

## EMPIRICAL STUDIES OF LAW AND SOCIAL CHANGE: WHAT IS THE FIELD? WHAT ARE THE QUESTIONS?

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### INTRODUCTION

The rise of empiricism within legal scholarship has had a profound influence on studies of lawyers,<sup>1</sup> the legal profession,<sup>2</sup> legal education,<sup>3</sup> and legal mobilization.<sup>4</sup> The overarching emphasis on the empirical study of behavior reflects and reproduces a broader trend across disparate legal fields: turning away from theories of law that rest upon implicit assumptions about rule compliance or stylized models of rational action and toward descriptive and normative accounts based on the real decision-making processes of real people.<sup>5</sup> Hence, a defining feature of

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1. See, e.g., Lynn Mather & Leslie C. Levin, *Why Context Matters*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 3 (Leslie C. Levin & Lynn Mather eds., 2012).

2. See, e.g., ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* (2008); Eli Wald, *In-House Myths*, 2012 WIS. L. REV. 407.

3. See, e.g., Rebecca Sandefur & Jeff Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57 (2009).

4. See, e.g., CATHERINE R. ALBISTON, *INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT: RIGHTS ON LEAVE* (2010); Douglas NeJaime, *Cause Lawyers inside the State*, 81 FORDHAM L. REV. 649 (2012).

5. See Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063, 1064–65 (2006); Russell B.

the contemporary scholarly landscape is that the fundamental question of jurisprudence—how law relates to society<sup>6</sup>—is now being asked by a generation of scholars equipped with empiricism and steeped in interdisciplinarity. This trend—what some have termed the new legal realism<sup>7</sup>—is not so much a disjuncture as a revival and repositioning of prior strands of sociolegal work,<sup>8</sup> some of which—deemed outside the legal mainstream at the time of their production—have now achieved a place of honor in the canon of empirical legal studies. Nonetheless, despite the ascendancy of empiricism, its current iteration may represent less the culmination of the law and society movement than its mainstream assimilation. While the current version of law and social science embraces the craft of empirical study, it is often divorced from the normative commitments that drove first-wave law and society scholars to examine the law “in action” as a way to make law’s application align with a vision of a just society animated by left-progressive political goals.

What are the implications of the empirical turn for understanding law’s power to produce social change? Recent scholarship has centered on how empiricism informs the pursuit of greater access to justice.<sup>9</sup> While I support this goal, my focus in this Essay is on a related, though slightly different, empirical project: the study of how law is deployed to change policy and social practice in order to achieve substantive political reform. In exploring that project, this Essay offers three ideas.

First, it explores how to think of law and social change as a field of empirical inquiry, sketching out a framework for considering its boundaries, main themes, and contested meanings.<sup>10</sup> As I suggest, there has been a proliferation of scholarship across disciplines touching upon different aspects of the broad topic; yet this research often operates in silos without an attempt to connect questions in a unified theory of the field. I do not offer such a theory here, but rather suggest ways to think about linking together similar issues related to law’s power to change.

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Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1143–44 (2000).

6. See RICHARD L. ABEL, POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980–1994, at 7 (1995).

7. See Howard Erlanger et al., Foreword, *Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 359.

8. See JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978).

9. See, e.g., Jeffrey Selbin, Jeanne Charn, Anthony Alfieri & Stephen Wizner, *Service Delivery, Resource Allocation and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45 (2012); Laura K. Abel, *Evidence-Based Access to Justice*, 13 U. PA. J.L. & SOC. CHANGE 295 (2010).

10. See Martha Minow, *Law and Social Change*, 62 UMKC L. REV. 171 (1993).

Second, I focus on what empirical research has taught us about the way that law is mobilized for change—what I call the “input” side of the law and social change equation. We now know a great deal about how lawyer motivations, professional contexts, and political structures influence the decision to mobilize law as a political tool; which lawyers advance mobilization and what challenges they face; and what form mobilization takes and how it relates to other types of politics. I review some of the important insights from this literature and suggest how they may fit together. My main point here is to mark how empirical research on the input side has produced a rich body of literature showing that law is mobilized for quite distinct reasons, by lawyers across different practice sites, deploying a range of tactical repertoires. Contextual factors shape these efforts, which are often undertaken as part of sophisticated power mapping processes, but which also are frequently contested from within movements and always subject to contingency.

Finally, I turn to the output side to consider the many ways in which law may effect change—or not. Here, I highlight an important challenge that the new empiricism poses to law and social change researchers: the challenge of evaluation. In particular, much of the debate about law and social change has centered on whether legal mobilization makes positive or negative contributions to various reform efforts.<sup>11</sup> As these debates become more informed by empirical research, it is useful to think about how the questions asked may shape the answers produced—and what this means for our understanding of law as a tool of transformative politics.<sup>12</sup> My contribution here is to interrogate the evaluative questions scholars have asked and suggest how they might be reframed to measure the complex ways that law can produce social change.

#### I. FRAMEWORK: THE RELATION OF LAW TO SOCIAL CHANGE

Whether, under what conditions, and how law contributes to social change have been central questions of jurisprudential and social scientific inquiry for the past half century.<sup>13</sup> The literature—which sweeps broadly across scholarly fields,<sup>14</sup> geographic boundaries,<sup>15</sup> and

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11. See Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do for, and to, Social Movements: An Introduction*, in *CAUSE LAWYERS AND SOCIAL MOVEMENTS* 1, 1–34 (Austin Sarat & Stuart A. Scheingold eds., 2006).

12. See generally Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 *HARV. L. REV.* 937 (2007).

13. See Richard Abel, *Speaking Law to Power: Occasions for Cause Lawyering*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 69 (Austin Sarat & Stuart Scheingold eds., 1998).

14. These include civil rights, clinical theory, constitutional theory, history, political science, and sociology.

historical epochs<sup>16</sup>—is defined by contestation.<sup>17</sup> Law, in its multiple forms, is viewed as both power and peril: constituting justice while instantiating inequality,<sup>18</sup> a tool to resist oppression but also its main instrument, a force for progress yet defender of the status quo.<sup>19</sup> At bottom, these competing visions reflect the gap between what law is and what it aspires to be<sup>20</sup>—a gap that justifies pessimistic appraisals of legal change,<sup>21</sup> but also creates opportunities for transformation by allowing challengers to hold those in power to their promise of fidelity to law.<sup>22</sup> Whether genuine transformation is really possible and whether, even in moments of purported victory, reformers only succeed in fortifying the legitimacy of fundamentally unjust systems constitute the field's critical intellectual and political dilemmas.<sup>23</sup>

Despite this long tradition, the study of law and social change has experienced a significant transformation over the past decade. Historically the domain of “outsider” scholars (in law and society,

15. See, e.g., Scott L. Cummings & Louise G. Trubek, *Globalizing Public Interest Law*, 13 *UCLA J. INT'L L. & FOREIGN AFF.* 1 (2008); Jeremy Perelman & Lucie E. White, *Stones of Hope: Experience and Theory in African Economic and Social Rights Activism*, in *STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY* 149, 149–171 (Lucie E. White & Jeremy Perelman eds., 2011). See generally *LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY* (Boaventura De Sousa Santos & César A. Rodríguez-Garavito eds., 2005).

16. See, e.g., GORDON SILVERSTEIN, *LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS* (2009).

17. For excellent reviews of this literature, see ALBISTON, *supra* note 4, and ANNA-MARIA MARSHALL, *CONFRONTING SEXUAL HARASSMENT: THE LAW AND POLITICS OF EVERYDAY LIFE* (2005).

18. Compare RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 780–83* (1975), with DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004). For skeptical views of law within critical theory, see Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 641, 641–61 (David Kairys ed., 3d ed. 1998); within social science, see LINDA MEDCALF, *LAW AND IDENTITY: LAWYERS, NATIVE AMERICANS, AND LEGAL PRACTICE* 15–17, 123–27 (1978), and Rita Bruun, *The Boldt Decision: Legal Victory, Political Defeat*, 4 *LAW & POL'Y Q.* 271 (1982).

19. Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in *CAUSE LAWYERING*, *supra* note 13, at 3, 3–28.

20. See Richard L. Abel, *Redirecting Social Studies of Law*, 14 *LAW & SOC'Y REV.* 805 (1980).

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

22. See Abel, *supra* note 20, at 820–22; Austin Sarat, *Going to Court: Access, Autonomy, and the Contradictions of Liberal Legality*, in *THE POLITICS OF LAW*, *supra* note 18, at 97, 97–114. See generally Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *HARV. L. REV.* 630 (1958).

