

LAW, ISSUE FRAMES AND SOCIAL MOVEMENTS: THREE CASE STUDIES

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INTRODUCTION

Sometimes deliberately and sometimes unintentionally, lawyers have played a role in the framing processes of social movements. These processes are the means by which movements set boundaries and construct shared understandings concerning their methods, visions, and goals.¹ To take an iconic example, it was the lawyers of the NAACP Legal Defense and Education Fund (LDEF), interacting with a sympathetic and energetic social movement, who successfully framed school segregation as a civil rights issue and a violation of constitutional equality principles—a frame that continues to define civil rights efforts decades after their initial court victories.² Similarly, feminists in the 1970s and 80s named the age-old practice of sex-based provocation and assaults as sexual harassment and framed it as a type of sex discrimination. As a legal and social concept, this phenomenon has spawned an entire industry in sexual harassment trainings and human resources tools, not to mention popular media.³ More recently, lawyers of Gay and Lesbian Advocates and Defenders (GLAD), LAMBDA Legal, and other gay rights groups framed

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¹ Michael H.G. Hoffmann, *Analyzing Framing Processes by Means of Logical Argument Mapping 2* (Ga. Tech Sch. Pub. Policy, Working Paper No. 36, 2008), available at <http://ssrn.com/abstract=1298520> (identifying boundary setting, sense making, and meaning construction as three forms or aspects of framing).

² See MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 1925-1950* (1987).

³ Catharine MacKinnon is generally credited with leading this initial framing effort. See, e.g., CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979). Only a few decades after this initial frame-setting, websites such as <http://sexualharass.com> offer a range of preventive tools to employers seeking to curb sexual harassment in their workplaces. For movies featuring sexual harassment themes, see *NINE TO FIVE* (20th Century Fox 1980), *DISCLOSURE* (Warner Bros. Pictures 1994), and *NORTH COUNTRY* (Warner Bros. Pictures 2005). For a comprehensive discussion of framing in the women’s movement, see Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women’s Movement in the 1960s*, 111 AM. J. SOC. 1718 (2006). For framing in the sexual harassment context specifically, see Anna-Maria Marshall, *Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment*, 28 LAW AND SOC. INQUIRY 659 (2003).

their claim for state-sanctioned same-sex marriage as an issue of equality, using the frame in both litigation and advocacy.⁴

Over the past two decades, social movement scholarship has increasingly stressed the role of framing processes as a central aspect of social movement mobilization.⁵ This development in the social science literature coincides with lawyers' own increasingly self-reflective examination of their movement roles, played out in articles and books generated by legal academics as well as practitioners.⁶

This article contributes to that examination of lawyers' roles by presenting three brief case studies of legal framing and social movement mobilization drawn from the area of poverty law—first, the framing of issues of welfare inequality and poverty spearheaded by Ed Sparer that led to the wave of welfare rights litigation in the 1960s and early 1970s;⁷ second, the framing of poverty and inequality issues through a human rights lens, as illustrated by the activities of the Maryland Legal Aid Bureau; and third, the framing of housing as a human right in the United States, spearheaded by the National Law Center on Homelessness and Poverty.⁸

These case studies suggest three important lessons for activist lawyers: (1) a frame should not be confused or conflated with a legal theory; while there may be (and indeed, should be) overlap, these categories of meaning serve different functions; (2) because the functions of these concepts are different, it is important to engage in deliberate and strategic thinking beyond purely black-letter legal viability when proposing and developing frames that will straddle legal work and organizing; and (3) issue frames selected for their potential impact on decision-makers such as judges should be continuously tested for their resonance with, and relevance to, affected social groups if enhancement of social mobilization is one of the goals of legal advocacy.

