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## PERRY AND THE LGBTQ MOVEMENT

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### I. INTRODUCTION

In order to discuss the ongoing impact of *Hollingsworth v. Perry*<sup>1</sup> on LGBTQ activism, it is important to first examine the impact of litigation on social movements more generally.

Much of the literature on law and social movements is skeptical of the value of litigation for social movements.<sup>2</sup> Some sociolegal scholars believe that social movements squander time and money when they seek legal change.<sup>3</sup> They argue that, by pursuing change through the courts, rather than through the political system, movements cede decision-making to lawyers, impair mobilization efforts, and make their missions more conservative.<sup>4</sup> Even more problematic,<sup>5</sup> litigation may create backlash, as in the cases of *Brown v. Board of Education*<sup>6</sup> and *Roe v. Wade*.<sup>6</sup> Many question whether law and legal institutions can ever produce progressive social change given that the courts are unlikely to be much ahead of public opinion.<sup>7</sup>

In response, some sociolegal scholars counter that litigation can provide useful leverage for social movement organizations that are negotiating with opponents.<sup>8</sup> Still others note that framing grievances in terms of legal rights can help to mobilize a constituency. For instance, a focus on legal rights has helped mobilize organizing against sex discrimination.<sup>9</sup>

Both the critiques and defenses of litigation in social movements share

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1. *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144), *granting cert. to Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *aff'g Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

2. See e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 9–10, 430 (2d ed. 2008); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* xviii–xix (2d ed. 2004).

3. Mary Bernstein, Anna-Maria Marshall & Scott Barclay, *The Challenge of Law: Sexual Orientation, Gender Identity, and Social Movements*, in *QUEER MOBILIZATIONS: LGBTQ ACTIVISTS CONFRONT THE LAW* 1, 3–4 (Scott Barclay, Mary Bernstein & Anna-Maria Marshall eds., 2009).

4. ROSENBERG, *supra* note 2, at 430–31.

5. SCHEINGOLD, *supra* note 2, at xix.

6. KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 144 (1984).

7. JASON PIERCESON, *COURTS, LIBERALISM, AND RIGHTS: GAY LAW AND POLITICS IN THE UNITED STATES AND CANADA* 4 (2005).

8. See Neal Milner, *The Denigration of Rights and the Persistence of Rights Talk: A Cultural Portrait*, 14 *LAW & SOC. INQUIRY* 631, 636 (1989).

9. See MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 48–53 (1994).

something in common: they assume a movement with very clearly and narrowly defined goals. For example, those in favor of litigation point to the anti-sex discrimination movement; in that movement, legal strategies increased mobilization around the central goal of ending sexual harassment and discrimination. Conversely, those who claim that litigation necessarily derails mobilization assume that once a case is in court, there are no other issues that the movement can address. While these points of view are each valid in some cases, they are not easily applicable to social movements such as the LGBTQ movement that have numerous and complex goals.

In this essay, I adopt a multi-institutional politics (MIP) approach<sup>10</sup> to assess the impact of *Perry* on the LGBTQ movement. This approach acknowledges that society is comprised of multiple institutions that exert power in different ways. To illustrate: the institution of psychiatry has been historically important in providing a reason to deny LGBTQ rights. Until 1973, the American Psychiatric Association (APA) defined homosexuality as a mental disorder, thus limiting the progress the LGBTQ movement could make.<sup>11</sup> Once the APA removed homosexuality from its Diagnostic and Statistical Manual (DSM), the movement was able to make progress in areas such as immigration policy and public health regulations.<sup>12</sup> Thus, psychiatry is one of the multiple institutions (along with the media, religion, education, and others) that exert power and influence over the lives of LGBTQ people.

The MIP approach does not negate or deny the importance of the state and the law in social movements. However, it demonstrates that institutions other than the state and the law also exert power over movements in symbolic and material ways. The MIP approach thus reveals that the impact of litigation on social movements should be variable and complex, depending on the institutions at issue. With this perspective, I now examine the effects of litigation on the LGBTQ movement.

