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## Marriage Equality and a Lawyer's Role in the Emergence of "New" Rights

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# Marriage Equality and a Lawyer's Role in the Emergence of "New" Rights

*Daniel J. Canon\**

## INTRODUCTION

In 2015, the author was fortunate enough to represent six couples and their children before the United States Supreme Court in two Kentucky cases styled *Love v. Beshear* and *Bourke v. Beshear*,<sup>1</sup> which are now better known by their consolidated name: *Obergefell v. Hodges*.<sup>2</sup> When the case was accepted by the high Court, a handful of day-to-day civil litigators were drawn into a different world—one few lawyers get to see. Even lawyers who regularly practice at the Supreme Court do not often see the kind of concerted effort witnessed by the advocates in *Obergefell*. It was the culmination of decades of work by countless activists, scholars, organizations, and lawyers. And all that effort was in order to create what amounted to a new right.<sup>3</sup>

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<sup>1</sup> 989 F. Supp. 2d 536 (W.D. Ky. 2014); 996 F. Supp. 2d 542 (W.D. Ky. 2014).

<sup>2</sup> 135 S. Ct. 2584 (2015).

<sup>3</sup> Whether or not the right is "new" depends on who is asked, and how you define the scope of the right. The legal fiction that the right to same-sex marriage existed in 1878, but had not quite been discovered yet, was a critical argument to some proponents of marriage equality, and indeed is discussed in no uncertain terms by the District Court in *Bourke v. Beshear*, discussed at length *infra*. ("For many others, this decision could raise basic questions about our Constitution. For instance, are courts creating new rights? Are judges changing the meaning of the Fourteenth Amendment or our Constitution? Why is all this happening so suddenly? The answer is that the right to equal protection of the laws is not new. History has already shown us that, while the Constitution itself does not change, our understanding of the meaning of its protections and structure evolves. If this were not so, many practices that we now abhor would still exist.") *Bourke*, 996 F. Supp. 2d 542, 556 (W.D. Ky. 2014), *rev'd sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (citing *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to

In 1970, two men from Minnesota tried to get a marriage license. They took their case all the way to the Supreme Court, too. But in a sharp contrast with Justice Kennedy's grandiose, 28-page opinion in *Obergefell*, the holding of *Baker v. Nelson* contained but one sentence: "The appeal is dismissed for want of a substantial federal question."<sup>4</sup> In other words, a right to same-sex marriage under the Constitution was not an idea the Court was willing to entertain, even as a threshold issue. What happened between 1970 and 2015 to catapult an assertion of a right thought of as a fringe idea worth only one dismissive sentence to a full-fledged, constitutional right? And how can practitioners replicate that success on behalf of clients who seek changes in the law, including the recognition of "new" rights?

This Article seeks to begin the process of answering those questions. To do so, the Article uses the example of the *Obergefell* litigation, and changes in social circumstances between *Baker* and *Obergefell*, to provide a working conceptual model to be used by lawyers seeking to aid in bringing new rights into being. Part II discusses the development of same-sex marriage in the context of the historical concept of rights overall. In Part III, this Article posits a model of rights as existing in three different stages. Part IV explores a number of identifiable factors that advance rights through those three different stages. Part V discusses, in a practical and historical sense, how the concepts identified in the previous sections came into play in establishing marriage equality as a right. Part VI briefly deals with the issue of caution and incrementalism vis-à-vis the role of the practitioner in litigating a client's rights. And the final section discusses ways a practitioner can use these concepts to further civil and human rights in her own practice.

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have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.")). No doubt this argument resonated with originalists struggling to square a uniquely twenty-first century idea with an eighteenth century document. And there are still others who would prefer not to think of the right to same-sex marriage as distinct from the right to marriage overall. But in the broad context of human history, the idea that two persons of the same biological sex could possess a right to be married is undeniably novel, and that is the assumption from which this article proceeds.

<sup>4</sup> *Baker v. Nelson*, 409 U.S. 810, 810 (1972).

I. SAME-SEX MARRIAGE AS A RIGHT

A. *What is a right?*

At the outset, it is useful to discuss briefly what is meant by a “right” in this context. From a strictly academic perspective, there is no widespread agreement as to what a “right” is, or where rights come from.<sup>5</sup> For our purposes, it is less important to specifically define these terms than it is to conduct a gross observation of how they operate.

First, let us dispense with the idea that any rights are fixed, at least from a legal standpoint. Indeed, the entire concept of individual rights did not exist in any sort of cognizable form until the last couple of centuries or so; ancient languages did not even have a word that meant “rights.”<sup>6</sup> Legal theorist Edward L. Rubin discusses the origin of property “rights” as coming from English philosopher and theologian William of Ockham.<sup>7</sup> Though laws regarding ownership of property were common in the Middle Ages, the concept of an inherent “right” to property was not. Ockham’s “general position was that human beings possess an inherent right to use material objects and an inherent liberty that can perhaps be regarded as a right. They then establish, by means of human law, systems of property rights and political rights.”<sup>8</sup> Thus, according to Ockham and those that followed his reasoning, property rights were what we might call “natural rights.”

Critical for our purposes, “natural rights can be asserted by individuals against political authorities.”<sup>9</sup> For example, Hobbes posited an early, natural right of self-preservation, which meant (among other things) that “subjects cannot be ordered to kill themselves, although they may be executed.”<sup>10</sup> As such, most early “rights” were kept separate and apart from the few natural rights that

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<sup>5</sup> For an extensive, scholarly discussion of the origin of human rights, see Edward L. Rubin, *Rethinking Human Rights*, 9 INT’L. LEGAL THEORY 5, 8–9 (2003).

<sup>6</sup> JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* (2d ed. 2013).

<sup>7</sup> Rubin, *supra* note 5, at 13–14.

<sup>8</sup> *Id.* at 16.

<sup>9</sup> *Id.* at 17.

<sup>10</sup> *Id.* at 22.

people could assert as against their own government.<sup>11</sup> “[A]most all the protections against government that we currently associate with human rights were products of social movements that were unrelated to natural rights theory.”<sup>12</sup>

In Rubin’s view, in the late eighteenth century, this began to change.

[T]he natural rights conception was losing its force and revealing government as a purely human and potentially unconstrained creation. Under those circumstances, it was reassuring to describe the protection that they championed as rights, rights that were related to the natural rights that people possessed in their presocial condition. It became possible to envision a right to speak, to worship freely, to be free of slavery or torture, and to be tried by due process of law. Such rights, like natural rights, could be conceived as possessions, borrowing, by virtue of their form, the sacerdotal quality of their God-given predecessors. Like natural rights, these possessions existed independently of government, and controlled the government’s proper relationship to individuals.<sup>13</sup>

In other words, social movements co-opted the label of “rights” generally from the idea of “natural rights,” and began to apply that label to things that were pragmatic social needs. Of course, specific information on how those needs came to be widely recognized as rights by societies during and before the eighteenth century is sparse. But the point is that the longstanding moral authority of a “natural right” was purposefully harnessed and used by social movements to control the behavior of the state and to facilitate the wishes of a group of people who might otherwise lack the political power to vindicate those wishes.<sup>14</sup>

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<sup>11</sup> *Id.* at 47.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 49–50.

<sup>14</sup> See DONNELLY, *supra* note 6, at 11–12.

As a result, a “right” as we understand it in twenty-first century America is a social trump card; it allows for the assertion that a power structure must do something that it would not otherwise do in order to accommodate an individual.<sup>15</sup> As one scholar puts it, rights are “moral demands on government.”<sup>16</sup> So, by definition, power structures do not recognize rights at their inception. To the contrary, this initial stage is often marked by apathy, scorn, or ridicule by the majority and, by extension, governmental and other institutions that reflect the majority view (or “political authorities,” to use Rubin’s nomenclature).<sup>17</sup> Even those rights one might consider most basic today were, at best, luxuries to previous generations, not at all within the purview of government action or non-action.<sup>18</sup>

But now, by and large, people the world over have figured out the power of asserting something as a “right” and not merely a desire as a means of managing the behavior of governing institutions. As a result, rights are born at an ever-increasing frequency. Today’s wishes are tomorrow’s fervent hopes and the next day’s god-given rights. Contemporary examples abound. In 2016, the United Nations “declared that ‘online freedom’ is a ‘human right,’ and one that must be protected.”<sup>19</sup> The *Right to Try Act of 2017*, which became federal law in May 2018, provides patients with an affirmative right to “obtain investigational drugs outside of clinical trials.”<sup>20</sup> Advances in neurotechnology have led to calls for the

<sup>15</sup> *Id.* at 7–8; see also Neil Stammers, *Social Movements and the Social Construction of Human Rights*, 21 *JOHNS HOPKINS U. PRESS, HUM. RTS. Q.* 980, 982–983 (1999), <http://www.jstor.org/stable/762754>.

<sup>16</sup> Rubin, *supra* note 5, at 66.

<sup>17</sup> “First they ignore you. Then they ridicule you. And they attack you and want to burn you. And then they build monuments to you.” Nicholas Klein, Address During a Biennial Convention of Amalgamated Clothing Workers of America (May 15, 1918) (speaking about that union).

<sup>18</sup> See Rubin, *supra* note 5, at 34–45 (discussing the abolition of slavery, the abolition of torture, and the birth of due process rights).

<sup>19</sup> Tim Sandle, *UN Thinks Internet Access as a Human Right*, *BUS. INSIDER* (Jul. 22, 2016, 11:57 PM), <http://www.businessinsider.com/un-says-internet-access-is-a-human-right-2016-7>; see also, e.g., *What is the Human Right to Housing?*, *NAT'L ECON. & SOC. RTS. INITIATIVE*, <https://www.nesri.org/programs/what-is-the-human-right-to-housing> (last visited May 11, 2018); Jimmy Tobias, *Meet the Rising New Housing Movement That Wants to Create Homes for All*, *NATION* (May 24, 2018), <https://www.thenation.com/article/the-way-home/>.

<sup>20</sup> Kate Traynor, *Federal Right-to-try Law Aims to Broaden Access to Investigational Drugs*, *AM. J. HEALTH-SYS. PHARMACY* 1085, 1085 (2018), <http://www.ajhp.org/content/75/15/1085?sso-checked=true>.

“creation of new rights to protect people from potential harm[,]” such as the right to “mental privacy” and the right to “psychological continuity.”<sup>21</sup> Rights such as these, in various stages of recognition, and concerning just about any topic, can be readily observed. Most of these are not “natural” rights in any realistic sense, and it is difficult to see how it is a derivative of any natural right in the Hobbesian sense.

### *B. The History of Marriage as a Right*

As part of making a case to the Supreme Court as to why the right to same-sex marriage should exist, the *Obergefell* litigators had to learn the history of the assertion of that right, at least in a judicial context, in order to explain to the Court why government should conform its conduct to that assertion now when it had never done so before. There was not much to know. When Richard Baker and James McConnell applied for a marriage license in Minnesota in 1970, people laughed. Eventually, the Minnesota Supreme Court issued a curt and cursory rebuke of their legal arguments.<sup>22</sup> And a year later, the Supreme Court summarily discarded the idea of same-sex marriage as a right altogether.<sup>23</sup> This was the same Court that just a half-decade before had unanimously affirmed a right to interracial marriage—an idea which was ridiculed throughout most of America’s history,<sup>24</sup> but by 1967 “reflect[ed] the central meaning” of the Fourteenth Amendment.<sup>25</sup> In the succeeding years,

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<sup>21</sup> Marcello Ienca & Roberto Andorno, *Towards New Human Rights in the Age of Neuroscience and Neurotechnology*, LIFE SCI., SOC’Y AND POL’Y 2 (Apr. 26, 2017), <https://lssjournal.biomedcentral.com/articles/10.1186/s40504-017-0050-1>.

<sup>22</sup> See *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

<sup>23</sup> *Baker v. Nelson*, 409 U.S. 810 (1972), *overruled by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>24</sup> Peggy Pascoe, *Why the Ugly Rhetoric Against Gay Marriage is Familiar to this Historian of Miscegenation*, COLUMBIAN C. OF ARTS & SCI. AT THE GEO. WASH. U. (Apr. 19, 2004) <https://historynewsnetwork.org/article/4708>.

<sup>25</sup> *Loving v. Virginia*, 388 U.S. 1, 2 (1967); compare the recounting of the congressional debates over what eventually became the Fourteenth Amendment contained in R.C. Pittman, *The Fourteenth Amendment: Its Intended Effect on Anti-Miscegenation Laws*, 43 N.C. L. REV. 92, 94–95 (1964) (“Senator Lyman Trumbull, who had introduced the Bill and was its manager, made it clear that there was no intention to nullify the anti-miscegenation statutes or constitutional requirements of the various states . . . . On that point he said: . . . ‘Are not both races treated alike by the law of Indiana? Does not the law make it just as much a crime for a white man to

the Court affirmed the fundamental marriage rights of prisoners and parents who were behind on support payments.<sup>26</sup>

Shortly after the fundamental right to marriage was firmly established by this series of cases in the United States Supreme Court, individual states began to contemplate same-sex marriage in earnest. In 1993, in a case called *Baehr v. Lewin*, the Hawaii Supreme Court intimated that someday, maybe same-sex marriage could be possible.<sup>27</sup> Then, in 2003, the Massachusetts Supreme Court in *Goodridge v. Department of Public Health* said that marriage was a right to be enjoyed by couples within the state.<sup>28</sup> At the same time, the right to sexual intimacy between adults, regardless of sex, emerged in the United States Supreme Court's jurisprudence in *Lawrence v. Texas*.<sup>29</sup> And in 2013, in *United States v. Windsor*, Justice Kennedy called the right to same-sex marriage, as conferred by certain states, "a dignity and status of immense import," hinting that the country might be at a tipping point.<sup>30</sup> It was. And the tipping was realized by *Obergefell*.

However, the stark difference between *Obergefell* and *Baker* cannot be explained solely by reference to case law, or even the combination of jurisprudential changes and a few successful ballot initiatives. As legal scholar and ACLU National Legal Director, David Cole, succinctly puts it, "constitutional law develops not by slippery-slope arguments made in the abstract, but through public debate about fundamental principles and values, pressed by people with powerful commitments willing to make sustained efforts in multiple arenas—local, state, and federal, public and private, at home and at work."<sup>31</sup> How

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marry a black woman as for a black woman to marry a white man, and *vice versa*?"

<sup>26</sup> *Turner v. Safley*, 482 U.S. 78, 100 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 377 (1978).

<sup>27</sup> See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

<sup>28</sup> *Goodridge v. Dep't Public Health*, 798 N.E.2d 941, 969 (Mass. 2003).

<sup>29</sup> *Lawrence v. Texas*, 539 U.S. 558, 564, 579 (2003) (right of consenting adults to sexual intimacy); see also *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to use contraception).

<sup>30</sup> *United States v. Windsor*, 570 U.S. 744, 768 (2013).

<sup>31</sup> DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* 91 (2016) (ebook, Kindle ed.). Were it otherwise, individual rights, once validated by a constitutional provision, would be limitless. Detractors of marriage equality, including Justice Alito, often imply that same-sex marriage is the herald of (at least) a constitutional right to

can a litigator conceptualize the way in which this complicated series of cultural changes occurs, and make it work in her own law practice? How can an amorphous set of cultural changes be put into motion in a deliberate, conscious way by an individual practitioner? These questions are explored below.

## II. THE THREE-STAGE LIFE CYCLE OF RIGHTS

If a gross oversimplification is allowed, rights may be observed in three stages. The first stage in the life of a right occurs when someone speaks it into being. It is the point in time where a want is elevated to the status of an entitlement, at least in the mind of the wanter.<sup>32</sup> And it is when an individual or group of individuals, often members of an outgroup or subculture with limited political power, demand that governing power structures behave a certain way in accordance with that entitlement.

