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NOTICE

Finding Gold in the Rainbow Rights Movement

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RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT. By *Patricia A. Cain*. Boulder: Westview Press. 2000. Pp. xi, 288. $30.

In her history of the past fifty years of the gay and lesbian civil rights movement, Patricia Cain[1] recounts the litigation successes and failures that contributed to the legal status of gays and lesbians in the United States today. Clearly an insider who has marched with the movement every step of the way, Cain provides a comprehensive account of all fronts of the battle in state and federal courts since 1950. But while *Rainbow Rights* serves as a good primer on the legal challenges and the key themes uniting them, the book reads like an account of a struggle ending in defeat — not, as Cain describes, "a history of the litigation that has been central to the *progress*" of the movement (p. 9; emphasis added). Cain's focus on the movement's losses — most notably *Bowers v. Hardwick*[2] — obscures the significance of its gains and, consequently, depicts the movement's future as overly bleak. As a veteran of the movement, Cain seems more comfortable recounting setbacks and lost opportunities than providing an optimistic prescription for the future.

Cain tells the history of *Rainbow Rights* chronologically, dividing the chapters into two time periods, 1950-1985 and 1986-present. These time periods are marked by *Bowers v. Hardwick*, the 1986 Supreme Court decision holding that homosexual sodomy is not protected under the constitutional right of privacy. Structurally and symbolically, *Hardwick* is the defining moment in Cain's history of the gay and lesbian rights movement. Certainly, *Hardwick* represents the low point of the movement, with its heart-wrenching 5-4 vote, harmful rhetoric, and widespread impact. But fifteen years later, it is not so clear that *Hardwick* is, or should be, the focal point of the movement's history.

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1. Professor of Law, University of Iowa College of Law.

2. 478 U.S. 186 (1986).

Cain's fascination with *Hardwick* can be explained by her elevation of private rights over public rights: because *Hardwick* still governs same-sex intimacy, the private rights of gays and lesbians lag behind their public rights. Cain divides each time period into chapters discussing public sphere rights, private sphere rights, and private rights that become public rights. For Cain, public rights include protection from discrimination in employment, First Amendment freedom of association, and the right to access to the political process. Private rights include parental custody, opportunities for gay couples to adopt children, and the right to practice consensual same-sex sodomy. Private relationships between same-sex couples become public when they seek the state's official recognition of their relationship through marriage or domestic partnership laws.[3]

Cain utilizes the distinction between public and private rights to contrast the progress of gays and lesbians in each realm during different time periods. From 1950 to 1985, struggles for public rights were more successful than those in the private sphere (p. 167). Since *Hardwick*, gays and lesbians have struggled to convince courts that the illegality of sodomy should be irrelevant to other private rights, such as the right to obtain custody of a child (pp. 246-47). The distinction between public and private rights relates closely to two other themes that run through *Rainbow Rights*: the contrast between arguments based on sameness versus difference, and the disparate attitude of courts toward arguments based on homosexual status versus sexual conduct. Sameness is the idea that similarly situated gay and straight people should be treated equally, because their differences are not relevant to their individual merit. As Cain points out, sameness arguments are a useful tool for civil rights movements, and the gay and lesbian civil rights movement is no exception (p. 277). Arguments that groups should receive protection because of (or despite) their difference are less successful, as the *Hardwick* case demonstrates. Like private rights, Cain emphasizes courts' recognition of gays' difference as crucial to the real success of the gay and lesbian civil rights movement, because sameness arguments "devalue the very thing that makes us who we are" (p. 277). Similarly, while courts have been willing to protect gays and lesbians from discrimination based on their status as gays, they will not protect any related conduct — even if that conduct is simply suspected or assumed (p. 187). Since *Hardwick*, gay rights

3. This mixture of public and private rights is somewhat unique to the gay rights movement as compared to other civil rights movements, as Cain mentions in Chapter 1:

> The lesbian and gay civil rights movement will likely surpass both the race and gender equality movements in the number of cases that challenge the private/public divide. This arena, this crossover space between private and public, is the arena in which the lesbian and gay civil rights movement will need to break new ground.

P. 40.

lawyers have had to argue that their clients' status as gay or lesbian was unrelated to any illegal conduct (p. 192). In Cain's opinion, protection of status without protection of conduct is meaningless, because "[l]esbian and gay identity has always been connected to choices about sexual intimacy. To protect the person and not the choice often seemed pointless" (p. 192).

Cain uses these three interrelated themes to demonstrate that, historically, gays and lesbians have received more protection from courts when making arguments based on being treated differently than similarly situated heterosexuals in the public rights arena than when arguing for protection on the basis of their status alone. Cain's dissatisfaction with the success of the movement stems from her belief that private rights, including the protection of intimate conduct and an acknowledgment of gays as different, are more fundamental to gays' and lesbians' identity. Thus, regardless of the movement's gains in the public rights arena, Cain's apparent frustration with the stagnation and even regression in the realm of private rights — which follows each chapter on public rights — minimizes the successes. Cain's belief that private rights are crucial to the recognition of gays and lesbians as equal citizens[4] renders her history of the rainbow rights movement a disheartened one. The movement's successes in the public rights arena, however, have led to important improvements in the lives of gays and lesbians, and their positive impact extends beyond the public realm into the private.

Ironically, while Cain's view of the state of the movement today seems somewhat jaded, her vision of the movement's lawyers is steadfastly admiring and awestruck.[5] She does not question any of the strategic decisions to pursue litigation, but merely describes the fight and, typically, the subsequent loss. Perhaps her personal involvement in the movement is to blame for this lack of critical analysis, although she never indicates overtly that she is more than a supporter and a scholar

4. See, for example, Cain's discussion of private rights in her conclusion:

> The claim to be part of humanity should be the driving argument in the lesbian and gay civil rights movement as it has been in other civil rights movements. And our argument, as with race, should be that gays are fully human, not despite our gayness, but because of it. To make this argument, lesbian and gay rights advocates need to focus on what it is that makes us gay. And that, I believe, requires us to focus on sex and intimacy. We need to make the private more public.

Pp. 285-86.

