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Social Movements, Social Process: A Response to Gerald Rosenberg, 42 J. Marshall L. Rev. 671 (2009)

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SOCIAL MOVEMENTS, SOCIAL PROCESS: A RESPONSE TO GERALD ROSENBERG

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I. INTRODUCTION

Social movements are complex social processes. The strategies, goals, and members of social movements change over the course of their history. As particular goals are achieved, new ones are set. Other goals may begin to seem impossible to achieve and are abandoned in favor of more “realistic” ones. Or, impossible goals may transform into rallying cries that define a movement. Movement actors and icons die, change their minds, become less involved, and quit over rivalries with other leaders. Organizations are created, flourish, fundraise, and often die. Political opportunities come and go with legislative composition, judicial appointment, and sheer serendipity.

As such, it is very difficult to determine a precisely optimal social movement strategy. Movement actors, social scientists, lawyers, and historians analyze social movements to critique, to divine strategies for the future, and to simply tell movement stories. Decades of socio-legal research in a variety of disciplines reveal that the criteria for success are contingent across time, organization, individual, and region. The nature of resistance to social movements also is contested, and there is no straight line from Point A (oppression) to Point B (liberation).

And yet, in the arena of same-sex marriage, Point B seems closer all the time. In the few weeks since I received Gerald Rosenberg’s Article about the failure of the litigation strategy in the gay-rights marriage movement, the number of states that allow same-sex marriage has tripled (from two to six) with Iowa , Vermont, Maine, and New Hampshire joining Massachusetts and Connecticut as states where same-sex marriage is not legally prohibited.¹ The Governor of New York, David Paterson,

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1. Amy Lorentzen, *In Iowa, Same-Sex Couples Rush to Tie the Knot*, THE WASH. POST, Apr. 28, 2009, at A04; The Associated Press & Lisa Leff, *CA Gay Rights Group: Wait for 2012 to Attack Ban*, LAS VEGAS. SUN, Aug. 12, 2009, available at <http://www.lasvegassun.com/news/2009/aug/12/ca-gay-rights-group-wait-for-2012-to-attack-ban/>.

introduced a bill that would make same-sex marriage legal in the state of New York,² and conservative lawyer, Theodore Olson has joined the team fighting for same-sex marriage in California.³

As an aside, I will state from the outset that I have no confidence in my ability to know whether Saul Alinsky would think a litigation strategy for social change is a good idea for advocates of same-sex marriage in the twenty-first century United States. Professor Rosenberg convincingly demonstrates that Alinsky was not thinking about litigation strategies at the time he wrote *Rules for Radicals*.⁴ But Alinsky's sustained attention to social movements and social change leads me to believe that he would do what it takes to advance the causes in which he believed. While the work Professor Rosenberg highlights demonstrates that Alinsky's practice preferences were for consciousness-raising and creative protest, his career of advocating for justice reveals a true believer who likely would be oriented toward accomplishing his justice goals.

As a general matter, I believe that the law can be limiting as part of a social movement and do not disagree with a caution for activists who pursue litigation strategies only. And yet, I take issue with Professor Rosenberg's (now famous and seemingly universal) pessimism about litigation as a social change strategy in general and in the marriage equality movement in particular. In this Article, I argue that Rosenberg: (1) ignores some of the most significant gay rights activism when he argues that the gay-rights movement primarily has used a litigation strategy to advance their cause; (2) overstates the determinacy of social movements themselves; and (3) overstates the limits of litigation strategies for social change.

II. THE MOVEMENT ROSENBERG IGNORES

Professor Rosenberg argues that “[t]he campaign for marriage equality between heterosexuals and gay men and lesbians has been waged largely in the courts.”⁵ This is simply not true. The campaign for marriage equality decidedly has not occurred primarily in the courts with litigation strategies. Lawyers and legal academics like to parse legal strategies endlessly, pointing

2. Jeremy W. Peters, *Paterson Introduces a Same-Sex Marriage Bill*, N.Y. TIMES, Apr. 17, 2009, at A1.

3. Jo Becker, *A Conservative's Road to Same-Sex Advocacy*, N.Y. TIMES, Aug. 18, 2009, available at <http://www.nytimes.com/2009/08/19/us/19olson.html>.

