GAY RIGHTS AND AMERICAN LAW

Daniel R. Pinello

CAMBRIDGE

Gay Rights and American Law

DANIEL R. PINELLO
John Jay College of Criminal Justice of the City University of New York

CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
The Edinburgh Building, Cambridge CB2 2RU, UK
40 West 20th Street, New York, NY 10011-4211, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
Ruiz de Alarcón 13, 28014 Madrid, Spain
Dock House, The Waterfront, Cape Town 8001, South Africa

http://www.cambridge.org

First published 2003

Printed in the United States of America

Typeface Sabon 10/13 pt. *System* LaTeX 2ε [TB]

A catalog record for this book is available from the British Library.

Library of Congress Cataloging in Publication Data

Pinello, Daniel R.
Gay rights and American law / Daniel R. Pinello.
p. cm.
Includes bibliographical references and index.
ISBN 0-521-81274-7 (hb.) – ISBN 0-521-01214-7 (pb.)
1. Gays – Legal status, laws, etc. – United States. 2. Gays – Legal status, laws, etc. – United States – Cases. 1. Title.
KF4754.5.P56 2003
342.73′087–dc21 2002041555

ISBN 0 521 81274 7 hardback
ISBN 0 521 01214 7 paperback

Gay Rights and American Law

Gay Rights and American Law investigates how American appellate courts dealt with the struggle for lesbian and gay civil rights during the last two decades of the twentieth century. The study is grounded on an exhaustive database of both federal and state cases and of the personal attributes of the judges who decided them, as well as of the ideological, institutional, and legal environments in which the decisions were situated. The book's comprehensive quantitative examination of appellate response to an emergent minority's legal claims affords an empirically sound explication of that judicial action, as well as a pathway to more general – and telling – commentary on judicial policy making, wholly independent of the lesbian and gay context. The work both explains how diverse factors influenced the adjudication of civil rights claims during a vital era of the homosexual rights movement and formulates promising methodologies for the meaningful quantitative empirical study of law.

Daniel R. Pinello was educated at Williams College, New York University, and Yale University. His scholarship includes *The Impact of Judicial-Selection Method on State-Supreme-Court Policy: Innovation, Reaction and Atrophy* (1995) and "Linking Party to Judicial Ideology in American Courts: A Meta-Analysis," *Justice System Journal* (1999).

For

Lee Nissensohn

my domestic partner, without whose unswerving love and support this book would not have been possible

and

Ronald Tommie Tucker

my beloved cousin, whose death from AIDS at forty-one robbed the planet of one of its finest citizens

List of Tables

Acknowledgments

One of academe's abiding delights is collegiality. I am deeply indebted to myriad people who helped this project on its long journey and am very grateful for their unstinting support of this endeavor.

The single most important individual providing aid in the undertaking by far was Rogers M. Smith, who read the full manuscript. The book profited enormously from his generous and detailed critical commentary, particularly regarding the work's accessibility to a readership beyond judicial behaviorists and statistically sophisticated legal scholars. If the volume in fact reaches a wide audience, he deserves credit for the feat by reminding me to view a forest and not just trees.

Paul R. Brace, Evan Gerstmann, Michael Heise, Arthur S. Leonard, and Richard A. Posner also read the manuscript and offered gracious criticism. Michael Bobic, Jeff M. Gill, Herbert M. Kritzer, Keith Marcus, Kirk A. Randazzo, and Paul J. Wahlbeck provided sage advice on methodological issues.

Much of the material here premiered as papers at the annual meetings of the American and Midwest Political Science Associations. Forerunners of Chapter 3 appeared at the 1995 APSA and 1999 MPSA conferences, where Sally Kenney and Mary R. Mattingly in the former and Ellen Ann Andersen in the latter, served as discussants. Precursors of Chapters 4 and 5 were offered at the 2001 MPSA and 1999 APSA meetings, respectively, where Laura Langer and Jeff Yates were discussants. These colleagues, as well as audience members, gave valuable comments.

Numerous individuals assisted the data collection. Foremost among them were the 474 state and 5 federal judges who completed and returned the self-administered questionnaire (Appendix 3.3) soliciting

personal attribute information on which the study fundamentally relies. The book would not be possible without these jurists' welcome cooperation. Similarly, the database on U.S. Court of Appeals judges amassed by Gary Zuk, Deborah J. Barrow, and Gerard S. Gryski and housed at the Inter-University Consortium for Political and Social Research was indispensable to the investigation.