Jumping ahead, the third and final stage is one in which a right gains total institutional acceptance. Over time, the right is taken for granted by the power

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polygamy. “Suppose we rule in your favor in this case and then, after that, a group consisting of two men and two women apply for a marriage license; he said to Mary Bonauto, one of the lawyers arguing against state bans on same-sex marriage. ‘Would there be any ground for denying them?’” Amy Davidson Sorkin, *Justice Alito’s Polygamy Perplex*, NEW YORKER (Apr. 30, 2015) <https://www.newyorker.com/news/amy-davidson/justice-alitos-polygamy-perplex>. While the *Obergefell* oralist, Mary Bonauto, gave an adept legal answer, the answer is less a legal one than a practical one; the cultural preconditions for such a development in the law have not yet been met. The same was true in 1972; although marriage was a fundamental right that prohibited states from criminalizing interracial marriage, this same right did not extend to same-sex marriage—at least not yet. Of course, this does not mean that legitimized polygamy is inevitable, rather that significant cultural groundwork would have to be done for the right to plural marriage to be institutionally recognized.

<sup>32</sup> It is worth noting that this view is in accord with Rubin’s conception of the origin of human rights. According to Rubin, rights have historically derived almost exclusively from the concept of natural liberty, or the “assumption that people are naturally free, and voluntarily submit to social control in return for the benefits of civil order.” Rubin, *supra* note 5, at 59–60. A better way to view the origin of those rights is by starting from the “assumption that people are comprehensively controlled by a dense multiplicity of social and political prescriptions. Liberty, according to this view, is not something they are given, something that they naturally possess, but something they must struggle to create.” *Id.* at 60. Such an approach acknowledges that rights, and even the sources of those rights, are *ad hoc* creations that are responsive to attendant circumstances, rather than something fixed, universal, or naturally occurring. Moreover, this view “pays homage to the dissidents, protestors and nonconformists who have seized liberty from the forces of repression.” *Id.* at 61.

structures that rejected it in the first place, as if to say “of course this is a right, we always recognized it as such.”<sup>33</sup> Those who ignore the institutional acceptance do so at their own peril. The right has become part of the pre-existing power structures and often makes them stronger.<sup>34</sup> To return to the example of marriage equality, its third stage was realized by *Obergefell*.

But the second stage—the one at which marriage equality found itself in the wake of *Windsor*—is the one to which a lawyer's craft is most effectively applied. It is here when a right, teetering on the precipice of total institutional acceptance, may be given a final shove by impact litigators. At stage two, a right, having been spoken into existence by an individual, begins to gain acceptance by people who do not benefit from it,<sup>35</sup> and later by institutions which formerly suppressed it.

For example, while Americans tend to take for granted the right to be free of race discrimination in the workplace, more than half of all states still do not explicitly recognize a corresponding right based on sexual orientation.<sup>36</sup> However, many power structures *do* recognize such a right, including municipalities within states that do not.<sup>37</sup> This right is ripening. The tension on

<sup>33</sup> See, e.g., Richard Rothstein, *Misteaching History on Racial Segregation*, 70 SCH. ADMIN. 38 (2013), <http://www.aasa.org/content.aspx?id=30814>.

<sup>34</sup> See Blake Ellis, *Gay Marriage Boosts NYC's Economy by \$259 Million in First Year*, CNN MONEY (July 24, 2012, 6:01 PM), <https://money.cnn.com/2012/07/24/pf/gay-marriage-economic-impact/index.htm>.

<sup>35</sup> An interesting question is that of when to call what is sought a “right,” and to whom. As Cole notes, “Simon and Watts [a pollster and psychologist, respectively, interviewed by the author] . . . found that arguments phrased in the language of ‘rights’ were not particularly effective.” COLE, *supra* note 31, at 73. However, as noted above, the term “right” itself carries a particular contextual meaning and moral weight and *must* be invoked at some point if the right is ever to achieve total institutional recognition. Moreover, Simon and Watts appear to contemplate messaging which “characterized marriage as a ‘civil right’ and linked the fight for marriage equality to the battles against segregation and race-based internment of Japanese-Americans,” which, naturally, complicates matters. *Id.* at 71–72. One need not implicitly refer to the bigotry of those who stand against a new right, nor explicitly invoke any historical period, for the basic terminology of rights to be effective.

<sup>36</sup> Twenty-six states do not have a state law preventing workplace discrimination based upon sexual orientation. *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws](http://www.lgbtmap.org/equality-maps/non_discrimination_laws) (last visited Sept. 3, 2018).

<sup>37</sup> See, e.g., LOUISVILLE, KY., CODE ORD. § 92.06 (1999), [http://library.amlegal.com/nxt/gateway.dll/Kentucky/loukymetro/titlegeneralprovisions/chapter21ethicscode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlega1:louisville\\_ky\\$anc=JD\\_Chapter21; Paducah Becomes Kentucky's 9th City](http://library.amlegal.com/nxt/gateway.dll/Kentucky/loukymetro/titlegeneralprovisions/chapter21ethicscode?f=templates$fn=default.htm$3.0$vid=amlega1:louisville_ky$anc=JD_Chapter21; Paducah Becomes Kentucky's 9th City)

the proponents' side is almost equal to that of the opponents.<sup>38</sup> Likewise, the right not to be executed is currently in a state of equilibrium. For nearly all of human history, it was a foregone conclusion that the state had the power to put people to death. But in the last fifty years, nearly all of Western society, and indeed nearly the world, has abolished capital punishment.<sup>39</sup> In the twenty-first century alone, eight states have abolished it.<sup>40</sup> In addition, some courts have acted to eradicate the death penalty either in practice or as a matter of constitutional principle, and at least two Supreme Court Justices believe the practice itself to violate the Eighth Amendment.<sup>41</sup>

Another as-yet unripe idea is that of the would-be right to compensated family leave. Again, this is a right that much of the world takes for granted already, but it is just now gathering steam in the United States.<sup>42</sup> It began, as rights do, with individuals asserting that to raise a family and still be financially solvent is not just a *desire*, but a *right*. Similarly, medical marijuana, now accepted in one form or another by more than half the states, is nearing its critical mass.<sup>43</sup> The list of rights in limbo between partial and total institutional acceptance, examples of which are explored in more depth in Section VIII, *infra*, is getting longer all the time.

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*with LGBT Fairness*, ACLU KY. (Jan. 9, 2018), <https://www.aclu-ky.org/en/news/paducah-becomes-kentuckys-9th-city-lgbt-fairness-0>.

<sup>38</sup> *Non-discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws](http://www.lgbtmap.org/equality-maps/non_discrimination_laws) (last visited Sept. 3, 2018); *see also* *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017).

<sup>39</sup> Oliver Smith, *Countries That Still Have the Death Penalty*, TELEGRAPH (July 6, 2018, 12:00 PM), <https://www.telegraph.co.uk/travel/maps-and-graphics/countries-that-still-have-the-death-penalty/>.

<sup>40</sup> The eight states that have abolished the death penalty in the twenty-first century are Connecticut, Delaware, Illinois, Maryland, New Jersey, New Mexico, New York, and Washington. *30 States with the Death Penalty and 20 States with Death Penalty Bans*, PROCON.ORG (Oct. 16, 2018, 10:30 AM), <https://deathpenalty.procon.org/view.resource.php?resourceID=001172>.

<sup>41</sup> *Glossip v. Gross*, 135 S. Ct. 2726, 2756 (2015) (Breyer, J., dissenting) (describing his belief that the death penalty now may qualify as cruel and unusual punishment prohibited by the Eighth Amendment).

<sup>42</sup> Kelly Wallace, *Paid Leave For Parents: What's The Right Amount Of Time?*, CNN (June 29, 2017, 2:05 PM), <https://www.cnn.com/2017/06/29/health/paid-leave-how-much-time-enough/index.html>.

<sup>43</sup> "A total of 33 states, the District of Columbia, Guam and Puerto Rico have approved a comprehensive public medical marijuana and cannabis programs." *State Medical Marijuana Laws*, NAT'L CONF. ST. LEGIS. (Jan. 23, 2019), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

To sum up: for our purposes, rights occur in three stages:

1. A right is conceived by an individual or group and is spoken into being. It has no formal, institutional recognition.
2. A right gains some formal recognition, usually through a court opinion, an executive order,<sup>44</sup> or a legislative act.
3. A right achieves total institutional recognition and becomes part of the status quo. Non-recognition of the right by individuals leads to negative consequences.<sup>45</sup>

#### IV. MOVERS OF RIGHTS

Much has been written about the origin and development of rights through the courts.<sup>46</sup> But little is understood of the mechanisms that further such development. A notable recent exception is the work of David Cole.<sup>47</sup> This Article, in part, uses Cole's expository framework together along with the author's own experiences and other theoretical frameworks to create a conceptual model to be used by practicing attorneys who seek vindication of "new" rights on behalf of clients.

Put another way, above, this Article seeks to provide a preliminary answer to this question: what are the factors that help a right get from stage one to stage three in the aforementioned model, and what is a lawyer's

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<sup>44</sup> Executive actions are not dealt with extensively in this Article, but a noteworthy example in the context of marriage equality is then-Mayor of San Francisco Gavin Newsom's decision to issue marriage licenses on February 12, 2004 (ten years to the day from the historic trial court opinion on marriage equality in Kentucky). Melanie Mason, *When Gavin Newsom Issued Marriage Licenses In San Francisco, His Party Was Furious. Now, It's A Campaign Ad*, L.A. TIMES (May 15, 2018, 12:05 AM), <http://www.latimes.com/politics/la-pol-ca-gavin-newsom-gay-marriage-20180515-story.html>.

<sup>45</sup> See *Miller v. Davis*, 123 F. Supp. 3d 924 (E.D. Ky. 2015). This model is akin to the Hegelian dialectic: thesis (an assertion of a right) meets antithesis (the opposition to institutional recognition) resulting in synthesis (formal recognition of the right, albeit probably in a watered-down version, if you ask those who originally asserted it). See Stanford Encyclopedia of Philosophy, *Hegel's Dialectics*, <https://plato.stanford.edu/entries/hegel-dialectics/>.

<sup>46</sup> *Important Supreme Court Cases for Civil Rights*, LEADERSHIP CONF., <https://civilrights.org/judiciary/federal-court-system/important-supreme-court-cases-civil-rights> (last visited Sept. 3, 2018).

<sup>47</sup> COLE, *supra* note 31.

role in making it happen? As alluded to above, the answer lies in stage two, in which a focused effort may be made to shove a right from *partial* to *total* institutional recognition.

If that sounds relatively simple in theory, it is not at all simple in practice. Rights have historically languished for (at least) decades at stage two. For example, when delegates got together at Seneca Falls, New York, in 1848 to discuss the future of women's rights, the concept of suffrage was a fringe idea favored by only a few at the convention.<sup>48</sup> It was briefly considered and, ironically enough, voted down.<sup>49</sup> The next eighty years were an uphill, door-to-door battle that included a Supreme Court loss, but which finally resulted in the Nineteenth Amendment.<sup>50</sup> Or consider that even after Franklin Roosevelt, a popular President with a disability, took office for three terms in a row, it was another fifty years before the Americans with Disabilities Act was signed into law.<sup>51</sup> The battle for institutional recognition is often tedious, taxing, and bloody. But the last thirty years have seen a dramatic increase in the pace of cultural interchange, such that people can watch rights come to fruition in real time and can consciously aid in the process.<sup>52</sup>

In the abstract, what common factors moved suffrage from a fanciful notion to a full-fledged right, led to taking the right to be free of racial discrimination in the workplace for granted and caused the Court's dramatic shift between *Baker* and *Obergefell*? As a

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<sup>48</sup> Allison Lange, *Suffrage and the Seneca Falls Convention*, NWHM, (Fall 2015), <http://www.crusadeforthetvote.org/seneca-falls-meeting/>.

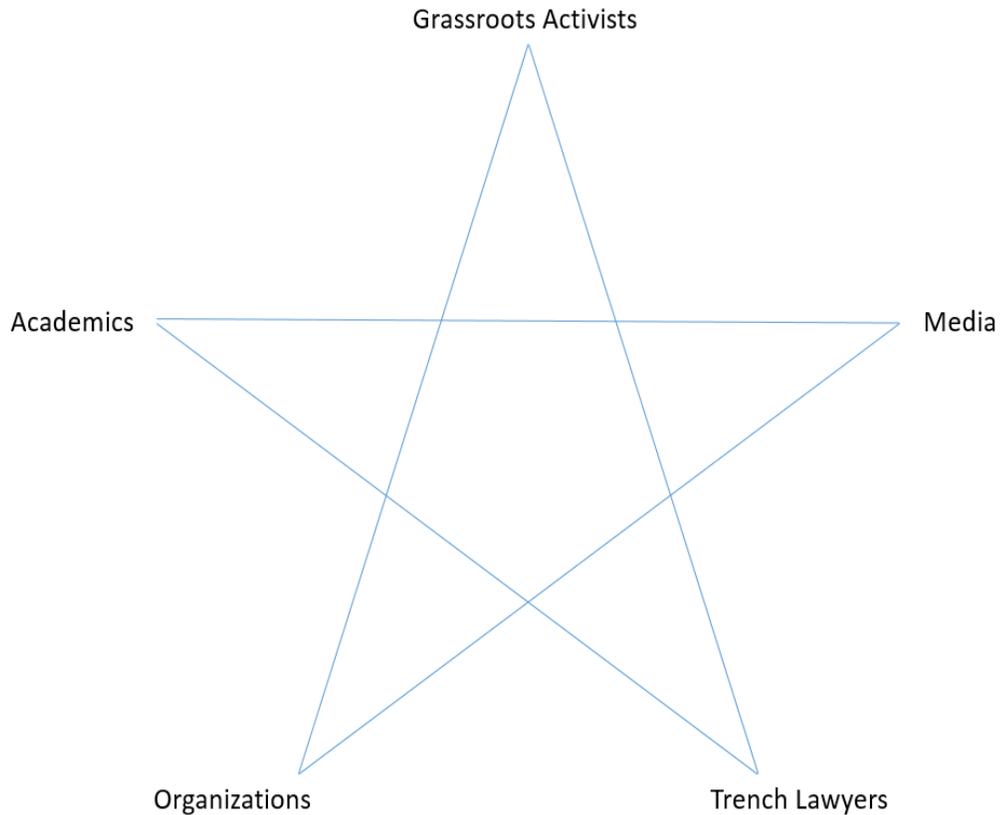
<sup>49</sup> *Woman Suffrage: History and Time Line*, VCU LIBR. SOC. WELFARE HIST. PROJECT, <https://socialwelfare.library.vcu.edu/woman-suffrage/woman-suffrage-history/> (last visited Sept. 3, 2018).

<sup>50</sup> See, e.g., *Minor v. Happersett*, 88 U.S. 162 (1875). This illustrates a fact that should be fairly self-evident in this context, which is that institutional recognition can be achieved through legislation, or perhaps even executive action, as well as via the judicial branch. How the process plays out outside of a judicial realm is beyond the scope of this Article.

<sup>51</sup> 42 U.S.C. § 12101–12213 (1990).

<sup>52</sup> The author is cognizant that “an ‘individual’s rights’ model . . . exists specifically to legitimize power over ongoing relationships of exploitation.” Gabriel Arkles, Pooja Gehi & Elana Redfield, *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. SOC. JUST. 579, 595 (2010), Strategies for change outside of the legal system are beyond the scope of this Article; rather the focus here is on bringing diverse elements to work within the confines of existing legal power structures.

guidepost, this article suggests an examination of five primary forces, or "movers," which push rights from stage two to stage three, as represented by the figure below.



### 1. The Activists

These are the individuals who assert that their wants, needs, or desires ought to become rights. They are the prime movers for social change. Their ideas tend to be developed further, and taken more seriously, once the remaining four categories get involved. But the most important step happens here, as the mere assertion that something is a *right* carries weight in and of itself, even to those who believe it is not (or should not be) a right.

