the book, Fone surveys “historical events and literary, religious, philosophical, and scientific texts” from the Greco-Roman period through the twentieth century in an effort to “examine [the] judgments [that have been] made about those who engage in same-sex sexual practice.”

Fone traces the roots of sexual prejudice all the way back to ancient Greece. Even though, in retrospect, Greece is often viewed “as a utopia in which homosexual love flourished without blame or censure,” the only homosexual activity accepted in Greek society was that which conformed to, and reinforced, the primacy of the adult male citizen. Both women and younger men (but not underage boys) “were socially defined as passive and were thus legitimately desirable,” and “the adult male had the unquestioned right to penetrate and dominate”
his presumably weaker, usually younger, and socially inferior partner.” What was not socially acceptable, however, was an adult male who was effeminate, who accepted the passive role in homosexual sex, or who engaged exclusively in homosexual sex. Fone describes the prevalence of similar conventions 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.” Referring to the biblical punishment of Sodom and Gomorrah, the edict directed that the offender was to “‘expiate his crime in the avenging flames.’” Then, in 533 C.E., as part of his codification and revision of Roman law, the emperor Justinian decreed “that the death penalty be extended to homosexual acts.”

In the following passage, Fone nicely summarizes the treatment of homosexual activity in the first one thousand years of the Common Era:

In secular and ecclesiastical law, in the admonishments of local penitentials, in the declarations of Church councils, and in literature, homosexual acts were generally considered heinous and occasionally described as the worst of all sins. Punishment ranged from a few years of penance to excommunication for life. Though Christendom enacted only a handful of antihomosexual statutes in the five centuries after Christ announced his gospel of tolerant love, the following five centuries, between Justinian’s edict and the millennium, saw more than a
hundred antihomosexual civil and ecclesiastical pronouncements emanate from a
dozen nation-states and numerous local churches. Some have argued that this
represents a relatively small amount of regulation of sexual behavior by a
negligent and uninterested Church and an even less interested state, but in
comparison with the Church fathers and the Apostles, it is a significant attempt at
control. What official attention to the morality and social implications of
homosexual acts shows is that they had begun to generate increasingly intense and
negative concern. As the millennium approached and Christendom fearfully
awaited the Second Coming and the Last Judgment, some also eagerly awaited
the moment when sodomites, the worst of sinners, would receive exquisite and
appropriate punishment.97

By the late Middle Ages, sodomy was no longer a sin that could be repented; it had
become a sin without forgiveness.98 In the early thirteenth century, the Church called for civil (as
well as ecclesiastical) punishment of sodomy.99 Civil punishments were enacted in Italy, France,
Spain, and England in the thirteenth century.100 The extent to which homosexual activity was
persecuted during that period remains unknown; this 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.”101 Nonetheless, “[t]he earliest legal record of a European execution for
sodomy . . . dates from 1292,” with the guilty man having been burned alive for his crime.102

Notwithstanding a “rediscovery of classical writings [that] prompted a cautious
reexamination of male eros,”103 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.\textsuperscript{104} 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.\textsuperscript{105}

During the colonial period in New England, sodomy was also punishable by death.\textsuperscript{106} 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.\textsuperscript{107}

By the late eighteenth and early nineteenth centuries, many Western European nations had decriminalized sodomy.\textsuperscript{108} Unhappily, however, the decriminalization of sodomy “did not mean that intolerance of sodomites had disappeared.”\textsuperscript{109} 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.\textsuperscript{110} 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).\textsuperscript{111}

William Eskridge, a law professor at Yale University, has documented the rise in arrests and convictions for “crimes against nature” in late nineteenth- and early twentieth-century America as well as the use of disorderly conduct, vagrancy, loitering, indecent exposure, public lewdness or indecency, and solicitation laws to regulate same-sex “degeneracy.”\textsuperscript{112} Eskridge describes the practical effect of this regulation of homosexual activity in the following terms:
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-marital 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.\textsuperscript{113}

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.”\textsuperscript{114} While the invert was considered a threat for challenging traditional gender roles (an invert would 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.”\textsuperscript{115} 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.”\textsuperscript{116}

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, regularized and modernized vice or morals 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 that ranged from lobotomies to electric shock aversion therapy, pharmacological shock (induced vomiting when homoerotic images are 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 further attempted to exclude alien homosexuals from entering the United States. These federal witch hunts had a broader impact, because the government shared “police records and grounds for discharge with private employers” who often blacklisted individuals discharged for being homosexual. The states began their own witch hunts “either independently or following the federal lead.”