4. Gerald N. Rosenberg, *Saul Alinsky and the Litigation Campaign to Win the Right to Same-Sex Marriage*, 42 J. MARSHALL L. REV. 643, 643-47 (2009).

5. *Id.* at 648.

out that particular decisions are flawed⁶ and that various arguments are more or less likely to be successful.⁷ This attention to law (our law-first attitude) belies the fact that in the modern period, the gay rights movement has employed all the strategies of traditional civil rights movements including violence,⁸ direct action,⁹ community organizing,¹⁰ political strategies,¹¹ education,¹² and, my personal favorite, parades.¹³

I cannot adequately condense a history of the gay rights movement into this brief response to Professor Rosenberg's Article, but even a cursory analysis of the gay rights movements reveals that the activities of gay right activists have in no way been limited to litigation strategies. In the modern period, what is now known as PRIDE (Lesbian, Gay, Bisexual, Transgendered, Transsexual, Queer and their Friends, Families and Supporters

6. See Janet E. Halley, *Reasoning about Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, Part III (1993) (discussing the definition of "Homosexual Conduct" as defined by the Court in *Bowers v. Hardwick*).

7. See Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805, 1828-32 (1993) (critiquing previous litigation strategies on this issue).

8. See TOBY MAROTTA, *THE POLITICS OF HOMOSEXUALITY* 71-99 (1981) (discussing the Stonewall riots in June 1969 and the emergence of the Gay Liberation Front).

9. See STEPHEN M. ENGEL, *THE UNFINISHED REVOLUTION: SOCIAL MOVEMENT THEORY AND THE GAY LESBIAN MOVEMENT* 54-57 (2001) (analyzing the gay and lesbian movement and its interaction with government).

10. *Id.* at 95; see also JONATHAN GOLDBERG-HILLER, *THE LIMITS TO UNION: SAME-SEX MARRIAGE AND THE POLITICS OF CIVIL RIGHTS* 115-16 (2002) (discussing the role that labor organizations have played in furthering gay rights); Kathleen E. Hull, *The Cultural Power of Law and the Cultural Enactment of Legality: the Case of Same-Sex Marriage*, 28 LAW & SOC. INQUIRY 629, 656 (2003) (promoting same-sex marriage to benefit the gay community and communicate a message to society).

11. GOLDBERG-HILLER, *supra* note 10, at 7-8; KATHLEEN E. HULL, *SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW* 70, 206 (2006). See Harvey Milk, *The Hope Speech*, in *WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS* 450-53 (Mark Blasius & Shane Phelan eds., 1997) [hereinafter *WE ARE EVERYWHERE*] (discussing gay politician Harvey Milk and reproducing his famous speech, "The Hope Speech"). Gay activists have also worked with members of government, at all levels, in an attempt to further gay rights. *Id.* at 741-42.

12. See *WE ARE EVERYWHERE*, *supra* note 11, at 741; GOLDBERG-HILLER, *supra* note 10, at 24-25; HULL, *supra* note 11, at 70 (discussing the use of educational strategies by the gay rights movement).

13. *WE ARE EVERYWHERE*, *supra* note 11, at 749; see also *Gay Pride History & Events Calendar*, <http://gaylife.about.com/cs/4/a/gaypridedates.htm> (last visited May 2, 2009) [hereinafter *Gay Pride History*] (providing a history of gay pride parades and a calendar of gay pride parades that take place around the country).

Pride Parade), began as a protest march commemorating the Stonewall Riots in New York City, which is considered the beginning of the modern gay rights movement.

