

# PROP 8: ADVANCING CIVIL RIGHTS THROUGH CULTURAL AND CONSTITUTIONAL CHANGE

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“If Prop 8 were undone and kids — like me growing up — could never know what this felt like, then I assume that their entire lives would be on a higher arc.”

Kris Perry

On August 4, 2010, Judge Vaughn Walker issued his historic decision in the landmark case *Perry v. Schwarzenegger*, upholding the right of gays and lesbians in California to marry.<sup>1</sup> This decision—the first of its kind from a federal court—set the stage for a world where Kris Perry’s heartfelt plea will become a reality. *Perry* has contributed to the emerging public consensus that people who are lesbian, gay, bisexual, or transgender (LGBT) should have the same right to marry the person they love that every other American citizen enjoys.<sup>2</sup> Judge Walker’s decision was a moving vindication of the most basic right of all: the right to one’s own family. *Perry*’s challenge to the revocation of marriage equality in California changed the national debate about LGBT civil rights and is affecting society far beyond the issue of marriage.

*Perry* has affected the work of LGBT advocates focused on issues other than marriage through two channels: doctrinal change and cultural influence. First, Judge Walker’s decision supporting heightened scrutiny for classifications based on sexual orientation or gender identity has begun to influence court decisions on impact issues affecting the LGBT community far beyond marriage. Second, the cultural legacy arising from *Perry*’s dialogue about LGBT civil rights has helped tell powerful personal stories of the effects of anti-gay discrimination and inequality that will continue to change the world for future generations.

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

2. See Ben Harris & Crosby Burns, *Marriage Equality Now a Mainstream Value*, CENTER FOR AMERICAN PROGRESS (July 10, 2012), [http://www.americanprogress.org/wp-content/uploads/issues/2012/07/pdf/polls\\_marriage\\_equality.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2012/07/pdf/polls_marriage_equality.pdf) (discussing polling data on same-sex marriage).

## I.

## DOCTRINAL LEGACY

Judge Vaughn Walker's groundbreaking finding that sexual orientation is immutable will likely be one of *Perry's* enduring legacies.<sup>3</sup> The decision recognized that gays and lesbians do not somehow choose their sexual orientation and that claims of successes with so-called change therapies are unsupported by the evidence.<sup>4</sup> Equally important to the future of LGBT rights in America was Judge Walker's declaration "that gays and lesbians are the type of minority strict scrutiny was designed to protect."<sup>5</sup> Applying strict scrutiny makes constitutional legal challenges easier by requiring laws that discriminate against people because of their sexual orientation or gender identity to meet the highest burden required by the courts when scrutinizing discriminatory laws. These developments, among others, hint at a more hopeful future in which LGBT people will be protected by the judicial process from laws targeting them on the basis of their identity.

The history of discrimination against LGBT people in America is as long as it is notorious.<sup>6</sup> Anti-gay advocates have long used challenges to the dignity of lesbians and gays as a political and legal tactic to deny gays and lesbians equality under the law.<sup>7</sup> They have done so by making pernicious accusations that gay men are predatory child molesters incapable of forming lasting unions and by criticizing lesbians as pathologically ill in their violation of expected female gender roles.<sup>8</sup> Anita Bryant famously crusaded to repeal an anti-discrimination ordinance by popularizing these types of attacks, and her rhetoric was replicated

3. *Perry v. Schwarzenegger*, 704 F. Supp. 2d at 966 ("Individuals do not generally choose their sexual orientation. No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation.").

4. *Id.*

5. *Id.* at 997.

6. See generally LINDA HIRSHMAN, *VICTORY: THE TRIUMPHANT GAY REVOLUTION* (2012); NEIL MILLER, *OUT OF THE PAST: GAY AND LESBIAN HISTORY FROM 1869 TO THE PRESENT* (2006).

