

## ONE

### The Puzzle of Gay Rights Litigation

Attorney Bill Thom came across a request for a gay lawyer as he was reading a magazine one day in 1972. Although he was closeted at his midtown Manhattan law firm, Thom was active in the Gay Activists Alliance, one of several gay liberation groups formed in the immediate aftermath of the Stonewall Riot.<sup>1</sup> He decided to reply to the request and discovered that he was the *only* person willing to come forward. As Thom later recalled, the event brought home to him the need for lesbians and gay men to have legal representation. He envisioned an organization that would work to advance gay civil rights just as the National Association for the Advancement of Colored People (NAACP) Legal Defense and Educational Fund had advanced the civil rights of African Americans. Marshaling a small group of gay lawyers, he filed papers in 1972 to create the nation's first public interest law firm dedicated to the advancement of gay rights: the Lambda Legal Defense and Education Fund.<sup>2</sup>

In New York, voluntary associations can only practice law if they are “organized for benevolent or charitable purposes, or for the purpose of assisting persons without means in the pursuit of any civil remedy.”<sup>3</sup> To ensure that Lambda's petition for incorporation as a nonprofit law firm met these guidelines, Thom copied verbatim from the application of the Puerto Rican Legal Defense and Education Fund—a group that had been granted approval by the New York courts only a few months earlier. Where the latter application said *Puerto Ricans*, Thom simply altered the text to say *homosexuals*. The completed petition stated that Lambda would engage in a number of activities designed to protect the civil rights of lesbians and gay men, including

providing without charge legal services in those situations which give rise to legal issues having a substantial effect on the legal rights of homosexuals [Puerto Ricans]; to promote the availability of legal services to homosexuals [Puerto Ricans] by encouraging and attracting homosexuals into the legal profession; to disseminate to homosexuals [Puerto Ricans] general information concern-

ing their legal rights and obligation, and to render technical assistance to any legal services corporation or agency in regard to legal issues affecting homosexuals [Puerto Ricans]. (Quoted in *In re Thom*, 1972, 589)

The application was denied.

According to the three-judge panel assigned to review it, Lambda's purpose was neither benevolent nor charitable. No parallel existed, they wrote, between Lambda and the Puerto Rican Legal Defense and Education Fund. Puerto Ricans needed a legal defense fund because widespread indigence effectively deprived them of legal representation. Homosexuals were in a different situation. While they too faced widespread discrimination, the difficulties they had in securing legal representation merely reflected "a matter of taste" on the part of individual lawyers. In response to this decision, Lambda became its own first client, suing to establish its very right to exist. Thom made two major claims in his appeal to New York's highest court (which is incongruously called the Court of Appeals). Drawing on U.S. Supreme Court precedent holding "collective activity undertaken to obtain meaningful access to the courts [to be] a fundamental right within the meaning of the First Amendment,"<sup>4</sup> he argued that the lower court's decision infringed impermissibly on the speech and association rights of homosexuals. He also argued that the lower court's denial of Lambda's application after approving the virtually identical application of a similarly situated group raised serious equal protection considerations under the Fourteenth Amendment.

Persuaded by Thom's argument, the Court of Appeals reversed the lower court's decision and remanded the case to the lower court for a reevaluation of Lambda's incorporation papers. With little option to do otherwise, the lower court reluctantly granted the application—with one modification. Refusing to lend their approval to the purpose of encouraging homosexuals to enter the legal profession, the three judges used their discretion to strike that clause from Lambda's charter.

The Lambda Legal Defense and Education Fund was officially authorized to practice law on October 18, 1973, nearly eighteen months after the organization was first conceived. Thom deposited twenty-five dollars into a bank account, installed a second phone line in his Manhattan apartment, and added Lambda's name to his mailbox. Lesbians and gay men requesting legal assistance began phoning almost at once.

