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Article in *Administrative Theory & Praxis* · September 2013

DOI: 10.1080/10841806.2013.11029932

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Bureaucratic Discretion and Same-Sex Couples

Considering Administrative Advocacy as an Activism Strategy

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ABSTRACT

This article considers the role that bureaucratic discretion can play in expanding access to government resources and government legitimacy for same-sex couples during periods of policy ambiguity, and how efforts to shape the use of bureaucratic discretion can be used as moments of political activism by same-sex marriage advocates. Special attention is given to the heightened role of bureaucratic discretion in the context of policy ambiguity surrounding gay marriage in California, before the U.S. Supreme Court's decision in the historic Hollingsworth v. Perry case.

In spite of Woodrow Wilson's call for a sharp dichotomy between politics and administration (Wilson, 1887), modern scholars of public administration have long acknowledged bureaucracy as an innately political institution. Bureaucratic agencies are sites of political conflict and negotiation, and bureaucrats both respond to and shape their political environments (Bryner, 1987; Cooper, 1982; Epstein & O'Halloran, 1999; Fording, Soss, & Schram, 2007; Goggin, Bowman, Lester, & O'Toole, 1990; Huber & Shipan, 2002; Huber, Shipan, & Pfahler, 2001; Keiser, 1999; Keiser, Mueser, & Choi, 2004; Lewis, 2003; Potoski, 1999; Riccucci, 2005; Weissert, 1994; Wood & Bohte, 2004). Street-level bureaucrats are given particular attention in the literature due to the highly discretionary nature of their work (Greenley & Kirk, 1973; Hasenfeld & English, 1974; Lipsky, 1977, 1980; Maynard-Moody & Musheno, 2000; Prottas, 1978, 1979). Street-level bureaucrats not only frequently engage in discretionary decision-making in response to the challenges posed by front-line work environments, but also shape their decisions in response to, and in anticipation of, the perceived preferences of their political masters (Canes-Wrone, 2003; Gilboy, 1992; Keiser & Soss, 1998; Meier, 2000).

Bureaucratic discretion is much discussed, in part, because of its implications for equity. When concerns about equity are raised, the focus is usually on how bureaucratic discretion can be misused in ways that systematically disadvantage minorities or other marginalized groups (Halland & Sutton, 2003;

Katz, 1989; Keiser et al., 2004; Key, 1949; Lieberman, 1998; McConnell, 1966; Piven & Cloward, 1977; Williams, 2009). (Some exceptions to this are discussions of representative bureaucracy and active representation, whereby public servants make a specific effort to address the needs of minority groups [Meier & Bohte, 2001; Meier & Stewart, 1992; Saltzstein, 1979; Sowa & Selden, 2003].) Organizational restrictions that constrain discretion are suggested as necessary to protect citizens from the impulses of individual public servants and to reduce the potential for bureaucrats to interject personal biases into decision-making (Blau & Meyer 1971; Burke 1986; Kaufman 1977). As Krislov and Rosenbloom caution, "it is not the power of public bureaucracies per se, but their unrepresentative power, that constitutes the greatest threat to democratic government" (1981, p. 21).

In spite of these concerns, this article considers how bureaucratic decisions instead may be used to increase access to government benefits, resources, and legitimacy for same-sex couples. This potential is examined in the context of shifting views on same-sex marriage, policy ambiguity surrounding same-sex marriage in California, and the potential for administrative advocacy to change agency cultures and target discretionary decisions in ways that positively affect same-sex individuals.

Policy Ambiguity, Bureaucratic Discretion, and Same-Sex Marriage in California

Theories of bureaucratic discretion emphasize that opportunities for bureaucratic discretion are heightened by policy ambiguity (Lipsky 1977, 1980; Matland 1995). Use of discretion is of necessity greater when public servants are confronted with unclear or frequently changing policy guidelines. Policy regarding same-sex marriage in California has experienced frequent shifts in recent years, and the status of certain couples has been highly ambiguous, as a complex series of voter initiatives and court cases has taken place.