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.

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 lesbians and gay men seem to be encoded in our cultural DNA. 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.

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 an example of what had been an amazing transformation 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 supposed to be law: doing something without his permission or contrary to his views was not to be tolerated. When I told him that I was gay, he excoriated me for doing “this” to them (he couldn’t even bring himself to talk about it directly), as if I was intentionally trying to hurt or defy him. After I refused to speak with my father 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 just

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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 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. The day that 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.

At some level, most (if not all) of those engaged in the struggle to advance the lesbian and gay movement must share in this hope that the boundaries of straight limited sympathy can be expanded. After all, why agitate for change if you believe that change is not 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.¹²⁷

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. First, the ability of courts to effect social change through their legal decisions has been the subject of serious question.¹²⁸ Second, whenever a case brought by a lesbian or gay litigant is tried before a jury, there is a danger that the jurors’ sexual prejudice will influence their decision.¹²⁹ Third, a recent empirical study of appellate court decisions has confirmed anecdotal evidence¹³⁰ that the state courts are far more receptive to the claims of lesbian and gay litigants than are federal courts.¹³¹ Indeed, a commentator has characterized the results of 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.¹³² As a practical matter, this hostility limits the fora in which 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 state battles in lieu of a single federal battle.
Finally and most troublingly, when pursuing legal claims, lesbians and gay men must conform to the expectations of the legal system. To obtain the desired result, they may feel constrained to make arguments that will help them win in the short-term, but that may do them 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.” And this censorship does not come from the legal system alone; lesbian and gay rights organizations are complicit in this silencing when they discourage individuals from pursuing their legal rights for fear of suffering a loss in court or when they choose a plaintiff for a test case in the belief that he embodies characteristics that will make him sympathetic to a court.

The End of the Beginning

Thus, rather than narrowly focusing our efforts on effecting legal change, we must resolve to expand our efforts and pursue both legal and non-legal avenues for change. These two realms influence—and are influenced by—each other; for example, legal decisions can create opportunities for social change, while social change can alter how legal decisions are made. And, while we should welcome help in undertaking these efforts, we can no longer afford to sit back and rely on others to undertake these efforts for us. On the one hand, our straight allies, suffering from the limited sympathy discussed above, have too quickly abandoned us when it has
served their own interests. On the other hand, the “representatives” of the lesbian and gay movement who act on our behalf and purport to speak for us—organizations such as the Human Rights Campaign, the National Gay and Lesbian Task Force, and the Lambda Legal Defense and Education Fund—are not our “representatives” in any true sense of that word and do not always take actions or make statements that are in our best interest. \(^{138}\) With these admonitions in mind, I will close this introductory chapter and open the remainder of the book by exploring a radical and powerful tool for enhancing our ability to effect change: our individual lesbian and gay narratives. \(^{139}\)

But, as a prelude to this discussion, a quick story first. 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 my year in San Diego, I purchased a T-shirt from the ACT UP booth at a local event. \(^{140}\) 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 two semesters of law school working in our 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 that year in San Diego, I was at the grocery store with my partner, standing in the check-out line. An attractive, nicely-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 failure to talk about HIV/AIDS would only lead to more and more deaths.
from the disease—so we need to make the effort to speak out, to talk about the disease, to raise awareness, and to demand a cure. I’m not sure that this elderly woman quite knew how to respond to this explanation, but, after she reflected for a moment or two, she said that she thought the message was a 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:

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.”

The more lesbians and gay men who tell their individual stories—stories of
discrimination or 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 a valuable understanding of what it is 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.
Our stories may therefore help to extricate us from our current predicament and move us toward
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. We would be far better served by enriching the lesbian and gay
narrative with the many individual stories that compose the diverse rainbow that we have
embraced 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). 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.”

Naturally, this strategy entails 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 must 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 this 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 all areas of our lives. Because this privileging is an unspoken assumption upon which our society is built, the only way to combat the privileging and its effects is to draw attention to it 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 root of the problem by engaging in an active overturning and destabilizing of the underlying privileging of heterosexuality in our society.