### 2. The Media

News media can often uncover information that a lawyer might otherwise overlook or not have access to. But the truly critical role played by the media is that of

provoking people to think—and talk—about something they otherwise wouldn't. Similarly, someone asserting a right can be humanized, and ultimately normalized, by the media. When a person's face is repeatedly beamed into someone's living room, it makes ostracizing or "othering" that person, and their associated experiences, more difficult.<sup>53</sup>

### 3. The Academics

These are the scholars, typically associated with universities, who validate, develop, and lend credence to the ideas of the activists. In the context of litigation, academics tend to further rights in two ways: 1) by publishing works that provide foundation for, or aid in the development of, the way a right is presented to a court by attorneys; and 2) by providing direct or indirect testimony in judicial proceedings. Through their work, academics assure judges (and the public) that a court's decision will not inadvertently bring about social disaster by being drastically out of sync with scientific or community standards.

### 4. The Organizations

These are officially organized groups of activists and lawyers who are dedicated to one or more discrete purposes, generally advocacy and/or policy matters. An organization's focus on both particular policies and the applicable law often provide a focused view of the overall health of a fledgling right, and how to help grow its wings.

### 5. The Trench Lawyers

These are lawyers in private practice, engaged in the work of representing individuals in civil rights cases. In some ways, the individual lawyer's mission is diametrically opposed to the mission of a national organization. National organizations have a macrocosmic focus—how can we solve the big-picture problem? But the

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<sup>53</sup> "In this way, we can conceive of a powerful challenger movement as 'holding up a mirror' in which society recognizes its own reflection." JONATHAN SMUCKER, *HEGEMONY HOW-TO: A ROADMAP FOR RADICALS* 62 (2017).

individual advocate's focus is necessarily microcosmic—how can I solve *this* client's problem?

The process of successfully bringing rights into being is a holistic one. The star model is apt because all five of these categories touch upon, feed off of, and play into one another. A successful litigator knows how to use all five simultaneously; she will use the narratives of the activists, the resources of the national organizations, the platform of the media, and the ideas of the academics to push a right out of the shadows into the light of institutional recognition.<sup>54</sup>

Unfortunately, the law tends to be an exclusionary profession, even in the context of civil and human rights work. Legal and social movement scholars have noted:

troubling dynamics where lawyers take center stage, where the voices of people with the most privilege in our communities are centralized, where knowledge stays within the legal profession rather than being shared outside of it, where an intersectional analysis is lacking, and where decisions about priorities are made in isolation from many key movement leaders and the people who are most impacted by the issues.<sup>55</sup>

This model seeks to avoid such outcomes by actively encouraging the practitioner to incorporate the ideas and resources of the other “movers” into flexible, collaborative litigation strategies.

## V. HOW THE MOVERS AFFECTED MARRIAGE

Utilizing this view of rights formation, there is an observable reason why Richard Baker lost at the Supreme Court in 1973. At that time, sex acts between consenting adults of the same sex were still criminalized in much of

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<sup>54</sup> See generally “Successful social movements characteristically put great effort into actively courting influential supporters, in order to set more social forces into aligned motion.” *Id.* at 70. Note that this is in keeping with Social Movement Theory, which “has shown that it takes more than discontent with one’s current situation to produce a social movement. Instead, a movement is created when groups combine their ideologies with instrumentally rational action.” JoAnne Sweeny, *The United Kingdom’s Human Rights Act: Using its Past to Predict its Future*, 12 LOY. J. PUB. INT. L. 39, 47 (2010).

<sup>55</sup> Arkles, *supra* note 52, at 584.

the United States.<sup>56</sup> There was no national dialogue about same-sex marriage at the beginning of the 1970s because there was no meaningful national dialogue about same-sex relations of any kind.<sup>57</sup> And the media was no help. In 1967, Mike Wallace reported that “homosexuality [was] an enigma” and that “Americans consider homosexuality more harmful to society than adultery, abortion, and prostitution.”<sup>58</sup> The rare gay television or movie character was a foil, or an outright villain.<sup>59</sup> In Hollywood, for an actor or director to be publicly identified as gay or lesbian was often a career-ender as late as the early 1990s.<sup>60</sup>

Academics, by and large, condemned same-sex attractions too (or were mostly silent on the matter).<sup>61</sup> At academic institutions, openness about same-sex attraction “commonly was cause for dismissal or denial of tenure.”<sup>62</sup> The American Psychiatric Association (APA) did not remove homosexuality from the Diagnostic and Statistical Manual of Mental Disorders until 1973—the year *Baker* was decided.<sup>63</sup>

Also that year, advocacy organizations supportive of same-sex couples were virtually nonexistent. The ACLU had just begun its Sexual Privacy Project, which

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<sup>56</sup> Richard Weinmeyer, *The Decriminalization of Sodomy in the United States*, 16 *AMA J. OF ETHICS* 916 (Nov. 2014), <https://journalofethics.ama-assn.org/article/decriminalization-sodomy-united-states/2014-11>; Ed Grabianowski, *How the Stonewall Riots Worked*, HOWSTUFFWORKS.COM, <https://history.howstuffworks.com/historical-events/stonewall-riots.htm> (last visited February 1, 2019).

<sup>57</sup> Rebecca J. Rosen, *A Glimpse Into 1970s Gay Activism*, THE ATLANTIC (Feb. 26, 2014), <https://www.theatlantic.com/politics/archive/2014/02/a-glimpse-into-1970s-gay-activism/284077/>.

<sup>58</sup> Kim Smythe, *The Homosexuals—Mike Wallaces CONTROVERSIAL 1967 CBS Report (FULL VIDEO)*, YOUTUBE (Sept. 13, 2014), <https://www.youtube.com/watch?v=tu1r6igCODw> (“The Homosexuals’ is a 1967 episode of the documentary television series CBS Reports. The hour-long broadcast featured a discussion of a number of topics related to homosexuality and homosexuals. Mike Wallace anchored the episode, which aired on Mar. 7, 1967.”).

<sup>59</sup> Fred Fejes & Kevin Petrich, *Invisibility, Homophobia and Heterosexism: Lesbians, Gays and the Media*, 10 *CRITICAL STUD. MASS COMM.* 395, 400 (1993).

<sup>60</sup> *Id.* at 399.

<sup>61</sup> VERNON A. ROSARIO, *SCIENCE AND HOMOSEXUALITIES* (1997).

<sup>62</sup> Fejes, *supra* note 59, at 396.

<sup>63</sup> Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, *BEHAV. SCI.* 565, 565 (Dec. 4, 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4695779/>. For an engaging history of how the APA did its historic about face on this issue, see *81 Words*, THIS AMERICAN LIFE (originally broadcast January 18, 2002) (available at <https://www.thisamericanlife.org/204/81-words>).

was then years ahead of its time. There was no GLAD,<sup>64</sup> NCLR,<sup>65</sup> or Lambda Legal.<sup>66</sup> And even the ACLU had comparatively little academic research, and almost no legal precedent, upon which to base its advocacy.<sup>67</sup>

In short, every one of the five “movers” (save the activists alone) was either not helpful enough, or was directly harmful, to the idea of same-sex marriage forty-seven years ago. Under the model above, the right was barely at stage one. There was no institutional recognition in mainstream society anywhere in the world. The litigators of *Baker v. Nelson*, brave as they were, were cramming a very large square peg into an infinitesimally small round hole. The nation was, in a very real sense, not ready yet.

*Obergefell* presented a completely different story, discussed below.

### A. *Media*

By 2015, because of the media's attention to the narratives told by activists and guided by advocacy/policy organizations, America *knew* gays and lesbians. While LGBT communities stayed mostly underground and out of the news in the 1960s, beginning with the Stonewall uprising in 1969<sup>68</sup> and into the 1970s, they garnered more

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<sup>64</sup> *History*, GAY AND LESBIAN ADVOC. AND DEFENDERS, <https://www.glad.org/about/history/> (last visited Sept. 3, 2018).

<sup>65</sup> *About Us*, NAT'L CTR. FOR LESBIAN RTS., <http://www.nclrights.org/about-us/> (last visited Sept. 3, 2018).

<sup>66</sup> Official condemnation by bar associations or other legal organizations directed at attorneys seeking to represent lesbians and gay men is, thankfully, scarce. However, on the topic of Lambda Legal, it is worth noting that obtaining representation for LGBT issues prior to the 1990s was not easy. *Lambda Legal History*, LAMBDA LEGAL, <https://www.lambdalegal.org/about-us/history> (last visited Sept. 3, 2018) (“Because of the overwhelming climate of prejudice against gay people, we became our own first client: A panel of New York judges turned down our application to be a nonprofit organization because, in their view, our mission was ‘neither benevolent nor charitable.’” This is a testimony to the prejudice against gays and lesbians present in the private bar at the time).

*But see* *Burton v. Cascade School District*, 353 F. Supp. 254 (D. Or. 1972), *aff'd* 512 F.2d 850 (1975).

<sup>67</sup> For an extensive account of “every civil case dealing with homosexuality” up until 1999, along with a brief history of scientific research into sexuality, *see* Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 50 HASTINGS L.J. 1015 (1999).

<sup>68</sup> *See* Douglas Nejaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CAL. L. REV. 87, 95 (2014) (“After Stonewall, the radical politics of gay liberation became a widespread animating principle of LGBT mobilization.”).

serious coverage (though often derisive in tone, as in the Wallace piece noted above).<sup>69</sup> Four years after the *Baker* decision, there were 262 gay or lesbian periodicals nationwide.<sup>70</sup> In addition, tragedy made gay people more visible and humanized them to the rest of the world. Brothers, sisters, sons, daughters, and friends died of AIDS in the 1980s, forcing “the media to regard the gay and lesbian community more seriously and in a different light.”<sup>71</sup> In the 1990s, there was Don’t Ask Don’t Tell,<sup>72</sup> *Will and Grace*,<sup>73</sup> and Ellen DeGeneres.<sup>74</sup> Marriage equality and anti-discrimination legislation became serious national topics in the 2000s.

In 2013, Maurice Blanchard and Dominique James were activists asserting a right that, although perhaps no longer novel as an idea, was still counter-majoritarian in Kentucky. They went to the county clerk’s office and

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<sup>69</sup> Fejes, *supra* note 59, at 403.

<sup>70</sup> *Id.* at 403.

<sup>71</sup> *Id.* at 404. One noted commentator has discussed the “Will & Grace” theory of cultural change: “A mainstream television comedy featuring openly gay characters demonstrated what social scientists have long known: the single most important indicator of one’s support for gay rights is whether one knows someone who is gay. In a pinch, it seems, a fellow on TV will do.” Dahlia Lithwick, *Extreme Makeover: The Story Behind the Story of Lawrence v. Texas*, NEW YORKER (Mar. 12, 2012), <https://www.newyorker.com/magazine/2012/03/12/extreme-makeover-dahlia-lithwick>.

<sup>72</sup> “Don’t Ask, Don’t Tell” became official United States policy in American military forces in December 1993 and was a national topic of conversation. 10 U.S.C. § 654 (2006) (*repealed by* Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111–321, 123 Stat. 3515. (2010)); see Bradford J. Kelley, *The Rainbow Sea Change: The Impact of Popular Culture on Homosexual Rights*, 16 SCHOLAR: ST. MARY’S L. REV. & SOC. JUST. 283, 331 (2014).

<sup>73</sup> See generally Stacey L. Sobel, *Culture Shifting at Warp Speed: How the Law, Public Engagement, and Will & Grace Led to Social Change for LGBT People*, 89 ST. JOHN’S L. REV. 143, 179 (2015) (citing Felicia Sonmez, *Biden: I’m ‘Absolutely Comfortable’ with Gay Couples Having Same Rights as Straight Couples*, WASH. POST (May 6, 2012, 10:14 AM), [http://www.washingtonpost.com/blogs/post-politics/post/biden-im-absolutely-comfortable-with-gay-couples-having-same-rights-as-straight-couples/2012/05/06/gIQA59Wg5T\\_blog.html](http://www.washingtonpost.com/blogs/post-politics/post/biden-im-absolutely-comfortable-with-gay-couples-having-same-rights-as-straight-couples/2012/05/06/gIQA59Wg5T_blog.html) (internal quotation marks omitted) (“I think “*Will and Grace*” probably did more to educate the American public [about LGBT people] than almost anything anybody’s ever done so far . . . . And I think people fear that which is different. Now they’re beginning to understand.”)).

<sup>74</sup> “Public figures like Caitlyn Jenner, Laverne Cox, and Chaz Bono—I think it helps, absolutely. Like Ellen DeGeneres for the gay community, who has changed the world—you have to be glued to your prejudice to dislike Ellen DeGeneres.” Deborah Kelly & Jennifer C. Pizer, *Department: On Direct: Senior Counsel and Law and Policy Project National Director, Lambda Legal*, 38 L.A. LAW. 8 (Dec. 2015); see also Sobel, *supra* note 73, at 180.

demanded a marriage license.<sup>75</sup> When the clerk informed them that she could not legally issue a license to two men, they refused to leave. They were arrested, prosecuted, and fined one penny by a Louisville jury.<sup>76</sup>

Naturally, their act of defiance created media uproar.<sup>77</sup> And people talked. Why shouldn't they have the same rights as different-sex couples? What's the difference between this couple and any other couple? Who gets hurt if they get married? And so on. People who had never before thought of two men getting married asked these questions at the dinner table. These questions, fueled by stories like Maurice and Dominique's, laid the groundwork for marriage equality's final shove from partial to total institutional recognition.

Their prosecution was six months before *United States v. Windsor*. Around a month after the *Windsor* opinion, and seven months after Maurice and Dominique's prosecution, trench lawyers filed a lawsuit on behalf of couples who had been married in states that recognized same-sex marriage, seeking recognition of those marriages by the Commonwealth of Kentucky. Judge John Heyburn, a Republican appointee, issued a thoughtful twenty-three-page opinion vindicating the plaintiffs' rights—rights that were scarcely worthy of judicial discussion just a few decades prior.<sup>78</sup> The opinion begins by saying that “Kentucky’s denial of recognition for valid same-sex marriages violates the United States Constitution’s guarantee of equal protection under the law, even under the most deferential standard of review.”<sup>79</sup> The day before Valentine’s Day 2014, *Time*

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<sup>75</sup> See Andrew Wolfson, *KY Gay Couple Fined 1 Cent In Fight For Marriage*, COURIER-JOURNAL & USA TODAY (Nov. 27, 2013, 9:23 AM), <https://www.usatoday.com/story/news/nation/2013/11/27/kentucky-gay-couple-marriage-protest/3765599/>.

<sup>76</sup> *Id.*

<sup>77</sup> See, e.g., *id.*; *Gay Couple Who Protested For License Fined 1 Cent*, WHAS11.COM (Nov. 27, 2013, 5:14 PM), <https://www.whas11.com/article/news/local/gay-couple-who-protested-for-license-fined-1-cent/417-266056181>; Associated Press, *Gay Couple Who Protested for Ky. Marriage License Fined 1 Cent*, LGBTQ NATION (Nov. 26, 2013), <https://www.lgbtqnation.com/2013/11/gay-couple-who-protested-for-ky-marriage-license-fined-1-cent/>.