The Stonewall Inn, a gay bar in Greenwich Village, New York, was raided by New York City police in the early morning hours of June 28, 1969, sparking violent resistance by patrons of the bar.¹⁴ This spontaneous resistance to state violence gave rise to the community activist group The Gay Liberation Front, which planned a march to commemorate the first anniversary of the Stonewall riots in June of 1970.¹⁵ That June weekend in 1970 saw demonstrations of commemoration not just in New York¹⁶ but also in Chicago,¹⁷ Los Angeles,¹⁸ and San Francisco.¹⁹ These marches ultimately morphed into the PRIDE parades we see today.²⁰

Although I may be alone in my declaration that these events are “traditional,” the idea of a march to commemorate social injustice perpetrated on group members is not only classic social movement strategy designed to organize the activist community and educate others,²¹ marches also were very in vogue in 1969.²² There was a whole civil rights movement going on that the Gay Liberation Front was clearly copying.²³

In addition to the annual parades that now occur all over the world the last weekend in June,²⁴ the gay rights movement has organized other marches that have the hallmarks of more traditional political protest. One march, modeled explicitly on Martin Luther King’s March on Washington, took place on April 29 and 30, 2000.²⁵ Hundreds of thousands of marchers

14. See WE ARE EVERYWHERE, *supra* note 11, at 787–88 (describing the historical context in which the Stonewall raid occurred and the resulting violent response).

15. *Id.* at 391–93.

16. *Id.* at 377.

17. *Id.*; see Gays and Lesbians, Encyclopedia of Chicago, <http://www.encyclopedia.chicagohistory.org/pages/509.html> (last visited May 3, 2009) (discussing the history of gays and lesbians in Chicago and the first Gay Pride Parade in Chicago, organized in June of 1970).

18. WE ARE EVERYWHERE, *supra* note 11, at 391–93.

19. *Id.*

20. Gay Pride History, *supra* note 13.

21. See ROGER S. POWERS ET AL., PROTEST, POWER, AND CHANGE: AN ENCYCLOPEDIA OF NONVIOLENT ACTION FROM ACT-UP TO WOMEN’S SUFFRAGE 83-85 (1997) (defining “civil disobedience”).

22. *Id. passim.*

23. *Id.* at 207–09.

24. See Ramon Johnson, 2009 Gay, Lesbian, Bisexual and Transgender Pride Calendar, <http://gaylife.about.com/od/gaypride/a/gaypridedates.htm> (last visited May 3, 2009) (listing 2009 Pride dates all over the U.S.; most are in late June).

25. Robin Toner, *A Gay Rights Rally Over Gains and Goals*, N.Y. TIMES,

participated in the “Millennium March” on Washington to hear speakers and performers advocating for basic human rights for members of the GLBT community including the right to marry, to be free from employment discrimination, for family rights (like adoption), and for more stringent hate crime laws and enforcement of existing laws (this was in the immediate wake of the Matthew Shepard murder).²⁶

The “Millennium March” was preceded by a similar march in 1993 which drew hundreds of thousands of marchers focused on HIV/AIDS activism.²⁷ These marches have played an integral role in advancing political agendas, raising public awareness of the problems faced by members of the GLBT community, and have shaped the political identity of the movement.²⁸

In addition to marching, gay rights advocates formed movement groups that performed all kinds of public awareness campaigns. For example, the group Act UP started an aggressive public awareness campaign to bring HIV and AIDS into the public eye.²⁹

Gay activists seeking acceptance of same-sex relationships follow Alinsky’s advice when he says a “good tactic is one your people enjoy,”³⁰ by holding public kiss-ins on college campuses, in city streets, and as part of awareness campaigns.³¹ The marriage equality movement, which is intimately tied with the rest of the GLBT social agenda, is not pursued only (or even primarily) in the courts. Activists are busily advocating equality using a variety of

May 1, 2000, at A14.

26. *Id.*; see also BETH LOFFREDA, LOSING MATT SHEPARD: LIFE AND POLITICS IN THE AFTERMATH OF ANTI-GAY MURDER 170–72 (2001) (reporting that Matt Shepard was killed in 1998, two years before the Millennium March took place).

27. Rene Sanchez & Linda Wheeler, *On the March, in Joy and Pain; Gay Activists Begin Gathering Amid Celebrations and Protests*, THE WASH. POST, Apr. 24, 1993, at A1.

28. For a complete analysis of the marches, the complexity of the relations among movement actors, and analysis of the previously understudied cases of mass protest in the GLBT movement, see AMIN GHAZIANI, THE DIVIDENDS OF DISSENT (University of Chicago Press, 2008).

29. Cynthia Crossen, *AIDS Activist Group Harasses and Provokes to Make its Point*, WALL ST. J., Dec. 7, 1989, available at <http://aidsinfobbs.org/articles/wallstj/89/367.txt>.

