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LOS and Legal Change

The sociolegal implications of homosexuality have changed enormously in the thirty-five some years since Stonewall. In 1969, every state in the nation but one criminalized same-sex sexual intimacy. Police regularly harassed the patrons of gay bars. Gay rights laws were nonexistent; lgb people had little recourse against discrimination in employment, public accommodations, and other areas of central importance to daily life. Individuals known or suspected to be homosexual were commonly given dishonorable discharges from the military. Openly gay parents lived in constant fear of losing custody of their children. The notion that same-sex couples might have a constitutional interest in marrying each other was not even a blip on the public policy radar.

By the middle of 2003, the legal status of lgb people had radically altered. The U.S. Supreme Court had held sodomy laws to be an unconstitutional invasion of the right of privacy. Thirteen states had implemented reasonably comprehensive gay rights laws, while eight additional states had passed more limited gay rights measures. Hundreds of localities had instituted similar provisions. Lgb people were officially permitted to serve in the military, so long as their sexual orientation was not revealed publicly. Those whose sexuality became known were entitled to honorable, rather than dishonorable, discharges. Judicial reactions to parental homosexuality had become far more tolerant. Although some courts still considered parental homosexuality to be harmful to children, many more considered it to be irrelevant. Joint adoptions by same-sex couples were permitted in a growing handful of states. Courts in three different states had ruled that same-sex couples had a constitutional interest in marrying each other, and courts in four additional states were considering the question.¹ A civil union law had gone into effect in Vermont, giving same-sex couples all the state-level rights and benefits associated with marriage. And following an Ontario court's ruling that same-sex couples had the right to marry, Canada had announced its intention to legalize same-sex marriage throughout the nation. Canada's policy change was of more than theoretical interest to same-sex couples in

America since Canadian law does not limit marriage to Canadian residents; within a few months of the Ontario court ruling dozens of American couples had married in Canada and then returned to the United States, although the status of their marriages under U.S. law remains unclear.

This book has endeavored to understand the role litigation has played in changing the sociolegal implications of homosexuality. More specifically, it has attempted to grapple with a specific puzzle: the varying ability of Lambda and other gay rights litigators to mobilize the law on behalf of gay rights. In this concluding chapter, I draw together some of the major strands of my analysis and consider some of its implications for the study of legal mobilization and legal change.

Litigation and LOS

The core claim of this book has been that the concept of *legal opportunity structure* can help us to understand the emergence, progress, and outcomes of Lambda's gay rights litigation. Specifically, I argued that Lambda's decisions about what kinds of cases to pursue, the tactics it used in pursuing those cases, and their ultimate legal outcomes were dependent in large part on the contours of the legal opportunity structure surrounding gay rights. I articulated several distinct dimensions of legal opportunity structure, namely, Lambda's ability to gain access to the formal apparatus of the law with respect to a specific claim, the configuration of power among decision makers with respect to that claim, the nature of the alliance and conflict systems surrounding that claim, and the availability of relevant legal and cultural frames. Let us take a closer look at each of those dimensions.

Access

Scholars utilizing the concept of political opportunity structure have been unanimous in their estimation of the importance of access to the formal institutional structure of the political system in shaping the emergence, progress, and outcomes of collective action. I have shown that access to the formal institutional structure of the law plays a similarly important role in shaping the emergence, progress, and outcomes of legal action. The primary institutional locus of the law examined in this book has been the courtroom. As have many other social movements, the gay