23. See Gordon, *supra* note 18, at 643–47, 658–59; Lobel, *supra* note 12.

critical legal studies, critical race theory, and clinical theory), the empirical study of law's relationship to social activism, its impact on society, and the role of lawyers in social movements has recently achieved greater mainstream prominence. At what has long been considered the legal academic apex—constitutional theory—scholars are engaged in a robust and ideologically charged debate over the appropriate role of judicial review—“muscular” versus “minimalist”<sup>24</sup>—that is now playing out upon the terrain of history, political science, and sociology.<sup>25</sup> These scholars are building theory from empirical assessments of how constitutional law is made “from below” and evaluations of whether court decisions change behavior and, if they do, which way the change cuts—increasing support for protected rights or provoking backlash against them.<sup>26</sup> Some of the foremost legal historians have joined the debate, reappraising the impact of seminal civil rights cases on racial practices, social mores, and American politics.<sup>27</sup> In these accounts of social change, lawyers occupy a central role in mobilizing law. Understanding how lawyers shape disputes, make strategic and tactical decisions, and influence the direction of change processes and outcomes has therefore reemerged as a central scholarly project.<sup>28</sup>

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24. See David J. Garrow, “Happy” Birthday, *Brown v. Board of Education? Brown’s Fiftieth Anniversary and the New Critics of Supreme Court Muscularity*, 90 VA. L. REV. 693 (2004).

25. See Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27 (2005); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001).

26. See Linda Greenhouse & Reva B. Siegel, *Before (and after) Roe v. Wade: New Questions about Backlash*, 120 YALE L.J. 2028 (2011); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

27. See TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2011); RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

28. See Alan K. Chen, *Rights Lawyers Essentialism: Reflections on Richard Thompson Ford’s Rights Gone Wrong*, 111 MICH. L. REV. (forthcoming 2013); Scott L. Cummings, *The Pursuit of Legal Rights—and Beyond*, 59 UCLA L. REV. 506 (2012); Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591 (2006); Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027 (2008). For excellent accounts of lawyer decision making and its impact, see Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663 (2012); and Douglas NeJaime, *Winning through Losing*, 96 IOWA L. REV. 941 (2011).

In this project, what types of questions get asked and what methodologies are used to answer them depend crucially on the disciplinary orientation of the researchers. It is therefore useful to identify the distinct scholarly strands powering research in law and social change and map their relationship to show how they cohere as a field of study. My review here is illustrative and not exhaustive, meant to highlight some of the most significant scholarly building blocks in the field.

An important source of law and social change research comes out of the cause lawyering field pioneered over the past fifteen years by political scientists Austin Sarat and Stuart Scheingold. This literature has made important contributions to our understanding of lawyering as a mode of political engagement, focusing scholarly attention on why and how lawyers mobilize law to advance a range of missions. Its general emphasis has been descriptive and analytical, in that it has provided rich studies of lawyer motivation and practice, and how these relate to domestic and global politics.<sup>29</sup>

Law and social movement scholarship, coming out of political science and sociology, has focused on why movements enlist law as a tool and what impact legal mobilization has on movements and their goals.<sup>30</sup> Unlike cause lawyering—which starts with who cause lawyers are and what they do—law and social movement research has tended to proceed from the perspective of movement actors, asking why and how they turn to law, and what impact that decision has on their overarching goals.<sup>31</sup> This move toward movements illuminates relations between lawyers and other activists, focusing on what Mark Tushnet calls lawyers’ “comparative advantage.”<sup>32</sup> It also raises questions about whether lawyers dominate the field in terms of resources or agenda-setting power.

Outside of the cause lawyering and social movement fields, political scientists have tended to study what causes “interest groups” (rather than

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29. See STUART A. SCHEINGOLD & AUSTIN SARAT, *SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING* (2004); Sarat & Scheingold, *supra* note 11; Austin Sarat & Stuart A. Scheingold, *State Transformation, Globalization, and the Possibilities of Cause Lawyering: An Introduction*, in *CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA* 3, 3–31 (Austin Sarat & Stuart Scheingold eds., 2001).

30. The seminal work in this area is by political scientist Michael McCann. Michael W. McCann, *How Does Law Matter for Social Movements?*, in *HOW DOES LAW MATTER?* 76, 76–108 (Bryant G. Garth & Austin Sarat eds., 1998).

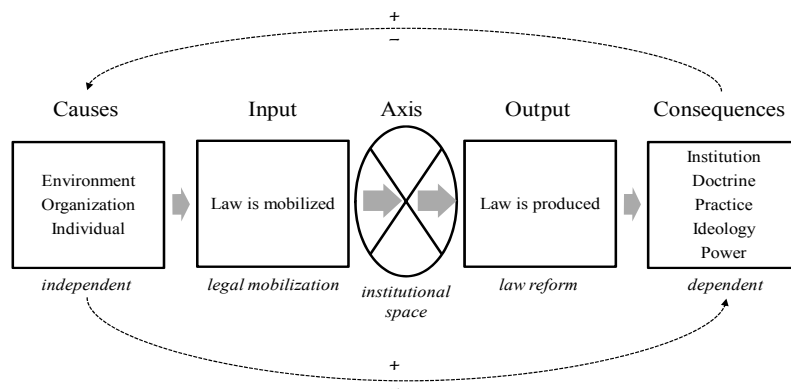
31. Organizational sociologists have recently become interested in how legal change produced by movements is understood and mediated by different institutional environments. See Lauren B. Edelman et al., *On Law, Organizations, and Social Movements*, 6 *ANN. REV. L. & SOC. SCI.* 653 (2010).

32. See MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950*, at 146–48 (1987).

movements) to mobilize law in the first instance (as opposed to traditional politics) and have also pioneered so-called “impact studies,” in which they evaluate the impact of court decisions on various measures of social outcomes. One important question raised by impact studies is what the dependent variables should be: is impact measured in terms of implementation, legal consciousness, the transfer of power, or some other metric? As this brief overview suggests, what “law” and “social change” mean may be contested both within and across disciplines, and may vary depending on the particular frame within which they are viewed.

Despite this variation, I suggest that there are common themes raised by the sociolegal literature that relate to one another in systematic ways, which I depict in Figure 1. Taken together, this research suggests a model for understanding the relationship between law and social change that forms the basis for marking the boundaries of the scholarly field. My goal here is simply to explain the elements of the model as a predicate for further examination of inputs and outputs in the next Part.

FIGURE 1: A MODEL OF LAW AND SOCIAL CHANGE



My basic claim is that accounts of law and social change, irrespective of their disciplinary origins, relate to some aspect of this dynamic model, within which law can be understood as both an input and an output.<sup>33</sup> On the input side, law can be seen as a tool mobilized to advance causes through litigation and other legal strategies (i.e., legal mobilization),<sup>34</sup> while on the output side, law is often the result of

33. See HELENA SILVERSTEIN, *UNLEASHING RIGHTS: LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT* (1996).

34. See Michael W. McCann, *Legal Mobilization and Social Reform Movements: Notes on Theory and Its Application*, 11 *STUD. L. POL. & SOC'Y* 225 (1991).

mobilization, formalized by judicial decree or legislative action (i.e., law reform). Law is, in this sense, both a tactic and a target of activism. Mediating inputs and outputs are different institutional spaces—courts, legislatures, and agencies, but also workplaces and grassroots contexts—in which the contest over law’s meaning and relationship to social practice and political power plays out.<sup>35</sup> These spaces are designated in the model as the axis through which law is translated from cause to effect. The central questions in the literature relate to how these categories relate.

On the input side, scholars examine the *ex ante* construction of law as a social change tool and attempt to understand the causal factors that explain why law comes to play a role in political struggle. Specifically, research examines how environmental (e.g., the structure of political opportunity), organizational (e.g., the availability of resources and expertise), and individual (e.g., the motivation of lawyers) factors influence the turn to law. What causes individuals and groups to mobilize law as a form of political activity? Then, what form does mobilization take: what are the characteristics of the groups (and lawyers) who do it, and what are the strategic and tactical moves they make?

On the other side of the axis point, output studies ask how law is created through institutional processes (law reform) and, going further, what the impact of law reform is on other measures of social change: the institutional practice of courts, the shape of legal doctrine, social practice (legal implementation on the ground, which is a product of both bureaucratic enforcement and compliance behavior), legal consciousness, and the distribution of political power. Some output studies also explore the impact of legal mobilization on social practice and political power even when formal law reform is not achieved—either because changing law on the books was not the goal or because a legal campaign failed to win in court. The relationship between law as input and output is dynamic in that the consequences of law reform can transform the background environmental and organizational factors leading to legal mobilization in the first instance—for better (by building funding and political support) or worse (by fueling backlash or countermobilization). Similarly, factors influencing inputs also shape outcomes to the extent that they affect the monitoring of legal enforcement and the diffusion of rights consciousness. Hence, the processes are iterative and intrinsically linked.

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35. See Peter Houtzager & Lucie E. White, *The Long Arc of Pragmatic Economic and Social Rights Advocacy*, in *STONES OF HOPE*, *supra* note 15, at 172 (proposing a model for understanding African economic and social rights activism in which grassroots organizing informs institutional decision making).



## II. INPUTS: THE ROLE OF LAWYERS AND LEGAL MOBILIZATION

On the input side, there is a conventional view of legal mobilization and the role of lawyers as social change actors. The view holds that the turn to law occurs because groups are shut out of politics and sees lawyers as responding to underrepresentation by asserting the groups' rights in court.<sup>36</sup> In the conventional story, the lawyer for such groups works in a nonprofit organization, funded by outside sources, either governmental or philanthropic. Impact litigation is the tool of choice.