30. SAUL ALINSKY, RULES FOR RADICALS: A PRACTICAL PRIMER FOR REALISTIC RADICALS 128 (Vintage Books 1989) (1971).

31. See Anna Marie Smith, *Resisting the Erasure of Lesbian Sexuality, in MODERN HOMOSEXUALITIES: FRAGMENTS OF LESBIAN AND GAY EXPERIENCES* 200 (Ken Plummer ed., 1992) (describing a kiss-in held in London); Joanna Cattanach, *Gays, Lesbians Hold “Queer Kiss-in” Displays of Issues, Affection Outside DMA Part of Gay Rights Effort*, THE DALLAS MORNING NEWS, Feb. 8, 2009, at 10B (reporting on a kiss-in held in Dallas in February 2009).

techniques: parades, direct action, and public kiss-ins. My discussion here is limited to community building public strategies, but the GLBT also has employed comprehensive grass roots political mobilization as well.

III. DETERMINACY AND INDETERMINACY

We may all agree (as I do, for the record) that the state should not prohibit people who wish to marry from doing so because of the sex combination of the couple. But, this is not universally the case and likely is not even the unanimous opinion of community organizers who follow in Alinsky's footsteps. Even GLBT activists disagree on whether marriage is a desirable social goal.

In other words, social movements are internally contested. The idea that there is a universally shared goal within a social movement is an oversimplification that fails to accurately capture the dynamic. In all social movements, there are disparate and often competing sub-movements. The civil rights movement in the United States famously divided African-Americans and was heavily criticized for disenfranchising or otherwise subordinating the role of African-American women in the movement. African-American women's rights were not as important. Similarly, the feminist movement experienced growing pains around the marginality of women of color,³² women living in poverty,³³ lesbians,³⁴ and other marginalized women. The current feminist movement remains internally conflicted about the relative importance of equality along a number of dimensions including a very interesting debate between those who would abandon (or at least deemphasize) sexual harassment in favor of structural emphasis on equal pay.³⁵

Like these social movements, the gay rights movement is internally contested. Many GLBT activists see no value at all in marriage as a right (largely because they think that marriage is a problematic social institution) and would prefer instead to focus on

32. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139-40 (1989); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 586-87 (1990); ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* 114-32 (1988).

33. MEGAN SEELY, *FIGHT LIKE A GIRL: HOW TO BE A FEARLESS FEMINIST*, at xiv (2007); ALDON D. MORRIS, *ORIGINS OF THE CIVIL RIGHTS MOVEMENT* (Free Press, 1986).

34. NANCY LEVIT & ROBERT R. M. VERCHICK, *FEMINIST LEGAL THEORY* 29 (2006).

35. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L. J. 1683, 1796-1805 (1998).

employment anti-discrimination and equality, adoption, anti-hate crime legislation, and the like.³⁶

The indeterminacy of the goals of a social movement is contrasted by determinacy in other arenas that Professor Rosenberg underplays. Professor Rosenberg says that GLBT activists may (and should) choose to ignore the law and focus on other strategies.³⁷ But since the lawfulness of same-sex marriage is defined by the state, activists have no choice but to appeal using legal techniques. The state has the monopoly on the legal definition of marriage.³⁸ If the goal were acceptance in the workplace, education may be a great strategy. If the goal is to reduce hate crime on the basis of sexual assault, education and enforcement of existing laws may be successful. But if the goal is to be able to be married and to enjoy the legal advantages associated with that legal arrangement, then law necessarily must be involved.

Law itself is the only way that marriage equality can be achieved. Of course, law takes many forms and the essence of Professor Rosenberg's Article is that gay rights advocates should be wary of litigation strategies for social change. But law has been used to advance same-sex marriage in Iowa and Vermont. The Iowa Supreme Court struck down a state law defining marriage as a relationship between a man and a woman,³⁹ making Iowa the first state in the Midwest to allow same-sex marriage.⁴⁰ Just days later, the Vermont state legislature overturned Governor Jim Douglas' veto to allow same-sex marriage in that State.⁴¹ At the same time, Washington, D.C., is undertaking a plan to recognize same-sex marriages legitimately authorized in other states.⁴² New York State is advancing legislation to allow same-sex marriage as well.⁴³

In addition to heterogeneity of goals, movements themselves are diverse. We must not essentialize movement activists. Among

36. MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 84 (1999).

37. Rosenberg, *supra* note 4, at 664.

38. Nancy J. Knauer, *LGBT Elder Law: Toward Equity in Aging*, 32 HARV. J.L. & GENDER 1, 41-43 (2009).

39. *Varnum v. Brien*, No. 07-1499, 2009 WL 874044, at *29 (Iowa Apr. 3, 2009).