<sup>78</sup> *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014), *rev'd sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>79</sup> *Bourke*, 996 F. Supp. 2d at 544.

magazine pronounced: “Kentucky Judge Turns Gay Marriage Tide in the South.”<sup>80</sup>

Backlash to coverage of the Kentucky opinion was so tepid as to be non-existent, especially compared to the extreme reaction by many state legislatures following a similar victory in Massachusetts just ten years earlier.<sup>81</sup> This is mostly because by 2014, the broader public was accustomed to the story. The idea of marriage equality was no longer a far-fetched, fanciful, fringe idea but a regular feature of daily American discourse.<sup>82</sup>

After the victory in the recognition case, Maurice and Dominique filed an intervening complaint asserting a federal constitutional right to marriage equality.<sup>83</sup> By the time the Supreme Court agreed to hear *Obergefell* in January 2015, more than sixty courts, including the Kentucky district court, had declared marriage bans unconstitutional, prompting near-ubiquitous media coverage.<sup>84</sup> By then, everyone in the country was asking the questions Kentucky asked when Maurice and Dominique were arrested. Even straight middle-Americans wanted to know: *what’s the big deal?*<sup>85</sup>

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<sup>80</sup> Michael A. Lindenberger, *Kentucky Judge Turns Gay Marriage Tide in the South*, TIME (Feb. 13, 2014), <http://nation.time.com/2014/02/13/kentucky-judge-turns-gay-marriage-tide-in-the-south/>. Note that the author takes no position as to whether Kentucky is in fact “the south.”

<sup>81</sup> *Goodridge v. Dep’t Public Health*, 798 N.E.2d at 969; COLE, *supra* note 31, at 49.

<sup>82</sup> For example, a Pew Research Center study of 500 news articles about same-sex marriage in the months leading up to *Windsor* revealed that nearly half of them reflected support for marriage equality in some way, while only 9% focused on opposition (the rest were considered neutral). Paul Hitlin, Amy Mitchell & Mark Jurkowitz, *News Coverage Conveys Strong Momentum for Same-Sex Marriage*, PEW RES. CTR. (June 17, 2013), <http://www.journalism.org/2013/06/17/news-coverage-conveys-strong-momentum/>. Perhaps more important here is that there were nearly 500 stories from major media outlets discussing same-sex marriage in a period of less than three months. It would have been difficult for anyone in America to escape this coverage.

<sup>83</sup> See *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014), *rev’d sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>84</sup> COLE, *supra* note 31, at 87; see also note 82.

<sup>85</sup> Indeed, support for marriage equality spiked in the years before *Windsor* even among conservatives who were formerly staunchly opposed. See Jonathan Merritt, *If the Supreme Court Legalizes Gay Marriage in 2015, How Will Evangelicals Respond?*, RELIGION NEWS SERV. (Jan. 5, 2015), <https://religionnews.com/2015/01/05/supreme-court-legalizes-gay-marriage-2015-will-evangelicals-respond/> (“From 2003 to 2013, support for gay marriage among white evangelicals more than doubled, and support among Catholics rose by 22 percentage points.”).

### B. Organizations

1972, the year of the *Baker* decision, turned out to be a watershed year for LGBT advocacy groups. Parents and Friends of Lesbians and Gays (PFLAG) was formed that same year.<sup>86</sup> A year later, the National Gay Task Force (now the National LGBTQ Task Force) was formed and immediately set to work on establishing a nationwide network of media organizations for the purpose of “minimizing negative portrayals of homosexuals and homosexuality.”<sup>87</sup> As a result, “the National Association of Broadcasters Code Authority agreed to interpret the NAB Code to guarantee that gays and lesbians would be fairly treated.”<sup>88</sup> This began the critical process, noted above, of slowly introducing LGBT people to the broader American public, as gay and lesbian characters began to appear (as something other than foil or antagonist) on sitcoms and prime-time dramas.<sup>89</sup>

More advocacy organizations were formed over the next few decades; many with a focus on lesbians and gay men and, over time, a few with a particular focus on marriage equality. For example, the Human Rights Campaign Fund PAC, now commonly known as HRC, was formed in 1980<sup>90</sup>; by the early 2000s, its membership had bloomed to around 500,000 members.<sup>91</sup> In 2012, HRC’s Executive Director resigned to co-chair President Obama’s campaign for re-election<sup>92</sup> —a testament to the influence of LGBT advocacy groups on governing institutions by the time *Windsor* was decided. Also in 1973, Lambda Legal was founded as the nation’s first legal organization dedicated to LGBT equality.<sup>93</sup> Another major legal

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<sup>86</sup> Bonnie J. Morris, *History of Lesbian, Gay, Bisexual and Transgender Social Movements*, AM. PSYCHOL. ASS’N, <http://www.apa.org/pi/lgbt/resources/history.aspx> (last visited Sept. 3, 2018).

<sup>87</sup> Fejes, *supra* note 59, at 401.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Our History*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/hrc-story/about-us> (last visited July 30, 2018).

<sup>91</sup> Emily Althafer, *Leading Gay Rights Advocate to Speak at U.F.*, U. FLA. NEWS (Jan. 23, 2006), <http://news.ufl.edu/archive/2006/01/leading-gay-rights-advocate-to-speak-at-uf.html>.

<sup>92</sup> Byron Tau, *Obama Campaign Announces Co-Chairs*, POLITICO (Feb. 22, 2012, 6:32 AM), <https://www.politico.com/blogs/politico44/2012/02/obama-campaign-announces-co-chairs-115161>.

<sup>93</sup> Lambda Legal History, LAMBDA LEGAL, <https://www.lambdalegal.org/about-us/history> (last visited Sept. 3, 2018).

organization, the National Center for Lesbian Rights, was formed four years later.<sup>94</sup> In 2003, a Lambda Lawyer, Evan Wolfson, who litigated the Hawaii case in the 1990s, formed an advocacy group solely focused on achieving marriage equality.<sup>95</sup> And of course, the ACLU's efforts on behalf of LGBT people burgeoned from the 1970s through the 2010s, in both the courtroom and on the ground. These groups, with the help of private lawyers, lost a few marriage cases<sup>96</sup> but, as discussed above, began making intermittent progress in the 1990s.

As discussed by Cole, another important aspect of the fight for marriage equality is that shortly after the sparse few judicial victories in various states, ballot initiatives on marriage equality—spearheaded by advocacy organizations—started to succeed all over the country.<sup>97</sup> To be sure, the successes were preceded by legislative and popular backlash. Twenty-seven states amended their constitutions in response to the judicial victory the *Goodridge* case realized in Massachusetts.<sup>98</sup> One of these states was Kentucky, which saw a referendum defining marriage between “one man and one woman” handily approved by 75% of voters in 2004.<sup>99</sup>

At the time, these amendments seemed to be a setback for the movement. An especially painful blow was dealt in California with the passing of Proposition 8, which prohibited recognition of same-sex marriage in the state.<sup>100</sup> If marriage equality could not be recognized by one of the most liberal states in the country through a

<sup>94</sup> *Mission & History*, NCLR, <http://www.nclrights.org/about-us/mission-history/> (last visited Sept. 3, 2018).

<sup>95</sup> *Winning the Freedom to Marry Nationwide: The Inside Story of a Transformative Campaign* *Freedom to Marry*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/how-it-happened> (last visited Feb. 1, 2019).

<sup>96</sup> *See, e.g.*, *Dean v. District of Columbia*, 653 A.2d 307 (D.C. Cir. 1995); *Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982); *Standhardt v. Superior Court ex rel. Cty. of Maricopa*, 206 Ariz. 276, 278 (Ct. App. 2003); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

<sup>97</sup> COLE, *supra* note 31, at 64–65.

<sup>98</sup> *Id.* at 49.

<sup>99</sup> *Kentucky*, INITIATIVE & REFERENDUM INST., UNIV. S. CAL. GOULD SCH. OF L., <http://www.iandrinstitute.org/states/state.cfm?id=36> (last visited Sept. 3, 2018).

<sup>100</sup> *California Proposition 8, the “Eliminates Right of Same-Sex Couples to Marry” Initiative (2008)*, BALLOTPEdia, [https://ballotpedia.org/California\\_Proposition\\_8,\\_the\\_%22Eliminates\\_Right\\_of\\_Same-Sex\\_Couples\\_to\\_Marry%22\\_Initiative\\_\(2008\)](https://ballotpedia.org/California_Proposition_8,_the_%22Eliminates_Right_of_Same-Sex_Couples_to_Marry%22_Initiative_(2008)) (last visited Sept. 3, 2018).

popular vote, how was there to be any hope of winning it nationwide? But all the attention garnered by these ballot initiatives carried two very important consequences. First, the losses strengthened both the resolve and the resources of organizations and individual leaders working to rally people around the issue of LGBT rights generally. Second, the extensive mainstream coverage of story after story on gay and lesbian families between the late 1990s through the early 2010s, which, as noted above, had become considerably more sympathetic to the LGBT movement, humanized those families to a broad base of media consumers.

All four states involved in *Obergefell* had at least one lawyer from the ACLU, Lambda Legal, NCLR, or GLAD representing plaintiff couples. These lawyers brought with them the decades of diverse, strategic, and focused experience garnered by their respective organizations.

### C. Academics

The academics played no small part in the cultural shift in favor of marriage equality. Immediately after *Baker*, the topic of same-sex marriage became an item of interest to legal scholars, who now had a jurisprudential "hook." In 1973, the Yale Law Journal published a note making an extensive argument in favor of marriage equality.<sup>101</sup> By 1996, noted Ivy League academics had published entire books devoted to the theory and practice of marriage equality.<sup>102</sup> In addition, the APA had by then "rejected the stigma of mental illness that the medical and mental health professions had previously placed on sexual minorities."<sup>103</sup>

As part of Michigan's marriage litigation, the plaintiffs submitted the testimony of six expert witnesses, including professors at Yale, Stanford, and Harvard.<sup>104</sup> In

<sup>101</sup> Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573 (1973).

<sup>102</sup> See, e.g., WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996); See EVAN WOLFSON, *WHY MARRIAGE MATTERS* (2004).

<sup>103</sup> REPORT OF THE TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION, AM. PSYCHOL. ASS'N 11 (Aug. 2009), <https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>.

<sup>104</sup> See generally *Case Profile: DeBoer v. Snyder*, CIV. RTS. LITIG. CLEARINGHOUSE, U. MICH. L. SCH.,

contrast, the closest thing Michigan could get to a star witness—Mark Regnerus—had been so totally discredited by mainstream sociologists that it actually tipped the scales in the plaintiffs’ favor.<sup>105</sup> As one amicus put it, the “scientific and medical consensus” debunking same-sex attraction as a social or mental illness had “become widely accepted over the past decades, to the point where there is so ‘great an analytical gap between the data and the opinion proffered’” that its scholarly opponents often “would not qualify to testify as expert witnesses.”<sup>106</sup> Because the academic consensus was so broad, it became difficult for even the most curmudgeonly of jurists to ignore it.

Academics contributed directly to the *Obergefell* case before the Supreme Court.<sup>107</sup> The Petitioners’ briefs in *Obergefell*, as well as those of the amici, demonstrated a synthesis of a diverse range of disciplines, from sociology to biology, history to religion; they are the quintessence of the Brandeis brief<sup>108</sup> (that is, a brief that asks “courts to take judicial notice of social facts, primarily to provide justification for challenges to

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<https://www.clearinghouse.net/detail.php?id=12811> (last visited Sept. 3, 2018).

<sup>105</sup> *Statement from the Chair Regarding Professor Regnerus*, U. TEX. AUSTIN C. LIBERAL ARTS (Apr. 12, 2014),

<https://liberalarts.utexas.edu/sociology/news/article.php/sociology/news/7572?id=7572> (in which Regnerus’ own institution notes that his research does not “reflect the views of the American Sociological Association, which takes the position that the conclusions he draws from his study of gay parenting are fundamentally flawed on conceptual and methodological grounds and that findings from Dr. Regnerus’ work have been cited inappropriately in efforts to diminish the civil rights and legitimacy of LGBTQ partners and their families”); Roberta A. Kaplan, “*It’s All About Edie, Stupid*”: *Lessons from Litigating United States v. Windsor*, 29 COLUM. J. GENDER & L. 85, 95 (2015) (Regnerus had been thoroughly discredited by the time *Windsor* was argued. “[T]he American Sociological Association, in its amicus brief submitted to the Supreme Court, condemned his work in no uncertain terms, stating that it ‘provides no support for the conclusions that same-sex-parents are inferior parents.’”).

<sup>106</sup> Brief for Survivors of Sexual Orientation Change Therapies as Amici Curiae Supporting Petitioners, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556), at 5 (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)), <http://www.nclrights.org/wp-content/uploads/2015/03/2015.03.04.-Survivors-of-Sexual-Orientation-Change-Therapies-Amicus.pdf>.

<sup>107</sup> Kentucky’s proposed oralist on the question of licensure was professor Jeffrey L. Fisher of the Stanford University Law School. See *Love v. Kentucky*, INFORMAVORE.MEDIA, <http://informavore.media/projects/love-v-kentucky/> (last visited Sept. 3, 2018).

<sup>108</sup> *Party Briefs on the Merits*, U.S., <https://www.supremecourt.gov/ObergefellHodges/PartyBriefs/> (last visited Sept. 3, 2018).

legislation").<sup>109</sup> These briefs could not have been written in the 1970s or 80s.

#### *D. Activists*

Emboldened by a strengthening media presence and the increasing clout of advocacy organizations, outspoken individual activists grew in number and influence from the 1970s on. In 1979, the first march on Washington, D.C. for gay rights occurred, organized by a loose confederation of prominent activists (including Harvey Milk before his assassination).<sup>110</sup> Another march in 1993, organized by the then twenty-year-old National Gay (and Lesbian) Task Force,<sup>111</sup> boasted as many as one million supporters.<sup>112</sup> These grassroots activists had years before planted the seeds of success for *Obergefell*, albeit primarily in discrete corners of the Northeast and California. In Vermont, for example, a concerted effort was made to teach gay and lesbian activists "to tell their own stories effectively," and to put those stories (and stories of the activists themselves) in the homes of people who were undecided on marriage equality.<sup>113</sup> These efforts curtailed the ability of lawmakers to do what lawmakers did in so many states in the early 2000s, i.e., introduce state constitutional amendments restricting marriage to being between a man and a woman.<sup>114</sup> Gay and lesbian couples, now humanized, could no longer be seen as the sharp-fanged closet monsters voters' parents had warned them about.

The efforts of these activists, and their narratives, made a big difference in legal landscapes. But Kentucky

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<sup>109</sup> Judith A. McMorrow, *Moving from a Brandeis Brief to a Brandeis Law Firm: Challenges and Opportunities for Holistic Legal Services in the United States*, 33 *TOURO L. REV.* 259, 262 (2017).

<sup>110</sup> Morris, *supra* note 86.

<sup>111</sup> The name had by then been changed from the National Gay Task Force. *About Mission and History*, NAT'L LGBTQ TASK FORCE, <http://www.thetaskforce.org/about/mission-history.html> (last visited January 23, 2019). For a thorough history of these marches, see AMIN GHAZIANI, *THE DIVIDENDS OF DISSENT: HOW CONFLICT AND CULTURE WORK IN LESBIAN AND GAY MARCHES ON WASHINGTON* (2008).

<sup>112</sup> *Id.*; Morris, *supra* note 86.

<sup>113</sup> COLE, *supra* note 31, at 37.

<sup>114</sup> See, e.g., Megan Moore, *The Money Behind the 2006 Marriage Amendments*, THE INST. ON MONEY IN ST. POL. (July 23, 2007), <https://www.followthemoney.org/research/institute-reports/the-money-behind-the-2006-marriage-amendments>.

(and most of the Midwest/South) did not benefit from the efforts of activists or organizations in the way that the coasts did, as evidenced by the overwhelming number of votes on the 2004 Federal Marriage Amendment.<sup>115</sup> As such, in 2013, Kentucky trench lawyers had a constitutional amendment to deal with, and no organizational support because Kentucky did not figure into the plan of the national organizations that had been working on marriage for years. And while the organizations were right—plaintiffs lost at the Sixth Circuit Court of Appeals, after all<sup>116</sup>—no one could have foreseen the dramatic shift in popular and judicial thinking that occurred nationwide in the two years following *Windsor*. Were it not for emboldened activists—quite separate and independent from advocacy organizations—at the state level, Kentucky’s legal team might have had no clients at all, and the “tide turning” described by *Time* might never have occurred.

