Lawyers, Legal Theories, and Litigation Strategy

Civil rights movements have long used litigation successfully to accomplish part of the movement’s agenda. Although some people question whether specific court opinions actually contribute to positive social change, the litigation process itself does contribute to the development of a civil rights agenda. High profile cases attract media attention and help to educate the public generally. Movement leaders and spokespeople must be familiar with legal precedent so that they are prepared to give appropriate sound bites to the press when cases are decided. Particular rulings by courts affect later litigation theories and strategies. Negative rulings can contribute to an increase in political activity aimed at legislative changes.

For all of these reasons, one should expect lawyers to play an important role in civil rights movements. Lawyers did play important roles in the NAACP’s legal battle over segregation, but they weren’t the only activists in the movement for racial equality. Other key participants ranged from public figures like Dr. Martin Luther King Jr. to student protesters in the streets. There were few women lawyers available to play central roles in the first wave of feminism. Indeed, even at the beginning of the second wave, female lawyers were scarce. By the 1970s, however, women lawyers became a more visible part of the movement. The role of lawyers in the lesbian and gay civil rights movement is similar to that of lawyers in the second wave of feminism. The modern gay rights movement was not begun by lawyers, but by grassroots activists, much like the early wave of feminism. Yet it wasn’t long before a small group of lawyers in New York agreed to form a legal organization that would litigate on behalf of les-
bians and gay men who had suffered discrimination. Unlike Ruth Bader Ginsburg’s legal work on behalf of women, however, the lesbian and gay lawyers did not step in at the Supreme Court level to change Supreme Court precedent. Thus, these early lawyers more nearly resembled the early lawyers of the NAACP, who began to fight discrimination by bringing individual cases, with the hope of one day gaining appellate-level rulings that recognized the civil rights of their plaintiffs. Unlike the NAACP, however, early gay and lesbian legal groups were not supported by anything as encouraging as the $100,000 grant from the Garland Fund, which established the NAACP’s litigation campaign against school segregation. Gay and lesbian legal organizations turned primarily to the gay and lesbian community itself for their early support. Later, broader financial support occurred as the work of these organizations became more visible and as the AIDS epidemic caught broader public attention. This chapter tells the story of these early lesbian and gay public interest lawyers and the legal groups they helped to form.

PUBLIC INTEREST LAWYERS

A person has to have something special to be a public interest lawyer who fights for rights on behalf of a group that has consistently been denied those rights by the establishment. Individual lawyers in earlier movements have been called crusaders and heroes. Such descriptions are equally applicable to the lawyers who have fought for lesbian and gay civil rights. Civil rights lawyers are visionaries who are passionate about their visions, and they are consumed with the energy and blind faith needed to turn visions into reality.

In addition to being crusaders on behalf of the downtrodden and on behalf of those against whom society discriminates, however, civil rights lawyers are also trained professionals who engage in battle with a certain set of professional skills and within a certain set of professional constraints. Nonlawyer movement leaders may be the great orators or the charismatic politicians who inspire others to join the movement. In some cases, the public interest lawyer may serve this role as well. But in every civil rights movement, the lawyers, who are fighting for clients whose interests converge with that of the larger movement, share some similarities that bear identifying. In his book Rebellious Lawyering,1 Gerald Lopez provides a list of the attributes of public interest lawyers. It includes the following:

1. Lawyers formally represent others, i.e., clients.
2. Lawyers choose between “service work (resolving individual problems) and “impact” work (advancing systemic reforms) and these categories are largely dichotomous.
3. Lawyers litigate more than they do anything else.
4. Lawyers consider themselves the preeminent problem-solvers in most situations they find themselves trying to alter.