One of the key contributions of empirical research on law and social change is to challenge the conventional account's application to contemporary practice, while also questioning its historical purchase.<sup>37</sup> In this Part, I review the empirical literature to suggest how it offers a richer understanding of why law is mobilized as a tool of social change, who does it, how they do it, and what challenges they face. What this review shows is that legal mobilization has moved beyond the standard conception of rights-claiming in court to advance underrepresented interests. In addition, legal mobilization now encompasses strategically sophisticated efforts by lawyers and their allies across practice sites to advance political goals in multiple venues through coordinated tactics in the face of persistent opposition. This multidimensional approach to social problem solving has become, at least in some areas, the new convention.<sup>38</sup>

*A. Why?*

Why do groups turn to law rather than politics? The recent literature suggests that this framing itself presents a false dichotomy. While it may have been true as a historical matter that less powerful social groups were channeled into courts in response to lack of access to legislative politics, the current picture is more complex and suggests that interest groups on all sides of issues pursue their goals through interlocking strategies in which law and politics are deeply intertwined and mutually reinforcing. Thus, rather than being viewed as a *substitute* for conventional politics, law is seen as an indispensable *supplement* to it in an environment of ongoing conflict, where the entire field is highly

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36. See ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 12–20 (2012).

37. See, e.g., BROWN-NAGIN, *supra* note 27.

38. See Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010); William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004); see also CHEN & CUMMINGS, *supra* note 36, at 515–24.

mobilized and contested. In this context, groups use law to both gain leverage within political struggle and to counter advances made by their adversaries.

In deploying law as a tool of struggle, the literature also suggests that, rather than naively turning to courts to secure a favorable judgment and then declaring victory, lawyers have a more nuanced approach to thinking about the relationship between legal advocacy and social change processes. Within the broader social movement field, there are important examples of deep collaboration between lawyer and nonlawyer activists around planning, strategy, and execution.<sup>39</sup> In this collaborative context, the literature shows lawyers and their allies evaluate the efficacy of legal mobilization in connection with a deep analysis of difficult strategic questions:

- What is the problem to be solved?
- How does law contribute to the problem?
- How could law be substantively changed or otherwise leveraged to redress the problem?
- What is the most effective strategy for changing (or leveraging) the law and where is the most appropriate venue—courts, legislatures, or the grassroots? How can these strategies be combined?
- What is the appropriate scale—international, national, state, local?
- What is the anticipated political and legal response by movement opponents?
- How can movement activists minimize the risks posed by opponents' response?
- If law is changed, what are the likely enforcement problems and how can they be addressed over time?
- How can power be built, defended, and extended over time?

### *B. Who?*

How much lawyers drive legal mobilization and who those lawyers are have been key issues throughout the public interest law movement—raising important questions of professional role and accountability. As suggested above, one contribution of recent scholarship has been to emphasize the complexity of legal mobilization efforts and their relationship to other forms of political activism. As this research suggests, legal mobilization operates in a complex field of

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39. See DANIEL R. PINELLO, AMERICA'S STRUGGLE FOR SAME-SEX MARRIAGE (2006); WORKING FOR JUSTICE: THE L.A. MODEL OF ORGANIZING AND ADVOCACY (Ruth Milkman et al. eds., 2010).

action, in which there are multiple, simultaneous, and sometimes conflicting efforts to advance different causes; these efforts are moved forward by lawyers and nonlawyers alike, sometimes together, but at other times separately and even at odds. Lawyers involved in mobilization efforts may work in nonprofit public interest groups, but often are found in for-profit firms or even government offices.<sup>40</sup> They may be “on top,” in the classical impact litigation formula, or “on tap,” in the sense of taking direction from more powerful movement organizations.<sup>41</sup>

Decentering lawyers in the field of social action offers a different vantage point for assessing their contribution to movements and the tensions raised by their professional role. This decentering leads me to make two points. The first is that lawyer accountability is actually a subset of broader accountability concerns in the field of social action: how well lawyers do in representing constituent interests may be usefully compared to how well other leadership structures do in this same regard. The second point is that how accountable lawyers are (and what that means) is related not just to the structure of legal representation, but also to the attitudes that lawyers bring to it, which we know are shaped by where they work. Thus, understanding lawyer motivation and how legal teams are structured across practice sites is important to understanding how legal resources are mobilized for causes.

In mapping the input side, we can think of legal mobilization as involving a potential range of individuals and groups, depending on the context. The central actors are the “constituency” that stands to benefit from changes to or the systemic enforcement of law.<sup>42</sup> African Americans in the Jim Crow South, the welfare poor, immigrants, and environmentalists are all examples of U.S. constituencies that have sought to advance their interests through law (among other strategies). It is possible, of course, that individual members of a given constituency will mobilize law on their own, but to the extent that constituent members invoke the formal mechanisms of law, they often rely on the

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40. NeJaime, *supra* note 4.

41. Jennifer Gordon, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CALIF. L. REV. 2133 (2007).

42. I note here that my terminology in this regard differs from the shorthand used in social movement theory, in which “constituency” has tended to be used to refer to those *donors* who finance a movement, while those who benefit from movement activity are often called simply “beneficiaries.” See John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, 82 AM. J. SOC. 1212 (1977). I choose the term “constituency” over “beneficiaries” because it both connotes more active participation in the social change project and rests on a concept of representation that is key to evaluating the ultimate efficacy of the mobilization itself.

expertise of lawyers, who therefore come to play a key—though often contested—role in the legal mobilization process.

The lawyer-client relationships may be formed either at the initiative of the clients, who seek out lawyers in specific interest-advancing cases, or by the lawyers, who develop a plan of law reform and then seek out the cases and clients that might maximize the chance for a positive outcome. This latter, lawyer-driven approach is associated with the famous “test-case” strategy pioneered by the NAACP Legal Defense Fund in its desegregation campaign and adopted by other legal groups, like the Center on Social Welfare Policy and Law, the National Organization for Women Legal Defense Fund, and the Natural Resources Defense Council.<sup>43</sup> The emphasis on the lawyer’s decision-making role, and the professional obligations it entails, is a key theme of research<sup>44</sup>—even though the test-case model represents only one possible method of legal mobilization and perhaps not the dominant one, at least within contemporary U.S. public interest practice on the political left.

The relationship between lawyers and the constituency is mediated by three potential representative structures or “intermediaries”: (1) a formal organization that claims to act on behalf of the constituency, (2) a legally defined class within a class action structure, and (3) an individual member or group of members acting outside of either of the first two organizational frameworks. In all three cases, lawyers may represent one (or more) intermediary as a client, which in turn claims to represent the broader constituency. As this illustrates, there is a *double representation*: the first running from the lawyer to the intermediary and the second from the intermediary to the constituency. Concerns about lawyer accountability treat, and often conflate, both layers. How we understand the problem of lawyer accountability to broader constituencies in an environment of political complexity is related to how well other leadership structures within social movements represent their constituents’ interests. The narrow point I want to make here is that whether lawyers do a better or worse job than other movement leaders in representing constituent interests, and under what conditions, is a relevant factor to consider in judging the lawyers’ role. One reason accountability matters is as a check to minimize the risk that lawyers take

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43. JOEL F. HANDLER ET AL., *LAWYERS AND THE PURSUIT OF LEGAL RIGHTS* 22–23 (1978).

44. The classic works are Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470 (1976); and William B. Rubenstein, *Divided We Litigate: Addressing Disputes among Group Members and Lawyers in Civil Rights Campaigns*, 106 *YALE L.J.* 1623 (1997).

action that ultimately disserves constituents. Yet that risk is present in other types of representative structures. And what the constituency's "best interests" are is always deeply contested. Thus, from the perspective of promoting community empowerment, there may be good reasons to be concerned about placing control in lawyers' hands (especially given their professional norms), but it is not always obvious that lawyers pose more risk to movement self-determination—whatever that may mean—than other types of leaders.

An additional lesson from empirical research on legal mobilization is that how lawyers approach their responsibilities to clients and constituencies is deeply contextual. Two findings are important. First, research has shown that cause lawyers are often highly attuned to power discrepancies between themselves and clients, and make efforts to minimize them; they are also attuned to the possibility of divergence between client interests and the broader interests of constituencies, and attempt to structure the lawyer-client relationship in such a way that promotes accountability.<sup>45</sup>

Another important finding is that a lawyer's orientation toward accountability issues is dependent on where she works.<sup>46</sup> Legal mobilization is often undertaken by lawyers working in a range of practice sites, with different expertise, different levels of commitment and relations to social movements, and different approaches to lawyering. Nonprofit lawyers who do not rely on clients for financing may be less client-centered than lawyers in private cause-oriented firms who rely on client fees.<sup>47</sup> But nonprofit lawyers may also have freedom to experiment with different forms of representation, some of which may assert a strong commitment to client-centeredness as a vehicle of client empowerment; others may explore different versions of community lawyering, in which lawyers seek to develop deep relationships with community members in order to advance their interests. Other lawyers may play distinct roles. For instance, large firm pro bono lawyers, who are not cause-oriented in general, may be called upon to support discrete

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45. See COREY S. SHDAIMAH, *NEGOTIATING JUSTICE: PROGRESSIVE LAWYERING, LOW-INCOME CLIENTS, AND THE QUEST FOR SOCIAL CHANGE* (2009); Scott L. Cummings, *The Accountability Problem in Public Interest Practice: Old Paradigms and New Directions*, in *LAWYERS IN PRACTICE*, *supra* note 1, at 340; Ann Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 *FORDHAM L. REV.* 2449 (1999).