rights movement has encompassed myriad sociolegal claims, and some of those claims have fit more comfortably into the mechanics of the judicial process than have others. Lambda and its colleagues had little problem getting access to the courts to battle antigay ballot measures, for example, but had much greater difficulty getting access to the courts to fight sodomy laws. For the purpose of access, the key difference between the two types of claims involved the nature of the harm alleged. While the harms caused by sodomy laws were very real, they were also largely indirect, and so gay rights litigators encountered persistent problems satisfying the legal requirement of standing, which mandates that someone be “directly harmed” by a law in order to be able to challenge its validity in court. The harms caused by an antigay ballot measure such as Amendment 2, conversely, were direct ones, ranging from the petty (discrimination by public libraries) to the profound (exclusion from the political process). Gay rights litigators thus had little problem meeting the standing requirement when challenging their constitutional validity. I showed that these variations in access had real repercussions for the ability of litigators to mobilize the law on behalf of gay rights claims. In *Bowers*, for example, the limited ability of gay right advocates to surmount the standing hurdle (Michael Hardwick had standing; the Does did not) allowed the Supreme Court to frame the issue before it as “homosexual sodomy” to the exclusion of “heterosexual sodomy.” In *Romer*, however, access to the formal apparatus of the legal system allowed Lambda and its allies to reverse losses incurred in the electoral arena.

Access-related constraints vary across time as well as issue area. The primary generator of shifts in access over time is the passage of new ordinances, statutes, and constitutional amendments. A prime example here concerns employment. As a rule, gay rights litigators have been unable to use the courts to contest antigay discrimination in hiring and firing except in those jurisdictions with gay rights laws on the books, because, barring a specific statute to the contrary, it is perfectly legal for private actors to discriminate against lgb people on the basis of their sexuality. But as the number of states and localities with gay rights statutes and ordinances encompassing employment has risen, litigators have been increasingly able to use the courts to give those laws teeth.

The passage of new laws can thus expand access to the courts; it can also limit it. The widespread passage of mini-DOMAs in the aftermath of *Baehr* certainly impeded the ability of Lambda and other gay rights litigators to articulate claims amenable to judicial remedy, which, like the standing requirement, is a prerequisite for bringing suit in a court of law.

Similarly, Amendment 2 was as much about limiting the access of lgb people to the judicial process as it was about limiting access to the political process.

A second generator of shifts in access over time is the establishment of new case law. Chapter 2 detailed how the 1965 Supreme Court decision in *Griswold v. Connecticut* did more than hold that the Constitution embodied a right to privacy that encompassed the procreative decisions of married couples. It also anchored a line of decisions that expanded the right of privacy into other spheres of sex-related decision making, most notably abortion. The articulation of a right to privacy encompassing at least some aspects of sexuality in turn suggested a new legal theory for challenging sodomy laws that litigators could bring into court, namely, that sex between two consenting adults, when undertaken in private, should also properly be encompassed by the right to privacy.

Bowers v. Hardwick (1986) is another example of the ways in which new case law can affect the ability of social movement litigators to access the institutional mechanisms of the law. *Bowers* effectively foreclosed the federal court system as a route through which sodomy laws could be challenged, at least for the time being. Only after years of litigating sodomy laws under state constitutions did Lambda consider bringing another federal case, and its decision to do so was based in large part on the Supreme Court's decision in *Romer v. Evans*, which suggested that the high court might be receptive to another sodomy challenge.

A third generator of shifts in access over time is the evolution of cultural understandings about the relationship between social movement claims and the law. Early attempts to litigate same-sex marriage were all but laughed out of court for failure to state a cognizable legal claim (another prerequisite for bringing suit). Courts in recent years have been far more open to the claim that same-sex couples have a constitutional right to marry, less because the amalgam of laws pertaining to marriage has changed than because of changes in judicial understandings about the meaning and sociolegal implications of homosexuality. Similarly, the willingness of judges to accord lgb people standing to contest sodomy laws under state constitutions in the 1990s was partly a reflection of the different requirements for standing in federal and state courts but also partly a shift in judicial understandings of the ways in which sodomy laws stigmatize lgb people.