#### *E. The Movers Working in Concert*

One example of an observable, real-time impact on a major institution (the Executive Branch) made by a concerted effort of at least three of our five movers (an individual activist, the media, and an advocacy organization) is recounted by Cole, who describes how the media was activated on a specific instance of LGBT discrimination in a meaningful way some four years before *Windsor*.<sup>117</sup> In 2009, the Obama Administration filed a brief in a DOMA case in California which likened same-sex marriage regulation to legal restrictions on marriages for minors and between first cousins, prompting one activist blogger to write “Holy cow, Obama invoked incest and people marrying children.”<sup>118</sup>

The charge got picked up by ABC News, and the following day, Joe Solmonese, president of Human Rights Campaign, wrote President Obama, saying, “I cannot overstate the pain that we feel as human beings and as families

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<sup>115</sup> See *Kentucky*, *supra* note 99.

<sup>116</sup> See *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

<sup>117</sup> See *COLE*, *supra* note 31, at 41, 84–86.

<sup>118</sup> *Id.* at 85.

when we read an argument, presented in federal court, implying that our own marriages have no more constitutional standing than incestuous ones." The New York Times followed up four days later with an editorial condemning the administration for its defense of DOMA. . . . radar. After much internal wrangling, the administration did what Bonauto, Wolfson, and many others had asked: it took the position that heightened scrutiny should apply to DOMA, and that it could not defend the law under such scrutiny.<sup>119</sup>

There are no doubt countless other examples of this model at work on both microcosmic and macrocosmic levels; in other words, it can work for individual practitioners in both the short and the long run.

In 2015, two-and-a-half years after being arrested, Maurice and Dominique were lawfully wedded in the Commonwealth of Kentucky.<sup>120</sup> Just four decades after *Baker v. Nelson*, the same Court decided that not only was marriage equality something worthy of the Court's time, but that a bona fide constitutional right existed where none had before.<sup>121</sup> While litigation ultimately drove the final nail into the coffin of marriage discrimination, it was a dramatic shift in attitudes that was truly responsible for its demise.<sup>122</sup> And that shift in attitudes was not brought about solely by brass-tacks litigation, not by a longshot.<sup>123</sup> Rather it was this

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<sup>119</sup> *Id.* at 85–86.

<sup>120</sup> See Roberto Roldan, *Once Jailed, Gay Couple Gets Marriage License*, COURIER J. (last updated June 30, 2015, 3:29 PM), <https://www.courier-journal.com/story/news/local/2015/06/29/jailed-gay-couple-gets-marriage-license/29488461/>.

<sup>121</sup> See *Baker v. Nelson*, 409 U.S. 810 (1972), *overruled by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>122</sup> See *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (June 26, 2017), <http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/>.

<sup>123</sup> “[D]o not celebrate the Constitution. It had nothing to do with it.” *Obergefell*, 135 S. Ct. at 2626 (Roberts, J., dissenting). Interestingly, and in contrast, the original Bourke opinion in Kentucky acknowledges the dramatic changes from *Baker* to *Windsor*, but remains focused almost solely on jurisprudential development within the courts, as opposed to outside forces which undeniably shaped that development. District Judge John Heyburn wrote:

[J]udicial thinking on this issue has evolved ever so slowly. That is because courts usually answer only the questions that come before it. Judge Oliver Wendell Holmes aptly described

combination of activists, media, academics, and advocacy organizations that allowed the *coup de grace* to be effectively delivered in court. *Obergefell* therefore presents a model of how all five movers can manage to effect institutional changes.

## VI. PUTTING THIS MODEL TO WORK: A LAWYER'S ROLE

This model for advancing emerging rights is a crude one. It should be dissected, explored, and refined.<sup>124</sup> And there are, no doubt, readers who will say, “yes of course, this is how movements work.” But the question is: how many practicing lawyers *consciously* use these elements to achieve a goal? The likely answer, especially for private lawyers who represent individuals every day, is very few. Private lawyers tend to develop tunnel vision in the pursuit of justice for one or more clients in a particular situation, but in the process, typically do not use any sort of “big picture” models, and thus may miss opportunities to effectuate change on a larger basis.

The great social engineers of our time have engaged these five “movers,” consciously or otherwise, for as long as rights have existed. Charles Hamilton Houston, a chief architect of the legal desegregation movement, famously stated:

A lawyer's either a social engineer or . . . a parasite on society. . . . A social engineer [is] a highly skilled, perceptive, sensitive lawyer who [understands] the Constitution of the United States and [knows] how to explore its uses in

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this process: “[J]udges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.” *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). In *Romer*, *Lawrence*, and finally, *Windsor*, the Supreme Court has moved interstitially, as Holmes said it should, establishing the framework of cases from which district judges now draw wisdom and inspiration. Each of these small steps has led to this place and this time, where the right of same-sex spouses to the state-conferred benefits of marriage is virtually compelled.

*Bourke*, 996 F. Supp. 2d at 557.

<sup>124</sup> See Arkles, *supra* note 52, at 612–13 (referring to various models for transformative social justice, most of which, it must be said, are at least as abstract as this one).

the solving of problems of local communities and in bettering conditions of the underprivileged citizens.<sup>125</sup>

His ideas were reified by perhaps the greatest social engineer of the twentieth century: Justice Thurgood Marshall. Evan Wolfson, the founder of Freedom to Marry, is one of the more well-known and articulate champions of this holistic method of litigation. The attorneys of the Sylvia Rivera Law Project are among the leaders of the current legal movement for trans rights and are outspoken about the need for litigators to observe principles that are both interdisciplinary and intersectional.<sup>126</sup> The modest idea advanced in this article is that lawyers—all of us—should use these movers consciously and deliberately.

A practitioner who seeks to change a law in the manner described here should develop a plan to do so that involves more than just filing documents with a court. Such a plan should involve active coordination with the other four movers. The question should be asked: how can academics, the media, advocacy organizations, and activists play a role in this case?

For example, vis-à-vis the activist community, a practitioner serves the important role of bridging; that is, connecting inherently insular groups with broader society and particularly with the institutions that have no reason to recognize them or their asserted rights. This can be a formidable challenge, because “[t]he stronger the identity and cohesion of the group, the more likely its members are to become alienated from other groups, and from society as a whole.”<sup>127</sup> But “without strong external bridging, the group will become too insular and isolated to forge the kind of broad alliances that are essential to winning meaningful changes in society.”<sup>128</sup> This isolation can be dangerous, and not just to the group itself.<sup>129</sup>

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<sup>125</sup> OUR HISTORY, HOWARD UNIVERSITY SCHOOL OF LAW, <http://www.law.howard.edu/19> (last visited Sept. 3, 2018).

<sup>126</sup> See Arkles, *supra* note 52, *passim*.

<sup>127</sup> SMUCKER, *supra* note 53, at 96.

<sup>128</sup> *Id.* at 98.

<sup>129</sup> Smucker provides a number of anecdotes regarding the tendency of activist groups to “encapsulate”—that is, to “develop an ideology that is internally coherent but virtually unintelligible to recruits and outsiders who do not share all of the members’ assumptions”—often with disastrous results. See *id.* at 83, citing Frederick D. Miller, *The End of SDS and the Emergence*

Lawyers—especially civil rights lawyers—are tasked with disrupting the process of self-reinforcing insularity that tends to occur within grassroots groups and bringing the needs of these groups to the attention of power structures in safe, socially acceptable ways (such as litigation).<sup>130</sup> And perhaps more importantly, well-meaning lawyers who jump into litigation of rights without first hearing from a sufficient number of activists fighting for those rights may contravene the work of the larger movement in ways that they could not anticipate.<sup>131</sup>

Indeed, while activists and those seeking to assert new rights may be “outsiders” in relation to governing power structures, lawyers are necessarily “insiders.” They are, in essence, constantly seeking to institutionalize ideas. The idea may be as simple as “my client is right and yours is wrong.” But when a judge puts that in an order, the idea becomes institutionalized. And the proposition that the sort of ideas we are responsible for institutionalizing can actually have an impact beyond one’s own clients should not be controversial. How are those ideas crafted? With careless, blunt-force litigation, or with purposefulness?<sup>132</sup>

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*of the Weatherman: Demise through Success, in WAVES OF PROTEST: SOCIAL MOVEMENTS SINCE THE SIXTIES*, 307 (Jo Freeman & Victoria Johnson eds., 1999). Ideally, “alternative narratives” will be “oriented to connect with broader bases of society” in order to combat encapsulation and ultimately to attain institutional acceptance. SMUCKER, *supra* note 53, at 85.

<sup>130</sup> See Arkles, *supra* note 52, at 602. “Lawyers often have an easier time getting meetings with decision makers precisely because we are seen as more ‘reasonable,’ i.e., amenable to the status quo, and we are too often tempted to accept this access rather than insisting on solidarity with more radical leaders from affected communities.” The individual lawyer should be mindful of this, but there is no reason why solidarity with the oppressed must be mutually exclusive with institutional access. Indeed, providing access-by-proxy to the oppressed is the civil rights lawyer’s *raison d’être*.

<sup>131</sup> See *id.* at 597. “Lawyers acting on what they believe to be best for a marginalized community without taking leadership from that community will often fail to generate the most effective solutions and may actually propose counterproductive solutions.”

<sup>132</sup> See *id.* at 581–82. Arkles, et al., make a separate but important point about the need for lawyers and academics to involve grassroots activists. “If the problems faced by our communities are rooted in and enforced by the legal system, then meaningful change would have to come from outside of it.” *Id.* The authors note well-meaning participation in “roundtables, conferences, and law school symposia, where lawyers may identify, discuss, adopt, and pursue various strategies for advancing the rights of queer and trans people. However, all too often, these spaces exclude nonlawyers from participation and these spaces recreate the very forms of oppression we must dismantle to achieve social justice.” *Id.*

In addition, trench lawyers can (and should) do a lot more communicating with universities, when appropriate. Law schools often want to be members of the legal community in their own right, not just diploma mills. Litigators should help them do just that. Academics should make an effort to create content for practitioners that is both realistic in its scope and readily available, and practitioners must make an effort to use that content whenever possible. Citations to law or social-science journal articles are an unfortunate rarity in day-to-day practice.<sup>133</sup>

Similarly, organizations should not exclude individual litigators any more than litigators should discard broader organizational goals. A collaborative relationship between advocacy organizations (which tend to be micro-focused and short-staffed), and private lawyers (who tend to have more flexible resources and a diversified portfolio of social contacts), can be advantageous.

Cultivating media contact is also something that is often overlooked, but vitally important in civil rights cases. The way in which a proponent of a right packages a message is often the way the media will present it. And the way in which it is presented may determine its success, at least in the short run.<sup>134</sup>

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<sup>133</sup> The peculiar wall between academia and boots-on-the-ground lawyering is beyond the scope of this article, but its existence is widely acknowledged by academics and lawyers alike. *See, e.g.*, the in-depth discussion of related issues in *Transcript—Conference on the Ethics of Legal Scholarship*, 101 MARQ. L. REV. 1084, 1138 (2017) in which Professor Carissa Hessick states: “I actually think that there are some virtues of the law review model. And one of the virtues that I see is it allows us to have a format for work that should be of interest to a more general audience. To the extent that we do want lawyers or judges to pay attention to what we do, I think it is helpful to have that format. **And I understand that it's contestable about whether we want lawyers and judges to pay attention to what we do.**” (emphasis added).

<sup>134</sup> Of course, prudence counsels caution in using the media as a litigation tool. ABA Model Rule 3.6 states:

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

*See* MODEL RULES OF PROF'L CONDUCT r. 3.6(a) (AM. BAR ASS'N 2016). An entire textbook could be written about what this rule means in the context of impact litigation. Suffice it to say that it is unlikely that a lawyer should

Regardless of where one fits into the big picture of furthering rights, it is critical to know the right problem solvers. The civil litigator should therefore forge relationships not just with activists, journalists, and organizational leaders, but also with criminal defense lawyers, domestic relations lawyers, and anyone else who has an up-close, daily audience with people whose rights are likely to be endangered.

## VII. DO ONLY FOOLS RUSH IN?

One final note: counterintuitively, in employing this model, there may be a certain danger in thinking too much about the big picture. Cole counsels that “cautious incrementalism” is “often essential” in approaching major changes to constitutional law.<sup>135</sup> This is also a common sentiment among seasoned impact litigators. The fear of getting a bad ruling likely stems from the supposition that the courts should be on the vanguard of most issues, when in reality they are often the last stop.<sup>136</sup> But an examination of history reveals that, while a degree of caution is obviously warranted, a premature pulling of the pin on the social grenade, at least in the judicial realm,

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need to say anything to the media aside from what appears in the public record, and if more need be said, a client may say it herself.

<sup>135</sup> COLE, *supra* note 31, at 43.

<sup>136</sup> Legislatures tend to be less progressive than the courts, but legislatures need not fit into this model at all, and need not be a point of comparison—they are in many cases the very last place to recognize rights. In the opinion reversing the Kentucky district court in the marriage equality case, Sixth Circuit Court of Appeals Judge Jeffrey Sutton framed the marriage case as “a debate about whether to allow the democratic processes begun in the States to continue in the four States of the Sixth Circuit or to end them now by requiring all States in the Circuit to extend the definition of marriage to encompass gay couples.” *DeBoer*, 772 F.3d at 396.

Respectfully, from a constitutional and jurisprudential perspective, no court case involving individual rights is about “the democratic process.” Were it otherwise, our understanding of rights in the United States would be profoundly different. Take, for example, the referendum held in 2000—thirty-three years after *Loving v. Virginia*—in which a full 40% of Alabama voters voted to retain the state constitution’s prohibition on interracial marriage. See Judith E. Schaeffer, *Alabama Shows Why Civil Rights Shouldn’t Be Put to a Popular Vote*, SLATE (June 12, 2015) <https://slate.com/human-interest/2015/06/gay-marriage-alabama-shows-why-civil-rights-shouldnt-be-put-to-popular-vote.html>. This sobering statistic underscores the importance of constitutional litigation apart from a purely democratic process; it is rendered even more confounding in light of the fact that the Alabama Supreme Court had unanimously held anti-miscegenation laws unconstitutional over a hundred years before *Loving*. See *Burns v. State*, 48 Ala. 195 (Ala. 1872).

often does not cause as much destruction as one might fear.<sup>137</sup>

Take, for example, the time between *Bowers v. Hardwick* in 1986, upholding sodomy laws, and *Lawrence v. Texas* in 2003, pronouncing such laws unconstitutional. This seventeen-year delay seems catastrophic at first glance, but progress on LGBT rights overall improved exponentially in the years after *Bowers*. This progress can even be seen at the Supreme Court level. *Romer v. Evans*, a decisive win for the LGBT community, held that states could not categorically prohibit legislation that protected people based on sexual orientation. This case was decided just ten years after *Bowers*.<sup>138</sup>

By 2003, only four states had sodomy laws that applied only to persons of the same sex.<sup>139</sup> Prosecutions under these laws were extremely rare. The ACLU acknowledges that "*Lawrence v. Texas* is one of a mere handful of cases since the American revolution involving two adults—straight or gay—actually prosecuted for being intimate in private."<sup>140</sup> Even the plaintiffs in *Lawrence* denied having engaged in the conduct they were prosecuted for, but "[s]ince *Bowers*, no other test case had emerged in which someone was actually arrested for violating a state sodomy law."<sup>141</sup> While undoubtedly helpful to LGBT rights overall, the victory in *Lawrence* was more symbolic than practical (as was the loss in *Bowers*). And the impact of this symbolic victory was strengthened by an explicit overruling—and sharp criticism—of *Bowers* by the *Lawrence* justices.<sup>142</sup>

Consider the forty-three year span between *Baker v. Nelson* and *Obergefell*. Perhaps *Baker* was prematurely filed, but was it truly a setback for the LGBT movement? If so, it was so slight as to be of no consequence. *Baker* was not treated as serious precedent by the Court in the *Obergefell* opinion, nor in oral argument.<sup>143</sup> Even if one

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<sup>137</sup> See, e.g., Andrew Simmonds, *Amah and Eved and the Origin of Legal Rights*, 46 S.D. L. REV. 516, 517 (2001). Rights tend to develop "not out of lengthy progress or historical development, but rather from relatively brief, abrupt, discontinuous episodes. Not based upon plans, ideas or logic."