5. Cain clearly admires 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 these visions into reality.

P. 46. This admiration explains why Cain is hesitant to critique these lawyers' decisions.

of the movement.[6] Regardless, Cain's refusal to question past choices renders her history incomplete. Most glaringly, Cain never questions the wisdom of the strategy that led to the *Hardwick* decision, "the nemesis of the lesbian and gay civil rights movement" (p. 244).

This Notice identifies the source of Cain's disenchanted view of the history of the gay and lesbian civil rights movement and offers a more hopeful interpretation of the events she discusses. Part I highlights some of the movement's early public successes that provided meaningful protections to gays and lesbians. Part II focuses on *Bowers v. Hardwick*, the Supreme Court case that Cain considers the pivotal moment of the movement thus far, and discusses both the gay and lesbian civil rights lawyers' decision to challenge the sodomy laws and the aftermath of the Court's decision. Part III analyzes the latter chapters of the book, which discuss victories and defeats since *Hardwick*, and suggests that the future of the movement may not be as bleak as Cain leads the reader to believe. This Notice concludes that, while the gay and lesbian civil rights movement may not have progressed as far as the movement's insiders might have hoped, it has indeed come a long way in the past fifty years, and there is hope for the movement's future as well.

I. GLIMMERS OF HOPE IN THE PUBLIC RIGHTS ARENA

One strength of Cain's history of the gay and lesbian civil rights movement is that it is simultaneously comprehensive and accessible. Indeed, accessibility seems to be one of Cain's goals in writing the book, as she seeks to reach a wider audience than legal insiders.[7] But she does not allow her pursuit of accessibility to get in the way of her detailed history of the past fifty years of the movement, nor does she limit her history to the most important Supreme Court decisions. Instead, she includes important district court and state court decisions in her history, despite subsequent events that render them seemingly trivial. Because Cain's history is so inclusive, the reader gains a broad perspective on how far the movement has really come. The reader's growing awareness of the extent to which life for gays and lesbians has progressed contrasts with Cain's own pessimism. This Part highlights several of the early victories that Cain discusses, mainly in the public rights arena, and emphasizes how essential these victories were to gay life and identity. The importance of these early victories will become

6. Cain's intimate involvement in the gay and lesbian civil rights movement is revealed through the footnotes, in which she indicates that she was a member of the Board of Directors of Lambda Legal Defense and Education Fund, arguably the most important player in the movement. P. 72 n. 41.

7. P. 9 ("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.").

evident in Parts II and III, which discuss Cain's overly defeatist focus on *Hardwick* and other denials of private rights, and her consequently discouraging message about the movement's future.

To understand the significance of the early public rights successes in improving the daily lives of gays and lesbians, consider what life was like for gays and lesbians in the 1950s. Cain describes this state of being as "captivity," because gays and lesbians had to leave their homosexual identity at home and remain closeted in public (p. 74). Given this backdrop, establishing public places for gays to congregate and build a community, and thereby to "develop a firmer sense of identity," was crucial (pp. 76-77). Gay bars became the key congregating sites, "the single most important center of lesbian and gay community" (p. 76), and Cain analogizes the role of such bars in the gay and lesbian civil rights movement to that of black churches in the black civil rights movement (p. 89). Not only were these bars a sanctuary where gays and lesbians felt safe being openly gay, but they allowed the gay community to strengthen itself socially and politically.[8]

In response to the proliferation of gay bars after World War II, many states and municipalities adopted regulations that explicitly or implicitly outlawed such bars.[9] The "first successful gay rights case in America" (p. 80) involved a challenge to the revocation of the Black Cat Bar's license in San Francisco because "persons of known homosexual tendencies patronized said premises and used said premises as a meeting place" (p. 79). In 1951, the California Supreme Court overturned the revocation, distinguishing between "meeting for purely social and harmless purposes" and the "doing of illegal or immoral acts" — between homosexual status and conduct — and holding that homosexuals have a right to access public spaces under California's civil rights statutes.[10] Following that case, the California legislature amended the statute to allow for revocation of liquor licenses if the bar served as a gathering place for "sexual perverts."[11] The California Supreme Court struck down this statute as well in 1959, holding that

8. P. 76 ("[B]ar communities were not only the center of sociability and relaxation in the gay world, they were also a crucible for politics." (quoting ELIZABETH LAPOVSKY KENNEDY & MADELINE D. DAVIS, BOOTS OF LEATHER, SLIPPERS OF GOLD: THE HISTORY OF A LESBIAN COMMUNITY 29 (1993))).

9. WILLIAM N. ESKRIDGE, JR., GAYLAW 78-80 (1999). Professor Eskridge analogizes these aggressive antihomosexual campaigns to witch-hunts and compares them to similar campaigns in Nazi Germany from 1933 to 1945. *Id.* at 59-83. As examples, Eskridge discusses police enforcement of laws prohibiting same-sex intimacy in many cities after World War II, including police stakeouts, decoy operations, and police raids. *Id.* at 63.

10. P. 81 (quoting Stoumen v. Reilly, 234 P.2d 969, 971 (Cal. 1951)).

11. P. 81 (quoting 1955 Cal. Stat. Ch. 1217).

catering to homosexuals was not "good cause" for revoking a liquor license under the California constitution.[12]

Similar challenges to revocation of gay bars' licenses under state statutes were brought in other states, with mixed results. The highest courts of both New York and New Jersey held that cities could not revoke the licenses of bars solely because they provided a place for gays and lesbians to congregate.[13] Florida, however, upheld the constitutionality of a Miami ordinance that prohibited bar owners from allowing gays to congregate, reasoning that enabling gays to gather increases the likelihood that they will engage in illegal sodomy.[14] Additionally, as Cain notes, even the states that acknowledged gays' right to congregate implicitly upheld states' right to revoke licenses because of immoral or illegal conduct that took place within the bars, leaving open the possibility of police raids (p. 89). In 1969, one such raid — on the Stonewall Inn, a gay bar in Greenwich Village — resulted in riots that "marked the beginning of the modern lesbian and gay civil rights movement" (p. 91).