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. Or we can refuse to remain silent, choosing instead 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 effort, and a very trying effort at that. 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 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 by talking about our lives in the same matter-of-fact tone and way that straight people speak about their own lives, we may be accused of “flaunting” the “private” matter of our (homo)sexual orientation. This reaction should not be viewed as a mark of benign ignorance—it should be viewed as the 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: the ability to speak freely about parents, grandparents, and grandchildren; dating, relationships, marriage, and divorce; and trying to get pregnant, the birth of children, and the ups and downs of raising children—they all presuppose and reinforce 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, or gender), some members of our community may pay a higher price than others for pursuing this strategy of destabilizing outness. 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. 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 begin to identify and challenge the privileging of heterosexuality in our society
as well.\textsuperscript{153}

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 as well as 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 (and a concomitant subversion of privilegings along race, class, gender, and other lines). To engage in this task, we will need these and other tools, we will meet both success and failure, and progress will 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.”\textsuperscript{154}

Notes


4. For a recent sociological perspective on the formation and evolution of the lesbian and gay movement in San Francisco from 1950 through the mid-1990s, see Elizabeth A. Armstrong, *Forging Gay Identities: Organizing Sexuality in San Francisco, 1950-1994* (2002). Armstrong’s account provocatively challenges the conventional wisdom that the 1969 Stonewall uprising was the catalyst for gay liberation. Instead, she asserts that it was the homophile movement’s encounter with the New Left that produced gay liberation. See id. at 56–80.


simple market profile offered in the enthusiasm of legitimizing gays as a market force may need qualification,” and examining the results of an opportunity survey of lesbians and gay men in Seattle, Washington that focused on discrimination and bias crimes). For an interesting discussion of the commodification of lesbian and gay identity as well as the general failure of legal scholars to take account of this phenomenon, see Skover & Testy, supra note 5.


12. 798 N.E.2d 941 (Mass. 2003); see also Opinions of the Justices to the Senate, 802 N.E.2d 565 (2004).


15. E.g., Karouni v. Gonzales, 2005 U.S. App. LEXIS 3740 (9th Cir. 2005); Hernandez-Montiel v. Immigration & Naturalization Serv., 225 F.3d 1084 (2000); Pitcherskaia v. Immigration & Naturalization Serv., 118 F.3d 641 (9th Cir. 1997); see Mike Hudson, Escaping Abuse Overseas, Advocate, May 24, 2005, at 36; Monica Rhor, US Grants Asylum to Gay Man, Boston Globe, Sept. 5, 2003, at B3. But see Amnesty Int’l, supra note 14 (including a number of occurrences in the United States among the examples of torture and ill-treatment of individuals based on their sexual orientation); Hudson, supra (recounting mistreatment of gay asylum seeker while in custody).


17. See Kenji Yoshino, Covering, 111 Yale L.J. 769, 783–875 (2002) (retelling the history of the lesbian and gay rights movement in a way that “might suggest it is an inexorable progress narrative. Yet a more probing appraisal of that history invites skepticism about how much a shift
from conversion to passing or covering has translated into actual progress in the material and
dignitary status of gays. Throughout [his] account, [Yoshino] emphasize[s] how some shifts from
gay conversion regimes to gay passing or gay covering regimes did not represent such
progress.”).

13, 2004, at A1; Michael Slackman & Andrew Jacobs, Sex, Ambition and the Politics of the
Closet: A Double Life, N.Y. TIMES, Aug. 15, 2004, § 1 at 33. U.S. Representative Jim Kolbe (R-
AZ) only decided to come out of the closet after he found out that The Advocate planned to out
him in a story focusing on closeted politicians who had voted in favor of The Defense of
Marriage Act. J. Jennings Moss, Heated Debate over House Approval of the Antigay Defense of
Marriage Act Shines a Wary Spotlight on the Congressional Closet, ADVOCATE, Sept. 3, 1996, at

More recently, the staunchly anti-gay Republican mayor of Spokane, Washington was outed
when a local newspaper accused him of abusing his positions and the public trust over a 25-year
period to have sex with young men and boys. Timothy Egan, A Mayor’s Secret Life Jolts a

19. E.g., Rebeka Burns, TV’s Portrayal of Gays Not a Realistic Picture, SUN-SENTINEL (Ft.
Lauderdale, FL), Apr. 28, 2004, at 5; Scott, supra note 8; Vinay Menon, Gay-Themed TV Still