Lambda's struggle to incorporate speaks volumes about the sociolegal position of lesbian, gay, and bisexual (lgb) people in the 1970s. The notion that homosexuals had the "right" to be free from discrimination

based on their sexuality seemed absurd to many. The notion is still a contested one today, but in the intervening years the issue has moved from the fringes of American social consciousness to a central position. The issues in contention have been myriad. The question of gay rights has entered areas as diverse as the bedroom, boardroom, and battlefield. The possibility of same-sex marriage, the creation of civil unions in Vermont, the “Don’t Ask; Don’t Tell” compromise over military service by lgb people, the referenda on antigay initiatives in several states (most notably Colorado and Oregon), and the criminal regulation of same-sex sexual conduct are among the most visible and fractious of the disputes over the extent and propriety of gay rights.

Yet they are only the tip of the figurative iceberg. The movement has also encompassed a host of other concerns, including AIDS (mandatory testing, patient confidentiality, and employment and housing discrimination); employment (hiring and firing, provision of benefits, and sexual harassment); family (custody, adoption, guardianship, inheritance, and housing); schools (teachers, curricula, library offerings, student groups, and peer harassment); immigration; prison; and even parades.

Lambda has played an important role in all of these issues. Like the civil rights and women’s movements before it, the modern gay rights movement has been transformational in nature, in that it has engaged a broad range of issues that deeply affect individual living experiences. It has differed from its predecessors, however, in that the courts have been the primary locus of movement activity. In the years since Lambda’s incorporation, virtually every gay rights concern has been the subject of sustained litigation, either by Lambda itself or by the handful of other gay rights law firms that have emerged.

This book is about the role of litigation in the movement for gay rights. More specifically, it seeks to answer two questions. First, under what circumstances are gay rights claims more or less likely to prevail in court? Second, what impact does winning—or losing—in court have on the real lives of lgb people? That is, does litigation matter? Both of these questions tie into large and contentious bodies of scholarly inquiry. I address the first now but hold off on discussing the second until later in the chapter.

## Gay Rights in Court

Courts have varied enormously in their treatment of gay rights claims. Two Supreme Court cases dealing with the same subject—the constitutionality of sodomy laws—vividly illustrate this phenomenon.

In *Bowers v. Hardwick* (1986), gay rights litigators attempted to use the courts to overturn a Georgia law that prohibited oral and anal sex, even when performed by consenting adults in private. Such laws were widely considered by activists as the bedrock of discrimination against lgb people because they were invoked to justify discrimination in multiple domains, including employment, military service, housing, public accommodations, immigration, speech and association, custody, adoption, marriage, and the provision of government benefits.<sup>5</sup>

*Bowers* was a carefully selected test case designed to build on a decade of legal and political mobilization—a decade in which seventeen states had eliminated their sodomy provisions. Lambda, the American Civil Liberties Union (ACLU), and other gay rights activists hoped *Bowers* would serve as the mechanism for voiding sodomy laws in the remaining states. The strategy backfired, however, when the Supreme Court upheld the constitutionality of Georgia's sodomy law by a 5–4 vote. Laws against sodomy had “ancient roots” according to the majority opinion, and against such a legal backdrop the notion that homosexuals had a right to engage in sodomy was, “at best, facetious” (*Bowers*, 192, 193–94).

Seventeen years later, the Supreme Court reconsidered the constitutionality of sodomy laws. Like *Bowers*, *Lawrence v. Texas* (2003) was a test case designed to build on years of political and legal mobilization. By the time Lambda appealed *Lawrence* to the Supreme Court the number of states with sodomy laws had dropped to thirteen; gay rights activists hoped that the high court would strike the remaining laws down. This time they prevailed. In a 6–3 decision, the Court overruled *Bowers*, finding that its “continuance as precedent demean[ed] the lives of homosexual persons” and stating that the gay male couple in the case were “entitled to respect for their private lives” (*Lawrence*, 2482, 2485).

How are we to make sense of the varying ability of Lambda and other litigators to mobilize the law on behalf of gay rights? Existing scholarship on litigation campaigns and legal change offers useful suggestions.