There is a danger that public interest lawyers who are committed to the goals of the movement in which they labor will not always listen closely to their individual clients as they are formulating their litigation strategy. Because the public interest lawyer identifies with the goals of the movement, the lawyer may become personally invested in cases that will further those goals. This personal investment in a particular case can cause a lawyer to feel as though the case really belongs to the movement rather than the client. Lopez warns that public interest lawyers often do not understand the nonlegal institutions that are part of the movement for social change. All of these factors suggest that lawyers are not ideal catalysts for social change. They are too isolated, and their vision is often restricted by their own professionalism.

Some public interest lawyers, especially those who represent more radical groups in civil rights movements, are so convinced that law itself will not change society that they are willing to state publicly that they have no respect for the law or legal institutions. In their opinion, litigating cases will never change society sufficiently to bring justice to their clients. These lawyers serve their clients and the movement out of a sense that such service is better than nothing and that occasionally, a legal decision will open up a possibility for minimal progress.2

Lawyers, fighting subordination, do convince courts to render decisions, to overturn precedent, and to issue orders that contribute to the ultimate goals of a movement. Furthermore, given the structure of litigation, only lawyers are in a position to play the role of advocate in the courtroom. But given the nature of law, lawyer activists, because they work within the legal system, are often viewed by their constituents as a relatively conservative force in the movement. Ironically, movement lawyers often find themselves criticized publicly by the very people they believe they represent.

Earlier civil rights movements experienced divisions of opinion between those who wanted to act within the confines of the law in order to change the law and those who wanted to act outside the law to bring attention to
made it. It is the one case that upheld classifications on the basis of sex during the period that she was arguing for a form of heightened scrutiny that should have struck down most if not all such classifications.

Tensions and divisions have arisen in all civil rights movements. The ones lesbian and gay civil rights lawyers face parallel those of their predecessors. Thus I will begin with some stories of the lawyers in these earlier battles before introducing the lawyers who have fought for lesbian and gay rights.

The NAACP Lawyers

"Crusaders for Change," as Jack Greenberg calls them in his book, seems an apt description of the lawyers who were at the forefront of the black civil rights movement. They include Charles Houston, Thurgood Marshall, Constance Baker Motley, and Greenberg himself. None of these advocates were willing to "accept the things I cannot change," despite its promise of serenity. Rather, they would have agreed with the wry remark of William H. Hastie, the first African American appointed to the federal bench, that "[a]t times it may be better for the Omnipotent One to give men the wit and the will to continue to plan purposefully and to struggle as best they know how to change things that seem immutable."  

Charles Houston was dean and professor of law at Howard Law School in the 1930s. Thurgood Marshall, later to become the first black Supreme Court justice, was an early protégé. Greenberg worked with Thurgood Marshall at the NAACP Legal Defense Fund (LDF) in the pre-Brown days and later served as director of the organization for twenty-three years after Marshall left to become a federal judge. Motley, whose family did not encourage her to enter the law, decided in 1937 at the age of fifteen to become a lawyer, not just despite her family's ambivalence, but because of it. In her autobiography, Equal Justice Under Law, Constance Baker Motley, the only female lawyer who worked for many years side by side with Houston, Marshall, Hastie, and their colleagues at LDF, tells stories of turf wars, spotlight grabbing, and all the bickering one might expect from high-profile, high-energy activists who are passionate about their cause. The NAACP had particular problems because it was at the center of the movement as a whole, and not just serving as the litigation team for the movement. Thus, the leaders in the NAACP were simultaneously the spokesmen, the lawyers, and the lobbyists for the movement. The situation changed in 1956 when, in response to threats from the IRS over tax exempt status, the organization had to split into the NAACP and the NAACP Legal Defense
Fund (LDF), also known as the Inc. Fund. The NAACP was the lobbying group with chapters throughout the country. The LDF became the litigation and educational arm. To satisfy the federal tax rules regarding tax-exempt organizations, the two organizations could not be under common control. After the 1956 division, LDF was clearly in charge of the litigation, but which organization would become the chief voice for the movement was less clear.