20. See Anthony C. Infanti, The Internal Revenue Code as Sodomy Statute, 44 SANTA CLARA L.
21. **HUMAN RIGHTS CAMPAIGN FOUND.**, *supra* note 9, at 30. An additional eleven states had laws in effect that prohibited such discrimination in the public sector only. *Id.*


24. *Id.*

25. 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); see also BADGETT, *supra* note 6, at 20–51 (Badgett’s method of identifying lesbians and gay men in her study has been critiqued both by Black et al., *supra* at 453–56, and by Blandford, *supra* at 625–26; this study was originally published as M.V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 INDUS. & LAB. REL. REV. 726 (1995)). Consistent with this data, a study exploring the interaction between attitudes toward lesbians and gay men and hiring discrimination based on sexual orientation found that lesbian and gay applicants were ranked consistently lower than heterosexual male applicants, but higher than heterosexual female applicants. Michael Horvath & Ann Marie Ryan, *Antecedents and Potential Moderators of the Relationship Between Attitudes and Hiring Discrimination on the Basis of Sexual Orientation*, 48 SEX ROLES 115, 125–27 (2003) (the subjects of this study were undergraduate students).

27. Black et al., supra note 25, at 463; Blandford, supra note 25, at 630, 636–38.

28. M.V. Lee Badgett, The Wage Effects of Sexual Orientation Discrimination, 48 IND. & LAB. REL. REV. 726, 728 (1995); see also Yoshino, supra note 17, at 813 (“Thus, while this account of passing may seem less punishing than the preceding account of conversion, it demonstrates that passing, too, exacts its costs.”). Badgett, an economics professor at the University of Massachusetts–Amherst, more fully explores the costs of remaining in the closet at work in BADGETT, supra note 6, at 51–73. She concludes that incentives should be developed to encourage coming out at work because the cost-benefit analysis engaged in by individual lesbians and gay men likely does not take into account all of the unintended, positive social consequences associated with coming out, resulting in a decision-making process that is inappropriately skewed in favor of remaining closeted. Id. at 72.

29. 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. As described below in note 30, these statistics only reflect reported bias crimes and therefore understate the total number of bias crimes that occur in the United States each year.

Investigation (FBI) 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 the National Coalition of Anti-Violence Programs 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), available at http://www.fbi.gov/ucr/ucr.htm#hate; see also NCAVP 2003 REPORT, supra, at 18–19. 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. ALTSCHILLER, supra note 14, at 27–28.

31. NCAVP 2004 REPORT, supra note 30, at 2, 24; NCAVP 2003 REPORT, supra note 30, at 2, 21. This represented a reversal of a general downward trend in anti-gay violence over the previous five-year period, which was part of the general decrease in crime nationally—although anti-gay violence “did not fall as far or as rapidly as violent crime in general” during that period. NCAVP 2003 REPORT, supra note 30, at 16.


34. Id. at 16; NCAVP 2003 REPORT, supra note 30, at 15. This paralleled earlier spikes: first, in New York City in June 1994, when that city hosted both the Gay Games and the Stonewall 25
celebration, and then nationally in March and April 1997, when Ellen DeGeneres and her
caracter on her eponymous television show simultaneously came out of the closet. *Id.* at 14.


39. NAT’L GAY & LESBIAN TASK FORCE, ANTI-GAY MARRIAGE MEASURES IN THE U.S. AS OF

40. *Id.* It is worth noting that there is substantial overlap between these two categories: fourteen
states have both a statutory and a constitutional prohibition of same-sex marriage. *Id.*

A39; Michael Kranish, *Gay Marriage Bans Passed; Measures OK’d in All States Where Eyed*,

42. NAT’L GAY & LESBIAN TASK FORCE, *supra* note 39. In 2005, a federal judge struck down
Nebraska’s constitutional amendment, which gay rights advocates had described as the most
extreme in the country. *Judge Voids Same-Sex Marriage Ban in Nebraska*, N.Y. TIMES, May 13,

Panoptics*, 89 CALIF. L. REV. 643, 648 n.19 (2001); Bob Drogin, *Struggle Pays off for S. Africa


57. Id.


59. 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); see Restatement (Third) of Foreign Relations Law of the United States § 111(3) & cmt. h (1987) (explaining the difference between self-executing and non-self-executing
treaties); Sosa v. Alvarez-Machain, 124 S.Ct. 2739, 2763 (2004) (“Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing.”).