I. WHAT IS FRAMING?

Drawing on disciplines such as psychology and behavioral economics, “framing” is a term of art that has been the subject of considerable study,⁹ though it has seldom been empirically examined in a legal context. While there are many definitions of framing and specific types of

⁴ See *Making the Case for Equality*, LAMBDA LEGAL (Mar. 3, 2007), <http://www.lambdalegal.org/about-us/history.html> (discussing Lambda Legal's legal strategy as making the case for equality in state and federal court); see also EVAN WOLFSON, *WHY MARRIAGE MATTERS: AMERICA, EQUALITY AND GAY PEOPLE'S RIGHT TO MARRY* 138, 154 (2004) (highlighting Lambda Legal's successful challenge to same-sex marriage restrictions in New Jersey); *Mission Statement*, GAY AND LESBIAN ADVOCATES AND DEFENDERS, <http://www.glad.org/about/mission> (last visited Mar. 31, 2011) (stating the organization's conviction “that every citizen deserves full equality under the law—without exception.”).

⁵ See Robert D. Benford & David Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611, 612 (2000).

⁶ See, e.g., GERALD LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 409-10 (1995); see also Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 447 (2001) (analyzing how lawyers have begun to reflect on the role that they as legal advocates should play in achieving social justice).

⁷ See, e.g., MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960-1972* (1993).

⁸ See *Program: Human Rights*, NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, <http://www.nlchp.org/program.cfm?prog=1> (last visited Mar. 31, 2011); Joe Lampert, *Housing as a Human Right*, GOTHAM GAZETTE, Nov. 26, 2007, <http://www.gothamgazette.com/article/housing/20071126/10/2353>.

⁹ Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1314 (2002).

frames, there is general agreement that frames are “schema of interpretation”¹⁰ that “give meaning to key features of some topic or problem.”¹¹ Movement lawyers generally draw on two types of frames that aid different aspects of their work: “issue frames” and “collective action” frames.

Issue frames have been defined as “alternative definitions, constructions or depictions of policy problems” intended to influence individual beliefs or opinions.¹² Prominent framing theorists Thomas Nelson and Zoe Oxley give several examples of issue framing that make clear the close alignment between framing and legal advocacy.¹³ For instance, the authors cite the alternative frames offered for affirmative action: “remedial action,” “reverse discrimination,” or “an unfair advantage.”¹⁴ Though often identified in academic writing as political frames designed to resonate with legislatures and other political institutions, these alternative concepts are also employed in litigation addressing the propriety of affirmative action measures.¹⁵ In these examples, the relevant legal theories of equality of opportunity and social frames of remedial action are quite similar if not identical.

Likewise, the concept of welfare has been subjected to multiple frames intended to elicit different audience responses—formulations ranging from a “government entitlement” to a “helping hand” to a “government handout.”¹⁶ While not as seamlessly transferrable to legalese as the affirmative action example, these issue frames are also reflected in litigation strategies, complaints, briefs, and judicial opinions. For example, a plaintiff’s complaint against the state in a welfare rights case might emphasize the relevance of subsistence support to democratic values of civic participation before proceeding on a legal theory more narrowly based on statutory non-compliance.¹⁷ On the other hand, a challenge to welfare entitlement might stress the idea of welfare benefits as an exercise of government discretion, a “handout” that should be denied if the recipients are undeserving or if other government priorities hold sway.¹⁸

Issue frames are of central importance in legal advocacy because the goal of legal advocates is to persuade an audience—whether a judge, legislative body or the broader public—to adopt a particular approach or reach a conclusion that will benefit the advocate’s clients or

¹⁰ Darren Noy, *When Framing Fails: Ideas, Influence, and Resources in San Francisco’s Homeless Policy Field*, 56 SOC. PROBS. 223, 223 (2009).

¹¹ Richard Lau & Mark Schlesinger, *Policy Frames, Metaphorical Reasoning, and Support for Public Policies*, 26 POL. PSYCHOL. 77, 80 (2005).

¹² Thomas Nelson & Zoe Oxley, *Issue Framing Effects on Belief Importance and Opinion*, 61 J. POL. 1040, 1041 (1999).

¹³ *Id.* at 1041; see also Paul Brewer & Kimberly Gross, *Values, Framing and Citizens Thoughts about Policy Issues: Effects on Content and Quantity*, 26 POL. PSYCHOL. 929, 929-30 (2005) (describing how both sides on the affirmative action debate use equality to frame their arguments).