Given the risk of such raids, Cain is skeptical about the real import of the favorable rulings that upheld the right of gays and lesbians to congregate, despite her acknowledgment that gay bars played a crucial political and social role in the civil rights movement. Her dissatisfaction results partly from the risk of police monitoring of conduct at the bars and some courts' conflation of status and conduct in denying protection to the bar owners. Moreover, she seems disappointed that courts did not go further to permit conduct to occur at the bars. Her disappointment implies a belief that protection of status without corresponding protection of conduct is merely illusory. Furthermore, she does not seem to consider these challenges part of the gay and lesbian civil rights movement at all, because the challenges were usually brought not by gay patrons but by bar owners, so the gay and lesbian community was not involved in the cases.[15] Perhaps Cain does not feel that the movement "owns" these successes, regardless of their symbolic and practical import, and consequently does not give them due credit.

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12. P. 81 (discussing Vallerga v. Dep't of Alcoholic Beverage Control, 347 P.2d 909, 912 (Cal. 1959)).

13. Pp. 84-85 (discussing Kerma Restaurant Corp. v. State Liquor Auth., 233 N.E.2d 833, 855 (N.Y. 1967) and One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control, 235 A.2d 12, 18 (N.J. 1967)).

14. P. 88 (discussing Inman v. City of Miami, 197 So.2d 50 (Fla. App. 1967), *cert. denied*, 201 So.2d 895 (Fla. 1967), and *cert. denied*, 389 U.S. 1048 (1968)).

15. P. 77-78 ("It is difficult to assess the importance or relevance of these early gay bar cases in the overall battle for lesbian and gay rights, since the victories belonged, for the most part, to the bar owners. In addition, the legal fight in support of gay bars was not a coordinated one and the gay and lesbian community was not itself an active participant in the development of the case law.").

Another area of important early successes that strengthened gay and lesbian communities was college student groups' fight for the right to associate on campus. These student groups used the First Amendment freedom of association to challenge university officials' refusal to recognize their status or to allow them to utilize university facilities. In 1972, a Georgia district court was the first to hold that these officials' conduct violated gays' freedom of association,[16] and subsequent federal courts unanimously followed suit, despite the criminalization of sodomy in the state (pp. 92-98). The Supreme Court has never granted certiorari on the issue.[17] These decisions represent the federal courts' willingness and ability to distinguish between homosexual conduct (illegal in many states) and status, regardless of university officials' appeal that gay and lesbian events would inevitably lead to criminal conduct (p. 96-97). While Cain acknowledges these victories, she minimizes their significance by attributing the success both to favorable precedent outside of the gay rights arena and the strength of the First Amendment (p. 98).[18] But there was no guarantee that earlier groups' successes would translate into rights for gays and lesbians, so it is significant that courts unanimously accepted this translation.

The case for equal employment rights for homosexuals has been, and continues to be, considerably less successful, but an early victory for federal civil service employees deserves mention. Under the Civil Service Act, codified in the early twentieth century, civil service employees can only be fired for cause.[19] In 1969, the U.S. Court of Appeals for the District of Columbia interpreted the cause requirement to mean that homosexuality and homosexual conduct were not sufficient reasons to fire an employee unless they were connected to the employee's fitness for service (pp. 108-09). This holding was based on both statutory interpretation and due process. Congress codified this "nexus requirement" in 1978 (p. 111). Although Cain acknowledges that this statute represents the "clearest success in employment discrimination cases," she treats it as a muted victory because of the myriad of ways in which courts can construe homosexuality — espe-

16. Pp. 94-96 (discussing Wood v. Davison, 351 F.Supp. 543 (N.D. Ga. 1972)).

17. Much to the dismay of Justice Rehnquist, who dissented to one such denial of certiorari because, "[f]rom the point of view of the University . . . the question is more akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing these measles sufferers to be quarantined." Ratchford v. Gay Lib., 434 U.S. 1084 (1978), *denying cert.* in Gay Lib. v. Univ. of Mo., 558 F.2d 848 (8th Cir. 1977).

18. The favorable precedent Cain refers to is *Healy v. James*, 408 U.S. 169 (1972), in which the Supreme Court held that Students for a Democratic Society ("SDS") had a right to recognition and facilities.

19. *See* Norton v. Macy, 417 F.2d 1161, 1167 (D.C. Cir. 1969) (discussing the requirements of the Civil Service Act).

cially homosexual conduct — to affect work performance (p. 110).[20] Moreover, she seems disappointed in the court's legal analysis because it was based on due process instead of equal protection. Thus, future employment discrimination plaintiffs could not use the case as precedent for equal protection arguments that gays constitute a suspect class or that their fundamental right to free speech was violated by a policy of imposed silence (pp. 123-25). While equal protection challenges to the exclusion of gays from the U.S. military, for instance, were indeed unsuccessful (pp. 117-22), it is unlikely that those failures stemmed from gays' successes in the civil service arena. More importantly, these early successes paved the way for city and state legislators to ban discrimination against gays and lesbians in city and state employment and, eventually, in private employment as well.[21]

These early successes in the gay and lesbian civil rights movement may not have been monumental, nor did they ensure success in challenges for private rights, such as the right to same-sex intimacy or custody rights of gay and lesbian parents (pp. 137-42, 148-50). But Cain accords these successes surprisingly little significance. She allows the movement's failures in the private rights realm to overshadow the public rights successes, as though she believes that accomplishments in recognition of status are negated by continued regulation of conduct. Given the far greater success in the public than in the private realm, this emphasis renders Cain's history pessimistic. An alternative interpretation might emphasize the importance of the early victories, which symbolize how far the movement has come since 1950. Cain's comprehensive account allows the reader to appreciate this progress, even though Cain herself seems unimpressed by it.

20. For example, Cain discusses the case of John Singer, a civil service employee who was fired for being gay. The Ninth Circuit upheld the firing because, by speaking out publicly about his homosexuality and attempting to marry a man, Singer brought discredit to the government and interfered with the government's interest in efficiency. P. 110 (discussing Singer v. Civil Serv. Comm'n, 530 F.2d 247 (9th Cir. 1976)). Singer's case was decided before Congress codified the nexus requirement, and the Supreme Court subsequently vacated it. As Cain notes, it is possible that such conduct may still be grounds for firing if it interferes with the gay employee's relations with other employees or otherwise disrupts his job performance. P. 110.