## II.

### THE INSTITUTION OF MARRIAGE

The introduction of Proposition 8, the largest antigay campaign in U.S. history,<sup>13</sup> sparked widespread mobilization among LGBTQ activists working

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10. See Elizabeth A. Armstrong & Mary Bernstein, *Culture, Power, and Institutions: A Multi-Institutional Politics Approach to Social Movements*, 26 SOC. THEORY 74, 74 (2008) (describing the multi-institutional politics approach).

11. RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHOLOGY: THE POLITICS OF DIAGNOSIS* 137 (1987).

12. Mary Bernstein, *United States: Multi-Institutional Politics, Social Movements and the State*, in *THE LESBIAN AND GAY MOVEMENT AND THE STATE: COMPARATIVE INSIGHTS INTO A TRANSFORMED RELATIONSHIP* 197, 201 (Manon Tremblay, David Paternotte & Carol Johnson eds., 2011).

13. AMY L. STONE, *GAY RIGHTS AT THE BALLOT BOX* 36 (2012). Proposition 8 was a ballot initiative that amended the California Constitution to ban same-sex marriage.

toward its defeat. The LGBTQ movement mobilized almost 50,000 volunteers and raised over \$38 million.<sup>14</sup>

After the passage of Proposition 8 and the introduction of the *Perry* litigation, there was significant movement discussion and dissension over how best to proceed. Particularly contentious were debates over whether or not to introduce a pro-same-sex marriage referendum in California.<sup>15</sup> Given that, with the exception of one referendum in Arizona, every defense of marriage act that had been put to a vote through a state referendum had passed<sup>16</sup> (this trend was later reversed in 2012<sup>17</sup>), many viewed referenda as extremely risky. Some preferred to give the legal challenge to Proposition 8 time to develop.

Once the fate of same-sex marriage in California moved into the hands of the courts, LGBTQ organizations did become less mobilized around marriage. However, this is not the same thing as completely demobilizing. The sociolegal literature has paid little attention to the fact that social movements, such as the LGBTQ movement, can remain active even while a case is wending its way through the courts.

To explain how the LGBTQ movement remained active during *Perry*, I would like to introduce a concept that I will call, “legal support tactics.” Legal support tactics include the variety of strategies used by social movements to advance their missions while a case is moving through the courts.

The LGBTQ movement is an example of legal support tactics in action. During the *Perry* trial, LGBTQ activists showed up outside the courthouse in large numbers to demonstrate their support for the movement and ensure significant media visibility. In addition, LGBTQ organizations have adopted several other legal support tactics. First, they have played a key role in analyzing what is happening with the case and keeping people apprised of new developments. This has required LGBTQ activists to stay current and disseminate information to constituencies and allies. Second, LGBTQ activists have issued press releases related to the *Perry* case. Finally, LGBTQ organizations have helped frame the media’s portrayal of the case. This has involved finding same-sex couples willing to speak about how the outcome of

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14. *Id.* at 138.

15. Joe Garofoli, *Coalition of LGBT Groups: Next Year Too Soon for Gay Marriage Vote in CA*, SFGATE POL. BLOG (July 14, 2009, 4:51 PM), <http://blog.sfgate.com/nov05election/2009/07/14/coalition-of-lgbt-groups-next-year-too-soon-for-gay-marriage-vote-in-ca/>.

16. STONE, *supra* note 13, at 136.

17. In 2012, voters in Maine and Washington approved the right to marry for same-sex couples through a statewide referendum. Kevin M. Cathcart, *Blockbuster at the Ballot Box*, LAMBDA LEGAL (Nov. 7, 2012), <http://www.lambdalegal.org/blog/blockbuster-at-the-ballot-box>; National Gay and Lesbian Task Force, *Election 2012 Was a Watershed Moment for LGBT Equality in America*, TASK FORCE BLOG (Nov. 7, 2012), <http://thetaskforceblog.org/2012/11/07/election-2012-was-a-watershed-moment-for-lgbt-equality-in-america/>. In Maryland, voters approved a law passed by the state legislature to allow for same-sex marriage. Cathcart, *supra*. In Minnesota, voters rejected a constitutional amendment that would have blocked same-sex marriage. *Id.*; National Gay and Lesbian Task Force, *supra*.