In addition, Robert A. Bernstein, Richard A. Brisbin, Jr., Kyle Cheek, Michele DeMary, Craig F. Emmert, Leslie Friedman Goldstein, William K. Hall, John C. Kilwein, Douglas D. McFarland, Carla E. Molette-Ogden, Vincent K. Pollard, Holly Sellers, Kenneth S. Sherrill, Neil Snortland, James R. Soles, Kenneth D. Wald, Stephen L. Wasby, and Marvin Zalman supplemented personal attribute information about appellate judges. Charles J. Barrilleaux and Richard C. Fording provided updated citizen and government ideology scores for Berry et al. (1998). Gary Buseck of Gay and Lesbian Advocates and Defenders, Sharra E. Greer of the Servicemembers Legal Defense Network, Kate Kendell of the National Center for Lesbian Rights, Syd Peterson of Lambda Legal Defense and Education Fund, and Millie Yan of the Lesbian and Gay Rights Project of the American Civil Liberties Union reviewed the book's collection of appellate court decisions on lesbian and gay rights and facilitated a comprehensive case compilation. They also informed me in which lawsuits their organizations participated as either counsel or *amicus curiae*.

Harvard University Press and William N. Eskridge, Jr., kindly granted permission to reproduce the excerpt in Chapter 5 from *Gaylaw: Challenging the Apartheid of the Closet*. Likewise, J. Stephen Clark, Frank B. Cross, Alan Gunn, Sanford Levinson, Richard K. Neumann, Jr., James Alexander Tanford, Eugene Volokh, and Marianne Wesson charitably allowed use of the excerpts appearing in Chapter 6 from their messages posted to LAWPROF, an email discussion group moderated by Edward P. Richards III.

Along the way, Stephen D. Ansolabehere, Aaron Belkin, Frank B. Cross, Barry Friedman, Sheldon Goldman, Timothy J. Groseclose, David R. Mayhew, Joan E. McLean, Ellen D. B. Riggle, Kenneth S. Sherrill, Steven A. Shull, Susan S. Silbey, James M. Snyder, Jr., Michael E. Solimine, Isaac Unah, Kenneth D. Wald, and Stephen L. Wasby extended helpful advice and information.

At Cambridge University Press, Lewis Bateman shepherded the project. Indeed, in less than a week, he responded enthusiastically to an unsolicited proposal from an untested political scientist with few references. I pray the outcome is worthy of his largesse. Stephanie Sakson, the production

editor and copy editor, adeptly helped transform my manuscript into a book. Her sure-handed guidance was indispensable.

My colleagues at John Jay College of Criminal Justice of the City University of New York – George Andreopoulos, Janice Bockmeyer, James Bowen, James N. G. Cauthen, Jack Jacobs, Barry Latzer, James P. Levine, Jill Norgren, Ruth O'Brien, Harold J. Sullivan, and Robert R. Sullivan – offered longstanding encouragement and support.

Lee Nissensohn, my domestic partner, and Patty Rae Stanley, my beloved sister, selflessly nurtured me through untold trying times – for me *and* them – while "The Book" was interminably in progress. They are suitable candidates for martyrdom and sainthood.

Wolfgang Amadeus Mozart's unique combination of genius and humility never ceased to inspire. His chamber music, especially the slow movements, reliably aided the muse to speak clearly and often.

Finally, I invite readers to visit www.danpinello.com.

Contents

1

Introduction

This is a book about how American appellate courts dealt with the struggle for lesbian and gay civil rights during the last two decades of the twentieth century. The volume also uses that conflict as a lens to scrutinize judicial behavior beyond the scope of homosexual rights.

The research is grounded on an exhaustive database of court cases about gay rights and of the personal attributes of the judges who decided them, as well as the ideological, institutional, and legal environments in which the decisions were situated. The empirical findings are striking, and I summarize some notable ones at the start.

First, a bench that is diverse with regard to age, gender, race, and religion is important to securing lesbian and gay rights. Judges who are female, African American, Latino, Jewish, or young (i.e., in their thirties or forties) are more likely than those who are male, white, Protestant, or older to recognize sexual minority rights and to treat lesbians and gay men as equal citizens whose distinctive interests and concerns merit judicial recognition. More generally, diversifying the bench to include groups that experience invidious discrimination creates sensitivity to the legal claims of other such communities. Heterogeneity among judges substantially helps to secure rights, and not just for the groups immediately represented. Moreover, this finding presumptively applies to all public officeholders.

The flip side of the coin is that other categories of jurists – for example, Roman Catholics and those with prior career experience in elective public office – have been far less hospitable to the civil rights of homosexuals.