While courtrooms have played a major role in my analysis, it is important to recognize that they are not the only formal institutions of the law. The processes that shape the amending of constitutions and

other forms of citizen lawmaking are also properly considered to be institutions. So are legislative processes. Issues of access likewise play an important role with respect to these institutions. Chapter 7 examined the ways in which variations in the ease of amending state constitutions shaped the ability of same-sex marriage opponents to use the amendment process to trump disfavored court rulings as well as the ways in which legislative decisions modified court rulings. Chapter 6 discussed how cross-state variations in the mechanics of the citizen lawmaking process sometimes facilitated and other times hampered the ability of antigay advocates to use referenda and initiatives to undermine perceived gay rights gains. The chapter also compared the citizen lawmaking process to the judicial process.

The dance of pro- and antigay advocates depicted in chapters 6 and 7 highlights the fact that access to the formal institutional structure of the law is an important variable for both movement and opposition actors. It also highlights the fact that the institutional structure of the law is decentralized and that its constituent elements are endowed with different entrance requirements. In some instances Lambda was able to use its access to the judicial system to trump or prevent citizen decision making. In others, oppositional forces used their access to citizen lawmaking processes to trump or prevent judicial decision making.

In sum, my examination of Lambda and its gay rights litigation indicates that variations in the organization's ability to access the formal institutional structure of the law played a significant role in shaping the contours and outcomes of its litigation docket and that changes in access-related constraints variously widened and narrowed its ability to mobilize the law on behalf of particular gay rights claims. My analysis also highlights the dialectical relationship between movements and oppositional forces and the ways that access to the formal institutional structure of the law variously privileges one sets of actors over the other. Finally, my examination suggests the importance of decentering courts, of viewing them as one of many potential locations for legal action.

Configuration of Power

Scholars of political opportunity structure have emphasized the importance of elite alignments in shaping the emergence, progress, and outcomes of collective action. I showed that the configuration of elite alignments also plays an important role in shaping the emergence, progress, and outcomes of legal action.

Specifically, I argued that judicial attitudes have colored decision making in gay rights cases and that these attitudes have varied systematically over time. For example, I argued that the increasing conservatism of the federal bench in the 1980s played a role in determining the outcome of sodomy reform litigation. I paid particular attention to the decision of President Reagan to replace the Supreme Court's relatively liberal Potter Stewart with the significantly more conservative Sandra Day O'Connor, who in turn voted to staunch the expansion of sexual privacy rights on numerous occasions and who provided one of the five votes to uphold Georgia's sodomy law in *Bowers v. Hardwick*.

I also showed that the Supreme Court's attitudes toward gay rights changed significantly in the years between *Bowers* and *Lawrence v. Texas*. This change seems to have been in part a product of membership turnover on the Court, although I showed that the general ideological leanings of the justices who decided *Romer* and *Lawrence* were quite similar to—and perhaps even a bit more conservative than—the *Bowers* justices they replaced. The membership turnover argument is also undercut to some extent by the fact that Justice O'Connor voted to uphold Georgia's sodomy law in 1986 but voted to strike down Texas's law in 2003, albeit under different legal theories of the case. I argued instead that the Court's changing attitude marked an evolution in its understanding of the sociopolitical implications of homosexuality. The changing rhetoric of the Supreme Court opinions in *Bowers* and *Lawrence* is only the most obvious marker of this attitude shift. Where the former was dismissive and contemptuous of the privacy interests asserted, the latter was respectful.

I also showed that this attitudinal shift was not confined to the Supreme Court. Lower courts throughout the nation became more open to gay rights claims over time. This shift is seen most clearly in cases involving lgb parents. Twenty-five years ago the great majority of judges deciding parenting cases concluded that homosexuality was a pernicious influence, one that clearly threatened the best interests of children. In more recent years, judges have been increasingly likely to conclude that a parent's homosexuality is irrelevant in the context of custody decisions. Notably, while some of these changes in the tenor of lower court decisions have occurred in the aftermath of appellate court pronouncements on the subject, in no instance has a change in judicial evaluations of parental homosexuality been prompted by new legislative enactments. The changes have all come from internal rather than external shifts in sociopolitical understandings of homosexuality.²