A simplified history follows: In 2000, California's Proposition 22 was passed, restricting marriage to opposite-sex couples. Proposition 22 was declared unconstitutional in May 2008 by the California Supreme Court, lifting the ban on same-sex marriage and initiating a flood of marriage license applications statewide. Some 18,000 same-sex couples were married that summer, but in November 2008 Proposition 8 was passed, which added language to the California Constitution restricting marriage to a relationship between a man and a woman. In May 2009, the California Supreme Court, in the case *Strauss v. Horton*, upheld the validity of the changes made to the California Constitution by Proposition 8, but also held valid the 18,000 same-sex marriages already in existence. In August 2010, Proposition 8 was overturned by the U.S. District Court in the case *Perry v. Schwarzenegger* (later *Perry v. Brown*, then *Hollingsworth v. Perry*), and in February 2012 the Ninth Circuit

Court of Appeals affirmed the prior court's decision overturning Proposition 8. The U.S. Supreme Court heard oral arguments in the case *Hollingsworth v. Perry* in March 2013, and in June 2013 upheld the prior court's decision, reinstating same-sex marriage in California.

One can imagine the numerous ambiguities faced in recent years by public servants in Californian bureaucracies that administer the entitlements associated with marriage. Initial lack of clarity over the validity of same-sex marriages officiated before Proposition 8, and frequent uncertainty regarding whether various court decisions would be immediately implemented or stayed, have added to the already confusing environment created by frequent policy change. This policy ambiguity, combined with the fact that marital status frequently is relevant to local, state, and federal procedures, creates numerous opportunities for discretionary decisions by bureaucrats.

A Tale of Citizen-Bureaucrat Interaction

In April 2011, Nathan Bauer and Ira Spector registered their domestic partnership with the state of California. Shortly thereafter, the couple received their official domestic-partnership documentation by mail with certification of their new, legally recognized last name, Bauer-Spector. The Bauer-Spectors set about the task of getting their names changed on their driver's licenses and other documents, and eagerly purchased airline tickets for summer travel to perform marriage ceremonies with family in other states. The tickets were purchased under their new, legally changed name.

In order to change their names on their driver's licenses, the most commonly accepted form of photo identification, the Bauer-Spectors first would need to change their names on their social security cards. They understood from married friends that this process would be quick and relatively routine. Ira called the Social Security Administration (SSA) to find out whether an appointment was necessary, and the representative said it was not, but in order to be helpful offered to let Ira know which documents the couple would need to bring. When Ira said they would be bringing the domestic-partnership document as proof of name change, the representative immediately asked whether Ira meant his marriage document. When Ira replied "no," the representative asked him, "You know that you are not actually married, right?" Ira, a same-sex marriage activist, assured the representative that he was well aware that he was not permitted to marry. The representative then informed Ira that he personally was in favor of same-sex marriage but that the law was the law, and while the state could change the couple's name, the federal government could not do so without a marriage document. The representative reminded Ira that he could legally change his name through a process independent of the SSA, but the Bauer-Spectors knew that this was an expensive and time-consuming process. In California, the name-change process involves advertising the

name change in a newspaper of sufficiently large circulation for four weeks in advance of the change. The legal fees and the advertising costs would add up to approximately \$800 for the young couple, not to mention the possible fees associated with changing their names on their airline tickets if the process could not be completed in advance of their summer travel plans.

“That is when I put my Master in Public Administration to work,” stated Nathan. He pored over SSA policy and found, buried deep within the code, a recent policy indicating that domestic-partnership documents from California were a valid document for changing one’s name with the SSA. The Bauer-Spectors went to the SSA office to process their name change, armed with a printed version of the policy. They were surprised to find that the representative with whom they worked on this occasion was already familiar with the policy and did not contest the validity of the domestic-partnership agreement. However, the representative indicated that it was the first time that she had used a domestic-partnership agreement to process a name change. “She seemed very nervous,” Nathan indicated. “She kept going to check with people, as if to make sure it was okay, even though she didn’t dispute the policy. The representatives were visibly unfamiliar with the process and seemed very unsure of themselves and their authority.” In spite of this uncertainty, the Bauer-Spectors ultimately were able to change their legal names with the SSA that day.