21. ESKRIDGE, *supra* note 9, at 130 and Appendix B2 ("More than forty cities, including almost all the nation's largest, adopted similar policies [banning sexual orientation discrimination in city employment] between 1971 and 1984. . . . In parallel fashion, most of these foregoing jurisdictions considered broader measures to prohibit sexual orientation discrimination by private employers as well.").

II. SHOT DOWN BY THE SUPREME COURT: *BOWERS V. HARDWICK* AND ITS LEGACY

As Cain tells the story, if any doors were cracked open before 1986, the Supreme Court slammed them shut in *Bowers v. Hardwick*[22] by giving future courts a justification for denying both public and private rights to gays and lesbians on the basis that they engage in criminal conduct. Although *Hardwick* was technically about sodomy, it was essentially the Court's stamp of approval on discrimination against gays and lesbians: "Discrimination was at the core of the *Hardwick* decision. Although the case was not litigated as an equal protection case and, on its face, said nothing about discrimination on the basis of sexual orientation, lesbian and gay rights litigators immediately understood the case's reach" (p. 184). That reach, as Cain describes in the latter chapters of her book, extended to matters such as child custody, marriage rights, and employment discrimination. By organizing her book around *Hardwick* as the defining case, despite earlier and later successes, Cain dooms the story of the gay and lesbian civil rights movement to one of defeat.

Although Cain chooses *Hardwick* as the focal point of her history of the gay and lesbian civil rights movement, she does not place the same priority on explaining the lawyers' strategy behind the sodomy challenges. The lawyers in the gay and lesbian civil rights movement made a conscious decision to focus on challenging state sodomy statutes. Cain acknowledges that "mainstream lawyers and activists have not always understood" this choice (p. 170). She explains the decision on an ideological level, arguing that sodomy statutes legitimized discrimination against gays.[23] Sodomy statutes allow people and courts to classify homosexuals as criminals and thereby discriminate against them on many different levels, denying them status based on the assumption that they engage in criminal conduct. This justification makes logical sense, and Cain has given enough examples of such conflation of status and conduct in the previous chapters to bolster its veracity. Additionally, Cain points out that sodomy laws represented the state's power to repress gay and lesbian identity, which provided the basis for the gay liberation movement in its original grassroots beginnings (p. 171).

Although Cain adequately explains the significance of sodomy laws as the foundation for other discriminatory laws, she does not discuss the choice of sodomy challenges as a litigation strategy or the counterargument that such challenges might have been risky. As Cain

22. 478 U.S. 186 (1986).

23. P. 280 ("Modern gay rights litigators focused on state sodomy statutes as their primary target because these statutes worked to endorse discrimination against gay men and lesbians.").

notes elsewhere, avoiding the Supreme Court can be a more prudent strategy.[24] For one thing, the threat of prosecution for sodomy was miniscule, as sodomy statutes were rarely enforced. As Cain acknowledges, "[i]n most states, the issue was more academic than real" (p. 232). So few people were actually injured by sodomy laws that it was often difficult for plaintiffs to establish standing to challenge the laws (pp. 137-38). Moreover, challenging sodomy laws does not seem to have been a wise choice for the delicate first step for a civil rights movement without a positive Supreme Court decision under its belt to have taken.

Historians of the African-American civil rights movement have recounted the painstakingly tedious steps the lawyers for the National Association for the Advancement of Colored People ("NAACP") took on their way to the important Supreme Court victories.[25] For instance, the crusade for desegregated public schools began by challenging segregated buses and moved on to graduate education before attacking public elementary schools, issues that are seemingly less threatening (or at least easier to talk about) than sex.[26] Only after winning victories for public rights at the Supreme Court level did the NAACP press the Court to recognize the private right to interracial marriage.[27]

Another reason the sodomy strategy seems riskier than, for instance, segregation challenges is that arguments based on equal opportunity and equal access implicate status, while sodomy challenges implicate conduct, which is less likely to be constitutionally protected. The fact that gay rights lawyers brought the sodomy challenges under the right to privacy of the Due Process Clause, not the Equal Protec-

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24. Cain discusses avoidance as a legal strategy in Chapter 8, when she explains lawyers' avoidance of a final Supreme Court decision on custody challenges based on the Equal Protection Clause: "So long as the *Palmore/Romer* argument is meeting with success in some state courts, litigators are quite sensible to avoid the risk that the Supreme Court might demolish that particular legal strategy." P. 252.

25. *See generally* RICHARD KLUGER, SIMPLE JUSTICE (1975); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987). Tushnet cautions against viewing the NAACP's litigation strategy as a deftly crafted plan:

> Most commentators on the NAACP's litigation have seen the campaign as a combination of strategic planning and successful implementation. . . . Thus, viewing the campaign in the light cast by its results, Richard Kluger tends to tell a story of unproblematic success: that the campaign was rationally and without fundamental error designed to maximize the chance that the NAACP would win.

TUSHNET, *supra*, at 144. Instead, Tushnet notes, the strategy was fluid, identifying certain goals of the movement and melding to meet those goals.

26. Pp. 18-19; *see* KLUGER, *supra* note 25, at 14 (discussing the NAACP's decision in 1947 to challenge the segregated bus system: "The way to start, NAACP strategists agreed, was with buses. It would be the least inflammatory step, and the hardest request for the whites to deny"; the NAACP won that case in a federal district court in South Carolina in 1948); pp. 260-84 (discussing the attack on segregated graduate schools).