In addition, the United States has not ratified the optional protocol to the ICCPR that would allow the Human Rights 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, at


61. Id. at ¶ 8.7.


63. Id. at ¶ 12.


65. ICCPR, supra note 59, art. 23(2).
66. Joslin, supra note 64, at ¶ 8.2.

67. Id. at app. (citations and footnotes omitted).

68. Id.

69. Byrne Fone, Homophobia: A History 3 (2000) (“[I]n modern Western society, where racism is disapproved, anti-Semitism is condemned, and misogyny has lost its legitimacy, homophobia remains, perhaps the last acceptable prejudice.”).

70. E.g., Romer v. Evans, 517 U.S. 620, 646 (1996) (Scalia, J., dissenting) (“Quite understandably, they [i.e., lesbians and gay men] devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.”).

71. There is a long history of scapegoating homosexuality for all of society’s ills. See Fone, supra note 69, at 186–87. For an interesting discussion of the contested interpretation of the biblical story of Sodom that is the source of much of this scapegoating, see id. at 75–107.

Vote Troubles Gay Community, SUN-SENTINEL (Ft. Lauderdale, FL), Nov. 7, 2004, at 19A;
David Sarasohn, Speaking in a Moral Tongue—Carefully, OREGONIAN, Nov. 5, 2004, at D7;
Stan Simpson, Marriage Issue Gave Bush His Edge, HARTFORD COURANT, Nov. 6, 2004, at B1;

72. 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 the rhetorical power of the term and its 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).

For example, Herek has noted that critics of the term “homophobia” argue that it “implicitly suggests that antigay attitudes are best understood as an irrational fear and that they represent a form of individual psychopathology rather than a socially reinforced prejudice.” Herek, Sexual Prejudice, supra, at 19; see also Herek, Beyond “Homophobia,” supra, at 9–11.
Herek points out that while the notion of a fear of homosexuality may have been well-suited to arguments made by early gay liberationists that “hostility toward homosexuality was very much about a heterosexual person’s fear and loathing of his or her own repressed homosexual feelings,” Herek, *Beyond “Homophobia,”* supra, at 12, it is inconsistent with the current view of lesbians and gay men as a minority group and of anti-gay hostility as a rejection of lesbians and gay men because of their outgroup status. *Id.* at 13. In fact, in a study of college students it was found that only “an extremely small portion” of anti-gay responses were phobic; the anti-gay responses in the study were actually more indicative of prejudice on the part of respondents. Logan, *supra,* at 48–49.

An additional problem with use of the term “homophobia” (more particularly, the “homo” part of the word, which is generally associated with gay men) is that, despite use of the term to describe hostility toward lesbians and gay men, psychological studies of anti-gay hostility have focused primarily on hostility toward gay men and have left heterosexual attitudes toward lesbians relatively unexamined. Herek, *Beyond “Homophobia,”* supra, at 11. Furthermore, Herek commented on the following paradox in the use of the word “homophobia”:

[W]hereas homophobia is overly narrow in its characterization of oppression as ultimately the product of individual fear, it is simultaneously too diffuse in its application. It is now used to encompass phenomena ranging from the private thoughts and feelings of individuals to the policies and actions of governments, corporations, and organized religion. The fact that homophobia is used so broadly
is itself an indication of the need for a more nuanced theoretical framework to
distinguish among the many phenomena to which it is applied . . . .

Id.

To remedy this problem and lay a foundation for future study of anti-gay hostility, Herek,
a psychology professor at the University of California at Davis, 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,” id. at
15), heterosexism (i.e., “the cultural ideology that perpetuates sexual stigma by denying and
denigrating any nonheterosexual form of behavior, identity, relationship, or community,” id. at
16), and sexual prejudice (“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,” id. at 17). See also White, supra, at 79
(likewise breaking homophobia into three parts: homoagression, homoanxiety, and
homorevulsion). Herek had earlier argued in favor of using the term “sexual prejudice” in place
of homophobia because the term

has several advantages. First, sexual prejudice is a descriptive term. Unlike
homophobia, it conveys no prior assumptions about the origins, dynamics, and
underlying motivations of antigay attitudes. Second, the term explicitly links the
study of antigay hostility with the rich tradition of social psychological research
on prejudice. Third, using the construct of sexual prejudice does not require value judgments that antigay attitudes are inherently irrational or evil.