7. See, e.g., Andrea Gardner, *Framing the Vote: Are Lawmakers Leading the Electorate or Following Public Opinion Preferences on Gay Rights Issues?* (forthcoming Apr. 2013) (unpublished B.A. thesis, Columbia University) (on file with author) (collecting examples of rhetorical attacks against LGBT people in federal legislative history). As one of myriad available examples, during the debate over the Defense of Marriage Act Representative Tom Coburn stated:

We hear about diversity, but we do not hear about perversity, and I think that we should not be afraid to talk about the very issues that are at the core of this. This is a great debate that we are going to have in our country, and it is not going to end with the debate on this bill. The fact is, no society has lived through the transition to homosexuality and the perversion which it lives and what it brought forth.

142 CONG. REC. H7441-03 (statement of Rep. Coburn) (1996).

8. See Ann M. Ciasullo, *Making Her (In)visible: Cultural Representations of Lesbianism and the Lesbian Body in the 1990s*, 27.3 *FEMINIST STUD.* 577, 577-608 (2001); Kylo-Patrick R. Hart, *Representing Gay Men on American Television*, 9.1 *J. MEN'S STUD.* 59 (2001).

in subsequent anti-gay ballot measures, such as California's Briggs Initiative.<sup>9</sup> Until 2004, homosexual relations could suffer the most serious sanctions the law provides in the form of criminal penalties imposed by sodomy laws.<sup>10</sup> To this day, certain religiously motivated therapists seek to somehow *cure* people of their homosexuality through the use of so-called conversion therapy—a practice grounded in junk-science and anti-gay bias.<sup>11</sup> Challenges to the humanity of gays and lesbians were seized upon by the Yes on 8 Campaign in their zealous quest to deny LGBT Californians of the right to marry.<sup>12</sup>

Challenges to the core identity of LGBT people have a stunning track record of success in the political realm.<sup>13</sup> As Dr. Gary Segura, a professor of political science at Stanford University, testified at trial in *Perry*:

There is no group in American society who has been targeted by ballot initiatives more than gays and lesbians. The number of ballot initiative contests since the first one in the late 1970's is probably at or above 200. Gays and lesbians lose 70 percent of the contests over other matters. They have essentially lost a hundred percent of the contests over same-sex marriage and now on adoption.<sup>14</sup>

The practical effects of these successful attacks have been devastating. Anti-gay advocates have used falsehoods and inflamed baseless fears about LGBT people to pass discriminatory voter initiatives and other laws targeting LGBT people as a class.<sup>15</sup> Courts' refusal to apply any form of heightened scrutiny to laws discriminating on the basis of sexual orientation led to many decisions upholding discrimination.<sup>16</sup>

9. MILLER, *supra* note 6, 366–91.

10. Lawrence v. Texas, 539 U.S. 558 (2003).

11. For example, California's groundbreaking law banning these practices for minor children includes statements by professional medical and psychological organizations condemning sexual orientation change efforts. See CAL. BUS. & PROF. CODE §§ 865–865.2 (West 2012).

12. Transcript of Record at 1918–90, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (2010) (No. 09-2292).

13. See, e.g., Associated Press, *Voters Pass All 11 Bans on Gay Marriage*, MSNBC (Nov. 3, 2004), <http://www.msnbc.msn.com/id/6383353/ns/politics/t/voters-pass-all-bans-gay-marriage/>.

14. Transcript of Record, *supra* note 12, at 1543.

15. Ciasullo, *supra* note 8, 577–608; Hart, *supra* note 8. See, e.g., *YesOnProp8, It's Already Happened*, YOUTUBE (Oct. 7, 2008), <http://www.youtube.com/watch?v=0PgjcqFYp4> (advertisement admitted into evidence in *Perry* as PX0099); E.J. Schultz, *Prop. 8 TV Ad Raises Questions: Controversy Swirls Around the Teaching of Gay Marriage in School Classrooms*, MERCED SUN-STAR, Oct. 15, 2008, available at <http://www.mercedsunstar.com/2008/10/15/499057/prop-8-tv-ad-raises-questions.html>.