27. P. 23; *see also* Loving v. Virginia, 388 U.S. 1 (1967).

tion Clause, is significant as well.[28] Traditionally, the right to privacy has been interpreted to protect the basic values that society deems fundamental.[29] Thus, courts look to history and tradition to see if a right should be protected under substantive due process, as the *Hardwick* Court did. Given the role of tradition, the right to privacy is not the ideal tool for social change. The Equal Protection Clause, on the other hand, protects disadvantaged groups from tradition and the deeply held values of the majority.[30] In 1986, as Cain points out, the Lambda Legal Defense and Education Fund, the major gay and lesbian civil rights organization, had no equal protection claims on its docket (p. 185). The distinction between equal protection and due process claims may explain why, when the Supreme Court awarded the gay rights movement its first victory ten years later, the decision was based on the Equal Protection Clause.

On the other hand, there were compelling reasons to support the sodomy strategy, although they do not excuse Cain's failure even to discuss the criticism. First, because courts declined to declare sexual orientation a suspect classification, they summarily dismissed many earlier equal protection cases (p. 123). Additionally, gay rights litigators won some early successes on the sodomy front, and an affirmative decision in *Hardwick* on the Supreme Court level may not have

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28. The *Bowers* case did not involve an equal protection argument. P. 177 ("The [Supreme Court] brief in the *Hardwick* case focused narrowly on the right of privacy.").

29. *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1170-71 (1988):

> From its origin, the Due Process Clause has often been interpreted so as to protect traditionally recognized rights from state and federal power. Nothing in the text of the clause compels such a conclusion, and on this point as on others history is ambiguous. But in its judicial interpretation, the clause has frequently been understood as an effort to restrict short-term or shortsighted deviations from widely held social norms; it has an important backward looking dimension. For purposes of due process, the inquiry has tended to be the common law, Anglo-American practice, or the status quo. The Due Process Clause is thus closely associated with the view that the role of the Supreme Court is to limit dramatic and insufficiently reasoned change, to protect tradition against passionate majorities, and to bring a more balanced and disinterested perspective to bear on legislation.

But see ESKRIDGE, *supra* note 9, at 142-43 (criticizing Sunstein's argument that the due process clause is backward-looking and the equal protection clause is forward-looking, on the basis that due process claims brought by gays against police procedures in the 1970s "were more dynamic and forward-looking for gay people than equal protection cases were." Additionally, Eskridge argues that the two clauses are interrelated in sodomy laws because such laws "not only threaten privacy rights but also discriminate on the basis of sexual orientation, either on their face or in practice.").

30. *See* Sunstein, *supra* note 29, at 1174 ("The function of the Equal Protection Clause is to protect disadvantaged groups, of which blacks are the most obvious case, against the effects of past and present discrimination by political majorities. . . . [T]he Equal Protection Clause is not rooted in common law or status quo baselines, or in Anglo-American conventions. The baseline is instead a principle of equality that operates as a criticism of existing practice.").

seemed as improbable as it does in hindsight.[31] And success was not unthinkable: as Cain remembers, the movement was one vote short of victory, with the deciding vote — Justice Powell — later publicly admitting that his vote to uphold the statute was a mistake (p. 179).

Finally, perhaps the "strategy" was not a strategy at all. There were many gay rights lawyers throughout the country, bringing many kinds of challenges, and coordinating a national movement was not as easy as it had been in the era when the NAACP was the primary legal organization fighting for African-American civil rights (pp. 48-49). But as Cain tells the story, the sodomy challenge in particular appears to have been a fairly well-coordinated national campaign, and there was even a national meeting in 1983 among gay and lesbian legal organizations to coordinate the national strategy for attacking sodomy laws across the country (pp. 64, 68-69, 169). Additionally, Cain points out that lawyers for the State of Georgia, not Hardwick's lawyers, made the decision to bring the case before the Supreme Court, since the State was appealing its loss in the Eleventh Circuit (p. 174). But Hardwick and the American Civil Liberties Union ("ACLU") did choose to initiate the original case in federal court, seeking a declaratory judgment that the law was unconstitutional, although the charges against Hardwick had been dropped (p. 172). At the very least, there are valid reasons to question the sodomy strategy — reasons that Cain might have addressed instead of exiling such criticism to the land of "[m]ainstream" (p. 170) and declaring the movement's lawyers "crusaders" (p. 46).

As Cain painfully recounts, the *Hardwick* decision was a heartbreaking "betrayal" for gay rights lawyers (p. 179). In addition to the Court's actual holding, there were several regrettable "if only. . ." events. Justice Thurgood Marshall's strategic vote to grant certiorari, added to the votes of three conservative Justices, provided the final vote necessary for the Supreme Court to hear the case (p. 174). Justice Marshall took the risk in the hope that the Court would affirm the Eleventh Circuit.[32] The other "if only" was Justice Powell's infamous swing vote in response to pressure from Justice Rehnquist (p. 178).

The legacy of the Court's holdings — since there is no fundamental right to engage in homosexual sodomy, a state must only show a rational basis for outlawing it, and promotion of public morality is one such rational basis — was far reaching (p. 179). The Court's charge that states could constitutionally criminalize private, consensual homosexual conduct led lower courts to link homosexual status with

31. P. 142; *see, e.g.*, People v. Onofre, 415 N.E.2d 936 (N.Y. 1980) (holding the New York sodomy statute unconstitutional). The Supreme Court denied certiorari on this case, leading gay rights lawyers to suspect that the Court may have believed the right to privacy protected sodomy (p. 142).

32. P. 174 (referring to Justice Marshall's papers, released in 1993).

criminal conduct and deny protection to gays and lesbians based on their assumed status as criminals, in areas ranging from custody decisions (p. 245) to the military's exclusion policy (pp. 196-202). The decision also diminished the strength of arguments that homosexuals should be protected as a suspect class by the Equal Protection Clause. For example, the D.C. Circuit equated homosexual status with criminal conduct to deny strict scrutiny in an employment discrimination case, arguing that "[i]t would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause."[33] Lawyers were forced to rebut the presumption that all homosexuals engaged in homosexual conduct, which was difficult because "[l]esbian and gay identity has always been connected to choices about sexual intimacy," and such an argument essentially denies gays' difference (p. 192).