¹⁴ Nelson & Oxley, *supra* note 12, at 1041.

¹⁵ See, e.g., *Gutter v. Bollinger*, 539 U.S. 306, 367-68 (2003) (Thomas, J., concurring) (pointing to the use of admission requirements in the past to discriminate against groups of people).

¹⁶ Nelson & Oxley, *supra* note 12, at 1041. For government benefits language, see *Goldberg v. Kelly*, 397 U.S. 254, 261 n.8 (1970) (“It may be realistic today to regard welfare entitlements more like ‘property’ than a ‘gratuity.’”) (emphasis added).

¹⁷ *Goldberg v. Kelly*, 397 U.S. at 264 (Thomas, J., concurring) (referring to welfare rights as “government entitlements”); *C.K. v. N.J. Dep’t of Health and Human Servs.*, 92 F.3d 171, 188 (3d Cir. 1996) (discussing the government’s role in alleviating poverty and exemplifying the principle of government largesse).

¹⁸ See MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* 9 (1990).

constituencies.¹⁹ Legal advocates aim to shape opinions, and considerable evidence supports the proposition that framing influences opinions.²⁰ Researchers assert that this influence comes about because of the role that framing can play in highlighting particular sympathetic aspects of an issue and minimizing the less sympathetic aspects.²¹ At bottom, issue framing serves an interpretive function, organizing information in ways that are intended to guide a particular decision-maker's action in response to the information.²²

A second category of framing utilized by public interest lawyers, the "collective action frame," is also a significant component of social movement mobilization. As opposed to issue framing, the goal of collective action frames is to promote collective action rather than highlighting particular issues and shifting individual opinion.²³ According to one study, "through collective action frames, activists identify problems, diagnose their causes, propose solutions, and give reasons for collective action."²⁴

The sociological literature examining the role of collective action frames in social movements is extensive. Among other things, sociologists have developed a typology of collective action frames. Big-picture organizing principles such as rights, justice, and choice that unite broad constituencies are labeled "master frames."²⁵ More particularized movement-specific organizing principles such as increased food stamp payments or greater access to legal assistance in civil cases are considered "organizational frames."²⁶ Organizational frames may work well in a particular social movement context but have limited or no utility for other movements. Master frames, in contrast, have the scope, flexibility, and cultural resonance to operate across social movements.²⁷

Interestingly, while scope and flexibility of collective action frames may be relatively stable over time, the cultural resonance of such frames will almost certainly shift; a frame that was ill-suited to be a master frame at one time may function as a master frame at a later date or in a different context when the frame becomes "culturally resonant to [its] historical milieu."²⁸ The resonance of the "domestic safety" frame after the attacks of 9/11 is an example. Because of the widespread concern about terrorism, the domestic safety frame became suddenly culturally resonant and sufficiently compelling to support many dramatic changes in national policy and individual privacy and autonomy.²⁹ The vividness and the immediacy of the events themselves played a role in creating this resonance and in bolstering the strength of the resulting frame. Indeed, sociologists David Snow and Robert Bedford identify a frame's credibility—its integrity,

¹⁹ See, e.g., MODEL RULES OF PROF'L CONDUCT PREAMBLE AND SCOPE (2010) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

²⁰ Nelson & Oxley, *supra* note 12, at 1042.

²¹ *Id.*

²² Benford & Snow, *supra* note 5, at 614.

²³ Ellen Reese & Garnett Newcombe, *Income Rights, Mothers' Rights, or Workers' Rights? Collective Action Frames, Organizational Ideologies, and the American Welfare Rights Movement*, 50 SOC. PROBS. 294, 294 (2003).

²⁴ *Id.*

²⁵ Benford & Snow, *supra* note 5, at 618-19.

²⁶ *Id.* at 619.

²⁷ *Id.*

²⁸ *Id.* (quoting W.J. Swart, *The League of Nations and the Irish Question: Master Frames, Cycles of Protest, and 'Master Frame Alignment*, 36 SOC. Q. 465, 466 (1995)).

