RAINBOW RIGHTS

THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT

PATRICIA A. CAIN

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Preface

Although this book is finished, gay rights litigation continues. Since *Bowers v. Hardwick* was decided in 1986, the U.S. Supreme Court has agreed to hear only three cases involving legal claims pressed by lesbian or gay litigants. The most recent case, *Dale v. Boy Scouts of America*, was handed down as recently as June 26, 2000, while this book was in production. Lower courts, both federal and state, hear lesbian and gay rights cases much more frequently. I have updated the discussion of all cases, including *Dale*, through July 15, 2000.

The reader should be aware that several cases discussed in this book have not yet reached their final conclusion. In particular, there are at least three cases challenging state sodomy statutes that may yet be appealed, conceivably even to the U.S. Supreme Court, thereby creating an opportunity for the Court to reconsider its opinion in *Bowers v. Hardwick*.

In addition, the Supreme Court has not yet ruled on whether the equal protection clause of the Fourteenth Amendment protects lesbian and gay employees from government-imposed discrimination. The *Romer* case can be cited as evidence that the Court will answer the question affirmatively, but as of the completion of this book, the Court has denied certiorari in every case posing the question directly.

Finally, I predict that there will be a flurry of post-*Dale* litigation in which landlords and employers, as well as allegedly private clubs, will claim that they have a First Amendment right to discriminate on the basis of sexual orientation. A case that is currently before the Ninth Circuit Court of Appeals, *Thomas v. Anchorage Equal Rights Commission*, may well tell us more about the strength of such First Amendment claims than the *Dale* case does. Stay tuned. The struggle for "rainbow rights" is far from over.

Patricia A. Cain

Acknowledgments

This book has been in the making for many years. During that time it has been improved by my ongoing conversations with colleagues in law, history, and gay and women's studies. In addition, a number of my Iowa students have worked on this book. The three who helped bring it to fruition when deadlines were approaching deserve special recognition. They are Lisa Clay, Marci Lowman, and Faith Pincus.

For their wisdom and their energy, I thank the many lawyers at Lambda, the ACLU, and the National Center for Lesbian Rights whom I have come to know over the years. All of us who care about gay justice owe these brave crusaders the highest respect and gratitude for the time they have spent in the trenches. It is not an easy life to swim upstream for so many years.

Three colleagues deserve special thanks for reading the entire manuscript and offering not only wise advice but also thoughtful editorial suggestions. I am particularly grateful to Rhonda Rivera, whose gay legal scholarship I have admired for years; to Linda Kerber, who always asks the right questions and insists on historical context to tell the full story; and, most of all, to my partner, Jean Love, whose penchant for perfection inspires me on a daily basis. Jean, you are my rainbow.

P.A.C.

Introduction

This book is about the legal battles in the courtrooms around the United States that have been part of the struggle for lesbian and gay rights. As other activists did in earlier civil rights movements, lesbian and gay activists have argued their causes in federal and state courts throughout the nation and, on rare occasion, before the Supreme Court of the United States. 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. Recent academic debate among legal and political science scholars, however, questions whether civil rights litigation victories actually do contribute to positive social change. Some scholars argue that courts do not cause social change and that civil rights movements do not make their biggest gains from litigation. One of the strongest contemporary legal advocates for gay rights, Tom Stoddard, agreed with this assessment, and before his untimely death from AIDS, cautioned us to work harder in the legislative bodies of the country in our fight for lesbian and gay equality.

Whether one believes that courts do in fact cause social change, courts are nonetheless crucial in any battle over equal rights. As Gregory Peck said, playing the role of attorney Atticus Finch in the film version of Harper Lee's *To Kill a Mockingbird:* "Our courts are the great levelers in this country."[1] What Finch meant, and what Lee tried to demonstrate in her novel, is that courts understand and apply the notion of equality much more readily than legislatures or than members of society in general. Justice Hugo Black made a similar point in a 1940 Supreme Court case, when he said: "Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."[2] What civil rights litigators understand is that, even if courts are imperfect as agents of change, they are important arenas for making civil rights claims, for arguing about equality and rights, and for educating legislatures and the broader society about injustices experienced by minorities.

A history of any civil rights movement would be incomplete without the stories of legal battles in the courtrooms across the country. And yet, most histories of the lesbian and gay civil rights movement focus more on political activity and legislative lobbying than they do on the litigated cases. This book is an attempt to correct that imbalance. This book will tell the stories of the lawyers and of the cases that have been central to the lesbian and gay civil rights movement. This book poses the question: How are our courts doing as "the great levelers in this country"?

Why Rainbow Rights?

After I began work on this book and started to use "Rainbow Rights" as a working title, several people asked: "Why call it 'Rainbow Rights'? What does 'rainbow' mean, especially as a modifier of rights?"

