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NEW ENTRANTS BRING NEW QUESTIONS

Douglas NeJaime*

A. Introduction

In a relatively short period of time, the lesbian, gay, bisexual, and transgender (LGBT) movement has moved from the margins to the center. The movement's push for equality has attracted the attention—both sympathetic and oppositional—of important groups and individuals outside of the movement. Christian Right advocates, on the one hand, and government lawyers and private nonmovement lawyers, on the other, now invest heavily in litigation implicating LGBT rights. This mainstreaming of the LGBT movement yields significant issues for sexual orientation and gender identity scholars. In this Essay, I will first show how the LGBT rights context provides rich new material with which to explore decades-old debates and pressing new questions in sociolegal scholarship. Then, I will explain how the addition of new voices and the increasing acceptance of LGBT equality norms present significant substantive issues relating to religious liberty and antidiscrimination law.¹

B. Sociolegal Scholarship—Cause Lawyering, Law and Social Movements, and Legal Mobilization

The rise of the Christian Right legal movement and its increasing attention to LGBT rights issues suggest critical questions that often have been neglected in sociolegal scholarship. As an initial matter, the literature on conservative cause lawyering is a domain from which sexual orientation and gender identity scholars are largely absent.² Yet analysis of conservative public interest lawyering is a worthwhile task. Christian Right advocates frame LGBT issues in provocative and influential ways. LGBT rights lawyers respond, unable to frame issues entirely on their own terms. For instance, in California's Proposition 8 battle, Christian

* © 2010 Douglas NeJaime. Associate Professor, Loyola Law School Los Angeles. I am grateful for the thoughtful comments I received at the Section on Sexual Orientation and Gender Identity panel at the 2010 AALS Conference. Many thanks go to Suzanne Goldberg for organizing this important discussion, and to Dean Spade, for his insightful comments on this Essay.

1. This short Essay attempts to highlight and pose some key questions for future legal scholarship on sexual orientation and gender identity. These highlights, of course, are colored by my own research interests, and I want to acknowledge that a number of important and provocative issues populate the field.

2. See ANN SOUTHWORTH, *LAWYERS OF THE RIGHT* (2008), for a thorough exploration of conservative cause lawyering.

Right advocates connected marriage equality to gay-inclusive public school curriculum, forcing Proposition 8 opponents to address both issues.³ LGBT advocates spent significant time and money responding to the fears of parents with school-age children and, instead of embracing gay-inclusive curriculum, largely dismissed the prospect of such curriculum as far-fetched and irrelevant.⁴ How, then, do countermovement frames affect movement messaging, priorities, and resource allocation?

On a broader level, the relationship between the Christian Right and LGBT rights movements provides a productive lens through which to explore movement and countermovement phenomena. While most scholarship on law and social movements conceptualizes movements battling against the state,⁵ the intense relationship between the Christian Right and LGBT rights movements illustrates the need to consider and understand opposing movement relationships. How does the increasing success of the LGBT movement facilitate Christian Right advocates' appeal to minority rights claims? How does analysis of the Christian Right/LGBT rights movement/countermovement relationship complicate established theories of movement mobilization and organization?

The LGBT movement's very recent history has witnessed a trend toward more sympathetic state actors, further underscoring how a simple model in which a social movement opposes the state does not map neatly onto LGBT rights. In fact, in the past year, top government lawyers from California and Massachusetts have staked out significant pro-gay positions. In the federal challenge to Proposition 8, the California Attorney General argued that the state constitutional amendment is unconstitutional under both federal due process and equal protection guarantees.⁶ At the same time, the Massachusetts Attorney General challenged part of the federal Defense of Marriage Act (DOMA).⁷ Working with an earlier suit brought by Gay & Lesbian Advocates &

3. See California General Election Official Voter Information Guide, *Arguments: Prop 8* (2008), <http://www.voterguide.sos.ca.gov/past/2008/argu-rebut/argu-rebutt8.htm>.

4. See *id.*

5. See David S. Meyer & Suzanne Staggenborg, *Movements, Countermovements, and the Structure of Political Opportunity*, 101 *AM. J. SOC.* 1628, 1629 (1996) ("Because most empirical and theoretical work on social movements focuses on movement challenges to the state, the phenomenon of ongoing interactions between opposing movements demands a revision and extension of our theories of social movements and social change.")

6. See Answer of Attorney General Edmund G. Brown Jr., *Perry v. Schwarzenegger* 2009 WL 1748382 (N.D. Cal. May 22, 2009) (No. 3:09-cv-02292-VRW).