According to the bulk of studies examining litigation campaigns, the primary factor influencing an interest group's or social movement's success in court is its ability to mobilize organizational resources. My reading of the literature finds eight resources to be the most commonly mentioned. They are sufficient staff, preferably “expert,” to handle cases in progress and to respond to new litigation opportunities (Manwaring 1962; Meltsner 1973; Sorauf 1976; Tushnet 1987); an internal organization facilitating coordination of litigation efforts (Cowan 1977; Greenberg

1977; Lawrence 1990; Meltsner 1973; Rubin 1987; Sorauf 1976); skill in forming coalitions with allies (Handler 1978; Kluger 1975; Vose 1959); the generation of extra-legal publicity (Cortner 1968; Vose 1959); adequate funding to support the litigation campaign (Cortner 1968; Handler 1978; Olson 1984; Rubin 1987; Sorauf 1976; Tushnet 1987; Vose 1959); control over the initiation and progress of litigation (Kluger 1975; Sorauf 1976; Wasby 1983); a sufficiently long time line to litigate repeatedly (Galanter 1974; Greenberg 1977; Kluger 1975; Vose 1959); and support from the Department of Justice and/or the solicitor general (Cortner 1968; Krislov 1963; Vose 1959).

It seems abundantly clear at this point that any account of Lambda's varying ability to mobilize the law on behalf of gay rights must carefully consider Lambda's access to organizational resources. But an emerging body of scholarship on the courts and legal change suggests that an account that focused solely on Lambda's ability to marshal resources would miss crucial aspects of the story. In recent years, sociolegal scholars have begun to embrace an approach known as "new institutionalism"<sup>6</sup> to examine the circumstances under which legal change does and does not occur. This approach emphasizes the relationship between actors and the sociopolitical institutions within which they operate. In other words, new institutionalist approaches take as their frame of reference what Theda Skocpol (1984, 1) has called "the interplay of meaningful actions and structural contexts."<sup>7</sup>

Scholars working within the vein of new institutionalism have emphasized a wide variety of structural determinants. Some have concerned themselves primarily with endogenous constraints on the courts, examining such factors as the norm of collegiality on multimember courts, the "rule of 4" for granting certiorari in the U.S. Supreme Court, and the legal requirements for filing lawsuits (Epstein and Knight 1998; Kahn 1999; Maltzman, Spriggs, and Wahlbeck 2000). Others have focused more on the constraints placed on the courts by exogenous institutions such as the legislative and executive branches, organized interests, and the population at large (Epp 1998; Epstein and Kobylka 1992; Eskridge and Frickey 1994). Still others have looked at the relationship between courts and deeply embedded social structures such as race, class, and gender (Kahn 1996; Smith 1995). Most commonly, though, scholars pick and choose several different kinds of constraints from the grab bag of institutional possibilities.

From a new institutionalist perspective, any explanation of why Lambda and other organized litigators have been more successful in

some cases than in others must weigh Lambda's actions against the larger legal and political institutions within which gay rights claims are made.<sup>8</sup> It follows that this account must also identify *which* of the myriad possible institutional factors are relevant at any particular point and articulate the ways in which these institutional factors interact both with Lambda and with each other to facilitate or retard legal change.

In this book I develop and deploy a theoretical perspective that does just that. Specifically, my legal opportunity structure (LOS) approach seeks to explain the dynamics of legal change through an examination of the institutional and sociological factors that shape the decisions made by legal actors. This theoretical perspective draws heavily on recent social movement scholarship on political opportunity structure (POS) and frame alignment processes. I lay out the central features of these two concepts next.

## Structuring Political Opportunity

In recent years, the concept of political opportunity structure has emerged as the most promising method of integrating the emergence, progress, and outcomes of social movements with the social context in which they operate. Political opportunity structure refers broadly to the institutional and sociocultural factors that shape social movement options—by making some strategies more appealing and/or feasible than others.