While Cain does not omit the details of the aftermath of *Hardwick*'s holding, she fails to appreciate fully the impact of the discriminatory and hyperbolic language the Court used to describe same-sex intimacy. As Professor William Eskridge has pointed out, the Court's antigay, moralizing "rhetoric turned the *Hardwick* decision into an exemplar of legal homophobia."[34] To begin with, although the Georgia statute outlawed oral and anal sex between both homosexuals and heterosexuals, the Court defined the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."[35] Justice Blackmun's dissent, on the other hand, characterized the issue not as a fundamental right to homosexual sodomy but as "the right to be left alone."[36] The majority opinion also delegitimized homosexual relationships by distinguishing them from familial ties: "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."[37] The final jab at gays and lesbians was the majority's comparison of same-sex intimacy to other crimes, which indicated that the Court saw so lit-

33. P. 187 (quoting Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987)).

34. ESKRIDGE, *supra* note 9, at 150; *see also* Jay Michaelson, *On Listening to the* Kulturkampf, *or, How America Overruled* Bowers v. Hardwick, *Even Though* Romer v. Evans *Didn't*, 49 DUKE L.J. 1559, 1569 (2000) ("Most importantly, although perhaps most difficult to fit into a doctrinal box, *Bowers* represented a clear moral statement on the part of the Supreme Court, and endorsed a set of value judgments about gays and lesbians. . . . I believe it is in this rather ill-defined sociological arena that the true significance of *Bowers* lies. *Bowers* defined the mainstream and the margins . . . .").

35. Bowers v. Hardwick, 478 U.S. 186, 190 (1986).

36. *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting) (quoting Olmstead v. U.S., 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

37. *Bowers*, 478 U.S. at 191.

tle difference between homosexual relationships and incest that it feared the inevitable slippery slope result:

> Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home. . . . And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.[38]

These images of gays and lesbians as common criminals and sexual deviants validated homophobic sentiments throughout the country: "If the enlightened Justices of our highest court are disgusted by homosexuals," Americans asked themselves, "then why shouldn't we be?" Justice Burger's concurrence offered even more validation to the moral opposition to homosexuality: he declared adamantly that "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching" and referred to sodomy as "an offense of 'deeper malignity' than rape."[39] Cain's omission of the language used by the Court is disappointing, not only because it ignores one aspect of the emotional harm to gays and lesbians resulting from the case, but also because it misses the chance to monitor the changing rhetoric after *Hardwick*. Even if gay rights lawyers have experienced no overwhelming victories since *Hardwick*, they have benefited from increased respect, as evidenced by the rhetoric of judicial opinions.

As this Part has discussed, there is no escaping the fact that *Hardwick* was a considerable setback. But the structure and tone of Cain's book indicate that none of the victories before or since *Hardwick* have mitigated its legacy or undermined the Court's hurtful language. The next Part will discuss whether or not the gay and lesbian civil rights movement has recovered, or will recover, from the *Hardwick* decision.

III. NO POT OF GOLD? THE FUTURE OF THE GAY AND LESBIAN CIVIL RIGHTS MOVEMENT

Although the Supreme Court decided *Hardwick* fifteen years ago, Cain's tone in retelling the story indicates that the "feeling of betrayal" is still fresh in her memory (p. 179). Cain acknowledges that there were some positive effects of the decision, such as the gay-

38. *Bowers*, 478 U.S. at 195-96.

39. *Bowers*, 478 U.S. at 197 (Burger, J., concurring) (quoting 4 W. BLACKSTONE, COMMENTARIES 215).

supportive public reaction to the decision,[40] but the latter chapters of the book describe the battles for public and private rights since 1986 as if the dark cloud of *Hardwick* still lingers over the movement. As this Part discusses, however, within the pages are some bright points that signal that the story is far from finished.

Probably the most important of such victories is the 1996 decision in *Romer v. Evans*,[41] in which the Supreme Court struck down a ballot initiative that amended the Colorado constitution to prevent municipalities and other governmental entities from enacting antidiscrimination measures protecting gays, lesbians, or bisexuals (p. 202). The Court used the Equal Protection Clause to find that the amendment classified homosexuals for no reason other than pure animus, which does not qualify as a rational basis for the classification, thereby denying an entire group access to the political process (p. 210). As Cain notes, this decision was a victory for the movement for several reasons. It demonstrated that gays and lesbians are protected by the Equal Protection Clause despite the cases construing *Hardwick* to preclude equal protection for gays (p. 211). Moreover, it revitalized the movement and "made it possible for the gay and lesbian civil rights movement to continue its work" (p. 212).

Beyond those signs of victory, though, Cain does not seem optimistic about the long-term effects of *Romer*, stating that "the decision did not go far enough to create any lasting impediment to antigay forces around the country" (p. 213). The Second Circuit refused to extend *Romer* to the military's exclusion policy, despite the fact that its justification — "unit cohesion" — was based on the military's concern about heterosexuals' prejudice toward their homosexual colleagues.[42] The Sixth Circuit declined to apply *Romer* to a citywide antigay initiative, and the Supreme Court denied certiorari.[43] Additionally, *Romer* had no positive influence on a subsequent employment discrimination case before the Eleventh Circuit. The court's decision indicated that *Romer* was based on status alone, and any conduct at all (such as a decision to marry another woman) would remove *Romer*'s protection.[44]

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40. P. 180; *see also* ESKRIDGE, *supra* note 9, at 150 (describing criticism of the *Bowers* decision that characterized the judgment as "manipulative, ignorant, inefficient, violent, historically inaccurate, misogynistic, authoritarian, and contrary to precedent").

41. 517 U.S. 620 (1996).

42. "Whether barring gays from the military is a rational or a prejudicial means of accomplishing unit cohesion will simply not be questioned by the court. . . . The result under the *Able* decision is that the military will only be subjected to meaningful equal protection scrutiny if it actually says that its motive is based on prejudice, an event unlikely to occur, given the high-quality legal advice that the Pentagon receives." P. 215-16 (discussing Able v. United States, 155 F.3d 628 (2d Cir. 1998)).