7. See Complaint, *Commonwealth of Mass. v. United States Dep't of Health and Human Services*, No. 1:2009-cv-11156 (D. Mass. July 8, 2009), <http://www.boston.com/news/politics/politicalintelligence/DOMA%20Complaint%20FINAL.pdf>.

Defenders (GLAD),⁸ the Massachusetts Attorney General argued that DOMA unconstitutionally requires Massachusetts to treat similarly situated couples differently.⁹ We can no longer consider the state to be *the* opposition to LGBT rights claims; rather, LGBT and Christian Right advocates each attempt to seize on openings offered by state actors sympathetic to their respective movements. By reconceptualizing movement dynamics in this way, I do not mean to cast the state as either a centralized or benign actor. Rather, power operates in multiple, diffuse ways across multiple institutional domains. How do the dynamics of power across state institutions affect the political opportunity structure available to the LGBT rights and Christian Right movements? How do the changing relationships of state actors to each movement influence how the respective movements use elite support to bring about social change?

The new role that government lawyers have taken in pro-gay litigation also complicates traditional cause lawyering analysis. While the increasing presence of government lawyers in LGBT rights litigation speaks to the progress of the movement, that same presence suggests a potential shift away from a carefully orchestrated trajectory. In challenging Proposition 8 in state court, the California Attorney General put forth a novel theory, arguing that a simple majority of voters cannot take away a fundamental right from a suspect class without a compelling governmental interest.¹⁰ He expressly rejected the amendment/revision theory advanced by LGBT rights lawyers.¹¹ While the Attorney General's opposition to the newly adopted constitutional amendment created a significant moment in LGBT history, his legal position produced some internal tension that those opposing Proposition 8 had to manage and resolve. How do government lawyers who side with a social movement negotiate their roles as public lawyers and cause lawyers? And how do movement lawyers respond to sympathetic but independent government lawyers?

The recent federal marriage equality lawsuit, brought by prominent private lawyers against the advice of movement advocates, casts in even

8. See Complaint for Declaratory, Injunctive, or Other Relief and for Review of Agency Action, *Gill v. Office of Personnel Management* (D. Mass. Mar. 3, 2009), <http://www.glad.org/uploads/docs/cases/gill-complaint-03-03-09.pdf>.

9. Complaint, No. 1:2009-cv-11156, *supra* note 7, at 3-4.

10. See Answer Brief in Response to Petition for Extraordinary Relief, *Tyler v. State of California*, No. 5168066 (Cal. S. Ct. Dec. 19, 2008), <http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/S168066-answer-brief-petition.pdf>.

11. See *id.* at 22-53.

starker relief the threat to social movement control.¹² David Boies and Ted Olson, supported by the newly formed American Foundation for Equal Rights, took decisive action ahead of the organized movement's timeline.¹³ Their federal suit challenging Proposition 8 provides further evidence of the mainstream-ing of LGBT equality norms. The unlikely marriage of two ideological rivals presents the question of marriage equality as a nonpartisan matter of basic fairness. And it attests to the success of the LGBT rights movement. But for work on cause lawyering and legal mobilization,¹⁴ the suit presents provocative questions regarding movement control. How do movement lawyers maintain control of strategy? How might elite support—a key indirect effect in the legal mobilization framework—actually threaten a movement's cause? How do advocates react to loss of control at the hands of supportive elites? And how does the move by Boies and Olson tell us about the risks and benefits of court-centered strategies in LGBT rights work? Might reliance on litigation without adequate popular support jeopardize the movement's progress?

While the LGBT rights domain provides experiences that pose pressing new questions on cause lawyering and law and social movements, it also presents new material to explore classic debates in sociolegal theory. In fact, many scholars are looking to the LGBT rights movement for rich new data with which to assess the effectiveness of litigation and the role of lawyers in social movements.¹⁵ Recent experiences with marriage equality litigation provide empirical evidence that speaks to the place of litigation in social change campaigns and to the strategic moves of activist lawyers.¹⁶ Furthermore, exploring the movement and countermovement relationships between LGBT rights advocates and Christian Right advocates might have significant implications for theorizing social movement lawyers' roles and determining the effectiveness of litigation strategies. Within the legal mobilization framework, what have been the indirect effects of marriage equality litigation? How have both LGBT and Christian Right advocates

12. See *Perry v. Schwarzenegger*, 592 F.3d 971 (9th Cir. 2009).

13. See Complaint for Declaratory, Injunctive, or Other Relief, *Perry v. Schwarzenegger*, 2009 WL 1490740 (N.D. Cal. May 22, 2009) (No. CV-092292VRW).