In keeping with this criticism of the term “homophobia,” I will eschew its use in this book except where another author employs the term. See Marc R. Poirier, *Hastening the Kulturkampf*: Boys Scouts of America v. Dale and the Politics of American Masculinity, 12 Law & Sexuality 271, 274, n.8 (2003) (similarly avoiding use of 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.

73. Although not one without cost, and not one that was experienced in the same way by all lesbians and gay men. Elizabeth Armstrong has described how women and people of color have experienced coming out differently from gay white men and have questioned the centrality of coming out to gay identity. *Armstrong*, supra note 4, at 136–37, 150.


75. Byrne Fone has likewise discussed this distinction between tolerance and acceptance of lesbians and gay men. Fone, supra note 69, at 419–21. For an enlightening discussion of the false empathy of whites for racial and ethnic minorities, see Richard Delgado, Rodrigo’s Eleventh Chronicle: Empathy and False Empathy, 84 Cal. L. Rev. 61 (1996).

I have chosen to use the term “sympathy” rather than “empathy” here, because straight people generally do not attempt to identify with and understand the experiences of lesbians and gay men in any meaningful fashion. Ingrained societal discomfort with homosexual sex makes it difficult for straights to put themselves in the place of lesbians and gay men. By way of example, consider the desexualized euphemisms used by straight society to describe the members of a gay or lesbian couple (e.g., “friend,” “special friend,” “partner,” or “significant other”). See Infanti, supra note 20, at 777, 783–84. Based on my personal experience, the studies that have shown a correlation between positive general attitudes toward lesbians and gay men and contact with
lesbians and gay men can most plausibly be explained as instances of straight sympathy (rather than straight empathy) for lesbians and gay men. Cf. Herek & Capitanio, supra note 74, at 422 (speaking in terms of contact fostering “empathy” for the situation of lesbians and gay men; nevertheless, when read in context, it seems that Herek and Capitanio may actually be speaking of sympathy rather than empathy here); Hinrichs & Rosenberg, supra note 74, at 78 (“These findings lend support to social bond theory as conceptualized by Hirschi. Hirschi discusses the bond of the individual to society as consisting of interrelated components: attachment, commitment, involvement, belief. Attachment to parents, adults, and peers is a significant factor in producing conforming behavior. Akers writes that the greater the attachment as seen in close affectional ties, admiration, and identity, the more we care about the expectations of others. Thus, attachment in the form of friendship should produce the positive attitudes evident in this study.” (citations omitted)). We still have not reached a point where straight people attempt to identify with and understand lesbians and gay men; at present, they simply feel an affinity toward lesbians and gay men whom they know intimately and, naturally, deplore any treatment of those lesbians and gay men that they perceive to be unjustified.

76. See LORD ALFRED DOUGLAS, TWO LOVES, in “TWO LOVES” & OTHER POEMS: A SELECTION 23, 25 (1990) (“Sweet youth,/Tell me why, sad and sighing, thou dost rove/These pleasant realms? I pray thee, speak me sooth,/What is thy name?” He said, “My name is Love.”/Then straight the first did turn himself to me/And cried: “He lieth, for his name is Shame,/But I am Love, and I was wont to be/Alone in this fair garden, till he came/Unasked by night; I am true
Love, I fill/The hearts of boy and girl with mutual flame.”/Then sighing, said the other: “Have thy will,/ I am the love that dare not speak its name.”).


80. In a March 2004 Los Angeles Times poll, 69% of respondents indicated that they know someone who is gay, and 60% of respondents indicated that they were sympathetic to the gay community. Elizabeth Mehren, Acceptance of Gays Rises Among New Generation, L.A. TIMES, Apr. 11, 2004, at A1. Nonetheless, 60% of respondents indicated that they would be very or somewhat upset if one of their children were gay or lesbian. Id. Fifty-two percent of respondents opposed allowing same-sex couples to adopt children. Id. Forty-eight percent of respondents indicated that same-sex relationships between consenting adults are morally wrong, and nearly three in five respondents stated that same-sex relationships are against God’s will. Id.

81. Herek & Capitanio, supra note 74, passim.


84. Id.
85. *Id.*

86. FONE, *supra* note 69.

87. *Id.* at 7.

88. *Id.* at 17.

89. *Id.* at 25–26.

90. *Id.* at 26–27.

91. *Id.* at 25–43.


93. *Id.* at 60–71.