²⁹ See, e.g., Stephanie McCrummen, *The Subtle Changes Since 9/11*, WASHINGTON POST, Sept. 11, 2006, www.washingtonpost.com/wp-dyn/content/article/2006/09/10/AR2006091001300.html.

and its salience or relevance to individual experiences—as the key component of its cultural resonance.³⁰

By the same token that successful collective action framing can enhance social movements, unsuccessful framing can have a neutral impact or even sap their energy and momentum. This is one of the sources of tension between movement strategies relying on legal action (which require viable legal theories or issue frames that may or may not serve as viable collective action frames) and those focused on coalition building and direct action.³¹ There are numerous examples from the legal literature where the issue frames imposed by litigation did not enhance social movement mobilization, and instead, contributed to the diffusion of the social movement the litigation was intended to serve. For example, it is instructive to compare the social movement impact of litigation striking down the Violence Against Women Act's Civil Rights Remedy, culminating in *U.S. v. Morrison*, with the litigation effort to hold communities accountable to enforce orders of protection, exemplified by *Castle Rock v. Gonzales*.³² Both litigation campaigns were counted as losses for the battered women's movement.³³ The *Morrison* case, however, raised highly technical issues of federalism and constitutional structure, and lent little momentum to social movement organization.³⁴ In contrast, the *Gonzales* case—framed as an issue of government accountability and bureaucratic finger-pointing at the tragic expense of victims of violence—has continued to contribute to social movement organizing.³⁵

The debate within the gay rights movement concerning the right to marry has been particularly transparent in this regard. A number of prominent activists have questioned the decision to focus resources on establishing a right to marry rather than a broader range of issues facing their constituency.³⁶ For these advocates, the equality frame adopted in the near term, while perhaps legally colorable and expedient in terms of achieving marriage rights under state constitutions, matters a great deal to the future direction of the gay rights movement. The choice, as they see it, is between a movement for social change that challenges norms of status and family structure or a movement for social inclusion that falls short of directly challenging the status quo.³⁷

³⁰ Benford & Snow, *supra* note 5, at 619-20.

³¹ Anna-Maria Marshall, *Social Movement Strategies and the Participatory Potential of Litigation*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 164, 164-65, 178 (Austin Sarat & Stuart Scheingold eds. 2006).

³² *U.S. v. Morrison*, 529 U.S. 598, 620-27 (2000); *Castle Rock v. Gonzales*, 545 U.S. 748, 760-763 (2005).

³³ In *Morrison*, the Supreme Court struck down a remedy that might have been invoked by victims of violence. 529 U.S. at 627. In *Gonzales v. Castle Rock*, the Court found that the municipality was not civilly liable for failing to enforce an order of protection. 545 U.S. at 748.

³⁴ *Morrison*, 529 U.S. at 620 (“[T]he language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers’ carefully crafted balance of power between the states and the National Government.”). For example, only two jurisdictions have enacted state or local versions of the VAWA Civil Rights Remedy in the wake of the Supreme Court’s ruling: Illinois and New York City. See Gender Violence Act, 740 ILL. COMP. STAT. 82 / 15 (2003), available at <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2494&ChapterID=57>; Actions by Victims of Gender-motivated Violence, 9 CITY ADMIN. CODE § 8-904 (2010), available at http://24.97.137.100/nyc/AdCode/Title8C9_8-904.asp.

³⁵ See, e.g., Caroline Bettinger Lopez, *Jessica Gonzales v. United States: An Emerging Model for Domestic Violence and Human Rights Advocacy in the United States*, 21 HARV. HUM. RTS. J. 183, 184-85 (2008).

³⁶ See, e.g., Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 9, 17; NANCY POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 123 (2008).

³⁷ See Nancy Polikoff, *Marriage Isn't the Half of It*, L.A. TIMES, Mar. 3, 2008, <http://articles.latimes.com>.