First, I use the term "rights" because my focus is on the legal arguments that have been made in courtrooms. Those arguments are derived from explicit or implicit guarantees of rights that are constitutionally granted to all "citizens," or, in some cases, to all "persons." Lesbians and gay men are citizens and persons; that characterization has never been seriously questioned. And yet, as the law has developed, gay men and lesbians have not enjoyed the same constitutional rights or protections as they would have enjoyed had they been nongay persons. On the surface, this result sounds like a denial of "equal rights." Yet some argue our very difference from heterosexuals prevents us from enjoying equal rights. Indeed, some argue that to give gays any rights means giving them "special rights." To avoid the equal rights/special rights rhetorical debate, I have settled on "rainbow rights," that is, rights for lesbians and gay men, whether viewed as equal or special.[3]

Why "rainbow"? Many people outside the lesbian and gay community assume that the word "rainbow," when used in a discussion involving politics or rights, refers to Jesse Jackson's Rainbow Coalition. But the gay movement claimed the rainbow first, and it remains the foremost symbol of gay pride, replacing the pink triangle, which was used to identify homosexuals in Nazi Germany and which has always carried negative connotations of the homosexual as victim. In her book *Another Mother Tongue*, Judy Grahn explains the symbolism of the rainbow in the lesbian and gay movement in several ways. Some in the movement embrace the rainbow as a fitting tribute to much-loved gay icon Judy Garland, who gave us the most well-known rainbow song ever, a song whose lyrics capture the hope of a

better world. Grahn also provides us with myths from various cultures about the transformative power symbolized by the rainbow. In one such myth, an uncle tells a tomboyish girl that if she walks under the rainbow, she will be transformed into a boy.[4]

Although the rainbow as a symbol of gay pride has its roots in ancient myths and modern fairy tales, it did not become the official symbol of the modern lesbian and gay rights movement until 1978, when Gilbert Baker, a renowned gay seamstress in San Francisco, conceived of the rainbow flag as a worthy symbol for San Francisco's gay pride parade. Baker claims to have been thinking of diversity and not *The Wizard of Oz,* according to lesbian columnist Deb Price. "We (gay people) are so different," he says. "We're men and women. We're black and white and brown, every color . . . and every class. It's a spectrum, and that's why it caught on."[5]

I mean to capture all these meanings in my title *Rainbow Rights.* I am looking for legal arguments that are transformative, that can bring us to that place over the rainbow where even bluebirds fly, and I am not the least bit interested in legal arguments that are not capable, in the end, of bringing us all there—black, white, brown, every color, male, female, able-bodied or not, rich or poor, English-speaking or not, gay, nongay, bisexual, and transgendered.

Making "Rights" Arguments

Civil rights movements succeed when they make arguments that win. The arguments may be ethical (e.g., all persons are deserving of equal respect), legal (e.g., no state can deny a person equal protection of the law), or economic (e.g., discrimination creates economic waste). Perhaps the most successful argument, and one that includes ethical, legal, and economic considerations, is this: Individual merit ought to be evaluated on the basis of one's ability. Blanket proscriptions on the basis of race, gender, or any other irrelevant characteristic have been struck down by the courts when civil rights lawyers have made arguments based on this concept of individual merit. The legally recognized remedy of "affirmative action" is currently under attack, in part, because some view it as a violation of the principle of individual merit.

"Equal opportunity" is another principle that is closely related to the concept of "individual merit." Stated in its individualistic form, the principle of equal opportunity means that all persons ought to be on a "level playing field," so that each individual has an equal shot at benefits such as

jobs and education, and so that such benefits will not be allocated on the basis of some characteristic unrelated to the benefit. Stated as a principle of class-based rights, the equal opportunity principle means that one class of people ought to be given the same opportunity as another class of similarly situated people—that women should have equal opportunities with men (and vice versa) and that nonwhites should have equal opportunities with whites (and vice versa).

The lesbian and gay civil rights movement has used these two types of arguments (individual merit and equal opportunity) in its efforts to gain public sphere benefits for gay, lesbian, and bisexual people. The arguments have been successful in court cases that have established employment rights and rights to public accommodations and to housing. In the legislatures, eleven states[6] and the District of Columbia[7] have enacted civil rights protections for lesbian, gay, and bisexual people in the public spheres of employment, public accommodations, housing, and education.

But the principles of individual merit and equal opportunity have been less valuable in the struggle to gain those rights that we typically identify with the private sphere, that is, rights to same-sex intimacy and the right to have our families recognized and protected by the state. To make the legal and moral argument in favor of private-sphere rights, gay rights activists have relied on a different principle, one that is derived from our notion that the government should not unduly interfere in certain private realms. This principle is the basis of the constitutional rights of privacy and liberty.

Privacy and liberty include the right to be left alone and the right to make individual choices about personal morality that differ from the majority. The values attached to privacy and liberty are strong traditional values in our heritage. The Bill of Rights was adopted to protect individual private spheres of life and conscience from unwarranted governmental intrusion. The right to speak in dissent, to keep government troops out of our homes, and to remain silent when questioned by government officials about wrongdoing all evidence the great concern the founders had for protecting the private sphere.

As many feminist writers have shown, however, state or governmental protection of the private sphere can serve to benefit the dominant members of society and to harm the subservient and less powerful members. This situation occurs, in part, because the private sphere deemed worthy of protection has tended to be defined by the dominant class, in particular nongay white men. Thus, the liberty and privacy interests of the dominant and the powerful have been protected, while the liberty and privacy interests of nonwhites, females, and lesbians and gay men have been ignored or debased.