Ultimately, my account reiterates the central finding of behavioralist accounts of judicial decision making: that personal values influence case outcomes, at least when those cases have ideological components to them (see especially Segal and Spaeth 1993). (Where it departs from the standard attitudinal account is in its treatment of judicial attitudes as a contributing rather than primary determiner of case outcomes.) In addition, my examination of Lambda and its litigation suggests that gay rights litigators are well aware of the ideological biases of the judges before them and take that knowledge into account when planning and executing their litigation strategies. Perhaps most crucially, it suggests that judges may become more comfortable with social movement claims as those claims percolate throughout society. To the extent this is true, it underscores two common claims about legal change: first, that time is a particularly valuable resource for movement litigators (see especially Galanter 1974) and, second, that courts are responsive to shifts in public opinion, rarely stepping too far into the vanguard or lagging too far behind.

Alliance and Conflict Systems

The literature on political opportunity structure commonly emphasizes the importance of allies in facilitating collective action. I have argued that allies also play an important role in facilitating legal action. The Litigators' Roundtable, for example, provides a forum for gay rights litigators to try out new legal theories, explore rhetorical approaches, forge agreements among the group, and coordinate the processes of litigation. In a related vein, amicus support from religious denominations, medical organizations, and other civil rights groups has signaled the courts about the importance of Lambda's cases and has allowed Lambda to present gay rights claims as within the mainstream of American society rather than on the radical fringe.

My claims about the importance of allies mesh closely with existing scholarship on the courts (e.g., Epstein and Knight 1998; Handler 1978; Segal and Spaeth 1993). Where I differ is in my emphasis on the importance of opposing forces. Oppositional forces, I showed, played a significant role in each of the three case studies that form the heart of this book. Indeed, I believe it is impossible to understand Lambda's varying ability to mobilize the law on behalf of gay rights claims without reference to the conflict system surrounding those claims. The actions of anti-gay activists, after all, prompted the litigation in *Romer v. Evans*. Oppositional forces utilized the AIDS epidemic to reshape the contours of

sodomy reform litigation. And oppositional forces utilized *Baehr* to secure the passage of DOMAs in Congress and in thirty-seven states.

Didi Herman suggests that litigation is used by opposing social movements as part of their “struggle for interpretive authority” (1994, 126) over a particular set of claims. This insight accurately reflects the movement-opposition interactions seen in the struggles over sodomy reform, antigay initiatives, and same-sex marriage. The battles over each were fundamentally battles over how a given gay rights claim should be understood. In each instance, one side attempted to redefine an existing (or potential) legal condition as unjust, while the other side sought to prevent such a redefinition from occurring. Notably, this battle over the framing of gay rights claims was fought in legislatures and ballot boxes as well as in the courts.

In sum, my examination of Lambda and its gay rights litigation indicates that alliance and conflict systems have played an important role in shaping the initiation, progress, and outcomes of its legal claims. All other things being equal, it seems reasonable to posit that social movement claims will fare worst in the context of a weak alliance and strong conflict system and best in the context of a strong alliance and weak conflict system.³ By extension, the success of movement claims made in the context of roughly equivalent alliance and conflict systems should fall somewhere in between. I do not mean to suggest here that the relationship among Lambda, its allies, and its opponents is strictly linear. There may well be a tipping point beyond which more help—or more opposition—contributes little. It may also be that the extent of the conflict system is more or less important to the outcome of a particular movement claim than the extent of the alliance system. My point here is simply that, in the context of social movements and the law, we should concern ourselves with opposing forces as much as we concern ourselves with allies.

Cultural and Legal Frames

Social movements seeking to effect change within the political system must draw on the existing cultural stock to frame their claims. I have argued that movements seeking to effect change within the legal system must draw on both the existing cultural stock and the existing legal stock to frame their claims. As Kim Scheppele (1988, 102) has noted in the context of common law, judges decide cases by reference both to social practices and to legal precedent. The legal claims that movements can successfully make are then necessarily constrained by the availability of both

cultural and legal stock. I have argued in this book that shifts in legal and/or cultural stock variously opened up and closed down the spaces within which Lambda could pursue gay rights claims. The emergence of the AIDS epidemic, for instance, shifted the cultural meanings of homosexuality in ways that made it more difficult to argue that sodomy should be encompassed by the right to privacy. Conversely, the unexpected early success of *Baehr v. Lewin* prompted a radical reframing, both culturally and legally, of the meaning of same-sex marriage.