43. P. 214 (discussing Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997)).

44. Pp. 219-21 (discussing Shahar v. Bowers, 114 F.3d 1097 (en banc) (11th Cir. 1997)).

While Cain discusses these negative decisions at length, however, she relegates a mere paragraph to the decisions that represent *Romer*'s positive impact. For example, the Seventh Circuit ruled in favor of a boy who sued his school for allowing him to be harassed on the basis of his sexual orientation and telling him he should have expected such harassment when he was openly gay.[45] The court rejected the defendants' reliance on *Hardwick* as irrelevant to the boy's equal protection argument and questioned the vitality of *Hardwick* in light of *Romer*.[46] Additionally, the Sixth Circuit held that selective criminal prosecution on the basis of sexual orientation motivated by animus violated the Equal Protection Clause.[47] Again, the court held that the defendants' reliance on *Hardwick* to justify their discriminatory treatment was misplaced in light of *Romer*.[48] Acknowledging these victories, Cain concludes that "*Romer* has clearly opened a door, or perhaps at least a window, for lesbian and gay civil rights lawyers" (p. 222). But these victories, which strengthen the rational basis review for gays and call into question the continued viability of *Hardwick*, seem to represent more than a "window." Cain's skeptical reading of *Romer* may simply be the thwarted optimism of a veteran of a civil rights movement that has experienced agonizing defeat.

A less jaded observer could instead see *Romer* as a paradigm shift in the way courts talk about gays and lesbians. Justice Kennedy, writ-

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45. P. 221 (discussing Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996)). The Seventh Circuit evaluated the school officials' conduct under rational basis review, but noted that "[t]here can be little doubt that homosexuals are an identifiable minority subjected to discrimination in our society." *Nabozny*, 92 F.3d at 457. Additionally, the court intimated that it considered sexual orientation to be an immutable characteristic: "We express no opinion on whether sexual orientation is an 'obvious, immutable, or distinguishing' characteristic. However, it does seem dubious to suggest that someone would choose to be homosexual, absent some genetic predisposition, given the considerable discrimination leveled against homosexuals." *Id.* at 457 n.10.

46. *Nabozny*, 92 F.3d at 458 ("[R]eliance on *Bowers* by the defendants in this case is misplaced. *Bowers* addressed the criminalization of sodomy. The defendants make no mention of sodomy as a motive for their discrimination. To the contrary, defendants offer us no rational basis for their alleged conduct."). Thus, the court found that the prohibition of sodomy per se cannot be a justification for discriminating against gays. The court went on to question the strength of *Bowers* after *Romer*: "Of course *Bowers* will soon be eclipsed in the area of equal protection by the Supreme Court's holding in *Romer v. Evans*." *Id.* at 458 n. 12.

47. P. 222 (discussing Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997)). The court found that "the defendant officers chose to arrest and prosecute her for driving under the influence because they perceived her to be a lesbian, and out of a desire to effectuate an animus against homosexuals." *Stemler*, 126 F.3d at 873.

48. *Stemler*, 126 F.3d at 873:

> [The defendants] argue that as a blanket matter it is always constitutional to discriminate on the basis of sexual orientation, citing *Bowers v. Hardwick*. However, *Bowers* held only that there is no substantive due process right to engage in homosexual sodomy, and expressly declined to consider an equal protection claim. It is inconceivable that *Bowers* stands for the proposition that the state may discriminate against individuals on the basis of their sexual orientation solely out of animus to that orientation. [citing *Romer*] [citations omitted].

ing for the majority in *Romer*, admonished Colorado for withholding the protection of the laws from gays and lesbians for no reason other than "animus."[49] This decision labeled gays and lesbians "persons," not criminals, and protected them from popularly expressed prejudice. The majority opinion so angered Justice Scalia that he felt compelled to write a venomous dissent, reminding the Court that homosexuals are criminals:

> Of course it is our moral heritage that one should not hate any human beings or class of human beings. But I had thought that one could consider certain conduct reprehensible — murder, for example, or polygamy, or cruelty to animals — and could exhibit even "animus" toward such conduct. Surely that is the only sort of "animus" at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*.[50]

Justice Scalia apparently believed that the Court's decision in *Romer* was inconsistent with *Hardwick*, because states need no rational basis to justify classifications based on sexual orientation beyond the justification provided by *Hardwick*. Cain calls Scalia's concern "far-fetched" (p. 212), although other scholars acknowledge that *Romer* at least poked a hole in *Hardwick*'s logic.[51] Perhaps Justice Scalia's reaction signals that he sensed a rhetorical shift in the majority's tone — from the pen of his conservative colleague, no less — to one of respect for gays and lesbians as human beings. Nevertheless, the fact that the majority rejected Justice Scalia's "moral disapproval" argument represents a significant choice by the Court, one that allowed lower courts to choose between the outmoded values of *Hardwick* and more progressive social attitudes.

In her conclusion, Cain identifies one of the movement's obstacles as "no respect" (p. 282). Unlike the African-American civil rights movement, where courts acknowledged that African Americans should receive "separate but equal" treatment to whites, and the

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49. Romer v. Evans, 517 U.S. 620, 632, 635 (1996) ("A State cannot so deem a class of persons a stranger to its laws.").

50. *Romer*, 517 U.S. at 644 (Scalia, J., dissenting).

51. *E.g.*, ESKRIDGE, *supra* note 9, at 150 ("Although Justice Anthony Kennedy's opinion for the Court declined to discuss the earlier decision, the logic of *Evans* calls *Hardwick* into question. To focus sodomy prohibitions on 'homosexual sodomy' alone, as *Hardwick* suggested and as ten states have expressly done, is to 'singl[e] out a certain class of citizens for disfavored legal status' because of popular 'animosity toward the class of persons affected,' contrary to *Evans*."); Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 65 (1996) ("[T]he continued force of *Hardwick* may be undermined by the Court's more recent pronouncement in *Evans* that antigay legislation, if unmoored to any identified harmful conduct, is unconstitutional."). But Professor Eskridge notes that courts seeking to limit gay rights can constrain *Romer* to its facts: "Judges are no longer constrained by *Hardwick* in equal protection cases and can follow *Evans*'s lead if they choose to do so. But judges desiring to reject challenges to antigay policies can follow *Hardwick* and limit *Evans* to its unusual facts." ESKRIDGE, *supra* note 9, at 172.