In the history of civil rights movements, the success of liberty and privacy arguments has lagged behind the success of individual merit and equal opportunity arguments. This trend is as true for the antiracism civil rights movement and for the women's liberation movement as it is for the lesbian and gay civil rights movement. For example, *Loving v. Virginia*,[8] the U.S. Supreme Court case that recognized the right to engage in mixed-race marriages, was not decided until 1967. That was almost two decades after the Supreme Court struck down segregated neighborhoods *(Shelley v. Kraemer)*[9] and segregated law schools *(Sweatt v. Painter)*[10] and thirteen years after *Brown v. Board*[11] called for an end to public school segregation in elementary and secondary schools.

Public sphere rights are important to individuals. Jobs, education, and housing are all necessary for individuals to lead productive lives. But private sphere rights are also important. Without the ability to create intimate relationships that support and foster our individual creativity and our capacity for human empathy and love, we, as individuals, are unable to develop our full promise as human beings. A responsible government must protect both sorts of rights. The challenge for government with respect to the protection of private sphere rights is to find the right balance between noninterference with private choice and affirmative support for productive private relationships. Although the government has faced that challenge in the context of other civil rights movements, the lesbian and gay civil rights movement poses the challenge most directly.

Courts Versus Legislatures

Every civil rights movement has two forums in which it can make effective legal arguments: courts and legislatures. This book will focus on the arguments made in courts. Courts hear cases. They do not make broad policy decisions about what is best for society. Their decisions, instead, focus solely on the controversy that is before them. This focus makes their task different from that of legislatures.

Legal scholarship is brimming with discussion about the limitations on courts and whether they should play an active or constrained role in civil rights movements that seek to create change by expanding rights. Without fully summarizing that literature, I do want to make a few key observations about the role of courts, observations that are central to the themes I develop in this book.

Courts are constrained because they can only rule on the case before them. Further, they can only rule if the case is a real one. Thus, the plaintiff in the case must have "standing." To have standing, a person must have suffered a real injury or be imminently threatened by a real injury. Because courts cannot give "advisory opinions," a group of concerned citizens cannot just walk into the courthouse and complain that certain laws are unfair. Rather, those complaints should be taken to the legislature, which has the power to repeal old laws or to enact new ones.

Once an individual or group has asked a court to resolve a real dispute over which the court has jurisdiction, the court must rule. Courts cannot avoid making decisions. Although it is true the Supreme Court can elect not to hear a case, trial courts and most appellate courts have no such option. By contrast, a legislative body, after hearing arguments about how laws ought to be changed, can decide to do nothing. Doing nothing will, of course, maintain the status quo. At the same time, inaction may simply be a means of deferring decision on an issue. Courts cannot defer. Issues before them must be decided.

Because courts must act when an individual has invoked the court's jurisdiction, one can get one's cause more easily considered by a court than by a legislature. When legislatures do not respond to citizen complaints, citizens can complain to the courts. Thus, for example, when legislative bodies refused to enact legislation that would desegregate schools, courts were asked to rule that school segregation was unconstitutional. When certain school boards refused to comply with the Supreme Court's mandate to end segregation, courts were asked to develop judicial remedies to desegregate the schools. Similarly, when some state legislatures refused to repeal their laws criminalizing abortion, courts were asked to rule that the laws were an unconstitutional invasion of a woman's right to choose.

Observers of the Supreme Court have opined that Court decisions recognizing new constitutional rights have very little effect unless society is ready to accept such social change. Gerald Rosenberg's book, *The Hollow Hope,*[12] is perhaps the most important piece of scholarship focusing on the role of the courts in bringing about social change. He demonstrates that, despite the moral victory in *Brown v. Board of Education,* the case did very little to desegregate schools. Similarly, he takes the position that the Court's decision in *Roe v. Wade*[13] appears to have had little impact on the availability of legal abortion. And, despite Supreme Court decisions championing the rights of women in the public sphere,[14] women are still paid less than men and still bump their heads on a "glass ceiling."

Girardeau Spann, in *Race Against the Court,* has argued that the Supreme Court's ability to support minority claims for expansions of civil rights is severely limited by the Court's necessarily conservative nature. He explains:

> Life tenure and judicial independence cause the Court to function as a political force for preservation of the status quo. However, because racial minorities in the United States are disadvantaged by the socioeconomic status quo, the Court's inherent conservatism impairs minority efforts to achieve racial equality. The Court has manifested its inherent conservatism in subtle, yet effective, ways. *Brown v. Board of Education,* the case most often lauded as the icon of judicial sensitivity to minority interests, has had the ironic effect of luring racial minorities into a dependency relationship with the Court that has impeded minority efforts to acquire political power.[15]

I do not wish to challenge Rosenberg's statistics nor debate Spann's observations about the conservative nature of the courts. The work of both of these scholars, and of others who question the efficacy of the courts in bringing about social change, demonstrates that courts alone will never get the job done. And, certainly *Brown v. Board of Education* did not immediately desegregate schools in the South. But without the decision, or if the decision had gone the other way, surely school desegregation would have taken much longer.

Brown, after all, only outlawed de jure segregation. It did nothing to alter individual racist attitudes that continue to produce de facto segregation right up to the present time. Although Robert Carter, one of the NAACP lawyers in the *Brown* case, has said that perhaps the lawyers litigated against the wrong evil, segregation rather than racism, I doubt whether any litigation strategy could have successfully changed racist attitudes. Ending de jure segregation was a reasonable first step in the eyes of most NAACP litigators.