40. NPR, *State by State: The Legal Battle Over Gay Marriage*, Apr. 16, 2009, <http://www.npr.org/news/specials/gaymarriage/map/index.html>.

41. Abby Goodnough, *Rejecting Veto, Vermont Backs Gay Marriage*, N.Y. TIMES, Apr. 8, 2009, at A1.

42. *Id.*

43. *New York Governor to Propose Legalizing Same-Sex Marriage*, CNN, Apr. 14, 2009, <http://www.cnn.com/2009/POLITICS/04/14/ny.same.sex.marriage/>.

those involved in the same-sex marriage movement, it is estimated that half are straight.⁴⁴

Similarly, there is indeterminacy in how a movement can best advance its goals (even if there are multiple and even contradictory goals within the movement).

On the one hand, [a litigation strategy] seems sensible since until the first decade of the twenty-first century there were no legislatures that could be considered even remotely likely to extend marriage to gay men and lesbians. With the legislative route to social change blocked, same-sex marriage proponents turned to the courts. Several cases were brought in the 1970s, but to no avail.⁴⁵

First, the idea that there were “no legislatures that could be considered even remotely likely to extend marriage to gay men and lesbians,”⁴⁶ while probably true, reads like the *status quo ante* was neutral—that the state had no position on marriage. It was not. Marriage already had been defined by these state legislatures.⁴⁷ So, in choosing a forum, in addition to the problems associated with re-election of these legislators that would make them unlikely to extend rights to gays, it is worth noting that there were laws on the books that prevented marriage. There is not a “blank slate” moment in the gay rights movement because laws on the books restricted gay rights. So forum shopping among the branches of government does not begin in a vacuum.

Social movements, like all kinds of social processes, are

44. See Douglas NeJaime, *Marriage, Cruising, and Life in Between: Clarifying Organizational Positionalities in Pursuit of Polyvocal Gay-Based Advocacy*, 38 HARV. C.R.-C.L. L. REV. 511, 525-26 (2003) (stating that the largest national gay rights organization, the Human Rights Campaign, has a large number of straight allies and that straight people are just as invested in the same-sex marriage movement as homosexual people).

45. Rosenberg, *supra* note 4, at 648 & n.33. Rosenberg listed a number of the unsuccessful early cases:

Losing suits were brought in Minnesota, *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), Kentucky, *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973), and Washington, *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974). A similar fate met a case argued in 1993 in the courts of the District of Columbia, *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995). Same-sex marriage was also implicated in cases dealing with immigration status in *Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Cal. 1980) and divorce of an asserted common-law marriage in *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. 1984).

Id. at 648 n.33.

46. *Id.* at 648.

47. See, e.g., ALA. CODE § 30-1-19(b) (1975) (defining marriage as between a man and a woman); ARIZ. REV. STAT. ANN. § 25-101(c) (1996) (prohibiting same-sex marriage); 750 ILL. COMP. STAT. 5/213.1 (1996) (stating that same-sex marriage is contrary to public policy); MONT. CODE ANN. § 40-1-401(1)(d) (1997) (prohibiting same-sex marriage).

complicated. As academics and as people who did not live through the civil rights movement, it is easy to sit here and say that the civil rights movement was a worthy cause or that all people should have the right to marry. Social movements are necessarily disputing the social meaning of society, and there would not be a movement if there were no disagreement among different members of society about what is the correct outcome.

I am not here to say I think we should have segregated schools or that gay marriage should be illegal, but we have to start by recognizing that social movements are contested. As such, there will be resistance no matter what techniques are used to advance the social agenda. It may be true that state constitutional amendments are particularly difficult to undo, but there is backlash no matter what. That is the dynamic and interactive process of protest, resistance, and change.