94. *Id.* at 62. Earlier in that century, in 313 C.E., the Roman Empire had been declared Christian by Emperor Constantine. *Id.*

95. *Id.* at 114–15. As mentioned earlier, Fone devotes two chapters to contesting the conventional interpretation of the story of Sodom and Gomorrah as a divine punishment for homosexual activity. *Id.* at 75–107.

96. *Id.* at 115.

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

98. FONE, *supra* note 69, at 132–75.

99. *Id.* at 142–43.

100. *Id.* at 143–44.

101. *Id.* at 174–75.

102. *Id.* at 144, 174.
103. *Id.* at 180.


105. *Id.* at 214.

106. *Id.* at 329.

107. *Id.* at 329, 331.

108. *Id.* at 265.

109. *Fone*, *supra* note 69, at 266.

110. *Id.*

111. *Id.* at 332; *see also* Lawrence v. Texas, 539 U.S. 558 (2003) (striking down Texas’ anti-sodomy law).


113. *Id.* at 1068–69 (footnote omitted).

114. *Id.* at 1054.

115. *Id.*

116. *Id.* at 1069.


118. *Id.* at 713–16.

119. *Id.* at 733–46.

120. *Id.* at 743.
121. *Id.*

122. *Id.* at 746.


124. *Id.* at 757–61.

125. Eskridge, *supra* note 5.

126. *See* JACQUES DERRIDA, OF GRAMMATOLOGY 160–61 (Gayatri Chakravorty Spivak trans., 1997) (describing the reader as within her history and culture and that history and culture as within the reader); 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) (“But scholars are beginning to realize that this mechanistic view of an autonomous subject choosing among separate, external ideas is simplistic. In an important sense, we *are* our current stock of narratives, and they us.”); Richard Delgado & Jean Stefancic, The Racial Double Helix: Watson, Crick, and Brown v. Board of Education (Our No-Bell Prize Award Speech), 47 HOWARD L.J. 473, 487 (2004) (considering how our “legal and social system perpetuates race relations, with Whites on top and the others arranged below”).

127. MILLER, *supra* note 82, at 140; *see also* PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT 1 (2000) (“The role of the lawyers, the legal arguments they construct, and the fine-tuning of these arguments in response to judicial opinions is a central part of any civil rights movement. . . . Whether one believes that courts do in fact cause social change, courts are nonetheless crucial in any battle over equal rights.”).
128. CAIN, supra note 127, at 5–9; MILLER, supra note 82, at 145–48; Toni M. Massaro, Gay Rights, Thick and Thin, 49 STAN. L. REV. 45, 53 (1996); see also ELLEN ANN ANDERSEN, OUT OF THE CLOSETS & INTO THE COURTS 3, 17–26 (2005) (viewing this debate from a sociological perspective, and arguing that legal decisions do no more than create the opportunity for social change).


130. See William B. Rubenstein, The Myth of Superiority, 16 CONST. COMMENT. 599 (1999) (maintaining that lesbian and gay civil rights litigants have fared better in state courts than they have in federal courts, and exploring the question whether state courts may have some institutional advantages over federal courts in certain cases); see also CAIN, supra note 127, at 233–41 (discussing the trend of state courts interpreting state constitutions to provide more protection than the federal constitution as well as the post-Hardwick shift from federal to state court in making challenges to sodomy statutes and the successes that were achieved there).


132. Hunter, supra note 131, at 942.
133. See MILLER, supra note 82, 114–18 (describing the drawbacks and dangers of making immutability arguments); Massaro, supra note 128, passim (describing the boomerangs and double-binds involved in making legal arguments in connection with lesbian and gay civil rights claims). For example, the immutability argument can be used by anti-gay forces against lesbians and gay men just as easily as it can be used by lesbians and gay men to obtain sympathy or to justify heightened scrutiny under the Equal Protection Clause. MILLER, supra note 82, at 148; Janet E. Halley, Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability, 46 STAN. L. REV. 503, 517 (1994) [hereinafter Halley, Immutability].

134. Delgado & Stefancic, supra note 126, at 474; see also MILLER, supra note 82, at 142–45; Massaro, supra note 128, at 55.