Peter Eisenger coined the term in his study of protest in forty-three American cities.<sup>9</sup> His argument was that the incidence of protest was related to the ability of potential protestors to “gain access to power and to manipulate the political system [from within]” (Eisenger 1973, 25). Likewise, Doug McAdam (1982) found that the rise of black insurgency in the United States in the period from 1930 to 1954 was due in large part to shifting political conditions resulting from greater black urbanization, education, and income levels. In the twenty-five or so years since its origination, the concept of political opportunity has become a staple in the study of social movements. It has been used to examine causes as diverse as the civil rights movement (Button 1989; McAdam 1982); the women's movement (Banaszak 1996; Costain 1992); the labor movement (Burstein 1991; Ruggie 1987); and the antinuclear movement (Kitschelt 1986; Meyer 1993).

One of the great strengths of political opportunity structure as a con-

cept is its balancing of agency between state and social movement (Gamson and Meyer 1996). The political configuration of the state shapes the opportunities afforded to movements; shifts in that configuration can open or close “windows” for action. Conversely, social movements can influence the political configuration of the state; through their actions, they can forge opportunities.

A corresponding weakness of the concept is its definitional plasticity. Sidney Tarrow (1988, 430) has argued that political opportunity “may be discerned along so many directions and in so many ways that it is less a variable than a nest of variables—some more readily observable than others.” The precise specification of its dimensions has varied, almost scholar by scholar. However, general agreement exists on three dimensions: *access to the formal institutional structure*, *availability of allies*, and the *configuration of power with respect to relevant issues/challengers* (see, e.g., Kriesi et al. 1992; McAdam, Tarrow, and Tilly 1996; Tarrow 1994).

A fourth dimension—the *underlying political culture*—is more contested. Some scholars argue that cultural factors play an important role in shaping social movement options, while others ignore this dimension. Still others recognize the importance of cultural factors in shaping opportunities for movement activity but argue that they are not properly elements of *political* opportunity.<sup>10</sup>

William Gamson and David Meyer suggest a simple and elegant way to conceptualize political opportunity, one that encompasses underlying political culture as well as the other three dimensions. The core idea weaving together the various threads of political opportunity structure, they argue, is the *opening and closing of space for action*: “Increased opportunity implies more space and fewer constraints. When we compare opportunities, we do so across political systems or over time. Adverse circumstances exist in one system and more favorable ones in another; or within a single system, circumstances become more or less favorable over time” (Gamson and Meyer 1996, 277).

## Frame Alignment Processes

A frame, as Erving Goffman defined the term, is composed of the implicit rules that, by defining the situation, shape the meanings generated by that situation. In other words, a frame is a sort of interpretive schematic that allows us “to locate, perceive, identify and label” aspects of an event in ways that make them meaningful (Goffman 1974, 21).

In recent years, scholars have made use of Goffman's notion of frames to explain the progress and outcomes of social movement claims. Successful framing occurs when a speaker's discussion of a subject leads the receiver of the discussion to alter the criteria on which she judges the subject. To succeed in her task, the speaker must package her discussion in a manner that resonates with the beliefs of the receiver. David Snow and his colleagues (Snow et al. 1986) refer to this packaging of claims as the process of frame alignment.

The process of frame alignment mediates between opportunity and action. The ability of social movements to push the right buttons depends on the availability of cultural frames. Movements "draw on the existing cultural stock for images of what is an injustice" (Zald 1996, 266) and to suggest directions for change. This cultural stock in turn shapes the kinds of claims that can be made. So, for example, Mayer Zald (1996) discusses how the feminist claim of a woman's right to her own body makes sense only in a cultural context that embodies notions of individual autonomy and citizen equality. Shifts in the existing cultural stock may open up—or close down—framing opportunities for movements. For example, the occurrence of a critical event such as September 11, Three-Mile Island, the Hill-Thomas hearings, or the murder of Matthew Shepard can draw attention to issues and influence public attitudes. The gradual revelation of what Zald calls "cultural contradictions" (268) can also shift the cultural stock. Cultural contradictions occur when cultural themes that are potentially in conflict (such as individuality and equality) are brought into active conflict by the force of events or, alternately, when articulated ideologies are not reflected in actual practices.