These illustrations show that legal and cultural frames change over time. It is also the case that legal and cultural frames vary across issue area. In other words, some gay rights claims fit more neatly within existing legal and cultural frames than do others. Survey data are indicative here. In 1993 a nationwide poll revealed that nearly two-thirds of those sampled believed that laws “should protect homosexuals against job discrimination” while less than one-third believed that gay and lesbian couples “should be legally permitted to adopt children.”⁴ Such variation in beliefs about the aspects of homosexuality that are worthy of legal protection is reflected as well in the rapidly growing body of case law devoted to gay rights claims. To take just one example, gay rights advocates such as Lambda have had quite a bit of success in litigating cases raising free speech issues, except in the context of military service, where repeated efforts to overturn the “Don’t Ask; Don’t Tell” policy have to date fallen flat.⁵ A salient difference between the two kinds of cases is that the courts have traditionally accorded great deference to the military’s assessments of its own needs. Here the positive legal weight the court traditionally attaches to free speech claims is countermanded by the court’s deference to asserted national security interests. The Supreme Court’s recent decision in *Lawrence v. Texas* may or may not alter the legal balancing of the interests at stake in future cases.

A key argument of this book has been that legal frames both influence and are influenced by cultural frames. A clear example of the influence of legal frames on cultural frames can be seen in the political battle over Amendment 2 in Colorado. CFV relied heavily on the distinction between “equal” and “special” rights in its campaign to get Amendment 2 passed. The organization linked both of these terms to civil rights laws and Supreme Court decisions. In fact, CFV clearly patterned its assessment of who deserved special rights on a legal test laid out by Justice Brennan in *Frontiero v. Richardson* (1973). Brennan laid out a three-pronged test for determining when legal classifications should be subject to heightened judicial scrutiny: when there has been a history of invidious discrimina-

tion against a group defined by a particular characteristic; when the characteristic that defines the group is immutable; and when the characteristic in question bears no relation to the ability of the group to perform or contribute to society.

In CFV's formulation, a group wanting "true minority rights" also had to satisfy a three-pronged test: it had to show discrimination of such severity that its members were unable to "earn an average income, get an adequate education, or enjoy a fulfilling cultural life"; the group had to be defined by an unchanging physical characteristic rather than a behavior; and it had to show that it was politically powerless.⁶ While CFV's formulation was not entirely faithful to Brennan's (note especially the absence of Brennan's relevance criterion), it clearly used legal concepts to attempt to influence cultural understandings of homosexuality in relation to civil rights.

The relationship between legal and cultural frames, as I see it, is clearly interactive. Just as legal frames influence cultural ones, so do cultural frames influence legal ones. The history of litigation around same-sex marriage is illustrative here. As noted earlier in this chapter, early arguments about a "right" to same-sex marriage were all but laughed out of court for failure to state a cognizable legal claim. In *Baker v. Nelson* (1971), the Minnesota Supreme Court decreed that two men did not have a legal right to marry one another because marriage, by definition, involved one man and one woman. But by the turn of the century courts in three different states had found that the right to marriage might well extend to same-sex couples. Particularly notable here is that the specific marriage statutes being challenged were all gender neutral. That is, none of the statutes explicitly stated that marriage consisted of one man and one woman. The laws about marriage did not change in the years between *Baker v. Nelson* and *Baehr v. Lewin* (1993). What changed were the cultural frames surrounding both marriage and homosexuality. There is a romantic view that holds that even the most politically disadvantaged person in society can bring a strong legal claim to court and prevail. The lesson of same-sex marriage litigation, however, cuts against that viewpoint, suggesting instead that existing cultural biases can and do replicate themselves in legal decisions.