46. See Scott L. Cummings & Ann Southworth, *Between Profit and Principle: The Private Public Interest Firm*, in *PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION* 183 (Robert Granfield & Lynn Mather eds., 2009); SHDAIMAH, *supra* note 45.

47. See Scott L. Cummings, *Privatizing Public Interest Law*, 25 *GEO. J. LEGAL ETHICS* 1, 43 (2012).

pieces of litigation in connection with an overall social change plan. Similarly, small firm cause lawyers may devote time to supporting movement cases, while working on other matters to pay the bills. As researchers continue to study how lawyer-client relationships are negotiated in complex legal campaigns, it will be important to focus attention on how lawyer attitudes and practice constraints shape accountability.

### C. How?

In terms of how law is mobilized, the existing literature tends toward a dichotomized view of legal mobilization that divides the way in which law is deployed for social change into two categories: litigation (actual or threatened) and grassroots mobilization. These categories have been used to correspond to notions of “top-down” (or lawyer-driven) versus “bottom-up” (or constituency-driven) mobilization. In both instances, the key legal resource that is mobilized is the concept of “rights.”<sup>48</sup> This concept is deeply contested,<sup>49</sup> but “has an affinity with individual interests in privacy and physical autonomy, with claims against state interference with individual action, and with the protection of established entitlements.”<sup>50</sup> In the canon of legal mobilization scholarship, rights-claiming plays a central role, whether in the form of litigation in court or rights-claiming in “everyday locations such as workplaces, neighborhoods and schools.”<sup>51</sup>

Although rights-claiming in court to effect social change is now propelled by groups on both the political left and right, the American origins of impact litigation and particularly its association with *Brown v. Board of Education*<sup>52</sup> and the Warren Court has tied it to the concept of “legal liberalism,” understood as a “trust in the potential of courts, particularly the Supreme Court, to bring about ‘those specific social reforms that affect large groups of people such as blacks, or workers, or women, or partisans of a particular persuasion; in other words, *policy change with nationwide impact.*’”<sup>53</sup> Whether legal liberalism succeeded or failed, and why, goes to the heart of the question of law’s impact. For now, I simply observe that the emphasis on rights, either through litigation or grassroots activism, presents the process of legal

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48. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

49. See Austin Sarat & Thomas R. Kearns, *Editorial Introduction*, in *LEGAL RIGHTS* 1, 1–13 (Austin Sarat & Thomas R. Kearns eds., 1996).

50. Simon, *supra* note 38, at 137.

51. ALBISTON, *supra* note 4, at 15.

52. 347 U.S. 483 (1954).

53. LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 2 (1996).

mobilization too narrowly. What we know about contemporary public interest lawyers and social reform activists who deploy law is that traditional court-based rights strategies are but one arrow in the quiver of social change tools. As Ann Southworth found in her classic study of civil rights and poverty lawyers in the 1990s, lawyers engage in a range of transactional and other problem-solving services.<sup>54</sup> Recent research by Laura Beth Nielsen and Catherine Albiston, as well as Deborah Rhode, supports the view that litigation is only a fraction of the type of advocacy public interest lawyers do.<sup>55</sup>

Indeed, the literature shows that there are at least three other ways in which lawyers mobilize law.<sup>56</sup> First, they negotiate resolutions to disputes. This occurs in the “shadow of law,”<sup>57</sup> and thus trades on background rights; however, negotiation also leverages other forms of bargaining power and translates them into contracts. Second, lawyers structure deals, creating legal relationships outside the framework of state-created rights. This type of legal mobilization is associated with the community economic development movement in the United States, and seeks to build power through collective structures that channel resources into economically and politically disadvantaged neighborhoods.<sup>58</sup> Third, lawyers commonly help clients and constituents move policy by advising them about opportunities for political intervention, crafting policy language that comports with constitutional and statutory standards, and helping to move law through the process of internal governmental review and validation. This type of lawyering involves strategic counsel, legal risk assessment, and policy legitimation. Within the process of building political support and lobbying for policy change, lawmakers care about the political stakes, but part of that calculation may be how likely it is that a piece of legislation will be legally challenged and successfully defended. Lawyers working with mobilized communities seeking law reform via legislative routes provide advice to groups and legal counsel to entities such as the city, state, or federal attorneys general who may be called upon to opine on the legal merits. Part of this advice may be helping city officials get comfortable with the legality of proposed

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54. See Ann Southworth, *Lawyers and the “Myth of Rights” in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469 (1999).

55. See Nielsen & Albiston, *supra* note 28, at 1611–12; Rhode, *supra* note 28, at 2046.

56. For a discussion of broadening the frame of understanding what lawyers do, see Jane Aiken & Stephen Wizner, *Law as Social Work*, 11 WASH. U. J.L. & POL’Y 63 (2003).

57. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

58. See Anthony V. Alfieri, *Faith in Community: Representing “Colored Town,”* 95 CALIF. L. REV. 1829, 1850–52 (2007).

reform. A key point of the research again is that these strategies are often consciously deployed in ways that are designed to be interactive and mutually reinforcing.

As this suggests, empirical research on the inputs to legal mobilization has emphasized how deeply embedded lawyers and legal strategies are in overarching political contests. Within this frame, how legal choices are structured to be synergistic with political ones (and whether that works), how targets are selected, how resource tradeoffs are negotiated, how lawyers relate to other actors (both grassroots and leadership), and how litigation relates to other types of legal advocacy are key questions for future research. Ultimately, whether the multidimensional approach deployed on the input side produces different types or even better results on the output side is a crucial question in the field—and the subject to which I now turn.

### III. OUTPUTS: THE CHALLENGE OF EVALUATION

How to study the impact of law is a question that has confronted scholars since the 1960s.<sup>59</sup> There are questions about which types of impacts to study and the proper methodology for doing so. I have already alluded to some of the complications in defining appropriate outcomes, since researchers may care about different impacts: on doctrine, social practice, community consciousness, or the underlying structure of political power. Indeed, much of the debate about the impact of legal strategies involves whether researchers are using the appropriate metric. In perhaps the classic example, critical legal studies scholars argued that although it was true that legal mobilization had produced change in doctrine and even some changes in social practice, it had failed to produce deep restructuring of political power (and in fact had legitimized the status quo).<sup>60</sup> In this Part, I bracket this question about the correct metrics, which is fundamentally contested, to focus more narrowly on how to think about best measuring the outcomes that scholars select in the first instance. My approach here is conceptual rather than technical in that I am not proposing methodological approaches, but rather framing questions that go to how we understand the goals of social scientific study of social change outcomes.

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59. See George W. Spicer, *The Federal Judiciary and Political Change in the South*, 26 J. POL. 154 (1964).

60. See Gordon, *supra* note 18, at 642–44.



*A. Background Conditions*

In evaluating outcomes of campaigns to mobilize law for change, it is relevant, though not always decisive, to know the conditions propelling the campaigns forward. This means understanding the motives and goals of the lawyers and activists who chose law and how the campaigns were triggered and evolved. This is not to suggest that one must always judge the outcome of a campaign exclusively by the goals set for it *ex ante* since it may be the case that either there was not a clear set of goals articulated or they were misguided from the outset. Nonetheless, some reflection on goals and background conditions is relevant. With respect to goals, it would be important to know whether lawyers pursued litigation because they wanted a judgment or because they thought that the case would support grassroots organizing or other political action.<sup>61</sup> In the same-sex marriage context, for example, some litigation was undertaken in order to focus public attention on issues moving forward in the legislative sphere, while legislative efforts were often undertaken with an eye toward setting up suspect classification arguments in potential constitutional litigation.<sup>62</sup> Meaningful evaluation of legal mobilization in this context would benefit from comparing outcomes to the goals set in these coordinated campaigns. In addition, analysis of the input side may inform how we judge outputs in other ways that I explore here: by framing how law was invoked and by whom, clarifying the challenges to legal mobilization and how they were understood by movement actors, and exploring how certain or uncertain various contingencies appeared at the time of decision making.