## Structuring Legal Opportunity

A core contention of this book is that the concepts of opportunity structures and frame alignment processes can be utilized to provide a theoretical framework for understanding the conditions under which interactions between or among legal actors and the various institutions in which they are embedded operate to facilitate or retard legal change. This approach is not necessarily incompatible with studies that focus on the mobilization of organizational resources in accounting for litigation strategies and outcomes. Factors such as funding and internal organization continue to matter in my telling of the tale, although they recede into the background. What becomes central in my account are the ways in

which sociolegal structures shape movement strategies and are shaped by those strategies in turn. As I will show, several of the most commonly articulated dimensions of *political* opportunity structure—access to the formal institutional structure, the configuration of power with respect to relevant issues, and the availability of allies—are also dimensions of *legal* opportunity structure. In the following pages, I lay out the three dimensions of legal opportunity structure (LOS) that have rough equivalents in political opportunity structure. I then lay out the dimension of LOS that makes it distinct from its political counterpart.

## Access

Scholars of political opportunity structure have noted with near unanimity that the extent of access to the formal institutional structure (such as legislatures) significantly shapes the emergence, progress, and outcomes of collective action (see, e.g., Kitschelt 1986; Rucht 1996; Tarrow 1994). Peter Eisenger (1973, 15), for example, argues that collective action is most likely to occur in systems that are open to some kinds of political participation but closed to others.

Much as access to political institutions shapes the emergence, progress, and outcomes of collective action, access to courts shapes the emergence, progress, and outcomes of legal action. Eva Rubin summarizes the situation clearly when she says: “Although courts offer an alternate route to policy change, they have their own institutional peculiarities and idiosyncrasies. The mechanics of the judicial process [are] very different from that of the legislative process, and the approach to judicial institutions must be made in the traditional framework of the lawsuit” (Rubin 1987, 33).

The mechanics of the judicial process shape access in a number of important ways, including what may be litigated, who may litigate, and where such litigation may occur. As noted previously, would-be litigants must show that they have standing to sue. The type of claim they make also affects where they can litigate. By way of illustration, claims arising under the federal Constitution may generally be brought in *either* federal or state court, while claims invoking a state’s constitutional provisions but not federal constitutional provisions can only be heard in that state’s courts.

Legal access requirements thus shape the options available to activists who hope to mobilize the law on behalf of social movement goals. For example, John McCarthy (1996, 146) notes that many American move-

ments have spawned organizations that specialize in legal strategies and tactics. (He refers to them as movement law firms.) The peace movement, however, is a notable exception. The reason the peace movement has not spawned any movement law firms, he argues, is that peace activists have been unable to get standing in U.S. courts to challenge the U.S. government's use of violence abroad.<sup>11</sup>

It is important to recognize here that access to the legal system is not an unmitigated benefit. When access to the courts has been discussed in the larger literature on groups in court, it has been in the context of gaining entry to the courts to secure legal rights.<sup>12</sup> Yet access to the courts is not a one-way street, not simply a matter of the legal system being open or closed to a set of potential litigants. It is also a matter of whether the courts are open to those who would act in opposition.

### *Configuration of Power*

In addition to access to the institutionalized political system, scholars of political opportunity structure have paid much attention to what Hanspeter Kriesi and his colleagues (1992, 220) call "the configuration of elites with respect to a given challenger" and what Doug McAdam (1996, 27) calls "the stability or instability of that broad set of elite alignments that typically undergird a polity." Sidney Tarrow (1994, 88) argues, for example, that conflicts within and among political elites serve as an incentive to resource-poor groups to risk collective action.