At this very time, Dr. Martin Luther King Jr., a minister, was becoming prominent in the movement by using boycotts and demonstrations in support of the cause of desegregation. King's rise to prominence can be traced to the 1955 Montgomery bus boycott when Rosa Parks set off the boycott when she refused to give up her seat to a white person on a city bus on a Thursday afternoon in early December. She was arrested and ready to assert a legal challenge to the segregation laws. But with the support of the black community in Montgomery, Rosa Parks used the occasion to make a bigger statement. The following Monday morning, the entire black community boycotted the Montgomery buses, and King seized the spotlight as a dramatic spokesperson for the event. Taylor Branch describes the mood at the NAACP convention that year, where the delegates welcomed King's presence with enthusiasm. "The idea of a mass movement by nearly fifty thousand Negroes in a single city captivated the delegates, whose customary role in the NAACP was limited to support of the lawyers fighting segregation in court." The delegates drafted resolutions in support of nonviolent demonstrations such as the bus boycott. The litigators, in particular Thurgood Marshall, were skeptical of such methods. In their view, the battleground over segregation should be the courtroom and not the streets. They expressed the same reservations years later when college students began participating in sit-ins. The litigators were fighting to change the law. Until the law had been changed, their view was that it ought to be obeyed.

This difference in opinion over appropriate techniques caused a rift in the movement. The NAACP lawyers were not just lawyers for the movement, however, they were lawyers for the individuals in the movement. When Rosa Parks or Martin Luther King Jr. broke the law by peacefully protesting, the NAACP lawyers had to defend them, whether they personally approved of the protester's methods or not.

Furthermore, although the lead NAACP lawyers had settled on a litigation strategy aimed at attacking segregated schools, not everyone in the larger African American community agreed with that goal. Some argued that rather than attack segregation per se, the NAACP should fight for truly equal schools for black children. Even today, some of the people who participated in developing the original strategy to attack segregation question the success of the strategy and suggest that ending segregated schools benefited only middle-class African Americans. Concrete improvement in the material conditions of all African Americans might have been accomplished more quickly by cases demanding increased government funding to improve the schools and the other institutions that served the entire black community.

Lawyers in the Modern Women's Movement

The closest comparison to the LDF in the modern feminist movement was the Women's Rights Project of the American Civil Liberties Union (ACLU), formed in 1971 and headed by Ruth Bader Ginsburg. The women's movement, unlike the African American civil rights movement, which concentrated on its crusade against separate but equal, was never as singly focused on a litigation goal or strategy. Ginsburg, however, did have her eyes set on one overarching objective: to convince the U.S. Supreme Court that women were protected by the Equal Protection Clause. To accomplish this goal, she had to fight for reversals of earlier negative precedents in the same way that the NAACP had to fight for a reversal of Plessy v. Ferguson.

Like the black civil rights movement, the modern feminist movement also had its "bigger than life" political leaders. At first, few of them were attorneys. Betty Friedan, sometimes called the mother of the movement, and Gloria Steinem, journalist, activist, and cofounder of Ms Magazine, were not law trained, but they both served as major spokespersons in the sixties and seventies. Bella Abzug was law trained, but at the time of the rebirth of the women's movement she was voting on legislation in Congress rather than litigating cases in court.

In 1971, Steinem became the first woman invited to speak at the annual banquet of the Harvard Law Review. The choice of Steinem indicated that the elite male population of Harvard Law School had a problem identifying "qualified women lawyers." Her lack of legal training, however, did not detract from her ability to deliver a scathing feminist attack on the venerable institution.

In 1966, when Friedan participated in the founding of NOW, the National Organization for Women, she anticipated that NOW would be an organization modeled after the NAACP that would fight for the rights of women, particularly in employment. Furthermore, she imagined that NOW
would have a legal arm comparable to the LDF that would be called the NOW Legal Defense Fund. NOW got off to a fast start, but it took four years for NOW's lawyers to work out the details and do the paperwork necessary to gain tax-exempt status for the NOW Legal Defense Fund, which finally began to litigate women's rights cases in 1970. The fund was soon eclipsed by the ACLU Women's Rights Project, which had a more sustained litigation strategy.