Further, although *Brown* may not have accomplished immediate desegregation or a significant reduction in racism, the decision did make material differences in people's individual lives. I have in mind not only the lives of those who were the direct beneficiaries of the decision—black students admitted to previously all-white schools—but also individuals for whom the decision created new visions of the possibility of equality. Consider, for example, Barbara Jordan's story.[16] In 1954, Jordan was in her junior year of college at Texas Southern, a historically black college in Houston. After a

short period of elation over the decision, she realized that nothing was changing in Texas. She then decided she would have to leave the South, so she applied to and was accepted by Boston University Law School. She understood that something more than legal cases were needed to change entrenched patterns of segregation and to improve the condition of black people. She was prepared to add her own personal efforts to that cause. If *Brown* had not been decided in 1954, would Barbara Jordan, inspired by *Brown*'s promise and committed to seeing its promise fulfilled, have become the first black woman to be elected to the Texas Senate? Would she have been elected to Congress in time to play the important public role that she played in the Nixon impeachment process?

Statistics cannot capture these defining moments in individual people's lives—moments that often occur in the wake of a momentous decision like *Brown*. The statistics show that desegregation occurred slowly, but, in the end, due in large part to the continuing efforts of NAACP lawyers, the *Brown* decision was implemented, city by city, school district by school district, university by university.

Rosenberg argues that many of the key participants in the civil rights movement were ignorant of the *Brown* decision. He reports that students who participated in sit-ins and similar demonstrations in the 1960s never cited *Brown* as a motivating factor in their political activities. But times have changed since *Brown*. In an era of televised news, cases such as *Bowers v. Hardwick*[17] and *Roe v. Wade* have quite literally become household words. Today, movement lawyers who take cases to court have a very direct impact on the nature of the nation's dialogue about the rights of minorities.

So, yes, what the courts say on the issue of gay rights matters. Although federal and state lower court opinions are less well publicized than U.S. Supreme Court opinions, those decisions also matter, especially rulings that empower activists in the movement to continue their work. Lower court opinions recognizing the rights of gay organizations and the right of lesbian and gay individuals to congregate in public, for example, have provided crucial support to the organization of the movement. Lower court decisions protecting the public speech rights of lesbian and gay activists have helped to ensure that the movement's claims are heard in the political arena.

This book is about the role of courts generally in the lesbian and gay civil rights movement. I will look at court cases over a fifty-year period, beginning in 1950. I divide these cases into three primary classifications: cases that focus on public sphere rights, cases that focus on private sphere rights,

and cases in which the litigants are asking for public recognition of their private relationships.

Organization of This Book

This book has several themes. One theme is the direct comparison of the lesbian and gay civil rights movement with the earlier struggles for race equality and sex equality. Another theme is the relative success of legal arguments in obtaining public sphere rights as compared with private sphere rights, a phenomenon that also occurred in earlier civil rights movements. Another theme, prevalent in earlier civil rights movements, is the tension between making litigation arguments based on a group's similarity to other groups and making arguments based on the group's difference.

The book is intended as a history of the litigation that has been central to the progress of the lesbian and gay civil rights movement. As I focus on specific cases, I identify legal arguments that touch on the public/private divide as well as arguments that raise tensions over the sameness/difference thesis. Because this book is a history, its organization will be primarily chronological.

By focusing on court decisions, legal theories, and litigation strategies, I highlight the role of the courts in bringing about change. I also hope to demystify litigation and court decisions for nonlawyers who are interested in gay and lesbian rights. Thus, although this book may be more easily read by lawyers and law students, it is written for a broader audience as well.

To address the various themes and to maintain the chronological nature, the book is organized as follows: Chapter 1 provides a brief overview of two earlier civil rights movements, the African American civil rights movement and the women's movement. After that, the primary focus is on the lesbian and gay civil rights movement, but I explore some of the similarities and differences among the movements in each chapter. Chapter 2 introduces the notion of public interest lawyering and describes the key public interest lawyers and their organizations, both for the earlier civil rights movement as well as for the lesbian and gay civil rights movement. In Chapter 3, I begin the story of lesbian and gay rights litigation by focusing on what I call "public sphere rights." These rights include the rights of equal access to employment, public accommodations, housing, education, and credit. Chapter 3 chronicles the litigation efforts that have increased public sphere rights for lesbians and gay men from the early days of the movement, circa 1950, until 1986, when the Supreme Court handed down its decision in *Bowers v.*

Hardwick. Chapter 4 focuses on litigation efforts relating to "private sphere rights" during the same pre-*Hardwick* period. In Chapter 5, I question the public/private divide and focus on those rights that I believe most challenge that divide. Marriage rights are the best example.

Chapter 6 focuses on the *Bowers v. Hardwick* case and puts it in the context of earlier gay rights litigation that had challenged sodomy laws. Then, Chapter 7 focuses on legal arguments post-*Hardwick* in the public sphere. Chapter 8 focuses on legal arguments post-*Hardwick* in the private sphere. Chapter 9 once again questions the public/private divide by focusing on the right to marry and similar couple or family rights. In Chapter 10, I provide a short conclusion that focuses on two of the themes raised in this book: the public/private divide and the sameness/difference thesis. In the conclusion, I identify four obstacles that the lesbian and gay civil rights movement faces, obstacles that will make it more difficult for this movement to obtain the same successes in litigation that earlier civil rights movements for race and gender equality were able to obtain.