*Perry* might affect them, and about the stress and uncertainty they feel as a result of the case.

*Perry* did not only create opportunities for the LGBTQ movement to engage in legal support tactics. It also provided a time of reflection for the movement on the issue of messaging, which has always been an important aspect of LGBTQ politics. Until 2012, as Amy Stone pointed out in her study of ballot measures, the LGBTQ movement had not yet learned how to persuade voters to affirmatively support same-sex marriage at the ballot box—despite successfully convincing voters to defeat measures that barred the legal protection of LGBTQ people from discrimination.<sup>18</sup> During *Perry*, activists were able to develop new ways of framing marriage so as not to repeat the loss of Proposition 8 and other anti-same-sex marriage referenda.

The respite provided by *Perry* allowed activists to test out messaging in other ways as well. For example, in 2009 and 2010, the Los Angeles Gay and Lesbian Center's Vote for Equality project began an experiment designed to create better messaging: a door-knocking effort that involved asking people about marriage. LGBTQ activists have continued to develop and refine methods of reaching the public to attain support for same-sex marriage and combat messages from the Right.<sup>19</sup>

Given the positive results regarding same-sex marriage in 2012, it appears that LGBTQ activists may finally have found an effective way to counter anti-same-sex marriage discourse. Shifts in public opinion may also have helped lead to these recent same-sex marriage victories.<sup>20</sup>

### III.

#### OTHER INSTITUTIONS

From an MIP perspective, *Perry* also created the space for the LGBTQ movement to work on different goals and target other institutions. Though marriage has become a battleground issue that has mobilized even those LGBTQ activists who do not wish to marry,<sup>21</sup> it was never the only priority for activists. Thus, the “No on Proposition 8” campaign sparked organizing on issues other

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18. STONE, *supra* note 13, at 136. Stone was writing before the 2012 election, when the LGBTQ movement finally achieved this goal.

19. Amy L. Stone, *Winning for LGBT Rights Laws, Losing for Same-Sex Marriage*, in THE MARRYING KIND?: DEBATING SAME-SEX MARRIAGE WITHIN THE LESBIAN AND GAY MOVEMENT (Mary Bernstein & Verta Taylor eds., forthcoming June 2013).

20. Brian Powell, Lala Carr Steelman & Oren Pizmony-Levy, *Transformation or Continuity in Americans' Definition of Family: A Research Note* 11–12 (Nat'l Ctr. for Marriage & Research, Working Paper Series, WP-12-12, 2012), available at <http://ncfmr.bgsu.edu/pdf/Brian%20Powell%202012/file119560.pdf> (noting that the favorable shift in public opinion on same-sex marriage in recent years is “not due entirely to the decrease in the percentage of people who have a traditional of [sic] family”).

21. Jeffrey Kosbie, *Beyond Queer vs. LGBT: Discursive Community and Marriage Mobilization in Massachusetts*, in THE MARRYING KIND?: DEBATING SAME-SEX MARRIAGE WITHIN THE LESBIAN AND GAY MOVEMENT (Mary Bernstein & Verta Taylor eds., forthcoming June 2013).

than marriage in unexpected ways. For example, some activists felt that neither their campaign, nor the Democratic Party, nor other mainstream national organizations had worked sufficiently with grassroots activists. They also were angry that they had been denied adequate resources to organize in rural and conservative areas of California.<sup>22</sup> As a result, after the California Supreme Court upheld Proposition 8 in May 2009,<sup>23</sup> local organizers in Fresno, California, hosted a Fresno-based rally entitled “Meet in the Middle for Equality.”<sup>24</sup> Over 3,000 people attended the rally.<sup>25</sup>