Bureaucratic Decisions as Sites of Advocacy and Activism

The preceding story illustrates several interesting aspects of bureaucratic discretion, policy ambiguity, and citizen interaction with the state. The disagreement among representatives in the same SSA office about whether domestic-partnership documents could be used to change citizens’ names shows clear policy ambiguity within the organization. The second SSA representative’s apprehensiveness about implementing the policy, in spite of being aware of its validity, shows the trepidation bureaucrats may experience in the face of unclear or frequently changing policy.

However, the story also shows promising venues for administrative advocacy. Scholars have found that an organization’s culture can have a moderating effect on the ways in which discretion is exercised (Kelly, 1994; Scott, 1997). Although there is variation geographically and across demographic subgroups, broadly speaking support for same-sex marriage has grown substantially in California (Lewis & Gossett, 2008) and nationwide (Baunach, 2012) in the past twenty years. As opinions shift among members of the bureaucracy, we may see shifts in organizational culture that shape discretion and lead to more active representation of the LGBTQ (lesbian, gay, bisexual, transgender, queer) community. For example, in this story, the first SSA representative indicated that he was supportive of same-sex marriage. In spite of being misinformed

about the SSA's policy regarding use of domestic-partnership documents for name changes, the agency representative put forth extra effort and attempted to help Ira think of solutions to the name-change dilemma, even though the options fell outside the purview of his agency. In addition to shifts in organizational culture that may occur due to shifts in the broader culture, advocacy organizations may have an opportunity to engage in concerted efforts to educate agency administrators in ways that can shape culture and discretion.

Research indicates that citizens who are more educated, informed, and articulate have a greater ability to pressure bureaucrats to modify their use of discretion and thus receive proportionately greater benefits (Tripi, 1984). The Bauer-Spectors certainly fall into this category, but what are the implications for other members of the LGBTQ community who, unlike Nathan, do not have a graduate degree in public administration? LGBTQ advocacy groups can and should play a role in educating both citizens and the bureaucracy about legal rights and challenges pertaining to same-sex couples. Research shows that negotiating with the bureaucracy and engaging in administrative advocacy can be a means of ensuring better services and greater access for marginalized groups (Handler, 1992; Malekoff, 2000; Soss, 2000; Williams, 2009).

Advocacy groups can also have substantial impact by educating LGBTQ citizens about their personal interactions with the bureaucracy, their rights, and strategies for being self-advocates. Research with members of low-income communities demonstrates that contact with advocacy groups provides citizens with vital sources of information and support (Handler, 1992) and that support from advocacy groups can positively affect citizen-bureaucrat interactions (Soss, 2000). Activists have an important opportunity in targeting moments of bureaucratic discretion as a site of activism.

Administrative advocacy is often a neglected advocacy strategy and not without reason. Aside from the fact that such acts often occur with little visibility or fanfare, individual procedural solutions do not provide a panacea for injustice and inequality. Involvement in administrative processes can drain time and energy activists would prefer to spend on broader policy change (Williams, 2009). These perspectives, while valid, overlook the important influence that bureaucratic decisions can have on the life opportunities of individuals. These decisions can have a critical impact on quality of life, while advocates simultaneously engage in pursuing broader-reaching policy change. Also overlooked is the process of political consciousness-raising that can transpire for citizens as they engage in effective self-representation with functional and responsive bureaucratic institutions (Soss, 2000). Citizens who become empowered during their day-to-day interactions with the state may then be emboldened to engage in further-reaching activist activity. In developing advocacy strategies to represent the needs of same-sex couples, I would urge activists to follow Lucy Williams's (2009) call to "search for pockets of transformative opportunity in administrative practice" (p. 48).

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