women's rights movement, where adverse court decisions were couched in terms of protection and respect, courts have declared gays and lesbians immoral and criminal: "Gay rights litigators must attack a Supreme Court precedent that is totally devoid of any rhetoric of respect" (pp. 282-83). Cain acknowledges that *Romer* contains respectful rhetoric for gay rights in the public sphere, but not the private sphere: "While *Romer* can be cited for the principle that gay men and lesbians are worthy of equal respect in the public sphere, it does not speak to private sphere concerns" (p. 283). Her compartmentalization of *Romer*'s positive rhetorical impact to the public sphere, however, is inconsistent with her argument that the rhetoric "totally devoid of respect" in *Hardwick* had far-reaching negative effects in both the private and public spheres and still represents a hurdle for gay rights litigators to overcome (p. 283). On the contrary, *Baker v. Vermont*,[52] the 1998 Vermont Supreme Court case holding that, under the Vermont constitution, the Vermont legislature must provide same-sex couples with the same rights and benefits as heterosexual married couples, serves as evidence of *Romer*'s rhetorical impact on the realm of private rights. The court's language demonstrates clear respect for the strength and validity of same-sex relationships and, moreover, for gays and lesbians as human beings:

> The past provides many instances where the law refused to see a human being when it should have. The future may provide instances where the law will be asked to see a human when it should not. The challenge for future generations will be to define what is most essentially human. The extension of the Common Benefits Clause [of the Vermont constitution] to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity.[53]

The Vermont court's recognition of same-sex relationships as bearing the same elements as heterosexual marriages, and of gays and lesbians as sharing common traits as heterosexuals, is a far cry from the "common criminal" rhetoric of *Hardwick*.

Even the Supreme Court's recent decision in *Boy Scouts of America v. Dale*,[54] which was a defeat for the gay rights movement, did not return to the hateful rhetoric of *Hardwick*. The Court held that the Boy Scouts' First Amendment right to express antigay views by excluding gays was protected from challenge under the New Jersey antidiscrimination and public accommodations statutes. As Cain points out, the decision is problematic for several reasons, including the

52. 744 A.2d 864 (Vt. 1999).

53. *Baker*, 744 A.2d at 889 (citations omitted).

54. 530 U.S. 640 (2000).

Court's deference to the Boy Scouts and the majority's baffling distinction between a gay Scout leader and a straight but pro-gay leader.[55] Cain interprets the decision to indicate that morality is still a valid justification for discriminating against gays, despite *Romer* (p. 283). But even Justice Rehnquist's majority opinion is careful to couch the idea of morality in terms of morality as the Boy Scouts of America — a private organization whose views are protected by the First Amendment — sees it, not as society or the Court sees it. In discussing the Scout Oath and Law requiring Scouts to be "morally straight" and "clean," the Court acknowledges:

> [T]he terms "morally straight" and "clean" are by no means self-defining. Different people would attribute to those terms very different meanings. For example, some people may believe that engaging in homosexual conduct is not at odds with being "morally straight" and "clean." And others may believe that engaging in homosexual conduct is contrary to being "morally straight" and "clean." The Boy Scouts say it falls within the latter category.[56]

Fourteen years earlier, or even less, the Court might have made the connection to *Hardwick* and concluded that "morally straight" could not possibly mean "criminal," and considered the question closed. Additionally, the majority acknowledged the dissent's argument that the public perception of homosexuality has become more positive: "Indeed, it appears that homosexuality has gained greater societal acceptance. But this is scarcely an argument for denying First Amendment protection to those who refuse to accept these views."[57] Such an admission underscores the fact that this case was about the time-honored First Amendment right to express unpopular ideas, and the Court acknowledges that homophobia is one such unpopular idea.[58] This point should not be overstated; it is clear that this decision was not a victory for gay rights. But for Cain to conclude that "[t]he only positive aspect of the *Dale* majority opinion is that it did not cite *Bowers v. Hardwick* as relevant precedent" seems unnecessarily pessimistic (p. 283).

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55. P. 227; *see Dale*, 530 U.S. at 650-51, 655-56.

56. *Dale*, 530 U.S. at 650.

57. *Dale*, 530 U.S. at 660 (citation omitted).

58. *Dale*, 530 U.S. at 660 ("The First Amendment protects expression, be it of the popular variety or not. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 342 (1989) (holding that Johnson's conviction for burning the American flag violates the First Amendment); Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 430 (1969) (holding that a Ku Klux Klan leader's conviction for advocating unlawfulness as a means of political reform violates the First Amendment). And the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view."). It is significant that the two cases the Court cited involved flag-burning and the Ku Klux Klan, two tremendously unpopular causes, underscoring the Court's acknowledgment of the unpopularity of homophobia.

Along with these rhetorical shifts that indicate a possible trend toward courts' acceptance of gays, Cain's final chapters contain other glimmers of hope. One is the gradual diminution of sodomy laws by state courts and legislatures (pp. 233-42). These victories, which render *Hardwick* increasingly irrelevant in practical terms, coupled with the signals of the rhetorical overruling of *Hardwick* discussed above, may soon relegate *Hardwick* to obsolescence. State courts have also made important steps forward (and some backward, unfortunately) in the area of family law, from custody decisions (pp. 248-49) to the Vermont Supreme Court's decision regarding same-sex marriages (pp. 261-63). While the gay and lesbian civil rights movement certainly has intimidating obstacles to face in terms of lingering prejudice and bad precedent, it is certainly not trapped under the legacy of *Hardwick*.

CONCLUSION

Cain's account of legal challenges in the gay and lesbian civil rights movement is both historically informative and legally insightful. But her focus on the *Hardwick* decision makes her analysis overly defeatist and minimizes the importance of positive developments. Additionally, her failure to discuss the rhetorical shift in the three major gay rights decisions by the Supreme Court contributes to her pessimistic tone. While the in-depth description of past cases is necessary and helpful as a primer, Cain's focus on *Hardwick* rather than the positive developments before and since diminishes her ability to offer real hope and advice for future lawyers in the gay and lesbian civil rights movement.