The configuration of power similarly serves to influence the emergence, progress, and outcomes of legal action. The elites in LOS are generally judges.<sup>13</sup> Imagine, for example, a universe of judges presented with a particular legal claim. The judges may align themselves in one of three ways: they may uniformly reject the claim, they may uniformly accept the claim, or they may be divided among themselves with respect to the claim's legal implications. Legal claims that are uniformly rejected exit the litigation process. Claims that are uniformly accepted also exit the litigation process, because they get settled out of court. Where judges are divided, however, further litigation of the claim is stimulated and legal ammunition is provided for both sides to the dispute. H. W. Perry illustrates the implications of judicial conflict in his study of the Supreme Court certiorari process. The single most important factor in determining a case's "certworthiness," he argues, is the existence of a conflict among the circuit courts (Perry 1991).

The perspectives of individual judges thus affect the progress and out-

comes of social movement litigation. Anyone familiar with appellate litigation knows that judges hearing the same case often come to diametrically opposing conclusions. Whether these disagreements are a product of legal or political differences is unimportant for the moment. What is important is that claims that more directly touch on legal and/or political fissures are more likely to spark significant disagreement among judges. Moreover, turnovers in the population of judges may open (or close) windows of opportunity for legal action.

### *Alliance and Conflict Systems*

The presence or absence of allies is a third aspect of the structure of political opportunities. Craig Jenkins and Charles Perrow (1977), for example, found that the farm worker movement in the 1960s was more successful than its 1940s counterpart largely because of the existence of urban liberal allies in the latter period. Similarly, William Gamson (1975) found that differential success rates on the part of fifty-three challenging groups were closely related to the availability of allies willing and able to support their claims. By creating political openness on their issues of concern, social movements almost always generate their own opposition (Meyer and Staggenborg 1996). “Consensus movements”—those that enjoy widespread support and little opposition—are uncommon, and when they arise they tend to be local and short-lived (McCarthy and Wolfson 1992). Opposition to social movement concerns, when it occurs, may coalesce into one or more countermovements—such as the pro-choice and pro-life movements—or may remain fragmented and sporadic. Regardless of the form that opposition takes, the relationship between movement and state is rarely dyadic but instead is mediated by the movement’s opposition.

The presence of allies and/or opponents is also an aspect of legal opportunity structure. Allies can defray the substantial costs of bringing a case. They can offer assistance with devising legal strategies. They can also file *amicus curiae* (friend of the court) briefs. These briefs can signal the importance of the case under consideration, provide supplemental legal arguments, and add credibility to claims made by challengers.<sup>14</sup> This is precisely the reason why *amicus* briefs from the solicitor general are widely sought.

Given the adversarial form of the American legal system, articulated opposition to a legal claim is generally a given. Opponents (and their allies) work to undermine legal claims in just the same way that allies

work to support them. Claims making is, at heart, a strategic activity. Movement litigators seek to redefine an existing legal condition as unjust and to identify a strategy for redressing the problem. Opposing litigators in turn seek to prevent them from successfully engaging in such redefinition. Opponents can also do something allies cannot, namely, appeal adverse decisions. Ironically, once a challenger wins a case, she loses control of it. Unless the case is decided by a court of last resort, such as the U.S. Supreme Court (and sometimes state supreme courts), her opponent controls what happens next. He may choose to abide by the adverse decision, or he may choose to appeal it to a higher court.

### *Cultural and Legal Frames*

Were the dimensions of LOS limited to those listed previously, it would simply be political opportunity structure by another name. What makes *legal* opportunity different from *political* opportunity are the underlying frames that ground them. As we have seen, movements seeking to effect change within the political system must draw on the existing cultural stock to frame their claims. Movements seeking to effect change within the legal system are likewise constrained by availability of cultural stock. However, they are also constrained by the availability of *legal* stock. That is, they must articulate their claims so that they fall within the categories previously established by an amalgam of constitutional, statutory, administrative, common, and case law. These laws shape the progress and outcome of movement claims in important ways.