Subsequently, activists in community forums and other meetings across California again discussed the merits of pursuing a ballot initiative to repeal Proposition 8. Ultimately, there was too much disagreement to pursue this option.<sup>26</sup> Instead, activists, while not abandoning marriage equality as a focus of their work, began to target other areas for change as well. For instance, Robin McGehee, a local co-organizer of the “Meet in the Middle” march, went on to co-direct the October 2009 National Equality March, where thousands marched on Washington D.C. to demand full federal rights for LGBTQ citizens.<sup>27</sup> After the march, McGehee founded GetEqual, a direct action organization that sought to repeal Don’t Ask, Don’t Tell.<sup>28</sup> Since the repeal of Don’t Ask, Don’t Tell, GetEqual continues to publicize and protest anti-LGBTQ discrimination.<sup>29</sup>

#### IV.

#### CONCLUSION

While mobilization of the LGBTQ movement certainly declined after *Perry* was filed, the litigation did not derail grassroots efforts to create social change. Instead, LGBTQ activists engaged in a variety of legal support tactics. They also used the space created by the *Perry* case as a time for reflection in order to develop new messaging around same-sex marriage, in preparation for future battles in California and other states. Finally, activist energy was harnessed into

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22. Joe Garofoli, *Pro-Gay Activists Hit the Heartland*, S.F. CHRON., May 31, 2009, at A1.

23. *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009).

24. Garofoli, *supra* note 22, at A1.

25. *Id.* (reporting 3,000 people in attendance). See also *Nation Digest: Gay Activists Reach Out to Rural Residents*, WASH. POST, May 31, 2009, at A7 (reporting hundreds of people in attendance); Ashley Simmons, *Met in the Middle for Equality*, SOCIALISTWORKER.ORG (June 10, 2009), <http://socialistworker.org/2009/06/10/met-in-the-middle-for-equality> (reporting over 5,000 people in attendance).

26. For descriptions of the debate over a 2010 pro-same-sex-marriage ballot initiative see Garofoli, *supra* note 22; Seth Hemmelgarn, *Groups Tussle Over When to Repeal Prop 8*, BAY AREA REP. (July 16, 2009), <http://www.ebar.com/news/article.php?sec=news&article=4061>; Cynthia Laird, *Marriage Supporters Need 1,000 Voters a Day*, BAY AREA REP. (June 25, 2009), <http://www.ebar.com/news/article.php?sec=news&article=4013>; Jesse McKinley, *Backers of Gay Marriage Rethink California Push*, N.Y. TIMES, July 27, 2009, at A11.

27. Bob Roehr, *National Equality March Draws 100,000 to DC*, BAY AREA REP. (Oct. 15, 2009), <http://www.ebar.com/news/article.php?sec=news&article=4270>.

28. GET EQUAL, <http://getequal.org> (last visited Nov. 20, 2012).

29. *Id.*

new organizations that targeted other institutions.

The remaining question is what will happen after *Perry* is decided. Given the significance of this decision, a successful outcome is likely to encourage activists to continue seeking same-sex marriage through the courts and legislatures. However, I expect that a negative decision will have an effect on activists similar to that of the *Bowers v. Hardwick*<sup>30</sup> ruling, which permitted states to criminalize sodomy between consenting adults.

After *Bowers v. Hardwick*, LGBTQ activists responded with a national march on Washington, and they renewed their efforts to decriminalize sodomy.<sup>31</sup> New organizations formed as grassroots mobilization grew, focusing on both decriminalization and other LGBTQ issues.<sup>32</sup> Should Proposition 8 be upheld, I expect there will be outrage among LGBTQ communities, and a tidal wave of activism will ensue.

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30. 478 U.S. 186 (1986). *Bowers* was later overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003).

31. Mary Bernstein, *Nothing Ventured, Nothing Gained?: Conceptualizing Social Movement "Success" in the Lesbian and Gay Movement*, 46 SOC. PERSP. 353, 366–67 (2003).

32. *Id.*