Research on social change has often drawn a distinction between the role of *law* and the role of *lawyers*. Within the literature on court impact, the threshold question is whether a specified legal change, on its own terms, translates into some type of change in social practice. How the legal change occurred in the first instance and who caused it are bracketed off. This facilitates empirical analysis by isolating the independent variable (legal change), but does so by sacrificing important details that may be relevant to understanding aspects of the story. For instance, one reason we may care about court impact is as a way to judge movement lawyer decision making. Did the lawyers help or hurt the movements on whose behalf they worked? Court impact studies

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61. See Scott L. Cummings, *Hemmed in: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1 (2009). In evaluating impact, it would also be important to know whether lawyers might have asserted short-term goals they knew were unrealistic at the time in order to build a long-term foundation or make other goals seem more moderate by comparison.

62. Cummings & NeJaime, *supra* note 38, at 1312–14.

implicitly (and sometimes explicitly) offer a critique: they say that lawyers should not have brought claims in the first instance because they did not advance the cause or perhaps set it back. Gerald Rosenberg, who is famous for his seminal impact research finding that Supreme Court decisions generally do not produce social change,<sup>63</sup> has focused his analysis on the impact of “law,” but in so doing makes judgments about the decisions of lawyers (or “proponents” in his terms), as is evident from his negative assessment of the same-sex marriage movement:

Same-sex marriage proponents had not built a successful movement that could persuade their fellow citizens to support their cause and pressure political leaders to change the law. Without such a movement behind them, winning these court cases sparked an enormous backlash. They confused a judicial pronouncement of rights with the attainment of those rights. The battle for same-sex marriage would have been better served if they had never brought litigation, or had lost their cases.<sup>64</sup>

My point here is that to the extent that such judgments about court impact are, at least in part, about the wisdom of ex ante lawyer decisions to bring cases to court, it is important to include the context of lawyer decision making within the framework of empirical evaluation.

The movement for same-sex marriage, which Rosenberg criticizes, offers a useful vehicle for considering how evaluating law’s impact may be informed by understanding the conditions under which law comes to play a role. The case now before the United States Supreme Court, *Hollingsworth v. Perry*,<sup>65</sup> originated in challenge to Proposition 8, the California initiative passed by voters in 2008 that amended the state constitution to prohibit marriage for same-sex couples.<sup>66</sup> That case, as is well known, was brought by the unlikely team of conservative lawyer Ted Olsen, former Solicitor General under President George W. Bush, and David Boies, a noted trial lawyer and staunch Democrat.<sup>67</sup> They brought the case in *opposition* to advice by movement lawyers from groups such as the ACLU and Lambda Legal, who had spent more than two decades trying to advance the right to marry in California by keeping

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63. ROSENBERG, *supra* note 21.

64. Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 813 (2006).

65. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted*, *Hollingsworth v. Perry*, 133 S. Ct. 786 (Dec. 7, 2012) (No. 12-144).

66. Cummings & NeJaime, *supra* note 38, at 1299.

67. *Id.*

the issue *away* from the courts.<sup>68</sup> Proposition 8 itself was a reaction against the California Supreme Court's decision in *In re Marriage Cases*,<sup>69</sup> which asserted a constitutional right of same-sex couples to marry under California law.<sup>70</sup> That case, too, originated outside of movement lawyer control when San Francisco Mayor Gavin Newsom began issuing marriage licenses to same-sex couples in 2004, triggering an injunctive lawsuit by Christian right groups.<sup>71</sup> It was as a defensive response to that lawsuit that LGBT movement lawyers came into the case, which ultimately raised the constitutional question resolved by the California Supreme Court. *In re Marriage Cases* ultimately elicited countermobilization and backlash in the form of Proposition 8. But it was pointedly not because of movement lawyer decision making—but rather despite it. Thus, in evaluating the use of law in this context, it may be fair to note that legal mobilization produced negative effects, but not to assign that blame to movement lawyers directly.

In the same-sex marriage case, one could view Olsen and Boies's decision to file a federal constitutional challenge to Proposition 8 as validation of the “myth of rights”<sup>72</sup>—and perhaps this is so. But it does highlight another background issue: that there is often no unified set of law reform “proponents.” Instead, lawyers are differently situated relative to movement decision making and therefore judging the outcome of legal cases requires inquiry into the practice locations and motivations of lawyers bringing them. Thus, we might view outcomes differently if the lawyers leading the litigation are movement lawyers versus private attorneys whose motivation is fee recovery or professional recognition, or pro bono lawyers whose motive is experience before the appellate bar. To fully appreciate legal outputs, it is therefore relevant to know what factors shape the input side. Was legal mobilization part of a considered strategy developed among lawyers, activists, and community members? Or was it initiated by leadership rivals to assert alternative movement claims or gain status within the field? Or was it a project advanced by private lawyers seeking payment or prestige? Or did it even occur by accident? The reasons that lawyers and activists turn to law, in other words, are complex. They operate in a fluid and competitive field; they might do so out of extreme faith in law or they might do so because they are forced by events and adversaries to get into the game.

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68. *Id.* at 1299–1300.

69. 183 P.3d 384 (Cal. 2008).

70. *Id.* at 433–34.

71. Cummings & NeJaime, *supra* note 38, at 1276, 1279–81.

72. See STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (1974).

In evaluating law's impact, it is also relevant to know the preexisting and anticipated barriers to success. Studies of court impact may attempt to measure outputs by the distance traveled from court decision to legal implementation. I will return shortly to the issue of appropriate baselines, but for now I want to suggest that attempting this measurement without accounting for structural barriers to implementation may present a distorted view. In reality, legal reformers often face a political environment in which there is an already activated opposition ready to resist any movement advance, whether it occurs through courts or legislatures. If this is true, then it still may make sense to judge court impact by the extent of implementation, but it may also make sense to view less-than-full implementation much more favorably if we know: (1) that large-scale legal implementation is generally difficult to achieve, even when it rests on legislative mandates (as in the case of welfare), and (2) movement opponents are already mobilized to resist implementation (as opposed to situations in which the court decision itself provokes backlash). We now know much more about how implementation works (or does not work) across different legal regimes and how countermobilization and backlash affect it.<sup>73</sup> Thinking about how this knowledge feeds into theories of court impact is important to deepen the evaluative project. It also relates back to how we should understand and judge the role of lawyers as the agents of law reform. Blaming lawyers for failing to achieve implementation through court orders seems fair only if lawyers actually believed that such decisions would be in fact be implemented (as opposed to needing activated citizenry to mobilize) and there were other available political means that would have achieved a better result.<sup>74</sup>

As this discussion suggests, legal mobilization—like all system-challenging political action—is inherently risky.<sup>75</sup> Lawyers can bring a case and lose. They can bring a case, win in the short term, but lose over time because of backlash and countermobilization. They can bring a case that is technically successful, but alienates and demobilizes the constituent members and thus undercuts their motivation and sense of agency. How lawyers and activists judge these risks at the time they are making them is obviously a different project than how researchers judge outcomes after the fact. That is, at the moment lawyers and activists elect to pursue law, they operate under conditions of deep uncertainty. They

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73. See ROBERT T. NAKAMURA & FRANK SMALLWOOD, *THE POLITICS OF POLICY IMPLEMENTATION* (1980); Post & Siegel, *supra* note 26.

74. I return to this last point in the discussion of counterfactual analysis, *infra* Part III.D.

75. See MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994).

can attempt to game out possible scenarios and estimate the probability that they will occur, but these estimates will be imperfect—both because information is imperfect and because the lawyers may, like many of us, suffer from processing biases that cause them to systematically misjudge. Yet the contingency of these decisions may be related to how we evaluate them. Activists may have a plausible theory of change that is derailed by unforeseen circumstances—as opposed to a theory that is just wrong. How one judges outcomes depends on which is true.

### *B. The Baseline Question*

In any analysis of outcomes, one must choose the point from which one measures success or failure. This may be obvious in natural scientific experiments, but can become complicated in the social science context, in which there are often multiple ways of understanding and measuring success. For instance, should success be understood in relation to the ultimate aspirational goal or the reality of where one starts?<sup>76</sup>

To be more concrete, take again the movement for same-sex marriage. Should we view success by reference to achievement of the ultimate goal: securing the right to marry for same-sex couples throughout the United States? Or by reference to the initial starting point, which was the absence of any state-level legal recognition of same-sex couples prior to *Baehr v. Levin*<sup>77</sup> in Hawaii?<sup>78</sup>

In his analysis of the same-sex marriage movement, Rosenberg takes the former view—that is, he evaluates success, or the lack of it, based on the discrepancy between the aspirational regime of full marriage equality and the current reality in which only a handful of states recognize marriage for same-sex couples.<sup>79</sup> He also argues that not only has legal mobilization through courts failed to achieve the movement's aims, but that it has actually made those aims *more difficult* to achieve by erecting numerous roadblocks: statutory and constitutional amendments in most states prohibiting same-sex marriage, which are difficult to overcome, and more polarized public opinion.<sup>80</sup> Contrast his view with that of Thomas Keck, who in analyzing the trajectory of LGBT rights, argues that measurement should occur from the baseline of no rights.<sup>81</sup>

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76. This discussion draws on my work with Doug NeJaime on same-sex marriage. See Cummings & NeJaime, *supra* note 38, at 1325–27.