Despite this caution, it is clear that legal and cultural frames are not identical, and the differences between the two may present opportunities for social movement action. Once again, the battle over Amendment 2 is illustrative. Lambda and its colleagues were able to take a political defeat and translate it into a legal victory in part because the cultural and legal

frames surrounding civil rights diverge. Phrases such as *special rights*, *protected class status*, *minority status*, and *quota preferences* were ubiquitous in the political campaign over Amendment 2 and clearly tapped into culturally resonant frames. But while these terms sounded as though they were legal standards, they were meaningless in a legal sense (something CFV itself recognized), and so they lost their resonance when the battle over Amendment 2 moved from the ballot box to the courtroom.

Ultimately, my examination of Lambda and its gay rights litigation shows that the existing stock of legal and cultural frames had a significant impact on Lambda's ability to mobilize the law on behalf of particular gay rights claims and that shifts in the legal and cultural stock variously opened up and closed down spaces for successful legal action. My analysis also highlights the close relationship between legal and cultural frames, showing how changes in one may stimulate changes in the other. This in turn suggests that there may be a limit to how far legal and cultural frames can diverge from one another. It may be that social movements seeking to use the legal system to counter political disadvantage will find the law to have its limits, not simply because of the court's well-known lack of enforcement power but because of the close linkage between legal and cultural frames. This hypothesis is in line with scholarship arguing that law frequently replicates social hierarchies (e.g., Galanter 1974; Scheingold 1974; Tushnet 1984).

Other Dimensions of LOS

I want to be clear that my focus on specific factors of LOS such as access and the availability of legal and cultural frames does not imply that other factors do not exist. Legal opportunity structure, like its cousin political opportunity structure, has multiple dimensions. What makes any particular aspect of LOS relevant to any given study is the nature of the question being explored; my interest in Lambda's varied ability to mobilize the law on behalf of gay rights claims within the United States led me to disregard a number of factors that might be quite relevant in a cross-national comparison of legal reform. I sketch out one such dimension here. In the aftermath of the Supreme Court's decision in *Bowers v. Hardwick*, Lambda shifted its focus away from the federal courts and to the state courts in its effort to eradicate sodomy laws. Lambda's ability to turn to the state courts was conditioned on the existence of parallel court systems with independent sources of authority. In a nation with a centralized legal system, a loss such as *Bowers* would have foreclosed all

additional litigation on the legality of sodomy laws. In other words, the multiple points of access to the courts provided by the American legal system meant that litigation remained a viable alternative even after a decisive loss before the nation's highest court, a result that could not occur in a legal system in which access was controlled by one dominant court. Scholars seeking to understand the dynamics of legal change in a cross-national comparison thus might well consider the extent to which the (de)centralization of the legal system might structure reform efforts. They might likewise consider variations in the relationship of courts to other governmental institutions and variations in the capacity of the courts to resolve politicized questions, as well as the dimensions of legal opportunity utilized in the present study.

Balancing Structure and Agency

While my account has highlighted the institutions and structures shaping the litigation terrain faced by Lambda, it has also highlighted Lambda's agency. The organization has not simply waited for opportunities to arise; it has actively worked to produce them. The bulk of its actions has taken place in the context of the courtroom, obviously. To take only the most obvious examples, Lambda helped engineer the shift in legal opportunities created by *Bowers*, *Lawrence*, *Romer*, and *Baehr*.