I am not the first scholar to point out that there is a synergistic relationship between litigation strategies and other more populist social movement strategies for achieving social change.⁴⁸ Sometimes, when we look for law, all we see is law. And when we look for political protests, all we see is civil protests. In reality, most social movements are combinations of education, litigation, legislative and lobbying strategies, public outreach, and the like.

Although we tend to think that Rosa Parks, inspired by Martin Luther King Jr., singlehandedly began the Montgomery bus boycott and subsequent integration of public transportation in Montgomery, Alabama, the truth of that social movement involves a largely forgotten litigation strategy.⁴⁹

In addition to the variety of techniques employed by activists in the gay rights movement, his analysis of legal strategy only obscures the wide variety of goals that those people have for their participation.

IV. THE POWER OF LITIGATION

While Professor Rosenberg cautions us not to overemphasize the capacity of law generally and litigation in particular to advance social causes, I urge caution in underestimating the constitutive power of law in (a) the consciousness of ordinary citizens; (b) everyday interactions between people; and (c) the capacity of social movement organizations to survive.

48. Christopher Coleman, Lawrence D. Nee & Leonard S. Rabinowitz, *Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest*, 30 *LAW & SOC. INQUIRY* 663, 665 (2005) (discussing the synergy between litigation and populist movements in the Montgomery bus protests).

49. *Id.*

Litigation is the forum in which citizens make rights claims. I agree and have argued elsewhere, that rights are far from self-enforcing.⁵⁰ But rights are more than claims of ownership; they are claims about justice, legitimacy, and power (or resistance to power). And, especially for members of traditionally disadvantaged groups, "one's sense of empowerment defines one's relation to the law in terms of . . . rights/no-rights."⁵¹ Depending upon whether one is a member of a traditionally disadvantaged group, the language of legal rights provides a common ground for discourse, establishing community norms, and membership.⁵² For those who enjoy the benefits of various systems of unearned privilege defined by race, social class, and gender, rights may be less important for ensuring one's needs than they are for those who do not.

And it is not just material benefits that can flow from rights. Interpretive socio-legal scholars point out that law and society are interdependent; meanings, ideologies, rights, conceptions of rights, law, and social relationships are not static categories, but are continually being constructed, negotiated, altered, and resisted.⁵³ Thus, they share the theoretical orientation of many modern theorists that practice, structure, and ideology are interrelated.⁵⁴

Interpretive scholars look to the utility of rights in a variety of social settings to examine who invokes rights, when are rights claims made, and when are they successful, looking for both intended and unintended consequences of rights. This literature teaches us that legal rights are affected by the organizational settings in which they are applied, the nature of the competing claims being made to the rights-claims, and according to the different social locations of the individual rights claims.⁵⁵

50. See generally LAURA BETH NIELSEN, LICENSE TO HARASS: LAW, HIERARCHY, AND OFFENSIVE PUBLIC SPEECH (Princeton Univ. Press 2006); Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663 (2005).

51. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 403, 409 (1987).

52. See generally Neal Milner, *The Denigration of Rights and the Persistence of Rights Talk: A Cultural Portrait*, 14 LAW & SOC. INQUIRY 631 (1989); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987).

53. See generally PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE (The Univ. of Chicago Press 1998); NEW CIVIL RIGHTS RESEARCH (Ben Fleur-Steiner & Laura Beth Nielsen eds., Ashgate 2006); Christine B. Harrington & Barbara Yngvesson, *Interpretive Sociological Research*, 15 LAW & SOC. INQUIRY 135 (1990).

54. See generally PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE (Cambridge Univ. Press 1977).

55. See generally SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING

A. *Consciousness—Individuals and Rights*

Perfect legal knowledge does not automatically spring into the minds of individuals; individuals often do not know the rights they enjoy and when they have been breached.⁵⁶ But law and rights do affect individual self-perception and self-presentation.