<sup>138</sup> See *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>139</sup> See *Why Sodomy Laws Matter*, ACLU, <https://www.aclu.org/other/why-sodomy-laws-matter> (last visited Sept. 3, 2018).

<sup>140</sup> *Id.*

<sup>141</sup> *Lithwick*, *supra* note 71.

<sup>142</sup> *Lawrence*, 539 U.S. at 578.

<sup>143</sup> *Obergefell*, 135 S. Ct. at 2598.

were to imagine that *Baker* contained any meaningful constitutional analysis whatsoever, the difference in cultural norms would almost surely have led the Supreme Court to explicitly overrule it by 2015, as they had done with *Bowers* in *Lawrence*. It is far more likely that the news made by the *Baker* case contributed to the overall national conversation.<sup>144</sup> It may be purely coincidence that the NGTF, Lambda Legal, and NCLR were all formed, and that the APA removed same-sex attraction as a mental illness, all almost immediately after *Baker*, but it seems more likely that there is at least some connection between these events.

Looking to another era, the NAACP's "block by block, precedent upon precedent" approach to desegregation in the first half of the twentieth century led to victory in *Brown v. Board*—but it was a close call.<sup>145</sup> A bid for public school desegregation before the Supreme Court in the 1930s would surely have failed, but would this failure have set the movement back decades? If we are to draw any lessons from *Bowers/Lawrence* or *Baker/Obergefell*, it would seem not. And when the NAACP's legal strategy began to be successfully implemented, *Plessy v. Ferguson* was not quite forty years old.<sup>146</sup> In any event, "[t]he notion that *Brown* was the first case to consider the constitutionality of the segregation of public schools is, of course, fictitious. In many early cases the lawyers tried, perhaps ineptly, to argue that segregation was unconstitutional."<sup>147</sup>

On the other hand, the Massachusetts Supreme Court's ruling in *Goodridge*, which was achieved through "cautious incrementalism," resulted in immediate,

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<sup>144</sup> In fact, Jack Baker is such an intelligent activist that he managed to keep national media coverage going for months after his unremarkable loss in the Supreme Court. See, e.g., *Homosexual Wins Fight to Take Bar Examination in Minnesota*, N.Y. TIMES (Jan. 7, 1973), <https://www.nytimes.com/1973/01/07/archives/homosexual-wins-fight-to-take-bar-examination-in-minnesota-marriage.html>.

<sup>145</sup> Simmonds, *supra* note 137, at 610, 616.

<sup>146</sup> See *id.* at 610–11.

<sup>147</sup> *Id.* at 616. In a similar vein, "those cases or statutes that appear to result in extraordinary victories for marginalized groups typically translate into little positive change . . . scholars and activists have pointed out that despite the momentous legal victory of *Brown v. Board of Education*, 76 public schools remain segregated with white children receiving much more resources and higher quality education than black children." Arkles, *supra* note 52, at 597 n.77.

observable backlash.<sup>148</sup> This backlash was nationwide—including in Kentucky—despite the fact that *Goodridge* only affected residents of Massachusetts. Forty-five states took steps to pronounce any union not between one man and one woman a nullity.<sup>149</sup> Cole criticizes Hawaii's *Baehr v. Lewin* opinion as an example of "taking too large a step [and resulting in] substantial negative repercussions,"<sup>150</sup> but it is difficult to see how those repercussions were any more negative than those suffered in the wake of *Goodridge*.

Cole recognizes that "[i]n a long-term campaign for constitutional reform, losses can be as productive as victories."<sup>151</sup> Though he is referring primarily to ballot initiatives, the same can be said of losses in the courts. However, for whatever reason, activists often perceive the latter to be more disastrous than the former. For example, Cole discusses the trepidation in filing a challenge to Proposition 8 in the wake of the "painfully long" delay between *Bowers* and *Lawrence*.<sup>152</sup> Of the Proposition 8

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<sup>148</sup> COLE, *supra* note 31, at 49–51.

<sup>149</sup> *See id.* at 49.

<sup>150</sup> *Id.* at 43.

<sup>151</sup> *Id.* at 75.

<sup>152</sup> COLE, *supra* note 31, at 79. Cole discusses Professors Rosenberg and Klarman's view that "the nationwide backlash that *Goodridge* sparked was 'nothing short of disastrous for the right to same-sex marriage.'" (citing Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 *DRAKE L. REV.* 795, 812 (2005); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* U. OF CHI. PRESS, 343 (2008); MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH AND THE STRUGGLE FOR SAME SEX MARRIAGE* 105–106 (2013); John D'Emilio, *The Marriage Fight is Setting Us Back*, *GAY & LESBIAN REV. WORLDWIDE* 10 (November-December 2006)). If one takes the position that such cases should not be litigated at all (and some do, *see e.g.*, Rosenberg, *supra*) perhaps this makes sense. Otherwise, it is difficult to see the sense in decrying both losses and victories in the courts as counterproductive.

It is perhaps worth noting, however, that a victory for marriage advocates may have been more disastrous than a loss had it come from the United States Supreme Court early on, as it may have spurred conservatives and centrists to more vigorous attempts at passage of a federal constitutional amendment defining marriage—something that was pushed by President George W. Bush and others in the early 2000s. *See, e.g.*, David Stout, *Bush Backs Ban in Constitution on Gay Marriage*, *N.Y. TIMES* (Feb. 24, 2004), <https://www.nytimes.com/2004/02/24/politics/bush-backs-ban-in-constitution-on-gay-marriage.html>. One could argue that this push was due in part to *Goodridge*, but still came to naught. To the contrary, *Goodridge* and Obergefell counsel Mary Bonauto "was confident [that if a victory could be won in court], people would see for themselves that there were no negative effects on families, local communities, or society more broadly, and the fear and opposition would dissipate." COLE, *supra* note 32, at 45. She was right. Once the bell of a right like that of marriage has been rung in America, it is difficult to unring.

litigation which became *Perry v. Schwarzenegger*,<sup>153</sup> Cole notes the following:

No other federal suits were pending when [David] Boies and [Ted] Olson filed theirs. And while they could not guarantee that no one else would file, [organizational counsel] Wolfson, Bonauto, Coles, Davidson, and many others had repeatedly talked couples and lawyers out of filing when the time or place was not right. They felt that they could continue to do so. But they couldn't dissuade Boies and Olson.<sup>154</sup>

In other words, private lawyers pushed the movement forward even when the movement didn't want to go. Until then, advocacy organizations "had been carefully pursuing an incremental state-by-state strategy, intentionally avoiding federal claims in order to keep the issue out of federal court" because only four states recognized same-sex marriage.<sup>155</sup>

*Perry* turned out for the best (as did *Obergefell*), but could it have led to disaster? Maybe, but given the solid reinforcement provided by our five movers over the decades elapsed since *Baker*, it seems unlikely. As Cole notes, "In retrospect, however, like *Goodridge*, the Proposition 8 loss was the catalyst that pushed marriage equality down the road[.]"<sup>156</sup> Similarly, one could credibly argue that *Perry*—won or lost—might have moved the needle in favor of marriage equality. A critically important aspect of major operations, both electoral and judicial, appears to be not just that those operations are successful, but that they start the right kind of conversations, thus bringing about the cultural changes necessary to achieve institutional recognition. Social movement scholars appear to be generally in agreement on this point.<sup>157</sup>

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<sup>153</sup> COLE, *supra* note 31, at 79.

<sup>154</sup> *Id.* at 60–61.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 59.

<sup>157</sup> *Id.* at 69; see also Megan S. Wright, *End of Life and Autonomy: The Case for Relational Nudges in End-Of-Life Decision-Making Law and Policy*, 77 MD. L. REV. 1062, 1135 (2018). "And with regard to changing the culture of avoidance around death and dying, it is likely more feasible to change the structure—laws and policies—than to try to enact widespread cultural and psychological change. In fact, it is through changing the structure that

All this serves to underscore the fundamental difference between the goals of organizational litigators, and litigators who represent solely the interests of individual clients (the trench lawyers). The tension between the goals of organizations and the goals of trench lawyers can be helpful more often than harmful. Lawyers seeking justice for an individual client tend to be less cognizant of the fragility of social movements writ large; organizational lawyers tend to underestimate the strength and resilience of those same movements, in spite of (or even because of) judicial losses. This ostensible conflict often creates a powerful synthesis, as seen in *Perry*.<sup>158</sup>

Consider also that litigation victories almost universally produce backlash. This is true whether the backlash is a result of a case won by incrementalism, like *Goodridge*, or by surprise, like *Perry* or *Baehr*. Especially in the case of *Goodridge*, the immediate effects of the

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cultural changes in this realm may become possible; that is, changing law and policy may normalize conversations about end of life, which may decrease avoidance of discussions of death and dying.”

It should be noted that Maurice and Dominique probably did not expect to win their trial any more than Susan B. Anthony and Sojourner Truth did when they went to trial for illegal voting in 1872. *United States v. Anthony*, 24 F. Cas. 829 (N.D.N.Y. 1873). As plainly evidenced by Anthony's famous speech to the court at her sentencing, victory at trial was not the goal: “May it please the Court to remember that since the day of my arrest last November, **this is the first time that either myself or any person of my disfranchised class has been allowed a word of defense before judge or jury.**” See Remarks by Susan B. Anthony in the Circuit Court of the United States for the Northern District of New York, 19 June 1873, THE ELIZABETH CADY STANTON & SUSAN B. ANTHONY PAPERS PROJECT, <http://ecssba.rutgers.edu/docs/sbatrial.html> (last visited Jan. 23, 2019) (emphasis added). The opportunity to speak at length, to a larger audience in the context of a well-publicized case, about the injustice visited upon women in the nineteenth century, was rare indeed. Anthony seized that opportunity, even when there was no realistic hope of a verdict in her favor.

<sup>158</sup> Arkles, *supra* note 52, at 597 (noting that “[a]s parties in a lawsuit, individuals or small groups do not have the same opportunities they have in community organizing to share and learn from other people's experiences, build political analysis, and develop solutions dynamically with others from their community”). This is undoubtedly true, but may not necessarily be all bad. Many of the plaintiffs in *Obergefell* had not been involved in LGBT activism at all, at least not in any formal way. The same is true of the plaintiffs in *Lawrence*. These litigants lacked the political savvy of movement work veterans, but also the prejudices and preconceptions that can also come with that work. We should, of course, not deign to know what is right or wrong for the community or movements as a whole, but an individual lawyer's first duty is to her client, and working with an individual client to solve a problem can provide a microfocus on aspects of that problem which are often missed by larger organizations (as noted by the activist-scholars). *Id.*

backlash from an incremental win would seem to be worse than, or at least on a par with, the consequences of a loss. And like losses, as Cole observes, “backlash can be productive.”<sup>159</sup> Indeed, with the benefit of hindsight, it is not clear that cautious incrementalism in civil rights litigation has affected the development of rights any more or less than rushing into battle. To avoid litigation on the basis of fear of backlash, therefore, may only serve to delay justice. This is especially so today (as opposed to 100 years ago) when one accounts for the increased pace of communication, and therefore the increased pace at which rights are recognized. In the era of *Brown* or *Baker*, it could take days for word of a loss to spread; now it takes only seconds, and seconds more for activists to mobilize in response.<sup>160</sup>

Indeed, for those on the farthest fringes, the only way to stoke the fire of a would-be right may be to assert that right in a court of law and *lose*. The media, the legislature, the executive branch, advocacy organizations—none of these are obligated to hear the grievances of an individual or a group who seek to establish a new right. The courts, however, are built for just such a purpose. Even a curt, dismissive decision like the one in *Baker* starts conversations that would not likely occur otherwise.<sup>161</sup>

Still, it must be acknowledged that there is a serious danger in presenting a bad narrative which could further reinforce stereotypes or otherwise sway public

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<sup>159</sup> COLE, *supra* note 31, at 50; *see also* Jonathan Capehart, *Gays And Lesbians Owe Thanks to President George W. Bush and Justice Scalia*, WASH. POST (Oct. 20, 2014), [https://www.washingtonpost.com/blogs/post-partisan/wp/2014/10/20/gays-and-lesbians-owe-thanks-to-president-george-w-bush-and-justice-scali+a/?utm\\_term=.7779eae1bb00](https://www.washingtonpost.com/blogs/post-partisan/wp/2014/10/20/gays-and-lesbians-owe-thanks-to-president-george-w-bush-and-justice-scali+a/?utm_term=.7779eae1bb00) (“By attempting to ban gay marriage, the president sparked public debate about marriage equality that ignited a historic backlash.”).

<sup>160</sup> *See, e.g.*, Nereida Moreno, *Activists Create Websites to Track Anti-Trump Events in Chicago*, CHI. TRIB. (Mar. 13, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-protest-websites-met-20170312-story.html>; Samuel Plank, *Tweeting Protest: Organization and Mobilization in the New Administration*, HARV. POL. REV. (July 24, 2017), <http://harvardpolitics.com/united-states/tweeting-protest-organization-and-mobilization-in-the-new-administration/>.

<sup>161</sup> Arkles, *supra* note 52, at 615 (using the example of a trans prisoner bringing a lawsuit against prison staff). “Even realizing the litigation outcome will probably be unfavorable to her, she may still develop leadership skills by rallying a broader community of people impacted by similar issues. Additionally, she may use the knowledge and energy gained through the lawsuit to change policy.” Although victory is nice, these can all be legitimate and powerful objectives for litigation.

opinion against the underlying cause. Marriage litigation teams have been gently (and perhaps rightly) criticized for “the heteronormative and traditional characteristics present in the carefully curated set of *Obergefell* plaintiffs” because “respecting individual choice in those we love[] will require challenging mainstream norms themselves rather than simply imitating existing models.”<sup>162</sup> But caution in the *content* of the narrative presented to the public and to the courts is different from an incremental approach to *when and where* that narrative is told, when it comes to long-term success in vindicating a right. As one activist-scholar writes,

A group engaged in challenging entrenched power . . . has to contend with far more powerful opponents in incredibly lopsided political contests. Such a group, therefore, has not only to foster a strong internal identity; it also has to win allies beyond the bounds of that identity, if it is to build the collective power it needs to move any serious political goals forward.<sup>163</sup>

This is precisely why lawyers should engage themselves with bridging activist communities to power structures and ensuring that broadly relatable client narratives are crafted. “When our subcultures become too self-referential and incoherent to outsiders, then our words and actions may come to function as repellants to others—even to our allies and people who agree with us on the issues.”<sup>164</sup> The point at which litigation is most likely to succeed is the point at which advocates may “credibly claim that our [clients’] values are popular—even that they are *common sense*—and connected to a substantial social base.”<sup>165</sup> A relatable, “common sense” narrative can and should be shouted as loudly and as often as possible.<sup>166</sup>

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<sup>162</sup> Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J.F. 136 (2015), <https://www.yalelawjournal.org/forum/perfect-plaintiffs>.

<sup>163</sup> SMUCKER, *supra* note 53, at 63.

<sup>164</sup> *Id.* at 56.

<sup>165</sup> *Id.* at 38 (emphasis in original).