Notes

1. See also Nixon v. Condon, 286 U.S. 73 at 89 (1932), where Justice Cardozo says "The Fourteenth Amendment, adopted as it was with special solicitude for the equal protection of members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color."

2. Chambers v. Florida, 309 U.S. 227 at 241 (1940).

3. The "special rights" versus "equal rights" debate was central in the passage of Colorado's Amendment 2, later held unconstitutional in Romer v. Evans, 517 U.S. 620 (1996). The antigay supporters of Amendment 2 had characterized civil rights laws as laws aimed at giving special protection to certain minorities. They argued that gay rights ordinances in certain Colorado cities gave gay men, lesbians, and bisexuals a form of special protection. Legal experts in civil rights law testified at trial that civil rights laws did not provide special protection to minorities, but rather prohibited discrimination on the basis of certain classifications, such as race and gender. Under such laws, all racial groups are protected, not just minority groups. Similarly, both women and men are protected under laws that forbid sex or gender discrimination. And laws that forbid discrimination on the basis of sexual orientation protect both gay and nongay persons. See Lisa Keen and Suzanne B. Goldberg, *Strangers to the Law*, at 137–141. Justice Kennedy rejected the special rights argument, pointing out that Amendment 2 "withdraws from homosexuals, but no others [i.e., heterosexuals], specific legal protection from the injuries caused by discrimination." *Romer*, 517 U.S. at 627.

4. Judy Grahn, *Another Mother Tongue: Gay Words, Gay Worlds* at 272–273 (1984).

5. Deborah Price, "Rainbow Flag is a Symbol of a United Gay People," *Star Tribune,* April 19, 1995, at 4-E.

6. The eleven states are California, Connecticut, Hawaii, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin. See Cal. Lab. Code § 1102.1 (Deering Supp. 1998); Conn. Gen. Stat. Ann. § 46a–81c (West 1995); Haw. Rev. Stat. Ann. § 378–2 (Michie 1988); Mass. Ann. Laws, ch. 151B, § 4 (Law. Co-op. 1989); Minn. Stat. § 363.03 (West 1991); Nev. Stat. §613.330 (Michie 1999); N.H. Stat. § 354-A:6–17 (1999); N.J. Stat. Ann. S 10:5–12 (West 1993); R.I. Gen. Laws S 28–5–7 (1995); Vt. Stat. Ann. tit. 21, S 495 (1987); Wis. Stat. S 111.36(1)(b)-(d) (West 1997).

7. See D.C. Code Ann. S 1-2512 (1998).

8. 388 U.S. 1 (1967).

9. 334 U.S. 1 (1948).

10. 339 U.S. 629 (1950).

11. 347 U.S. 483 (1954).

12. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991).

13. Roe v. Wade, 410 U.S. 113 (1973).

14. See, for example, Reed v. Reed, 404 U.S. 71 (1971) (striking down a state statute that established a preference for male executors of estates); Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (construing Title VII to prohibit sexual harassment in employment).

15. Girardeau A. Spann, *Race Against the Court: The Supreme Court and Minorities in Contemporary America* 3 (1993).

16. See Barbara Jordan and Shelby Hearon, *Barbara Jordan: A Self-Portrait* (1979)

17. 478 U.S. 186 (1986).

1

Earlier Civil Rights Movements: Lessons to Be Learned

The lesbian and gay civil rights movement has focused on two primary themes or arguments: (1) that gay people are similar to all other human beings and should be treated equally, and (2) that gay people are different in ways that the law ought to respect and protect. In this regard, the movement is no different than earlier civil rights movements that also emphasized the themes of sameness and difference. The "sameness" thesis leads to an argument based on the Aristotelian notion of equality, that similarly situated persons ought to be treated similarly. The "difference" thesis leads to the use of arguments based on notions of libertarianism and the freedom of the individual to define self and live according to individual conscience.

The first argument, based on sameness, is easier to articulate, both politically and morally. If A and B are equally talented at designing bridges, then a city who is looking for a competent bridge designer should not care whether the designer is black, female, or gay. The talent of designing bridges is all that is relevant. The second argument, based on difference, is tougher. A person embracing the difference thesis will argue that, because each individual is unique, the law must respect the ways in which individual A is different from B. Disagreements abound over what sort of state action is required to give equal respect to differences. For example, does the state give sufficient respect to individual choices about sexuality simply by not judging what occurs in private (e.g., no regulation of consensual sex in private)? Or must the state do more—for example, accord public recognition for couples who have chosen to experience sexual intimacy and commitment with someone of the same sex? Jean Bethke Elshtain, a renowned professor of ethics, explains the problem as follows:

> The argument that gays are oppressed . . . results in two different claims: either that society has no business scrutinizing the private sexual preferences of anybody, including gays; or that government *must* intrude in the area of private identity because gays, like women, require a unique sort of public protection and "validation." . . . The politics of democratic civility and equity holds that all citizens, including gays, have a right, as individuals, to be protected from intrusion or harassment and to be free from discrimination in such areas as employment and housing. They also have a right to create their own forms of "public space" within which to express and to reveal their particular concerns and to argue in behalf of policies they support. This I take as a given when a public-private distinction of a certain sort is cherished and upheld. . . .
>
> But no one has a civil right, as a gay, a disciple of an exotic religion, or a political dissident, to full public sanction of his or her activities, values, beliefs, or habits. To be publicly legitimated, or validated, in one's activities, values, beliefs, or habits may be a political aim . . . but it is hardly a civil right. Paradoxically, in his quest to attain sanction for the *full* range of who he is, the crossdresser [and presumably the homosexual] puts his life on full display. He opens himself up to *publicity* in ways that others are bound to find quite uncivil. . . .[1]

Elshtain either misunderstands the public/private divide in the lives of gay people or she misunderstands the arguments that gay activists make. Gay people can and do argue that government should not intrude in the private sexual sphere. Government should not act in that sphere to limit free moral choices, that is, choices regarding sexual intimacy that are respectful of others. This argument takes the form of a "rights" argument, in particular a right to privacy argument. At the same time, gay people can ask the government to accord equal respect to the private choices of both gay and nongay couples regarding sexual intimacy and commitment. This argument is an "equality" argument. The request for equal respect is not a demand for governmental intrusion in "the area of private identity" as Elshtain suggests, but rather a demand for equal public recognition and facilitation of that private commitment. Recognition of the commitments of opposite-sex couples facilitates the "togetherness" of the partners, a "togetherness" that government generally values. Same-sex couples ask for similar or equal treatment, not "unique" protection or "validation" as Elshtain suggests.

Both arguments, privacy rights and equality, can be made before courts. Elshtain's assertion that "full public sanction of [individual] activities, val-

ues, beliefs or habits" is not a civil right is reminiscent of early arguments raised in the battle over racial equality. The Fourteenth Amendment, it was argued, guarantees only equal civil rights, not equal acceptance in society. The lesbian and gay civil rights movement often runs up against similar arguments. The response to such arguments is that the immediate battle, as it was in the civil rights movement for race equality, is over equal treatment by the government. Social acceptance may follow, and indeed is more likely to follow once a group is treated with equal respect by the government. The first Mr. Justice Harlan made a similar point in 1896 regarding racial minorities when he insisted that with respect to "civil rights, all citizens are equal before the law."[2] To the extent gay couples can demonstrate similarity with nongay couples, equal treatment "before the law" should be the rule. Whereas Elshtain appears to view arguments that support public sanction as political, I view such arguments as legal ones based on equality. Equality of treatment by government *is* a civil right.

The lesbian and gay civil rights movement is not the first civil rights movement to wrestle with the sameness/difference question and the public/private divide. Other movements have debated these issues, both internally and externally, and crafted arguments, some political, some legal, to deal with both issues. Other movements have produced their own win/loss records in the courts using both equality arguments and privacy or rights arguments. The purpose of this chapter is to examine two earlier civil rights movements in order to learn lessons from the past—to observe the contexts in which these two movements sounded the themes of sameness and difference, of public and private, of equality and rights, and to observe the responses of the courts to the legal arguments crafted by the litigators in these movements.

The two earlier civil rights movements that are of particular interest for the lesbian and gay civil rights movement are the African American civil rights movement and the women's movement. Advocates in both these movements litigated cases arguing for equal rights in the public sphere and for the right of individual dignity in the private sphere. In an attempt to obtain national and uniform recognition of such rights, both movements pursued litigation to establish rights under the federal constitution. For rights in the public sphere, advocates relied primarily on equality arguments supported by the Equal Protection Clause of the Fourteenth Amendment. For rights in the private sphere, they relied on privacy arguments derived from the liberty rights protected by the Due Process Clause. The lesbian and gay civil rights movement has crafted legal arguments based on the successes of the arguments made in these earlier civil rights movements, thereby arguing

for the extension to gay men and lesbians of rights that had been earlier won for racial minorities and for women.

Civil Rights Movement for Race Equality

At the time of the founding of this country, the Declaration of Independence pronounced: "All men are created equal." But the debates that occurred in the drafting of the Constitution indicated that "all men" did not include black men. In 1857, the U.S. Supreme Court agreed when it announced that Dred Scott, a slave, was not a citizen of the state of Missouri, nor of the United States, and thus could not bring a case in federal court claiming his freedom under the Missouri Compromise.[3]

The *Dred Scott* decision was ultimately reversed by the Fourteenth Amendment, passed in 1868, which states that "all persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside." Slavery was abolished by the Thirteenth Amendment, which had been ratified three years earlier in 1865. The Fourteenth Amendment, in addition to defining citizenship, protects citizens against state abridgments of privileges and immunities and declares that no state should deny a person equal protection or deprive a person of life, liberty, or property without due process of law. The Fifteenth Amendment secures the right to vote in every male citizen regardless of race. These three amendments have all been crucial in crafting legal arguments for racial equality. Constitutional amendments are not self-executing, however. Both litigation and legislation were necessary to effectuate the principles embodied in these Reconstruction amendments.