77. 852 P.2d 44 (Haw. 1993).

78. *Id.* at 55–57.

79. ROSENBERG, *supra* note 21, at 353.

80. *Id.* at 416.

81. See Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 *LAW & SOC'Y REV.* 151 (2009).

Under this metric, Keck contends that, even accounting for statutory and constitutional retrogression in some states, the current regime looks better than the point at which LGBT advocates started.<sup>82</sup> Indeed, whereas there were no relationship recognition laws in the 1970s, there are now a significant number of laws, from marriage to other recognition regimes, across the United States. Looking only at California, Douglas NeJaime and I similarly found that, if measured from the starting point of nonrecognition, there had been substantial success despite the setback of Proposition 8:

Whereas same-sex couples had no statewide legal rights in early 1999, by the end of 2009, they had won comprehensive domestic partnership and, in addition, full legal recognition for in-state and out-of-state marriages performed prior to Proposition 8, and full recognition (without the label “marriage”) for out-of-state marriages entered after Proposition 8 . . . .<sup>83</sup>

One could ask the baseline question about other domains of legal mobilization (such as civil rights) and even about the public interest law movement more broadly. Louise Trubek, for example, has recently argued that the public interest law movement has failed to live up to some of its most ambitious goals, including addressing fundamental problems of inequality.<sup>84</sup> Yet how we understand these claims depends upon our theoretical and empirical understandings of how change occurs. If one presumes that reform is stable and that full implementation of legal decisions is possible, then the inability to achieve fully implemented reform looks like a failure. However, if one presumes that reform—particularly system-challenging reform—is highly unstable and, in fact, will tend to be eroded over time by countermobilization and noncompliance, then some forward motion short of full implementation appears closer to success. Moreover, legal mobilization may make a situation not as bad as it otherwise would be; thus, we may have more inequality than we did fifty years ago, but perhaps it is less than it would otherwise have been without legal mobilization efforts (I do not assert this to be true, just plausible). Some argue that it is precisely because of the rights revolution ushered in by public interest law and the resulting legalization of social disputes that the nation has moved politically away from the progressive aspirations underlying the early conception of

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82. *See id.*

83. Cummings & NeJaime, *supra* note 38, at 1326.

84. *See* Louise G. Trubek, *Public Interest Law: Facing the Problems of Maturity*, 33 U. ARK. LITTLE ROCK L. REV. 417 (2011).

public interest law.<sup>85</sup> But this is an impossible argument to prove, primarily because one cannot disentangle the backlash against rights claiming from the broader backlash against progressive politics. Was it public interest litigation and iconic victories? Or the movements they were associated with? Or both?

Another baseline issue concerns the time frame of evaluative analysis. When do researchers decide when to start and stop measuring social change? There is no obvious answer in many cases and the choice of endpoints, which may be artificial, can affect one's ultimate assessment. Legal mobilization does not occur in a neat and linear fashion, and the time frame of analysis is important. Consider again the movement for same-sex marriage. If one were to study the movement before *Goodridge v. Department of Public Health*,<sup>86</sup> it looks much worse than after; it may look like a much more positive story in a decade than it does now. Or take *Roe v. Wade*.<sup>87</sup> The short-term effect on access to abortion was arguably positive, though the longer-term picture looks more mixed.<sup>88</sup> Of course, as time passes, the number of other intervening variables that may have explanatory power increases—and thus telling a causal story becomes more difficult.

### *C. Burden of Proof*

What is the burden of proof for social scientists making empirical claims about the relationship between a specified independent variable (e.g., a court decision) and a dependent one (e.g., greater school integration, more equality in the workplace, less housing segregation)? In scientific experiments, the convention for proving one's hypothesis is that one be able to *disprove* an alternative explanation—the so called “null hypothesis.” But in social science, that is often not possible outside of experimental studies—and even then there are often challenges.

Again, Rosenberg's work is important here. Rosenberg's hypothesis about court impact is that such impact will have positive effects only when specified constraints are overcome—namely, when there are supportive legal precedents, political elites, and public attitudes, and when there are mechanisms to promote implementation and compliance.<sup>89</sup> There are two frames for evaluating his conclusions. One would lead us to ask what evidence would *prove* his hypothesis? Here,

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85. See, e.g., RICHARD THOMPSON FORD, *RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY* (2011).

86. 798 N.E.2d 941 (Mass. 2003).

87. 410 U.S. 113 (1973).

88. See ROSENBERG, *supra* note 21, at 179.

89. *Id.* at 36.

we might say that Rosenberg's burden is not simply to adduce all available evidence bearing on whether the specified constraints are overcome, but also to draw inferences from an ambiguous factual record in favor of the hypothesis.

The second frame would pose the opposite question, which is: what evidence would *disprove* Rosenberg's hypothesis? Strictly speaking, any evidence that positive change occurred, directly or indirectly, in the absence of the preconditions would invalidate his hypothesis. That is, if one could show positive social change emanating from a court decision in the absence of the preconditions, then the hypothesis fails. From this perspective, we might say that the burden of a researcher like Rosenberg is to go as far as possible to show the absence of alternative facts and to eliminate alternative interpretations. In Rosenberg's own view, if he meets that test and still cannot find evidence to support a causal link between court decision and specified outcome, then "it should serve to shift the burden of proof to the proponents of the claim" that court decisions produce positive effects.<sup>90</sup>

In that case, the central—and centrally contested—question becomes how social scientists should treat the evidentiary record and what type of inferences they should draw. Should they be required to draw all inferences in favor of the alternative view? Consider Rosenberg's analysis of *Brown v. Board of Education*'s impact on school desegregation. In evaluating that case, Rosenberg argues that there is no evidence that *Brown* is causally linked to the subsequent boycott phase of the civil rights movement.<sup>91</sup> Rosenberg suggests that it is plausible to think that *Brown* sparked Montgomery, which would then allow researchers to "trace the indirect effect of *Brown* to Montgomery to the demonstrations of the 1960s to white opinion to elite action in 1964 and 1965."<sup>92</sup> In this chain, *Brown* would have played a role in advancing the civil rights movement. Yet Rosenberg finds no causal link, noting that the planning for the boycott occurred prior to *Brown*, that the initial demands did not include an end to segregation, and that there were other examples of boycotts that were widely known to be models for Montgomery.<sup>93</sup>

Other scholars, however, point to different facts suggesting different causal chains. One study of the boycott, for instance, argues that *Brown* changed the context of struggle in ways that raised expectations about the possibility of reform, emphasizing that Dr. Martin Luther King, Jr.,

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90. *Id.* at 110.

91. *Id.* at 131–42.

92. *Id.* at 134.

93. *Id.* at 131–37. Historian Michael Klarman similarly argues against evidence of a link. KLARMAN, *supra* note 27, at 371.



had pointed to *Brown*'s promise of equality as giving African Americans "the necessary spark of encouragement to rise against their oppression."<sup>94</sup> Noting that lawyers associated with the boycotters early on attempted, but failed, to challenge the constitutionality of bus segregation under *Brown*, this study concludes that even though community leaders initially rejected an affirmative federal court test case, they used its threat as bargaining power in negotiations with city leaders.<sup>95</sup> In addition, Randall Kennedy's treatment of Montgomery reveals that the boycotters would probably have ended their boycott due to the imposition of a state injunction against their alternative transportation system but for the Supreme Court's per curiam decision in *Gayle v. Browder*<sup>96</sup> (handed down the same day as the injunction).<sup>97</sup> That case affirmed the lower court's extension of *Brown* to invalidate segregation in intrastate transportation.<sup>98</sup> Kennedy's analysis suggests that *Brown*, though perhaps not integral to Montgomery's beginning, was decisive to its favorable end. Under this historical reading, without *Brown*, the boycott may have been broken—and the iconic spark of the boycott phase of the movement might never have occurred.

The point here is not to take sides in this debate, but to use it as an example of a broader challenge of interpretation. Because there is no clear ex ante way to understand the salience of particular facts, what are the scholarly obligations to raise and reject alternative explanations? In Rosenberg's frame, it is the absence of evidence that shifts the burden of proof to proponents of the view that law matters. Even if one accepts this burden-shifting rule, then it would seem to require the researcher, here Rosenberg, to draw every reasonable inference from the record in favor of a positive impact. Of course, his failure to do so (if he has indeed failed) does not mean that proponents of law's positive impact are right, just that he has not met his burden. In the end, who *is* right turns on who assembles the best evidence and then makes the most compelling case for the inferences drawn—an interpretative project that always leaves space for contestation, thus underscoring the challenges of scientific study of social phenomena.

Michael McCann's work on legal mobilization offers another perspective on the burden of proof issue. In his notable exchange with

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94. Christopher Coleman et al., *Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest*, 30 *LAW & SOC. INQ.* 663, 671 (2005) (quoting Martin Luther King, Jr.).

95. *Id.* at 671–73.