<sup>166</sup> See, e.g., Binny Miller, *Give them Back their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 487 (1994); Benjamin L. Apt, *Aggadah, Legal Narrative, and the Law*, 73 OR. L. REV. 943 (1994).

Of course, exceptions to this rule abound. See, e.g., Dahlia Lithwick’s discussion of the circumstances leading to the Lawrence decision: “An interracial, lower-middle-to-lower-class pair hooking up in a seedy apartment

Volumes could be written about the relative merits of incrementalism versus “rushing in,” but the limited point of this section is to suggest that these considerations should not figure heavily into an individual practitioner’s decision as to whether or not to assert a “new” right on behalf of a client. For this strategy to be consciously employed and to be effective, some losses are to be expected in the courts. Every movement in American history has lost critical, right-defining court cases—often more than a few. The question: what can an effective advocate make of those losses? The answer: a relatable, popular narrative about their clients and their rights that can be told over and over. Examples below illustrate this principle.

### VIII. CURRENT EXAMPLES

Each of these examples is a right that is not yet fully realized but is in stage two of development per the model above (that is, it has achieved some, but not total, institutional recognition). These emerging rights could be purposefully advanced using this model.

#### 1. Healthcare as a Right

The discussion of healthcare as a “right” in the United States is in its infancy but is quickly gathering steam.<sup>167</sup> This discussion, which started with grassroots activists, may be seen as a direct response to social factors that have resulted in the exclusion of millions of people from receiving meaningful treatment without the threat of financial ruin. The right is finally ripening, and lawyers can assist in the process.

The idea of healthcare as a right is not a new one, at least not outside the United States. The 1946 World Health Organization constitution states that “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being

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in a marginal neighborhood: Lawrence and Garner were hardly a civil-rights litigator’s dream plaintiffs. They were not the type to tug at judicial heartstrings. But advocates for gay rights couldn’t afford to shop around for a perfect plaintiff.” Lithwick, *supra* note 71.

<sup>167</sup> Addy Baird, *Single-Payer Health Care is Gaining Steam. These Are the People Who Made it Possible*. THINKPROGRESS (Sept. 13, 2017), <https://thinkprogress.org/single-payer-political-moment-c4e0139244b1/>.

without distinction of race, religion, political belief, economic or social condition.”<sup>168</sup> The European Union and the United Nations both recognize health care as a basic human right, and as of 2015, 38% of United Nations’ member constitutions guaranteed medical care.<sup>169</sup> It is difficult to explain how this right has flourished for so long in much of the rest of the world, but is just now in the initial stages of recognition here.

However, as with marriage, there are “movers” that formerly worked against the idea of healthcare as a right and are now beginning to reverse course. For example, the American Medical Association (AMA) argued against any government intervention in healthcare at all until the advent of Medicare/Medicaid in 1965.<sup>170</sup> Similarly, the AMA opposed systemic changes proposed by the Clinton administration in the 1990s. However, it made a noticeable shift in 2009 by supporting the original version of the Affordable Care Act—including the addition of a public option to insurance exchanges.<sup>171</sup> While the AMA does not yet support healthcare as a right, other prominent physician-led organizations do.<sup>172</sup>

In the 2010s, spurred by the ACA debate and countless stories of personal tragedy, the media has just begun to weigh in on this subject in earnest.<sup>173</sup> Right on schedule, the first light of formal institutional recognition can now be seen. Massachusetts passed sweeping statewide reforms intended to provide health insurance to

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<sup>168</sup> Julia Kaufman, *Health Care is a Right, Not a Privilege*, THE KENAN INSTITUTE FOR ETHICS, <https://archive.kenan.ethics.duke.edu/humanrights/snowball/health-care-is-a-right-not-a-privilege/> (last visited Jan. 29, 2019).

<sup>169</sup> G. H. Jones & H. Kantarjian, *Health Care in the United States—Basic Human Right or Entitlement?*, 26 ANNALS OF ONCOLOGY, 2193 [needs start page] (2015), <https://academic.oup.com/annonc/article/26/10/2193/144592> (citing Jody Heymann, *Constitutional Rights to Health, Public Health and Medical Care: The Status of Health Protections in 191 Countries*, 639 [needs pincite] (July 4, 2013), <http://www.tandfonline.com/doi/abs/10.1080/17441692.2013.810765> (last visited May 27, 2015)).

<sup>170</sup> Kyle B. Jones, *It's Time to Recognize Health Care as a Right*, WASH. POST (Jan. 17, 2018), [https://www.washingtonpost.com/news/made-by-history/wp/2018/01/17/its-time-to-recognize-health-care-as-a-right/?noredirect=on&utm\\_term=.17a671f1110f](https://www.washingtonpost.com/news/made-by-history/wp/2018/01/17/its-time-to-recognize-health-care-as-a-right/?noredirect=on&utm_term=.17a671f1110f).

<sup>171</sup> *Id.*

<sup>172</sup> A notable example is Physicians for a National Health Program, which “has more than 20,000 members and chapters across the United States.” *About PNH*, PNH, <http://pnhp.org/about/> (last visited Jan. 21, 2019).

<sup>173</sup> See Atul Gawande, *Is Health Care a Right?*, NEW YORKER (Oct. 2, 2017), <https://www.newyorker.com/magazine/2017/10/02/is-health-care-a-right>.

every resident of the state in 2006.<sup>174</sup> As early as 2008, then-candidate Obama said that he believed healthcare “should be a right for every American.”<sup>175</sup> In June of 2017, the Nevada legislature passed a bill that would have allowed residents to buy into the state’s Medicaid plan, but the bill was vetoed by the Governor.<sup>176</sup> Around the same time, a statewide public “single-payer” healthcare system was nearly enacted in California.<sup>177</sup> In the last two years, support for a single-payer system has shot up dramatically; a poll showed that 51% of Americans support such a system as of April 2018,<sup>178</sup> up from 33% in a similar poll conducted a year earlier.<sup>179</sup>

Healthcare writ large has not been recognized as a right by any American court, but it may only be a matter of time. Litigators have lost on this issue thus far, but such losses are not uncommon in the development of a right.<sup>180</sup> And as with marriage, stepping-stone victories may be within reach in the realm of healthcare-oriented rights.<sup>181</sup> For example, a handful of attorneys have

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<sup>174</sup> Mitt Romney, *My Plan for Massachusetts Health Insurance Reform*, BOS. GLOBE (Nov. 24, 2004), <https://www.bostonglobe.com/lifestyle/health-wellness/2004/11/24/plan-for-massachusetts-health-insurance-reform/d111xFpnfLcQ8Ipz4nCdpJ/story.html>.

<sup>175</sup> Transcript of Second McCain, Obama Debate, CNN POLITICS (Oct. 7, 2008, 11:34 PM), <http://www.cnn.com/2008/POLITICS/10/07/presidential.debate.transcript/>.

<sup>176</sup> Gawande, *supra* note 173.

<sup>177</sup> Clio Chang, *What Killed Single-Payer In California?* NEW REPUBLIC (June 30, 2017), <https://newrepublic.com/article/143650/killed-single-payer-california>. “If single-payer can’t pass with Democratic super-majorities in the Golden State, that raises serious questions about any national effort.” *Id.* The author notes that this sentiment is analogous to the question of how national marriage equality was possible in the wake of California’s vote on Prop 8. *Id.*

<sup>178</sup> Jessie Hellmann, *Poll: Slim Majority of Americans Support Single-Payer Health Care*, HILL (Apr. 13, 2018), <http://thehill.com/policy/healthcare/383015-poll-slim-majority-of-americans-support-single-payer-health-care>.

<sup>179</sup> Jocelyn Kiley, *Public Support for ‘Single Payer’ Health Coverage Grows, Driven by Democrats*, PEW RES. CTR. (June 23, 2017), <http://www.pewresearch.org/fact-tank/2017/06/23/public-support-for-single-payer-health-coverage-grows-driven-by-democrats/>.

<sup>180</sup> See Gregory D. Curfman, *King v. Burwell and a Right to Health Care*, HEALTH AFFAIRS BLOG (June 26, 2015), <https://www.healthaffairs.org/doi/10.1377/hblog20150626.048913/full/>. “The Court’s opinion in *King v. Burwell*, validating the subsidies provided on the federal health insurance exchange, lends clear support for a right to health care.” *Id.* But nonetheless, “the halting approach to declaring a universal right to health care for all Americans has continued in the Supreme Court.” *Id.*

<sup>181</sup> Indeed, some victories have already been won on discrete aspects of healthcare. The right to emergency care, the right to abortion, the right to language access in healthcare, the right to die with dignity—these are all

tackled outlandish hospital bills by seeking to have them declared unconscionable, either under common-law contract theories or consumer protection statutes. More than a decade ago, Lehigh University professor George A. Nation, III set forth the differences between procedural and substantive unconscionability, arriving at the conclusion that both can apply to hospital billing:

The overriding factor . . . in finding hospital admission contracts procedurally unconscionable is that urgent medical services are necessities, and time is virtually always important. Thus, even if a patient understands the terms in the hospital admission contract and decides he does not want to agree to them, he is in no position to shop for an alternative supplier of urgently needed medical services. The patient must agree to the terms the hospital offers, because the patient requires the services. . . . Some courts have found that an excessive markup results in substantive unconscionability. [I]n one case expert testimony was given that the hospital's "full" or "published" charges for 1995 and 1996 were about 300% of the hospital's costs. . . . More recently, the national average full-charge rate was about 345% of costs.<sup>182</sup>

These theories are slowly finding their way into the courts. In 2007, the Arizona Court of Appeals published the outcome of a failed attempt at an unconscionability argument in a case called *Banner Health v. Medical Savings Insurance Co.*<sup>183</sup> Indeed, thus far, most offensive

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salient examples of rights affecting healthcare that did not exist 100 years ago. See Lily Lo, *The Right to Understand Your Doctor: Protecting Language Access Rights in Healthcare*, 31 B.C. THIRD WORLD L.J. 377, 381 (2011); Yvonne Lindgren, *From Rights to Dignity: Drawing Lessons from Aid in Dying and Reproductive Rights*, 2016 UTAH L. REV. 779, 780 (2016).

<sup>182</sup> George A. Nation, III, *Obscene Contracts: The Doctrine of Unconscionability and Hospital Billing of the Uninsured*, 94 KY. L.J. 101, 112, 114, 118 (2005).

<sup>183</sup> 163 P.3d 1096 (Ariz. Ct. App. 2007).

litigation based on this theory appears to have failed. But that is not to say that an unconscionability defense (or even a cause of action) could not succeed under the right circumstances.<sup>184</sup> The lengthy, well-reasoned dissent in *Banner Health* is telling:

In opposition to Banner's motion for summary judgment, MSIC and the patients argued the price terms of the COAs<sup>185</sup> were unconscionable. In support of this argument, the patients or their representatives who signed the COAs presented affidavits stating that they signed the COAs in emergency situations, while they were under stress caused by their medical conditions or the medical conditions of their dependents. Several of the patients stated in their affidavits that the COAs were not explained to them by the hospital personnel when they signed them, and that they believed that signing the COAs was a prerequisite to treatment. Furthermore, MSIC submitted the deposition of Banner's Vice President of Finance, indicating that the cost-to-charge ratio for some medical treatments at Banner hospitals was as low as 19.77%. These facts raise at least the specter of unconscionability as to the price terms in the COAs.<sup>186</sup>

Additionally, some states have consumer protection acts that cover unconscionable hospital billing, and these suits seem to fare better than those relying on common law contract principles. In *Via Christi Regional Medical*

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<sup>184</sup> For a promising start which resulted in abject disappointment, see the tortured history of *Colomar v. Mercy Hosp., Inc.*, 461 F. Supp. 2d 1265 (S.D. Fla. 2006), which ended up in protracted litigation over whether the plaintiff would owe the hospital its fees and costs for losing at the summary judgment stage. *See also* *Colomar v. Mercy Hosp., Inc.*, 335 Fed. 29 (11th Cir. 2009).

<sup>185</sup> COA is a common acronym meaning "Conditions of Admission" forms.

<sup>186</sup> 163 P.3d at 1109 (Kessler, J., concurring in part and dissenting in part).

*Center, Inc. v. Reed*,<sup>187</sup> the Kansas Supreme Court reversed the determination by the lower court judge on unconscionability. “The judge said that Reed sought ‘to attack the healthcare system’ and that ‘there is virtual universal agreement [that] it is in need of repair’ but ruled that the actions of Via Christi were not unconscionable.”<sup>188</sup> Nonetheless, the court held, “a hospital may engage in unconscionable conduct prohibited by the Kansas Consumer Protection Act when (1) it files and pursues enforcement of a lien based upon a bill inaccurate because of overcharges or duplicate charges, and (2) the hospital has enjoyed superior bargaining power when compared to its patient.”<sup>189</sup> These holdings sow the seeds of what could ultimately put an end to health care usury and ultimately help shape a judicially recognized right to healthcare.

## 2. The Right to Use Cannabis

The idea of the right to cannabis usage has existed in one form or another for decades, usually under the umbrella of privacy rights or broader libertarian concepts. But it is medicinal usage that has gradually put a spotlight on cannabis rights over the last forty years.<sup>190</sup> Here one can see institutional recognition at a further stage of development than healthcare, one akin to the recognitional limbo that marriage equality was in in the mid-to-late 2000s. In fact, California voters authorized use of medical cannabis by referendum back in 1996, making it the pioneering state on medical cannabis around the same time that *Baehr v. Lewin* was decided in Hawaii; a similar trajectory may be observed between these two issues since then.<sup>191</sup> Today, thirty-three states and the District of Columbia all formally make allowances of some kind for medical cannabis use.<sup>192</sup>

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<sup>187</sup> 314 P.3d 852, 859 (Kan. 2013).

<sup>188</sup> *Id.* at 859.

<sup>189</sup> *Id.* at 868.

<sup>190</sup> Scott C. Martin, *A Brief History of Marijuana Law in America*, TIME (Apr. 20, 2016), <http://time.com/4298038/marijuana-history-in-america/>.

<sup>191</sup> See CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2001).

<sup>192</sup> Francis J. Mootz III, *Ethical Cannabis Lawyering in California*, 9 ST. MARY'S J. LEGAL MAL. & ETHICS 6, 6 (2018).

Meanwhile, the U.S. government's enforcement of federal anti-cannabis provisions is, in itself, emblematic of institutional struggle to recognize a right. While the federal government has continued to insist that cannabis remain a Schedule I narcotic, the Obama administration issued a memorandum in late 2009 declaring that U.S. attorneys "should not focus federal resources in your states on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana . . . ." <sup>193</sup> The Trump administration, however, rescinded that memorandum and the Obama-era laxity regarding cannabis enforcement, "although it is unclear whether [Trump] will deploy the assets of the Justice Department to prosecute persons for activity that conforms to state-legal cannabis programs." <sup>194</sup>

Court cases on marijuana rights have had mixed results, but have not been universally anti-cannabis. An anomalous opinion from the Alaska Supreme Court effectively legalized small amounts of recreational marijuana in 1975. <sup>195</sup> But even a half-century later, states' rights arguments held little sway with the United States Supreme Court, as evidenced by cannabis users' successive (and decisive) defeats in *United States v. Oakland Cannabis Buyers' Cooperative* <sup>196</sup> and *Gonzales v. Raich*. <sup>197</sup> Both of these decisions held that California's medical marijuana provisions could not trump the federal Controlled Substances Act. <sup>198</sup> Since those decisions, however, courts and legal scholars are discussing the jurisprudence of cannabis usage more frequently, often under a theory of established rights such as due process or unique state constitutional provisions. <sup>199</sup>

While many courts and the federal executive branch remain stuck in limbo, the development of

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<sup>193</sup> *Id.* at 22 (internal citations omitted).

<sup>194</sup> *Id.* at 24.