Relying on the principle of equal access embodied in the Fourteenth Amendment and on section five of that amendment, which authorizes Congress to pass legislation required to enforce the substantive provisions of the amendment, Congress passed the Civil Rights Act of 1875. This legislation guaranteed equal enjoyment of public accommodations regardless of race, thereby prohibiting racial discrimination by privately owned enterprises that opened their doors to the public at large. In response to charges made by some legislators that blacks were asking for something Congress could not provide, the right to socialize with white people, African American congressman John Lynch from Mississippi replied: "No . . . it is not social rights we desire. . . . What we ask is protection in the enjoyment of public rights. Rights which are or should be accorded to every citizen alike."[4]

Note the similarity to current arguments used against gay men and lesbians. When gay people ask to participate in the public arena as gay people, we are viewed as asking for social acceptance. Yet the reality is that when a gay Boy Scout asks not to be stripped of his status as an Eagle Scout, he is asking for protection in the enjoyment of a public right. When partners in a lesbian couple ask that their relationship be acknowledged by hospital workers so that one partner might provide emotional support to the partner in intensive care, they are asking for rights that should be accorded every citizen who is part of a couple. These requests are forms of equality arguments.

Shortly after the passage of the Civil Rights Act of 1875, the Supreme Court thwarted the congressional goal of equal racial access by entertaining a constitutional challenge to the Civil Rights Act of 1875. In 1883, the Court handed down its opinion in the *Civil Rights Cases*,[5] holding that the Fourteenth Amendment addressed only *state* action that denied equal protection and due process.[6] Because the Civil Rights Act attempted to prohibit racial discrimination by privately owned businesses, the legislation exceeded the power granted to Congress under section five of the amendment. Thus, the Court struck down the statute, ruling that Congress had no power to enact it.

With the Court's holding in the *Civil Rights Cases,* the state action doctrine of the Fourteenth Amendment became official. Under this doctrine, race discrimination claims brought in federal court would succeed only if the discrimination could be traced to a state official or state statute. The Thirteenth Amendment, by contrast, contains no "state action" language. Although litigators had argued in the *Civil Rights Cases* that racial discrimination in public accommodations was a "badge of slavery" and thereby prohibited by the Thirteenth Amendment, the Court rejected the argument. Thus challenges to race discrimination, other than challenges to slavery itself, had to be pursued under the Fourteenth Amendment, now burdened with the state action requirement. The state action doctrine had the effect of drawing a sharp line between public and private discrimination and became the first roadblock to realizing the goal of equal access to the public sphere, much of which is controlled or owned by private employers and businesses.

The second "roadblock" to equal access for racial minorities was created by the famous case of *Plessy v. Ferguson,*[7] decided in 1896, in which the Court held that a black man could be barred from a white railroad carriage without offending the Equal Protection Clause of the Fourteenth Amend-

ment. This case created the "separate but equal doctrine," a doctrine that validated segregation in public until *Brown v. Board of Education*[8] was decided in 1954.

Litigating Against the "Separate but Equal" Doctrine and the "State Action" Doctrine

In 1914, the Supreme Court handed down a decision that greased the wheels for the subsequent battle by the NAACP against the "separate but equal" doctrine. In *McCabe v. Atchison, Topeka & Santa Fe Railway,*[9] the Court ruled against a railroad that maintained segregated rail cars, but failed to provide first-class sleeping and dining cars for black travelers. The justification for the unequal facilities was that there was less demand from black travelers for such accommodations. The Court rejected the justification, holding that the right to equal protection was an individual right, that is, the right to be protected regardless of group membership and, in this case, regardless of group demand for first-class service. This emphasis on the individual's right set the stage for later challenges involving individual demands for graduate school education.

Shortly after *McCabe* came another major legal success for the black civil rights movement. In 1917 the Supreme Court decided the case of *Buchanan v. Warley,*[10] which struck down a city zoning ordinance that prevented a white person from selling his home to a black purchaser. The ordinance was not found to violate principles of racial equality since it applied equally to black and white owners by requiring all sellers to restrict their sales to purchasers of the same race. This view of the matter was consistent with the "separate but equal" doctrine, which supported racial segregation. Racial segregation was not the problem in *Buchanan.* Rather, the problem was that the restriction on who could sell to whom violated the white seller's liberty of contract. Since "liberty of contract" was protected by the Due Process Clause of the Fourteenth Amendment, the zoning ordinance was held to be unconstitutional. Although celebrated as a major success at the time, the case was a Sisyphean victory for the African American civil rights movement because it did not advance the meaning of racial equality, nor make any normative statements about segregation. The narrow basis of its holding (that white people could freely choose to sell to black people) did little to further the notion that apartheid, in and of itself, was unequal. The decision was handed down during a short period in constitutional history when liberty of contract was entitled to strong constitutional protec-

tion. That period ended in the 1930s. Thus, after that period, even the narrow legal principle established in the case was no longer available to black civil rights lawyers. In addition, the state action doctrine prevented the *Buchanan* ruling from being extended to instances of private zoning, that is, private covenants that restricted property ownership to members of a particular race.

The victory in *Buchanan,* even though it produced no long-term benefit in the form of legal doctrine that might support black civil rights, did produce another sort of long-term benefit. Encouraged by this victory, the NAACP proposed to launch a broader litigation effort to attack racial discrimination. The legal committee of the NAACP developed a proposal to attack segregation in housing, the exclusion of blacks from juries, and to combat segregation in public schools. The Garland Fund provided a $100,000 grant to support the campaign. In 1934, Charles Hamilton Houston, then the dean of Howard Law School, was hired to head the NAACP legal team that would be responsible for conducting this litigation campaign against racism.