96. *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956), *aff'd*, *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam).

97. Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 *YALE L.J.* 999, 1047 (1989).

98. *Browder*, 142 F. Supp. at 716–17, *aff'd*, *Gayle*, 352 U.S. 903.

Rosenberg over methods for studying social change, McCann argued that it was not possible to distinguish “law” from the social change sought to be measured (e.g., the direct effects of *Brown* on desegregation and its indirect effects on attitudinal shifts and stimulating other forms of mobilization).<sup>99</sup> Instead, McCann argued that legal norms were “constitutive” of “citizen meaning making activity,” and therefore it was more useful to study the “complex ways” in which law and behavior “influenced each other and how these dialectical interactions over time figured prominently into processes of social change.”<sup>100</sup> While this debate has received much attention as positing opposed epistemologies of social behavior, I suggest that, at bottom, the debate hinges more on shifting metrics and arguments about what types of evidence count (and how much). Thus, it reproduces the burden of proof issue.

My own comparison of McCann’s study of pay equity law reform efforts with Rosenberg’s assessment of *Brown* suggests that the debate about the positive or negative effects of law turns on differences in perspective and interpretation, rather than fundamental epistemological divides. Fundamentally, the two researchers are studying different phenomena with different data. While Rosenberg asks what *courts* do by marshaling quantitative data about various impacts, McCann is more focused on the strategic choices of *lawyers and activists* in promoting pay equity across various cases, using surveys, interviews, and qualitative case studies to assess what the actors understood they were doing and what they achieved. McCann does draw some conclusions about impact not mediated by participant views, but that is not his focus. As a result, the differences between their projects are differences of design that produce distinctive tradeoffs.

The strength of Rosenberg’s design is that he is able to make powerful claims about the direct effects of court decisions by reference to systematic data about school desegregation; he is able to look at the entire school system impacted by *Brown* and track over time the degree to which the desegregation mandate was achieved. The limit to this design is that there are many intervening variables that may explain implementation that vary across school districts, and the causal link that Rosenberg posits does not address them. Nor does Rosenberg’s model address how lawyers deployed *Brown*, which means that he cannot speak to how *Brown* may have been mobilized on a district-by-district level to

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99. Compare Gerald N. Rosenberg, *Postivism, Interpretivism, and the Study of Law*, 21 LAW & SOC. INQUIRY 435 (1996), with Michael McCann, *Causal versus Constitutive Explanations (or, on the Difficulty of Being So Positive . . .)*, 21 LAW & SOC. INQUIRY 457 (1996).

100. McCann, *supra* note 99, at 462–63.

advance reform efforts beyond where they otherwise would have been. He offers only the bird's eye view.

With respect to the indirect effects of *Brown* on political change (e.g., the Civil Rights Act of 1964) and movement activity (sparking direct action), Rosenberg suggests that his burden is to adduce evidence in support of specific hypothesized causal links.<sup>101</sup> As I indicated above with respect to Montgomery, Rosenberg fails to find what he views as convincing evidence of impact because there is no discernible increase in press coverage on civil rights following *Brown*, no clear reference to *Brown* in the legislative histories of the 1964 Civil Rights Act or the 1965 Voting Rights Act, and no strong evidence of growing support in white public opinion.<sup>102</sup> This evidence is no doubt important, but it is only one window into how political and movement actors understood the meaning of *Brown* at the time and acted upon it. Without contemporaneous survey and interview data that posed the question more directly, we are left with large gaps that cannot be filled in by reference to aggregate citations in newspapers or broad public opinion polls. The question, again, is how to frame those gaps in light of what we know. My view is that the appropriate frame is to be clear about the limits of the data and what types of questions can be answered with it. This means engaging with and being clear about other pathways through which change could have occurred, while emphasizing that the evidence presented does not disprove hypotheses, only fails to confirm them with the available data. However, I believe Rosenberg goes beyond this line, concluding:

While it must be the case that Court action influenced some people, I have found no evidence that this influence was widespread or of much importance to the battle for civil rights. The evidence suggests that *Brown's* major positive impact was limited to reinforcing the belief in a legal strategy for change of those already committed to it. The burden of showing that *Brown* accomplished more now rests squarely on those who for years have written and spoken of its immeasurable importance.<sup>103</sup>

McCann, in contrast, combines surveys and interviews of actors with qualitative case studies to show how law influenced movement growth, policy development, and legal implementation at various points in the pay equity movement. Unlike Rosenberg's use of aggregate data to

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101. ROSENBERG, *supra* note 21, at 109.

102. *Id.* at 111–31.

103. *Id.* at 156.

test correlations, McCann's focus is on how activists used "legal leveraging" across campaigns to achieve advances, and thus offers a more nuanced analysis of the role of law and lawyers in case-by-case efforts. However, the tradeoffs of McCann's design are the mirror opposite of Rosenberg's. Without aggregate industry data, he is not able to step back as well to evaluate the bigger picture of what pay equity litigation achieved on the ground overall.

Like Rosenberg, McCann agrees that reform litigation is of limited effectiveness in promoting legal implementation. Where they primarily differ is in their assessments of indirect effects—how much litigation advances movement building and legal consciousness raising. Here, McCann's more positive overall assessment is rooted in his greater emphasis on the role of law in achieving policy concessions, building movement infrastructure, and transforming the legal consciousness of the actors involved, which he was able to evaluate through interviews and surveys. Because Rosenberg does not have that type of attitudinal data, he relies on media salience, which ultimately does not tell us how activists understood the importance of legal decisions. Here, it strikes me that McCann's data are better suited to the task set. Whether one is convinced by McCann depends on how much weight one places on evidence of movement building and attitudinal shifts in measuring success. There is the risk that, in contrast to Rosenberg's quantitative empiricism, McCann's qualitative approach can prove too much, since movement activists are always likely to see positive results from their efforts. Accordingly, using that information as a metric of success—while revealing the constitutive nature of law—also risks overly determining a positive outcome based on actors' own perceptual biases. Even if one could minimize this risk, figuring out how to objectively arrive at the "correct" overall assessment of law's contributions to movements is complicated by the fact that direct and indirect effects are incommensurable and thus there is no clear way to weigh them in any ultimate summation.

Access to justice scholars have also grappled with versions of these interpretative problems. James Greiner and Cassandra Wolos Pattanayak's study of the impact of representation on legal outcomes—and the response to it—reveals some of the tensions in experimental social science.<sup>104</sup> In their article, Greiner and Pattanayak rightly point out the inadequacies of existing studies of representation, which track people who have on their own secured legal representation and thus cannot avoid the problem of selection bias: there may be something

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104. See D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Officer and Actual Use) Make?*, 121 YALE L.J. 2118 (2012).

systematically different about those who are able to find lawyers to take their cases than those who do not.<sup>105</sup> Their solution is randomization,<sup>106</sup> which solves the selection bias problem, but with a tradeoff: that the effect they ultimately study is not representation itself but rather the offer of it (due to the obvious reason that one cannot force a poor person not to accept legal representation at all). This is unavoidable and the authors have compelling reasons for why offer matters, but what is ultimately at stake is whether someone with a lawyer is better off than someone without.

How should such an inquiry be framed when there are significant tradeoffs and much is at stake as a matter of social policy? My own view again is that the onus is on the researcher to clearly articulate the tradeoff and report the data in such a way as to permit comparison. I believe Greiner and Pattanayak do this by reporting, in addition to the results of the formal model, how many subjects did in fact ultimately retain counsel and what the results of those cases were.<sup>107</sup> Although those results of direct use are tainted by selection bias, the researchers apply sophisticated statistical methods to minimize bias and, in so doing, provide more confidence in reading the experimental outcome achieved: that an offer of legal counsel in the cases does not affect case results.

#### *D. Counterfactual Analysis*

As the previous discussion highlighted, a key challenge to output evaluation is that it is often not possible for researchers to disprove an alternative explanation for the outcome they identify. A related issue involves how researchers use counterfactuals, often implicitly, to judge the effectiveness of actual legal strategies.

My concern here is when counterfactuals are *not* evaluated—but should be. The concern arises when researchers judge output measures in isolation from a consideration of how they fare relative to viable alternatives. Thus, critics of reform litigation might be able to prove (in a positive scientific sense) the absence of a correlation between a court pronouncement and an implemented rule, but that “gap” is politically significant to the extent that the turn to courts substituted for and displaced a nonlegal strategy that was more efficacious, or that litigation caused movement retrogression. To state the converse: if political mobilization would have also resulted in failed implementation (or also produced backlash), showing the court’s failure does not explain deficiencies specific to *legal mobilization*, but rather may simply be

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105. *Id.* at 2188–92.

106. *Id.* at 2198.

107. *Id.* at 2166–70.

highlighting general political failures related to the nature of the issue in question or the relative weakness of disfavored groups whether they mobilize politically or through courts.