Second, the law – both judge-made and legislatively enacted – also matters. If legal precedents supporting gay rights are won, that case law

makes it significantly more likely that later tribunals, even those staffed with antigay jurists, will uphold those rights. Further, courts in jurisdictions with consensual sodomy statutes are less prone to back lesbians and gay men, while those where legislatures have adopted gay civil rights laws are more likely to embrace gay rights across the board. Thus, homosexual activists and their supporters should strive for further decriminalization of consensual sodomy in the nation, even though the offense is virtually unenforced. At the same time, successful political action for legislative passage of gay civil rights statutes will likely reverberate in the judicial arena.

Third, unlike the experience of the civil rights movement, the federal judiciary is not the most promising battle ground for the gay rights struggle. After more than three decades in which Republican presidents predominately selected federal judges, there are now numerous state courts more receptive to the legal claims of lesbians and gay men than the federal bench as a whole. Those groups pursuing litigative strategies to secure rights are best advised to work at the state level, even though participation by gay interest groups as counsel or *amicus curiae* has enhanced the likelihood of victory in federal tribunals.

Finally, the success of homosexuals in appellate courts generally has improved over time, especially with regard to gay family issues. In particular, judges have been increasingly more supportive of parental rights for gay people. Time appears to be on their side.

The Context of the Study

Lesbian and gay rights have received substantial attention in legal and political science research. For example, Koppelman (2000) reports that a "February 2000 search of articles listed under 'sexual orientation discrimination' in the *Index of Legal Periodicals* found 96 articles written on the subject from 1989 to 1994. From 1995 to the date of the search, there were 540 articles." In addition, many notable books have appeared,[1] contributing to a rich understanding of the place of lesbians and gay men in American law and politics.

[1] Important titles include Button, Rienzo, and Wald (1997), Strasser (1997), Keen and Goldberg (1998), Bailey (1999), Eskridge (1999), Gerstmann (1999), Halley (1999), Richards (1999), Riggle and Tadlock (1999b), Blasius (2000), Cain (2000), Rimmerman, Wald, and Wilcox (2000), Badgett (2001), Koppelman (2002), and Rimmerman (2002).

The scholarship on gays and the law, however, has been overwhelmingly normative or qualitative, with very few systematically statistical or otherwise quantitative investigations of legal issues relevant to gay people.[2] This dearth of quantitative empirical inquiry – as opposed to qualitative empirical research (Epstein and King 2002) – into the civil rights of homosexuals is in stark contrast to the wealth of statistical information on lesbian and gay politics.[3]

The comparative lack of quantitative empirical legal scholarship is not surprising, because such investigation often dismays legal academics. As Friedman (1986: 774) observes,

> empirical research is hard work, and lots of it; it is also nonlibrary research, and many law teachers are afraid of it; it calls for skills that most law teachers do not have; if it is at all elaborate, it is team research, and law teachers are not used to this kind of effort; often it requires hustling grant money from foundations or government agencies, and law teachers simply do not know how to do that.... Prestige is a factor too. Law schools ... tend to exalt "theory" over applied research. Empirical research has an applied air to it, compared to "legal theory."[4]

In short, extended quantitative studies by legal academics are rare. This book is a sample of their worth.

Moreover, law professors and political scientists generally have neglected each other's contributions. Rosenberg (2000: 267) notes,

> The academic disciplines of law and political science were once closely entwined under the rubric of the study of government. At the start of the twentieth century, to study government was to study law.... But as the century developed, and particularly after mid-century, the distance between the two disciplines grew. Today, legal academics and political scientists inhabit different worlds with

[2] The books by law professors (Cain, Eskridge, Halley, Koppelman, Richards, and Strasser) in note 1 have no consequential quantitative components; nor do most gay rights articles in law reviews and journals. Indeed, the only legal scholarship on lesbians and gay men informed by noteworthy data is Posner (1992) and Halley (1993). Examining countries tolerating homosexuality far more than the United States, Posner concludes there is no empirical evidence that elevating the social and legal status of gay people will increase their numbers. Halley reviews primary sources on the Georgia sodomy statute upheld in *Bowers v. Hardwick* (1986) and discovers that the Supreme Court's historical interpretation of the law is mistaken.

[3] Books such as Button et al. (1997), Bailey (1999), Gerstmann (1999), Riggle and Tadlock (1999b), Rimmerman et al. (2000), and Badgett (2001), as well as articles such as Sherrill (1993, 1996), Haeberle (1996), Haider-Markel and Meier (1996), Wald, Button, and Rienzo (1996), and Gamble (1997), are substantially empirical.

[4] For further explication of the paucity of empirical legal scholarship, see Schuck (1989), Nard (1995), Schlegel (1995), and Heise (1999).