Originally organized in 1909 by a small biracial group of New York citizens concerned about racial justice, the NAACP initially fought for legislative changes, in particular the enactment of antilynching laws, and represented black defendants in individual cases. This focus changed significantly under Houston's direction. His plan was to end segregation in education, which he considered "symbolic of all the more drastic discriminations."[11] In 1940, the NAACP Legal Defense and Educational Fund, Inc. was officially incorporated and its charter, authorizing practice of law as a corporation, was approved by the Appellate Division of the Supreme Court of New York County. African American lawyers in the organization at that time, in particular Houston, William Hastie, Thurgood Marshall, and Constance Baker Motley, developed the legal agenda and the legal arguments needed to attack segregated education.

The decision to use the courts was a conscious choice. The details of the NAACP's strategy have been provided by other authors, most notably Richard Kluger[12] and Mark Tushnet.[13] The attack focused primarily on educational opportunities. Two different legal arguments were pursued. Early cases argued that schools for black children were not in fact equal to schools for whites, that black teachers were not paid as much as white teachers, and that graduate school opportunities for blacks were often nonexistent when compared with opportunities for whites. In these cases, equalization was a permissible remedy. By the late 1940s, however, Thur-

good Marshall, now at the helm of the NAACP legal team, began a frontal attack on segregated education itself, arguing that separation of the races could never result in equal educational opportunity. This latter strategy ultimately succeeded when the Supreme Court ruled against segregation in *Brown v. Board of Education.*

The litigation efforts of the NAACP were not aimed at ending segregation so much as they were aimed at combatting racial discrimination in its many forms. Although segregated education ended up as a primary focus, the NAACP lawyers pursued other cases that also enlarged and protected the rights of black Americans. Attacks on the state action doctrine began to result in positive decisions as early as the 1940s with victories in the "white primary cases"[14] and the restrictive covenant case, *Shelley v. Kraemer.*[15] In *Shelley,* the Court ruled that private covenants to restrict property ownership on the basis of race violated the Equal Protection Clause even though the discrimination originated with the private landowners who had created the restrictions; the Court found the requisite "state action" in the judicial enforcement of the private covenants. Throughout the 1950s and 1960s, in cases that arose before the passage of the Civil Rights Acts of the 1960s, the NAACP litigated cases that continued to chip away at the state action doctrine, thereby enabling them to reach instances of private discrimination. Thus, a restaurant that leased space from a governmental agency was found to violate the Equal Protection Clause when the owner discriminated on the basis of race, despite the fact that the restaurant itself was privately owned.[16] And department stores that enlisted police aid in ejecting blacks from lunch counters were found to violate the Fourteenth Amendment, despite the fact that the stores were privately owned.[17] "Entanglement" with government officials became a sufficient nexus to turn a private actor into a state actor for equal protection claims.

This broadening of the state action doctrine came to an abrupt end when the political makeup of the Court changed in the late 1960s. The shift from the Warren Court[18] to the Burger Court[19] ended the expansion of the concept of state action.[20] By that time, however, the black civil rights movement had achieved legislative gains that made the state action doctrine less relevant to the attainment of its goals. The Civil Rights Acts of 1964 and the Fair Housing Act of 1968 established the principle of nondiscrimination on the basis of race in the arenas of private employment, education, accommodations, and housing. When civil rights opponents challenged these statutes on constitutional grounds, citing the late-nineteenth-century *Civil Rights Cases,* the courts upheld the legislative action under both the

commerce clause and the Thirteenth Amendment, neither of which contains a state action requirement.[21]

More important than chipping away at the state action doctrine was the NAACP's decision to wage a full-scale litigation battle against the separate but equal doctrine in the arena of public education. The first case to reach the Supreme Court was a case challenging the state of Missouri's practice of providing out-of-state scholarships for black graduate students who were unable to obtain graduate degrees in the segregated universities of the state. In 1938, the Supreme Court ruled that the state of Missouri was under an obligation to provide equal graduate education itself, rather than rely on other states to perform that function.[22] Ultimately, the state of Missouri complied, not by admitting the black law student to the white law school, but rather by creating a separate black law school. In subsequent cases, the NAACP legal team challenged the notion that a separate black law school created in a short amount of time could ever be truly equal to a fully established white law school. Finally, in 1950, the Supreme Court agreed and ordered the state of Texas to admit Heman Sweatt to the University of Texas Law School.[23] Furthermore, in its decision, the Court indicated that educating black law students apart from white students resulted in intangible harms to black students that could not be eradicated by spending more money on buildings, faculty, or books. In essence, the Court pointed out that there was only one University of Texas Law School and no comparable school could be built in less time than the time it had taken to establish the reputation of the existing school.

These cases finally led to *Brown v. Board of Education,* a case attacking the separate but equal doctrine directly in the context of elementary and secondary education. The key argument was that the state's separation of the races was inherently unequal because it was based on a system of white supremacy, thereby creating a stigmatic harm to each and every black child who was told that he or she was unworthy to attend the white school. The Supreme Court agreed:

> To separate [children in grade and high schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . .
>
> We conclude that in the field of public education, the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.[24]