<sup>195</sup> *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

<sup>196</sup> 532 U.S. 483 (2001).

<sup>197</sup> 545 U.S. 1 (2005).

<sup>198</sup> Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C. § 801–904 (2012)).

<sup>199</sup> Scott Bomboy, *Interest Picks Up in Legal Marijuana as Constitutional Issue*, NAT'L CONST. CTR. (Apr. 16, 2015), <https://constitutioncenter.org/blog/interest-picks-up-in-legal-marijuana-as-constitutional-issue/>; Jared L. Hausmann, *Sex, Drugs, and Due Process: Justice Kennedy's New Federalism as a Framework for Marijuana Liberalization*, 53 U. LOUISVILLE L. REV. 271, 272 (2015).

cannabis rights continues full steam ahead on the ground. Since the *Oakland Cannabis* decision in 2001, public support for recreational marijuana legalization has nearly doubled.<sup>200</sup> Some polls have public support for medical marijuana at a staggering 99%.<sup>201</sup> This is not just in states considered more progressive; Florida recently added a provision for medical cannabis to its state constitution, and Oklahoma recently became the fourteenth state to allow medicinal use by a voter-initiated measure.<sup>202</sup> More states now allow medical cannabis than those that prohibit it—a state of equilibrium that did not exist for very long in the case of marriage equality before total institutional recognition. As with marriage, ballot initiatives for recreational—or “responsible”—use of cannabis are underway in numerous states and have already been successful in some, including California.<sup>203</sup>

In short, cannabis rights are on the verge of total institutional recognition; a lawyer adeptly coordinating these five movers could help accelerate the process.

### 3. The Death Penalty

Capital punishment in America is also likely on the cusp of dramatic change. In 2014, a federal judge struck down California's death penalty.<sup>204</sup> In the first two pages of the opinion, Judge Cormac J. Carney, a George W. Bush appointee, summarized his reasoning:

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<sup>200</sup> Hannah Hartig & Abigail Geiger, *About Six-In-Ten Americans Support Marijuana Legalization*, PEW RES. CTR. (Jan. 5, 2018),

<http://www.pewresearch.org/fact-tank/2018/01/05/americans-support-marijuana-legalization/>.

<sup>201</sup> Max Greenwood, *Poll: Support for Legal Marijuana Hits All-Time High*, HILL (Apr. 26, 2018 12:37 PM), <http://thehill.com/homenews/news/385018-poll-support-for-legal-marijuana-hits-all-time-high>.

<sup>202</sup> Paul Armentano, *Public Support for Medical Marijuana Access is Overwhelming and Bipartisan*, HILL (June 30, 2018 06:00 AM), <https://www.politico.com/story/2017/06/29/supreme-court-strikes-down-death-penalty-june-29-1972-239938>.

<sup>203</sup> Thomas Fuller, *Recreational Pot is Officially Legal in California*, N.Y. TIMES (Jan. 1, 2018), <https://www.nytimes.com/2018/01/01/us/legal-pot-california.html>; see also Vince Sliwoski, *State Legal Cannabis in 2018: Who's Next?*, CANNA L. BLOG (Jan. 31, 2018), <https://www.cannalawblog.com/state-legal-cannabis-in-2018-whos-next/>.

<sup>204</sup> Erik Eckholm & John Schwartz, *California Death Penalty System is Unconstitutional, Federal Judge Rules*, N.Y. TIMES (July 16, 2014), <https://www.nytimes.com/2014/07/17/us/california-death-penalty-unconstitutional-federal-judge-says.html>.

[S]ystemic delay has made . . . execution so unlikely that the death sentence carefully and deliberately imposed by the jury has been quietly transformed into one no rational jury or legislature could ever impose: life in prison, with the remote possibility of death. As for the random few for whom execution does become a reality, they will have languished for so long on death row that their execution will serve no retributive or deterrent purpose and will be arbitrary.<sup>205</sup>

Carney's ruling was ultimately overturned,<sup>206</sup> but California has not executed a prisoner in twelve years, and the legal landscape of the death penalty is changing in a way that can be compared to the development of the other rights discussed above.

As with the right to healthcare, the United States lags decades behind most of the rest of the world when it comes to capital punishment.<sup>207</sup> The only industrialized nations left that retain the death penalty are Singapore, Taiwan, Japan, and the U.S.<sup>208</sup>

Furthermore, institutional recognition that individuals may demand their government refrain from putting them to death is not new, even here in the United States. A nationwide moratorium was imposed by the Supreme Court in 1972, but was lifted in 1976.<sup>209</sup> "Since then, one branch or another of government in several states has done away with the death penalty."<sup>210</sup> "Currently, 32 states are referred to as 'retentionist' (that

<sup>205</sup> Jones v. Chappell, 31 F. Supp. 3d 1050, 1053 (C.D. Cal. 2014).

<sup>206</sup> See Jones v. Davis, 806 F.3d 538 (9th Cir. 2015).

<sup>207</sup> See generally Lincoln Caplana, *The Growing Gap Between the U.S. and the International Anti-Death-Penalty Consensus*, NEW YORKER (Dec. 31, 2016), <https://www.newyorker.com/news/news-desk/the-growing-gap-between-the-u-s-and-the-international-anti-death-penalty-consensus>.

<sup>208</sup> Oliver Smith, *Mapped: The 53 Places That Still Have The Death Penalty—Including Japan*, TELEGRAPH (July 6, 2018, 12:00 PM), <https://www.telegraph.co.uk/travel/maps-and-graphics/countries-that-still-have-the-death-penalty/>.

<sup>209</sup> Andrew Glass, *Supreme Court Strikes Down Death Penalty, June 29, 1972*, POLITICO (June 29, 2017, 12:00 AM), <https://www.politico.com/story/2017/06/29/supreme-court-strikes-down-death-penalty-june-29-1972-239938>.

<sup>210</sup> Dan Canon, *Opinion: Death Penalty In Kentucky Is An Expensive, Ineffective, Obsolete Relic*, INSIDER LOUISVILLE (Aug. 29, 2014, 10:17 AM), [https://insiderlouisville.com/health/social\\_good/death-penalty/](https://insiderlouisville.com/health/social_good/death-penalty/).

is, they retain the use of capital punishment).<sup>211</sup> Carney's ruling is based in part on Justice Brennan's concurring opinion in the 1972 case that put the death penalty on hold. Brennan wrote: "When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system."<sup>212</sup> Since the reinstatement of capital punishment the following year,<sup>213</sup> the categories of people to whom that punishment may be applied have been steadily reduced by judicial fiat.<sup>214</sup> In Kentucky alone, the last two years have yielded decisions demanding more exacting science in competency determinations, and abolishing capital punishment altogether for everyone under twenty-one at the time of the crime.<sup>215</sup>

But the deadeast giveaway that this right may soon advance from stage two to stage three comes from Justice Breyer who, joined by Justice Ginsburg, wrote the following in 2015: "[R]ather than try to patch up the death penalty's legal wounds one at a time, I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution. . . . [T]he death penalty, in and of itself, now likely constitutes a legally

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<sup>211</sup> *Id.*

<sup>212</sup> *Furman v. Georgia*, 408 U.S. 238, 293 (1972).

<sup>213</sup> *Introduction to the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/part-i-history-death-penalty> (last visited Sept. 3, 2018).

<sup>214</sup> *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (barring capital punishment for those convicted of non-homicide crimes, including child rape); *Roper v. Simmons*, 543 U.S. 551 (2005) (juvenile offenders); *Atkins v. Virginia*, 536 U.S. 304 (2002) (individuals with intellectual disabilities); *Coker v. Georgia*, 433 U.S. 584 (1977) (rapists). From a purely theoretical standpoint, there is no "evolving standard of decency" associated with a Fourteenth Amendment-based fundamental right to marriage, although standards have obviously evolved over time. In the Eighth Amendment, by contrast, there is a built-in mechanism for evolution, making abolition via the Constitution an easier legal argument—but only once the social conditions are right.

<sup>215</sup> *Judge: Death Penalty Unconstitutional for Defendant Under 21*, U.S. NEWS (Aug. 4, 2017, 6:38 PM), <https://www.usnews.com/news/best-states/kentucky/articles/2017-08-04/judge-death-penalty-unconstitutional-for-defendant-under-21>; Caitlin McGlade, *Kentucky Supreme Court Rules Death Penalty IQ Law Is Unconstitutional*, LOUISVILLE COURIER J. (June 27, 2018, 12:02 PM), <https://www.courier-journal.com/story/news/politics/2018/06/14/kentucky-supreme-court-ruling-mental-competency/702539002/>.

prohibited ‘cruel and unusual punishmen[t].’<sup>216</sup> Breyer, in essence, asked to be given the right case.

This shift in judicial attitudes about capital punishment can be explained by reference to our movers. The media, covering activists and organizations like the Innocence Project, along with a vast body of research by academics suggesting that the death penalty does no practical good for anyone,<sup>217</sup> have helped to change the public’s view of the death penalty dramatically since the 1970s.<sup>218</sup> Take, for example, the incredible number of ghastly mishaps associated with lethal injection. Accounts of executions taking hours because officials could not find a vein, or administered the drugs incorrectly, or because the condemned person simply would not die properly, have been prominent in the news for years now.<sup>219</sup> The last few years have seen an upswing in these horror stories due to states using “experimental” drugs, which, for obvious reasons, have not been approved, tested, or even evaluated by any self-respecting medical professional.<sup>220</sup> Then there are the exonerations to contend with: 150 people have been released from death

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<sup>216</sup> *Glossip*, 135 S. Ct. at 2755. It remains to be seen how the retirement of Justice Kennedy, who authored many of the Court’s watershed death penalty cases, will affect the likelihood of further progress on this issue. For a fascinating exploration of how Kennedy’s “equal dignity” standard from LGBT-rights opinions might yet affect the Court’s death-penalty jurisprudence, see Kevin Barry, *The Death Penalty & the Dignity Clauses*, 102 IOWA L. REV. 383 (2017).

<sup>217</sup> See, e.g., *Discussion of Recent Deterrence Studies*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/discussion-recent-deterrence-studies> (last visited Sept. 3, 2018).

<sup>218</sup> Frank R. Baumgartner, Emily Williams & Kaneesha Johnson, *Americans Are Turning Against The Death Penalty. Are Politicians Far Behind?*, WASH. POST (Dec. 7, 2015), [https://www.washingtonpost.com/news/monkey-cage/wp/2015/12/07/americans-are-turning-against-the-death-penalty-are-politicians-far-behind/?utm\\_term=.7040f193cb3f](https://www.washingtonpost.com/news/monkey-cage/wp/2015/12/07/americans-are-turning-against-the-death-penalty-are-politicians-far-behind/?utm_term=.7040f193cb3f); see also Richard C. Dieter, *Changing Views on the Death Penalty in the United States*, Paper Delivered at the Conference On Alternatives to the Death Penalty in U.S.A and China, 10 n.27 (Oct. 7, 2007), available at <https://deathpenaltyinfo.org/files/pdf/Beijing07.pdf>. “RT Strategies of Washington, D.C., conducted this National Omnibus Poll on March 8–11, 2007 for the Death Penalty Information Center. The sample was 1,000 adults nationwide, and the margin of error was +3.1%.” *Id.*

<sup>219</sup> Michael L. Radelet, *Botched Executions*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/some-examples-post-furman-botched-executions> (last visited Sept. 3, 2018) (where University of Colorado professor lists over fifty new stories of “botched” executions).

<sup>220</sup> See generally Austin Sarat, Robert H. Weaver & Heather Richard, *Lethal Injection Leads to the Most Botched Executions*, DAILY BEAST (Apr. 30, 2014), <http://www.thedailybeast.com/articles/2014/04/30/lethal-injection-leads-to-the-most-botched-executions.html>.

row since 1973 upon proof of actual innocence.<sup>221</sup> These exonerations often occurred after the inmate had exhausted the lengthy appeals process.<sup>222</sup> DNA evidence swoops in to save the day just before a prisoner's last meal,<sup>223</sup> an eyewitness recants decades later,<sup>224</sup> the real killer confesses, etc. Innocent people have undoubtedly been killed by the state: people who did not have the benefit of DNA evidence, or a competent lawyer, an unbiased jury, or—again—just dumb luck.<sup>225</sup> A growing public awareness of this inescapable conclusion is finally undermining the integrity of the American death penalty. This is evidenced by recent polls demonstrating that for the first time, less than 50% of the American public believes that capital punishment is applied fairly,<sup>226</sup> and opposition to the practice overall was at an all-time low in 2017.<sup>227</sup>

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<sup>221</sup> *Innocence: List of Those Freed From Death Row*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row?scid=6&did=110> (last visited Sept. 3, 2018).

<sup>222</sup> Dan Canon, *Opinion: Death Penalty in Kentucky is an Expensive, Ineffective, Obsolete Relic*, INSIDER LOUISVILLE (Aug. 29, 2014, 10:17 AM), [https://insiderlouisville.com/health/social\\_good/death-penalty/](https://insiderlouisville.com/health/social_good/death-penalty/).

<sup>223</sup> Chris Kenning, *Missouri Governor Halts Execution to Examine Questions Over DNA*, REUTERS (Aug. 22, 2017, 3:04 PM), <https://www.reuters.com/article/us-missouri-execution-idUSKCN1B2280>.

<sup>224</sup> See Times Editorial Board, *Eyewitness Testimony is Often Unreliable and Police and Lawmakers Know It*, L.A. TIMES (May 08, 2018, 4:10 AM), <http://www.latimes.com/opinion/editorials/la-ed-eyewitness-testimony-20180508-story.html>.

<sup>225</sup> The examples are quite literally countless. Cameron Todd Willingham, executed in Texas after being convicted of murder on the basis of junk science, is a stark example. See Maurice Possley & The Marshall Project, *Fresh Doubts Over a Texas Execution*, WASH. POST (Aug. 3, 2014), <http://www.washingtonpost.com/sf/national/2014/08/03/fresh-doubts-over-a-texas-execution/>. Ruben Cantu, whose accuser recanted after his execution, is believed by almost everyone involved in that case, including the prosecutor, to have been innocent. The state's response was to threaten the prosecuting witness with a "murder by perjury" charge. Rick Casey, *"Murder by Perjury" in Cantu Case?*, HOUS. CHRON. (Dec. 4 2005), <http://www.chron.com/news/casey/article/Casey-Murder-by-perjury-in-Cantu-case-1936595.php>.

<sup>226</sup> Justin McCarthy, *New Low of 49% in U.S. Say Death Penalty Applied Fairly*, GALLUP NEWS SERV. (Oct. 22, 2018), <https://news.gallup.com/poll/243794/new-low-say-death-penalty-applied-fairly.aspx>.

<sup>227</sup> Jeffrey M. Jones, *U.S. Death Penalty Support Lowest Since 1972*, GALLUP NEWS SERV. (Oct. 26, 2017), <https://news.gallup.com/poll/221030/death-penalty-support-lowest-1972.aspx>.

## IX. CONCLUSION

The above model may serve as a starting point for practitioners grappling with the reality of emerging rights in the twenty-first century. Rights will continue to come into being at stage one of this model with or without involvement by the bar, but it is the movement from partial institutional recognition (stage two) to total institutional recognition (stage three) that an individual practitioner should be most keenly focused on. Given the increasing pace at which new rights achieve institutional recognition, a “wait-and-see” attitude makes little sense with regard to whether to pursue litigation; rather, a lawyer should be mindful of what the proper narrative should be for a client who seeks to vindicate a right that is not yet wholly recognized, and what vehicles may be used to help further the client’s cause—both in the context of litigation and in the broader context of a social movement overall. Those vehicles may be conceptualized as the five “movers” described herein. A conscious, deliberate choice by a practitioner to incorporate these movers into what might otherwise be a myopic, traditional litigation strategy is more likely to produce durable and desirable outcomes for a client.