14. See, e.g., MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994).

15. See, e.g., Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 *UCLA L. REV.* (forthcoming 2010).

16. Compare GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2008), with Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 *L. & SOC'Y REV.* 151 (2009).

conceptualized litigation, and how much have they affirmatively turned to courts for social change?

C. *Antidiscrimination and Religious Liberty*

Some of the same new entrants who present significant questions for sociolegal scholarship also affect the substantive doctrinal issues facing sexual orientation and gender identity scholars. Christian Right advocates have successfully pushed antigay initiatives across the country. Sexual orientation scholars must address how such laws, which strike at the heart of lesbian and gay families, contravene foundational constitutional protections. How does Arkansas's Act 1, which prohibits unmarried cohabiting couples from fostering or adopting children,¹⁷ deny equal protection of the law, invade privacy and freedom of intimate association, and strike at parental rights of LGBT individuals? And how does it do the same to other individuals who fail to meet entrenched notions of the married, heterosexual, nuclear family? Moreover, how does Act 1—and a host of other ballot initiatives across the country—distort the political process and complicate our conceptualization of direct democracy?

At the same time, Christian Right advocates have been forced to become more defensive. With government actors increasingly adopting LGBT equality norms (and displacing discrimination norms), Christian Right advocates must react. As LGBT rights are achieved, the contours of those rights must be determined. Such determinates will often turn on the operation of religious objections. How will religious exemptions carve out exceptions to LGBT rights? How will religious free exercise and expressive association influence the meaning of sexual orientation and gender identity nondiscrimination?

The push for religious accommodation by Christian Right lawyers illuminates the importance of substantive issues underexplored and under-theorized by sexual orientation and gender identity scholars. While some religious liberty advocates might exaggerate the extent to which LGBT rights threaten religious freedom, the conflict is real. Indeed, as marriage equality has moved from an impossibility to a reality, some state lawmakers have taken up the task of balancing the rights of same-sex couples to marry against the rights of religious groups and

17. See Lynda Altman, Editorial, *Arkansas' Act 1 Limits Foster Care, Adoption to Married Couples Only* (Oct. 23, 2008), http://www.associatedcontent.com/article/1137116/Arkansas_act_1_limits_foster_care_adoption.html?cat=17.

individuals not to recognize such marriages.¹⁸ Most of the scholars weighing in on these questions come from the law and religion field. While some sexual orientation scholars, most notably Chai Feldblum and Andrew Koppelman, do an admirable job of articulating normative positions in favor of LGBT equality while providing careful (but divergent) analyses of religious objections, more voices are needed.¹⁹ This conflict and its resolution will surely pervade the field for years to come, and it would be wise for sexual orientation and gender identity scholars to turn their attention to it. Our careful analysis, with its due respect for the rights of LGBT individuals, will add an important perspective to the scholarly debate and offer an essential contribution to future legislative efforts. Of course, even as we maintain a normative commitment to LGBT rights, we must acknowledge the importance of religious liberty; in fact, we must take to the question of religious accommodation the very solicitude for minority rights that informs sexual orientation and gender identity scholarship. How are religion- and LGBT-based identities similar? How do they manifest themselves in modes of public expression? How can courts and legislatures clearly articulate LGBT equality norms and yet also respect and accommodate sincere religious objections?

D. Conclusion

We have reached a pivotal moment in sexual orientation and gender identity work. We are not simply speaking to each other. Others are paying attention. Christian Right advocates have devoted significant attention to our issues. Government lawyers are now taking up our cause. And private lawyers on both sides of the aisle are defending our rights. But with these new players come new empirical, theoretical, and doctrinal questions. We should address such questions head-on: How have Christian Right lawyers changed our understanding of cause lawyering? How does the relationship between the Christian Right and LGBT rights movements inform work on law and social movements? How do sympathetic government lawyers and private nonmovement lawyers complicate our definition of cause lawyers and threaten movement lawyer control? How do the recent experiences of LGBT

18. See, e.g., Kevin Landrigan, *Religion Clause Added to Gay Marriage Proposal*, NASHUA TELEGRAPH (N.H.), May 30, 2009, at A1.

19. See, e.g., Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61 (2006); Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125 (2006).

rights litigation shed light on debates regarding the effectiveness of court-centered strategies? How do efforts by the Christian Right test our notions of equality and liberty? How do they challenge our ideals about the political process and the judiciary's role in protecting minority groups? And how do they pose difficult questions of religious freedom, antidiscrimination, and minority rights?