But Lambda has also worked to shape the cultural and legal contexts surrounding gay rights claims in ways that extend beyond the courtroom. As discussed in chapter 3, the organization invests considerable resources in projects such as the Foster Care Initiative, whose emphasis is more on fostering sociopolitical change and public education than on litigation per se. Lambda's current effort to challenge the constitutionality of New Jersey's prohibition on same-sex marriage began more than a year before it actually filed *Lewis v. Harris* (in progress). Lambda spent some of that time locating appropriate plaintiffs, but it also expanded significant resources on public education during that year. It held "town meetings" across the state, designed to educate the general public and specific subgroups, such as the clergy, on the need for same-sex marriage. It sent informational packets about the upcoming lawsuits to media venues across the state and then made the seven couples available for interviews on the day the lawsuit was filed. Lambda also hired a well-known state lobbyist in an effort to deflect legislative opposition to a favorable court ruling, should one occur. These actions indicate that Lambda is well

aware that the struggle for legal reform does not begin and end in the courtroom, a belief every litigator I interviewed shared with me.

Of course, the fact that actors such as Lambda can affect the LOS does not mean that the outcomes of its actions will always be desirable. The very notion of social movement agency necessarily implies that actors may make poor choices as well as smart ones.

A central finding of this study is that increases in legal opportunity do not translate automatically into litigation success. Shifts in LOS provide *opportunities* for action, not the action itself. That depends on the ability of social movement actors to recognize and respond to the opportunities presented. One implication of the importance of social movement agency to the generation of legal change is that the ability of movements to recognize and respond to shifts in the structure of legal change may wax and wane over time, depending on the availability of organizational resources. Lambda's experience is illustrative in this regard. In the 1970s, its resources were extremely limited by any estimation. Its ability to respond to opportunities for legal action was consequently also extremely limited, as its tiny docket suggests. By the late 1980s, the increased resources available to Lambda also resulted in an increase in Lambda's docket capacity. A second implication of the importance of movement agency is that shifts in the structure of legal opportunities provide only ambiguous road maps for action. Even organizations with generous resources may misinterpret the significance of an opportunity, miss it entirely, or be outmaneuvered in their attempts to exploit it.

Let me reiterate here that an LOS approach to studying movement litigation is not incompatible with the wealth of studies emphasizing the importance of resource mobilization in explaining the constituents of legal success. Indeed, my account of Lambda's varying ability to mobilize the law on behalf of gay rights claims pays careful attention to issues of resources and their mobilization. What LOS offers is a different window into the dynamics of legal change. What becomes central in an LOS-based inquiry is the interaction between actors and institutions. To borrow from Rogers Smith, an LOS approach focuses its attention on the "different types of structures or institutions that, we hypothesize, constitute and empower political actors and their environments in important ways, endowing actors with specifiable constraints or capabilities, or both" (Smith 1988, 90).

Centering the interaction between Lambda and the structure of legal opportunities has generated some important insights into the process of legal reform. Chief among them is that legal reform is not an

autonomous process but is rather contingent on the interaction of a variety of institutional, legal, cultural, and strategic factors. This finding suggests that future research on the genitors of legal reform should pay careful attention to the multiple contexts within which specific reforms are situated.

Litigation and Its (Un)Intended Consequences

The LOS window into the dynamics of legal change offers insight into more than just the *process* of legal reform efforts; it also offers insight into the *value* of those reform efforts. As such, it offers new insight into a debate at the heart of much sociolegal scholarship: the value of litigation as a tool for achieving social change. My study of Lambda and its litigation reveals both the promise and the limits of legal mobilization as a tactic for achieving social reform. 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. These opportunities may or may not be successfully exploited by activists. Litigation, in other words, can produce both intended and unintended consequences.

One clear finding from this study is that there are at least some circumstances in which reformers can be served by turning to the courts. In *Romer v. Evans*, for example, Lambda and its allies used legal mobilization to beat back a serious political attack. It is true that *Romer* was not an example of progressive reform (although the language of the Supreme Court concerning homosexuality had evolved significantly since *Bowers*); *Romer* stopped an attempt to strip lgb people of present and future rights. It restored the status quo ante. But given a sociopolitical context in which there are ongoing efforts to fence lgb people out of the political process, litigation may serve a valuable role in staunching political losses.

Lawrence v. Texas provides yet another example of a circumstance in which turning to the courts advanced movement goals. *Lawrence* was an unqualified victory for the gay rights movement. Not only did it invalidate Texas's sodomy law and by extension all other state sodomy laws, it did so in language that made it clear that lgb people deserved legal respect.