16. Heightened scrutiny has never been applied by a federal appellate court to LGBT people as a class. The issue of heightened scrutiny is presently before the United States Supreme Court in *Hollingsworth v. Perry*. See Roberta A. Kaplan & Julie E. Fink, *The Defense of Marriage Act: The Application of Heightened Scrutiny to Discrimination on the Basis of Sexual Orientation*, 2012 CARDOZO L. REV. DE NOVO 203 (2012) (arguing that “heightened scrutiny should be applied to laws that discriminate on the basis of sexual orientation.”).

Fortunately, the legal landscape for the rights of lesbians and gays has dramatically improved since *Perry* was first filed in May of 2009. A string of victories has changed the potential future for the rights of LGBT people. These victories include federal decisions striking down section three of the Defense of Marriage Act,<sup>17</sup> the Ninth Circuit's affirmation of *Perry* on appeal,<sup>18</sup> Justice Ginsburg's opinion refusing to permit cloaking sexual orientation discrimination under the guise of regulating conduct,<sup>19</sup> and the Justice Department's newfound support for making "classifications based on sexual orientation [] subject to a heightened standard of scrutiny."<sup>20</sup> These developments indicate a nascent doctrinal shift in the federal courts toward the application of some form of heightened scrutiny to laws that discriminate against people because of their sexual orientation or gender identity.<sup>21</sup> Adoption of heightened scrutiny would accelerate LGBT peoples' move from second-class to full citizenship—free from official discrimination in housing, public accommodations, and employment; able to marry the person they love and to form their own families; celebrated as part of the American story of increasing inclusion. To borrow a sentiment from David Blankenhorn, we will indeed be closer to the American ideals of freedom and equality the day LGBT people ultimately obtain equal treatment under the law; and this day is coming.<sup>22</sup>

## II. CULTURAL LEGACY

*Perry*'s cultural legacy may prove even more enduring than these vital doctrinal shifts. The stories told at the Prop 8 trial are being retold in theatres, legislatures, and homes around the country, weaving the stories of both LGBT suffering and inclusion into the fabric of the long American struggle for civil rights.

Theatrical works are bringing the issues at the heart of *Perry* to communities across the country, inspiring dialogue about LGBT civil rights and discrimina-

17. See *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 682 F.3d 1 (1st Cir. 2012), *aff'g* *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010); *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012); *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012), *cert. granted*, 81 U.S.L.W. 3116 (U.S. Dec. 7, 2012) (No. 12-307); *Pedersen v. Office of Pers. Mgmt.*, \_\_\_ F. Supp. 2d \_\_\_, No. 3:10-cv-1750, 2012 WL 3113883 (D. Conn. July 31, 2012).

18. *Perry v. Brown*, 671 F.3d 1052, 1052 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

19. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010) ("Our decisions have declined to distinguish between status and conduct in this context.").

20. See Letter from Eric Holder, U.S. Attorney Gen., Dep't of Justice, to John Boehner, Speaker, U.S. House of Reps. ¶ 13 (Feb. 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

21. Recent political victories for marriage equality demonstrate voters are extending bedrock principles of equality to LGBT people. See Ben Brumfield, *Voters Approve Same-Sex Marriage for the First Time*, CNN (Nov. 7, 2012), <http://www.cnn.com/2012/11/07/politics/pol-same-sex-marriage/index.html>.

22. Transcript of Record, *supra* note 12, at 2803–06.

tion in American society. Frustrated that the video recording of the trial remains under seal by court order, the American Foundation for Equal Rights (the sponsor of *Perry*) created *8 the Play*, reproducing the stories found in transcripts of the trial.<sup>23</sup> Free licensing allows schools and non-profit groups to perform the play, and thus the trial, to audiences all over the country.<sup>24</sup> Stars such as Kevin Bacon, Jane Lynch, George Clooney, John Lithgow, Morgan Freeman, and Yearley Smith lent their celebrity to productions of the play in New York and Los Angeles. Other playwrights have written plays about the *Perry* case, such as Kristin Carlson's *Unmarried in America*.<sup>25</sup> The dialogue inspired by these productions will continue to help forge a better, more equal world for LGBT people and for us all.