This question hinges on how one views the risks and rewards of legal strategy—but also how these risks are compared to those that attach to an alternative political strategy. There is a tendency in the literature to assume that different types of risks inhere in law versus politics, without subjecting these assumptions to careful empirical testing. Gordon Silverstein’s recent work on the risks and rewards of “juridification”—what he describes as “substituting or replacing ordinary politics with judicial decisions and legal formality”—raises this issue.<sup>108</sup> In Silverstein’s view:

Law can save politics by breaking through the barriers that are a part of the American system; law can kill politics when deference to judicial authority, precedent cycles, and deconstructive patterns take the wind out of the political sails and . . . when law’s allure becomes so powerful that the means becomes the ends.<sup>109</sup>

For Silverstein, law “kills” when it substitutes for “ordinary politics” that more deeply “embeds” policy preferences with the public. An assumption underlying this claim is that ordinary politics is in fact available. One of his case studies of law “killing” politics is of *Roe v. Wade*, about which he asks:

But are abortion rights advocates really better off than they might have been had they focused on a different precedent path or fortified their legal gains with more traditional political measures, passing statutes and constitutional amendments in each state and at the national level and, in the process of that debate, embedding their policy and their preferences? Did the turn to the courts short-circuit a political process that might have better, and more deeply, embedded itself into the political and social consciousness of the nation?<sup>110</sup>

Although Silverstein gives no explicit answer to this question (which is meant to be rhetorical), it is obvious his answer is “no.” Yet this “no” assumes that his counterfactual—that legal gains could have been “fortified with more traditional political measures”—could have in fact

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108. SILVERSTEIN, *supra* note 16, at 5.

109. *Id.* at 269.

110. *Id.* at 123.

been achieved in ways that might have avoided, or minimized, backlash. Yet while this argument is often rehearsed, and could in fact be correct, it is not correct by sheer assertion. Indeed, recent historical scholarship casts some doubt on its force, suggesting that “backlash” to abortion rights was already growing prior to *Roe* as the Catholic Church and Republican party strategists sought to use the issue to drive a political wedge between conservative white southern voters and the Democratic Party.<sup>111</sup>

Silverstein makes similar unsubstantiated counterfactual assumptions about the antipoverty movement, which he argues became overly invested in law reform strategies in ways that backfired once political support for the federal legal services program and rights-based arguments for welfare entitlements declined.<sup>112</sup> However, as with abortion, this story faults litigation by suggesting that it was possible to make advances through other means that are unspecified.<sup>113</sup> With respect to the antipoverty movement, Silverstein argues that “there were viable political alternatives, and a near-exclusive reliance on a judicial strategy never came close to forcing the government to do what politicians and public opinion did not support.”<sup>114</sup> Again, there may be truth in some of this statement, but if there were “viable political alternatives,” what were they? How does he account for the coordination between early welfare rights litigation and the welfare rights movement, led by the National Welfare Rights Organization (NWRO)?<sup>115</sup> For the failure of NWRO’s mobilization around the Nixon welfare reform law of 1972? And for the fact that one of the programs he critiques—the federal legal services program—was in fact the product of ordinary politics (not judicial decree), but still came under conservative assault?

As this discussion underscores, counterfactual analysis is of central concern in the context of discussions about relative institutional competence and backlash.<sup>116</sup> An important debate within the law and social change field continues to center on the relative institutional competence of courts and legislatures, and the degree to which a decision from courts is more likely to produce backlash than a decision from legislatures. As Silverstein suggests, the presumption of judicial vulnerability—that courts are more likely to trigger backlash—rests on

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111. Greenhouse & Siegel, *supra* note 26.

112. SILVERSTEIN, *supra* note 16, at 107–09.

113. *Id.* at 109.

114. *Id.*

115. See MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973* (1993).

116. See David Fontana & Donald Braman, *Judicial Backlash or Just Backlash? Evidence from a National Experiment*, 112 COLUM. L. REV. 731 (2012).

the notion that legislative change is more institutionally legitimate because it reflects popular will. This notion is based on three important assumptions. First, that political change depends on changing public opinion before legislation occurs (and thus has a deeper base of political support). Second, that legislative change more deeply embeds change than judicial decisions which “get out ahead of public opinion” and thus legislative change is harder to reverse. And, finally, that courts as countermajoritarian institutions are more likely to inflame opinion and thus ignite countermobilization.

Yet it is not obvious that these assumptions always hold true as empirical facts. For instance, there are cases in which legislative change appears to occur despite quite polarized public opinion. President Barack Obama’s 2010 health care reform law is a case in point. Just before the health care bill was enacted, in March 2010, a Kaiser Family Foundation poll of adults nationwide found that only 28% strongly supported the bill, while 33% strongly opposed (overall 46% strongly or somewhat supported the bill, while 42% strongly or somewhat opposed it).<sup>117</sup> Since then, polling about support for the law has continued to reflect a consistent split, with a recent Kaiser poll showing that more people now view the law unfavorably (42%) than favorably (36%) (while support actually went *up* after the Supreme Court decision upholding the key parts of the law).<sup>118</sup> Thus, legislative change may also inflame public opinion. This is especially true when opposition is already mobilized and in an environment in which media elites are prepared to spin the advent of any sort of change to influence partisan ideological struggle. Thus, how court or legislative decisions are framed and disseminated is an important feature. It still may be true that judicial opinions entail more risk—and recent experimental data suggest that judicial opinions may create more polarization even if they do not change net support for issues<sup>119</sup>—but researchers need to treat the counterfactual as an empirical question and not a background assumption.

#### CONCLUSION

The rise of empiricism within the field of law and social change has produced critical insights that have significantly advanced the study and practice of legal mobilization. In this Essay, I have suggested that as the field moves forward, it is important to reappraise some of its underlying

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117. KAISER FAMILY FOUND., KAISER HEALTH TRACKING POLL: PUBLIC OPINION ON HEALTH CARE ISSUES (Mar. 2010).

118. KAISER FAMILY FOUND., KAISER HEALTH TRACKING POLL: PUBLIC OPINION ON HEALTH CARE ISSUES (Feb. 2013).

119. See Fontana & Braman, *supra* note 116, at 747.



assumptions and to integrate the insights from different disciplines into a framework for analysis that adequately reflects the reality of contemporary social change practice. This project is at once crucially important and dauntingly complex. Its importance lies in its relevance to contemporary political action, particularly on the left, where the question of law's potential—and its risks—has had its most thoroughgoing and divisive airing. At a political moment marked, for liberals, by the enormous “hopefulness” of a Harvard-trained civil rights lawyer and post-boomer progressive winning the presidency of the United States<sup>120</sup>—the first African American to hold the office—the legacy of the civil rights era still casts a shadow over the “hollowness” of legal strategies as a tool of progressive legal change.<sup>121</sup> The Supreme Court's watershed desegregation decision in *Brown v. Board of Education* still looms large as a symbol of law's seductive “allure.”<sup>122</sup> More than fifty years later, scholars continue to debate whether legal action in general, and the NAACP's test case strategy in particular, played a productive role in advancing civil rights progress<sup>123</sup>—and how much authentic progress has, in fact, been achieved despite Obama's ascension.

The answers are not just of historical interest. They matter profoundly for the way that contemporary reformers view legal action as a possible strategy for social change and for the way that judges and other official actors respond to their demands. This fact was recently underscored when the Obama administration decided to intervene in the challenge to California's Proposition 8 banning same-sex marriage now pending before the Supreme Court. The administration did so in a powerful, though limited way: in its amicus brief, it did not assert a broad constitutional right for same-sex couples to marry, but rather argued only against the constitutionality of laws like California's, which deny marriage to same-sex couples while providing legally equivalent domestic partnership. In explaining why the administration chose not to make the most sweeping constitutional argument, it was reported that the President had privately told top advisers “he thought social change was better when it took place through elections, not by court decree.”<sup>124</sup>

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120. “Hope” was, of course, candidate Barack Obama's defining theme in the 2008 presidential election, symbolized by the now-iconic red, white, and blue Shepard Fairey poster.

121. ROSENBERG, *supra* note 21, at 420–21.

122. See SILVERSTEIN, *supra* note 16.

123. See, e.g., BROWN-NAGIN, *supra* note 27; KLARMAN, *supra* note 27; Balkin, *supra* note 25; David S. Meyer & Steven A. Boutcher, *Signals and Spillover: Brown v. Board of Education and Other Social Movements*, 5 PERSP. ON POL. 81 (2007).

124. David G. Savage & Christi Parsons, *White House Asks Justices to Reject Prop. 8*, L.A. TIMES (Feb. 28, 2013, 6:22 PM), <http://www.latimes.com/news/nationworld/nation/la-na-court-prop8-20130301,0,7758627.story>.

Although we do not know the content of these discussions, as a student of constitutional history, one could imagine Obama making the decision not to press the more sweeping argument (that all laws barring same-sex marriage are unconstitutional) based on an evaluation of the empirical literature on *Brown*, *Roe*, and other cases that make up the canon of law and social change scholarship. Researchers have a real role to play in affecting how vital social change issues are understood and resolved within contemporary politics. The stakes are high and so, therefore, should be our standards.