At the same time, another clear finding of this study is that litigation is no panacea for advocates of social reform. The attempts by Lambda and its compatriots to mobilize the law to eradicate sodomy laws in the 1970s and 1980s, for example, produced relatively little in the way of

direct reform. The major engine of change at that time was legislative repeal, not litigation. And *Bowers* actively damaged the sociolegal position of lgb people, erecting a legal roadblock that stretched across a wide swath of gay rights claims. Even after Lambda and other gay rights litigators began turning to state courts with some success, legislative repeals accounted for a significant proportion of the laws eradicated. At the very least it seems as though legal reform and legislative reform have proceeded hand in hand. At worst, it seems as though the promise of social reform through litigation diverted energy and resources away from activities better suited to achieving the eradication of sodomy laws. To use the term Gerald Rosenberg coined in his influential book *The Hollow Hope* (1991), the lure of litigation may have acted like “fly-paper,” preventing gay rights advocates from turning their talents to more fruitful forms of persuasion.

Notably though, Lambda was able to garner indirect benefits from *Bowers*, even as the case directly harmed the legal interests of lgb people. Its fund-raising soared in the aftermath of the court case, although it is impossible to determine how much of its increased funding was a product of *Bowers* and how much it was a product of Lambda’s involvement in AIDS. Its stature as a force within the gay rights movement likewise grew in the aftermath of *Bowers*, although again it is impossible to determine the precise impact of *Bowers* on this process. The 1987 March on Washington, a gay rights demonstration drawing hundreds of thousands of lgb people and their supporters to Washington, DC, was also conceived in large part as a response to *Bowers*. Just as Gerald Rosenberg has suggested that favorable legal decisions on hot-button social issues tend to inspire countermobilization, it seems that *unfavorable* legal decisions can be used to generate increased mobilization on behalf of reformist aims. Ironically, then, under some conditions litigation losses may be as or more useful to social movement aims than litigation wins.

Didi Herman argues that the relationship between litigation and legal discourse on the one hand and social movement politics on the other “is something more complex than a simple ‘results tally’ would indicate” (1994, 120). My examination of Lambda and its litigation lends support to this contention. I have shown that litigation wins can sometimes reverse political losses (*Romer*), while litigation losses can be used to advance political ends (*Bowers*). It is equally clear that litigation wins can engender a whole host of direct and indirect consequences, both favorable and unfavorable to social movement aims. The events surrounding *Baehr v. Lewin* are only the most obvious example.

The 1993 and 1996 decisions in the case sparked massive mobilization by counter-interests. Thirty-five states and the federal government passed “defense of marriage” laws based on a preliminary legal decision that suggested that the institution of marriage *might* be opened to same-sex couples, placing significant new hurdles into the path of same-sex couples seeking the right to marry. Based largely on this series of events, Rosenberg (2001) concludes that same-sex marriage litigation, while producing localized gains for the gay rights movement (namely, reciprocal beneficiaries in Hawaii and civil unions in Vermont), has been far more harmful than helpful to the interests of lgb people.

My analysis suggests that Rosenberg’s conclusion may be too bleak; litigation also seems to have produced some favorable shifts in the legal and cultural frames surrounding gay rights in general and same-sex marriage more particularly. Where we agree is in the assessment that *courts do not have the capacity to produce social change when their decisions diverge too radically from the values and expectations of the other two branches of government*. Legal and political opportunity structures, while distinct, are interdependent, and my study of same-sex marriage litigation indicates that courts too far in the vanguard of social change will find their rulings ignored, evaded, or overturned.

In the end, I would argue that Rosenberg’s metaphorical use of the word *flypaper* to describe litigation is inaccurate. Instead I suggest that litigation is a match. When struck, it is unpredictable. It may fizzle out, especially in the rain. It is always dangerous. And it can, under the right circumstances, light a path out of the darkness.