In the arena of same-sex marriage, law has been shown to have a complex relationship with identity and marriage. Jonathan Goldberg-Hiller's case study of same-sex marriage convincingly argues that the effectiveness of rights-based social movements has privileged the "structural consequences" of rights at the expense of the social, cultural, and institutional contexts in which rights operates.⁵⁷ And Kathleen Hull convincingly demonstrates that narratives of law (along with romance and love) permeate same-sex marriage ceremonies whether or not they are legal sanctioned unions.⁵⁸ In other words, the law makes a difference in the minds of these individuals, and legal decisions that establish equality are meaningful in their minds even if they do not always lead to the kind of structural changes we would like to see.

B. *Organizations*

In the twenty-first century, you simply do not have a social movement in the United States without a litigation strategy. Whether we think *Brown v. Board of Education*⁵⁹ was useful in sparking the Montgomery bus boycott or inspiring the second freedom ride (and, to be clear, I do) and even if *Brown* did nothing to integrate the public school system in the United States (empirically, it is pretty obvious that it did little for integration—only anti-discrimination), *Brown* captured the public imagination as successful, as a victory for justice. It may not have been immediate, but the outcry over *The Hollow Hope*⁶⁰ comes in part from the fact that *Brown* has a cultural significance that (may) be bigger than the specific holding the case articulates. Indeed, this is the reason I continue to assign the *Hollow Hope* to my students.

EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS (1990); NIELSEN, *supra* note 50; AUSTIN SARAT & WILLIAM L. F. FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS 10-17 (1995); LAW IN EVERYDAY LIFE (Austin Sarat & Thomas R. Kears eds., 1993); Barbara Yngvesson, *Re-Examining Continuing Relations and the Law*, 1985 WIS. L. REV. 623 (1985).

56. William L. F. Felstiner, Richard L. Abel, & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 643 (1980).

57. GOLDBERG-HILLER, *supra* note 10, at 222–25.

58. HULL, *supra* note 11, at 28, 42.

59. 347 U.S. 483 (1954).

60. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008).

As scholars, we might think it is a silly, contrived, story for history classes at the fifth grade level, or even a vicious drain on resources that sets back a social movement, but *Brown* gave us the lasting legacy of a litigation strategy in a social movement. It has everything movement actors dream about—one day, with the stroke of a pen, laws can change (for example, the reversal of *Bowers*⁶¹).

I would not be a socio-legal scholar worth my salt if I did not point out that changing laws does not immediately or inevitably translate into changed social conditions. But it provides authoritative symbolic “victory” for movement activists that provide legitimacy for a social movement. Social movements are necessarily on behalf of oppressed groups and the argument that somehow the law would not tolerate such injustice if the right argument could be made is necessarily a part of a social movement.

V. CONCLUSION

In summary, I disagree with Professor Rosenberg when he says that same-sex marriage advocates have primarily relied on litigation strategies. Marches, parades, political organizing, and even kissing(!) make up the grass-roots mobilization tactics advocates have employed. His argument overstates the determinacy of social movements and is premised on a linear construction of social evolution that is not indicative of reality.

Finally, while I agree that social movement activists should not over-rely on law, Professor Rosenberg’s argument overstates the limits of litigation because he fails to consider certain very difficult to measure constitutive effects of rights claims and very tangible effects of fund raising in social movements.

Even so, his main point is that litigation is not merely benign, but harmful to a social movement and to the same-sex marriage movement in particular. The empirical evidence on the ground indicates otherwise. Positive movement toward marriage equality is occurring in a variety of states and forums. And arguing that litigation strategies are either “good” or “bad” fails to capture the complex ways in which validated claims of equality and fairness inspire others to join movements and make other kinds of demands. Law does not just operate in the voting booth, courtroom, or in congress. A long body of socio-legal scholarship teaches us that the law operates in the consciousness of everyday citizens in important ways that matter for social change.

Social movements are complex processes that evolve. Thus,

61. *Bowers v. Hardwick*, 487 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

the goals and tactics at the beginning may not be the same in the middle or at the end. Similarly, social movements are not made up of people who have precisely the same goals. Many gay and lesbian activists reject marriage as a goal for equality and there are many participants in the gay rights movement that are straight and even married. The complexity of movement processes and the interrelationship between litigation, political protest, legal consciousness, and activism require more careful analysis than Professor Rosenberg's.