Title VII of the Civil Rights Act of 1964 purported to protect women from sex discrimination in the workplace, but sex had been added to Title VII at the last minute, as some commentators report, in an effort to defeat its passage. Even in the Equal Employment Opportunity Commission (EEOC), the agency responsible for carrying out the provisions of Title VII, persons had been heard to quip that Title VII was needed to protect men who wanted to become Playboy bunnies. In Washington in 1966, some even talked about taking "sex" out of Title VII. The primary purpose of NOW in its first year was to insist that sex discrimination in employment be taken seriously. To accomplish its goal, NOW focused on the EEOC, which NOW accused of shirking its duty to protect women who were the victims of employment discrimination. In 1967, Friedan made her first report as NOW president, which included a seven-point bill of rights for women. Six of the seven points related to public sphere rights, in particular, the right to equal access to jobs and education, supported by adequate childcare and maternity leave. Only one point in the bill of rights, the one referring to reproductive freedom, focused on the private sphere.

By 1970, the leadership of the women's movement, particularly within NOW, was becoming seriously fractured along the fault line of sexuality. Friedan's refusal to wear a lavender armband in support of her lesbian sisters at a march in support of abortion rights occurred in December of that year. Kate Millet had publicly announced her bisexuality and was being criticized by the press. Gloria Steinem and others agreed to pledge their support for Millet and identify themselves as lesbians if need be. Friedan was horrified. The battles between Friedan and Steinem soon became legendary in the movement.

Then, in 1971, feminist activists formed a new national organization to support women's entrance into the political arena. Among the founders of the National Women's Political Caucus (NWPC) were Friedan, Abzug, Steinem, Shirley Chisholm, the first black woman elected to the House of Representatives, and Brenda Feigen, a 1969 Harvard Law School graduate who had worked with NOW and was, in part, responsible for convincing Steinem to do the *Harvard Law Review* speech. With two national organizations fighting on behalf of women and with the increasing rifts between conservative and radical women, the national leadership for women's rights became more diffused than the leadership had been for African American rights under Thurgood Marshall and the LDF. Women's goals were also more heterogeneous, encompassing job security, equal educational access, child care and maternity leave, reproductive freedom, sexual freedom, freedom from male violence, and better representation in politics.

In the early 1970s, feminist litigators in various parts of the country began to make significant contributions to the women's movement. For example, in 1973 three visionaries on the West Coast, Mary Dunlap, Wendy Williams, and Nancy Davis, began their own small public interest feminist law firm, Equal Rights Advocates, in San Francisco, aided by Stanford law professor Barbara Babcock and Boalt law professor, and later dean, Herma Hill Kay. Several years later, Nancy Polikoff and Nan Hunter began a feminist law collective in Washington, D.C. And in 1972 a then-unknown young lawyer named Sarah Weddington argued *Roe v. Wade* before the U.S. Supreme Court.

In 1970, New York University Law School hosted the first annual conference on Women and the Law. This national conference continued for twenty-two years. All of the feminist lawyers mentioned in this chapter were active in the conference at some point in their activist careers. In the early years, the conference provided a crucial forum for feminist lawyers, law professors, community activists, and students to share information and brainstorm about strategy. Ruth Bader Ginsburg was a crucial participant in early conferences. Personal and professional relationships formed during the early days of the national conference remain strong today. And many of the feminist lawyers active in the movement at that time have continued their activist lawyering on behalf of lesbians and gay men.

**LESBIAN AND GAY PUBLIC INTEREST LAWYERING**

**Before Stonewall**

Many view the Stonewall Rebellion of 1969 as the beginning of the modern lesbian and gay civil rights movement. However, the battle for gay civil rights began much earlier. Shortly after World War II, a number of homophile organizations began to spring up around the country. Henry Hay,