First, laws shape the *kinds* of legal claims that can be made as well as the *persuasiveness* of those claims. For example, under Alaska case law, a parent's sexual orientation is considered to be irrelevant in determining custody (*S.N.E. v. R.L.B.*, 1985). In Missouri, however, courts generally have treated homosexuality as *prima facie* evidence of parental unfitness (*DeLong v. DeLong*, 1998). A (hypothetical) lesbian woman who would have maintained custody of her children were she living in Alaska would likely have lost custody of her children were she living in Missouri.

Second, the laws also structure the *facts that are considered to be relevant*, just as the facts of the case determine the legal categories that will be invoked. For example, hemophiliacs attempting to sue blood banks for transfusion-related AIDS have consistently had to contend with the question of whether blood products are properly categorized as a product or a service. The distinction is crucial because it determines the kinds of things for which blood banks can be held accountable. If the provision

of blood products to hemophiliacs (via doctors) by blood banks is a sale, then the provider of the blood product can be held responsible for any damage the product causes when used properly, whether or not negligence is involved.<sup>15</sup> If the provision of blood products is a service, however, then the provider of the service cannot be held liable for damages without a showing of negligence. In other words, if the provision of blood products is a sale, then the fact that hemophiliacs received AIDS from a blood-related transfusion matters. If it is a service, then that fact does not matter, unless negligence on the part of the blood banks is also established.

A major difference between legal and cultural frames is the *relationship of the past to the present*. One of the rules of the game in judicial decision making is that new decisions are constrained by previous ones.<sup>16</sup> To return to the example of hemophiliacs, the ability of courts to make decisions about AIDS was constrained by existing statutes and precedents. Many states have blood shield laws that protect hospitals, doctors, blood banks, and pharmaceutical companies from certain kinds of damage-related claims for the provision of contaminated blood. These laws were originally enacted to protect hospitals and others from liability for hepatitis contamination, which prior to 1985 was endemic in the blood supply. Their existence, however, unavoidably structured later claims about transfusion-related AIDS.

With respect to the law, it is generally *not* the specific factual outcome of a case that structures future litigation in the area but rather the manner in which the outcome is framed. In *Roe v. Wade* (1973), for instance, the U.S. Supreme Court accepted the privacy framing advanced by Roe in her attempt to void Texas's abortion statute. Since that decision, the lion's share of litigation around abortion has concerned the extent to which the state can permissibly limit that right to privacy.<sup>17</sup> Had the Court's decision been framed differently, the path of subsequent litigation would have been significantly altered.<sup>18</sup>

Shifts in legal stock can create (or foreclose) opportunities for movements to frame their claims successfully, independently of shifts in the social stock. However, it is important to understand that the legal and cultural frames do not exist in isolation from each other, nor is there a clear hierarchy among them. Just as judges do not divest themselves of their political sensibilities when they don their robes, the existence of those political sensibilities does not make the doctrinal framework in which they operate irrelevant. Legal and cultural frames are mutually constitutive: cultural symbols and discourses shape legal understandings

just as legal discourses and symbols shape cultural understandings. This is precisely why movements throughout American history have invoked *legal* norms and practices in their efforts to promote *social* change and conversely why shifting social norms have often been followed by shifting interpretations of what the law requires.

## Litigation Success and Social Reform

This book takes the concept of legal opportunity structure and uses it to explore the varying ability of Lambda and other gay rights litigators to mobilize the law successfully on behalf of gay rights. Much of it focuses on the factors that facilitate or retard success in the courtroom. That is only half the story, however. The other half concerns the impact of litigation on lived experiences. Litigation outcomes are not self-implementing. They must be interpreted and actualized by actors beyond the courtroom. To what extent are legal victories translated into real-world gains for lgb people?