The power of *Perry*'s cultural legacy comes from the power of storytelling. In *Perry*, we are confronted by the stories of real life folks suffering because of anti-gay bias. In the pages of the trial transcript, we read Jeff Zarrillo's compelling declaration of love for his partner Paul Katami:

He's the love of my life. I love him probably more than I love myself. I would do anything for him. I would put his needs ahead of my own. I would be with him in sickness and in health, for richer, for poorer, death do us part, just like vows. I would do anything for him. And I want nothing more than to marry him.<sup>26</sup>

We also read the stirring account of the Republican mayor of San Diego, Jerry Sanders, describing the evolution of his support for his lesbian daughter, and we read the story of Kris Perry and Sandy Stier trying to raise two teenage sons.<sup>27</sup>

Coming into contact with these stories moves the cause of equality forward by changing hearts and minds. One needs to look no further for proof of this maxim than my own story. On January 20, 2010, I took the stand in *Perry* and testified about my experiences with the psychological abuse of anti-gay so-called conversion therapy.<sup>28</sup> The story I told was deeply personal; it was the story of my parents' discovery of my sexual orientation and their subsequent rejection of me. In a desperate attempt to somehow *fix* me, my parents sent me to a series of conversion therapists, including one based in Southern California. What followed was a decade of struggle that included drug abuse, occasional homelessness, and thoughts of suicide. Telling my story in the challenge to Proposition 8 helped to expose the argument that LGBT people choose their sexual orientation or gender identity for the falsehood that it is, and it was an emotionally powerful

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23. Dustin Lance Black, 8, *THE PLAY* (2011).

24. See 8, *THE PLAY*, <http://www.8theplay.com/8-media/press-coverage/> (listing productions of the play and media coverage).

25. KRISTIN CARLSON, *UNMARRIED IN AMERICA* (2011).

26. Transcript of Record, *supra* note 12, at 79–80.

27. *Id.* at 1265–85, 161.

28. *Id.* at 1504–22.

moment in the trial. After my testimony in *Perry*, I continued to advocate for issues affecting the LGBT community. In 2012, Ted Lieu, a California state senator, saw an interview I gave to CNN in which I spoke of my experiences. Inspired in part by my story, Senator Lieu introduced Senate Bill 1172, a landmark piece of legislation banning anti-gay conversion therapy for minor children. On September 29, 2012, Governor Jerry Brown signed Senate Bill 1172 into law, making history by enacting the first ban of this type in the United States.<sup>29</sup> This law will not only protect children from a discredited and dangerous practice, but it is also “a major victory against the rhetoric of demonization so often employed by those who seek to diminish our humanity.”<sup>30</sup>

*Perry* has also changed the work of LGBT advocates focused on issues other than marriage through the legal shifts and cultural effects described above. It is possible, if not likely, that we are at the beginning of doctrinal changes that will apply heightened scrutiny to classifications based on sexual orientation or gender identity—a result unexpected by the legal academy and an action not taken by the federal courts in over forty years. The effect of such a shift would impact issues affecting the LGBT community far beyond that of marriage. More importantly, the cultural legacy of *Perry* has ushered in a new dialogue about LGBT civil rights, and through the stories it tells this landmark case will continue to change the world for generations to come.

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29. CAL. BUS. & PROF. CODE §§ 865–865.2 (West 2012).

30. Sunnive Brydum, *With California, So Goes the Nation?*, THE ADVOCATE (Oct. 2012), <http://www.advocate.com/print-issue/current-issue/2012/10/03/california-so-goes-nation>.