135. See, e.g., ANDERSEN, supra note 128, at 85–86 (discussing the choice between pursuing Bowers v. Hardwick or Baker v. Wade in terms of who would be a more “sympathetic” plaintiff); id. at 128–29 (similar discussion with regard to Lawrence v. Texas); id. at 186–87 (gay rights organizations issued a pamphlet discouraging individuals from filing same-sex marriage lawsuits in the wake of Baker v. Vermont, except in “‘the best cases in the best places at the best times’”); Devon Carbado, Black Rights, Gay Rights, Civil Rights, 47 UCLA L. REV. 1467, 1505–06 & n.148 (“Part of a civil rights strategy involves selecting the ‘right’ (read: most palatable) plaintiffs.”), 1505–17 (exploring gay rights advocates’ choice to use the stories of white lesbians and gay men in challenging the military’s anti-gay policies while they ignored the story of a black man who was the first to mount a successful challenge to those policies); Gay Newlyweds in Massachusetts Tackle Taxes, ADVOCATE, Jan. 26, 2005, at _____ (indicating that some
married same-sex couples from Massachusetts would like to fight the discrimination against
them in the federal tax laws, but stating that Gay and Lesbian Advocates and Defenders was
advising these couples not to file joint federal income tax returns because it was not “looking to
pick a fight with the IRS”); 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 in challenges
to sodomy laws and anti-gay measures to obtain a diverse group of plaintiffs).

136. MILLER, supra note 82, at 147; Massaro, supra note 128, at 56–57; see also VAID, supra
note 2, at 24–25 (describing the need to shift from legal/political reform to cultural reform and
changing people’s attitudes).


138. Vaid criticizes small, homogeneous groups of elites for being unrepresentative, self-
appointed spokespersons for the movement, asserting, in contrast, that the Human Rights
Campaign, the National Gay and Lesbian Task Force, and similar organizations are
“accountable” to the lesbian and gay community. Just a few pages later, however, Vaid describes
how the Human Rights Campaign, the National Gay and Lesbian Task Force, and similar
organizations are undemocratic; elitist; have memberships that comprise only a small fraction of
the lesbian and gay community; and, in their governance, are more responsive to the demands of
fundraising than to democracy. VAID, supra note 2, at 214–19, 221–23.
139. Contra VAID, supra note 2, 210–37 (evincing a notion of “liberation” that isn’t really liberating at all; it seems to consist of more political organizations such as the ones that Vaid has been a part of for decades—just at the state level rather than at the local or national levels).

140. For those not familiar with ACT UP, the website for ACT UP/New York describes the organization in the following terms: “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, at http://www.actupny.org.

141. “Covering means the underlying identity is neither altered nor hidden, but is downplayed. Covering occurs when a lesbian both is, and says she is, a lesbian, but otherwise makes it easy for others to disattend her orientation.” Yoshino, supra, note 17, at 4. For more on passing and covering, see id. passim.

142. Suzanne Goldberg has described the ways in which an individual’s story may be better told in court:

For example, a complaint may convey a full picture of the plaintiff, rather than portraying the stripped-down sketch intended to highlight only the particular protected feature that provides the basis for the discrimination claim. Similarly, the direct examination of the plaintiff (and other witnesses) during trial can incorporate a fuller discussion of the plaintiff’s multidimensional identity than the legal arguments will allow. In addition, in any multi-plaintiff suit making a claim
based on one particular identity feature, plaintiffs can be selected to exemplify the wide range of individuals bearing that trait. To the extent that plaintiffs become spokespersons in the public discussion regarding a case, their simple presence can help shatter unidimensional views of any given trait.

Goldberg, supra note 135, at 660–61.

143. MILLER, supra note 82, at 152 (quoting Urvashi Vaid, After Identity, NEW REPUBLIC, May 10, 1993, at 28).


148. Massaro, supra note 128, at 105.

149. See supra note 82 and accompanying text.

150. E.g., Harvey Fierstein, Widows and Children First, in TORCH SONG TRILOGY 103, 151 (1979) (speaking about Arnold’s being gay, Ma says “Arnold, you’re my son, you’re a good person, a sensitive person with a heart . . . and I try to love you for that and forget this. But you won’t let me. You’ve got to throw me on the ground and rub my face in it. You haven’t spoken a sentence since I got here without the word ‘Gay’ in it.”).

152. See Vaid, supra note 2, at 15–16 (asserting that the intersection of class and sexual orientation makes it harder for poor people to take advantage of the advances made by the lesbian and gay movement); Kate Kendell, Race, Same-Sex Marriage, and White Privilege: The Problem with Civil Rights Analogies, 17 Yale J.L. & Feminism 133, 137 (2005).


154. See supra note 1 and accompanying text.