Great disagreement exists about the empirical power of litigation to effect social reform. Gerald Rosenberg is widely considered to be the standard bearer of the proposition that the judiciary's ability to advance progressive social reform is, at best, limited, subject largely to the reactions of the legislative and executive branches (Rosenberg 1991; see also Horowitz 1977). In his book *The Hollow Hope*, Rosenberg sought to assess the conditions under which judicial processes could be utilized to secure significant social change through an examination of several major decisions, including *Brown v. Board of Education* (1954) and *Roe v. Wade* (1973). He concluded that courts are not only poorly designed to advance social change, by acting as "fly-paper," but they may actually impede social change efforts. He writes:

Turning to courts to produce significant social reform substitutes the myth of America for its reality. It credits courts and judicial decisions with a power they do not have. (Rosenberg 1991, 338)

And also,

Yet if groups advocating such reform continue to look to the courts for aid, and spend precious resources in litigation, then the courts also limit legal change by deflecting claims from substantive

political battles, where success is possible, to harmless legal ones where it is not. Even when major cases are won, the achievement is often more symbolic than real. Thus, courts may serve an ideological function of luring movements for social reform to an institution that is structurally constrained from serving their needs, providing only an illusion of change. (341)

Even worse, he continues, progressive court decisions are actually more likely to serve as a rallying cry for opponents of social reform than for its proponents. Reformers, he concludes, should largely abandon the courts and instead focus their efforts on the political arena.

A number of scholars have taken issue with Rosenberg's conclusions, arguing, among other things, that legal decisions have been important factors in the generation of sociopolitical reform. A few have directly contradicted his analysis, concluding that legal decisions are responsible for producing major social changes (see especially Schultz 1998). Others have offered more elliptical critiques. In a study commonly treated as a reply to Rosenberg, Michael McCann (1994) examined pay equity reform battles and concluded that litigation and other legal mobilization tactics have the capacity to generate *indirect* effects—such as constituent mobilization and increased leverage in workplace negotiations—even when court rulings themselves fail to directly produce significant social reform.

If Rosenberg's argument is correct, then Lambda and its litigation have played a negligible—perhaps even negative—role in the struggle for gay rights. If his critics have the better argument, then we should expect to see positive real-world impact from Lambda's litigation, whether directly or indirectly. My study of Lambda and its litigation mediates between the positions taken by Rosenberg and his critics. From an LOS perspective, litigation and legal decisions are best treated as creating moments of opportunity bounded by the specific legal and political contexts in which they occur. Activists may or may not be successful in exploiting these opportunities, both because of their own strategic choices and because of the bounded nature of the opportunities presented. As we shall see in subsequent chapters, litigation can thus have consequences both intended and unintended. Most notably, courtroom victories can result in political losses rather than gains, just as courtroom losses can actually help to produce political gains. An LOS perspective, then, can help to illuminate both the promise and the limits of legal mobilization as a tactic for securing social reform.

I begin this study by exploring the question of why litigation emerged as a tactic in the gay rights movement when it did (chapter 2) and by presenting a general overview of Lambda and its litigation from its emergence in 1973 through June of 2003 (chapter 3). These two chapters show that the emergence and progress of gay rights litigation were products of both shifts in the LOS and the increasing capacity of gay rights litigators to respond to those opportunities.

I then turn to an examination of the efforts of Lambda and other gay rights litigators to mobilize the law in three different issue areas: sodomy reform, antigay initiatives, and same-sex marriage. Chapters 4 and 5 focus on the stop-and-start progress of sodomy reform efforts. They show that shifts in the structure of legal opportunities over time have variously opened up and closed down spaces for successful legal and political challenges to sodomy laws. The disjoint between the political and legal outcomes of antigay initiatives is the subject of chapter 6. This chapter illustrates the very real differences between the structure of legal opportunities and the structure of political opportunities. Chapter 7 explores the ongoing controversy over the question of same-sex marriage, paying particular attention to the ways in which LOS can vary from state to state and the ways in which changes in the structure of legal opportunities are mediated by the existing structure of political opportunities. Chapter 8 draws the three case studies together, illuminating the complex relationship between the structure of legal opportunities and the varied legal fortune of gay rights claims and asking critical questions about the value of legal rights. A short afterword updates this study to include a discussion of the recent Massachusetts marriage case, *Goodrich v. Dept. of Public Health* (2003).