Some issue frames, while perfectly viable as a matter of rational legal analysis, are simply so far from the human experience or from existing cultural frames that they cannot serve as either alternative frames for mobilization or other collective action (including lawsuits) in a social movement context. For example, in a 1996 book, political scientist Eileen McDonagh proposed a reframing of the right to abortion as a tort issue—specifically, the tort of trespass, giving rise to the woman’s right to eject the fetus, a foreign trespasser or parasite, from her body.³⁸ Professor McDonagh developed her analysis of this theory consistent with existing tort law and reflecting accepted medical assessments of the status of a fetus at the early stages of pregnancy.³⁹ However, the frame deviated so dramatically from most women’s actual experiences of pregnancy, from the social construct of pregnancy as a joyous time, and from the socially-embedded narrative that ending a pregnancy was a difficult choice for women rather than the happy ejection of a parasite—the frame was never seriously taken up by proponents of abortion rights, however sympathetic they were to McDonagh’s theory.

Below I examine three more successful framing efforts by lawyers, using them to develop suggestions for lawyers’ role in the framing process necessary to all social movements.

II. FRAMING IN THE POVERTY LAW MOVEMENT OF THE 1960S

In poverty law circles, Ed Sparer was famous for framing, though social scientists were just beginning to identify this as a formal process at the time he was actively developing the emerging bases for welfare law.⁴⁰ Only a few years after his law school graduation, Sparer became the legal director of the newly formed Mobilization for Youth (MFY), a model social service organization based on New York’s Lower East Side.⁴¹ Client intake at a storefront office and referrals from MFY social workers formed the basis of the MFY legal unit’s caseload.

Sparer observed that his clients were raising the same issues that had been raised for decades by recent immigrants to the area, e.g., poor working conditions, poor housing conditions, and inability to access social services. Each individual client’s case presented issues encompassed by potential legal theories such as a breach of contract, tortious violation, or violation of state or federal regulations.⁴² Virtually all of the cases presented to MFY could have been resolved one-by-one on these grounds. But rejecting the traditional Legal Aid approach of providing individual case-by-case legal services for poor clients, Sparer stepped back and

com/ 2008/mar/03/opinion/oe-polikoff3.

³⁸ See EILEEN L. McDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* 5-6 (1996) (“[T]his book reexamines and reframes the basic principles underlying the abortion issue. It does so by shifting attention from what the fertilized ovum ‘is,’ . . . to what the fertilized ovum ‘does,’ as it causes pregnancy by implanting itself in a woman’s body.”).

³⁹ *Id.* at 90; see also Eileen L. McDonagh, *Remarks at the National Organization for Women Reframing Abortion Rights Briefing on “Breaking the Abortion Deadlock, From Choice to Consent”* (Jan. 21, 1997), <http://www.now.org/issues/abortion/mcdonagh.html> (“[T]he key issue [is] not merely her choice about what to do with her own body, but rather her right to consent to what the fertilized ovum is doing to her when it initiates and maintains pregnancy as a condition in her body.”).

⁴⁰ See ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* 25-26 (1974).

⁴¹ Sylvia A. Law, *Edward V. Sparer*, 132 U. PA. L. REV. 425, 425 (1995).

⁴² Legal Aid Society in New York and elsewhere had been resolving individual cases under these theories for decades before lawyers began framing these issues as constitutional claims. See, e.g., DAVIS, *supra* note 7, at 10-17.

articulated a “bill of rights” for welfare recipients including: (1) the right to privacy and protection from illegal search; (2) the right to freedom of movement and choice of residence; (3) the right to choose one’s own standards of morality; and (4) the right to freedom to refuse work relief without suffering penal or other improper consequences.⁴³

Building on this initial framing, which drew on, but did not replicate, relevant state and federal legal theories, Sparer identified a series of systemic and largely procedurally-oriented issues facing low income individuals that warranted development of systemically-focused litigation.⁴⁴ Through this process, he reframed the issues facing welfare recipients from examples of bad luck or individual failure to cases of broad and almost predictable injustice, reflecting systematic and unconstitutional inequality.

Sparer’s framing, circulated widely in the community of poverty lawyers, had great resonance with the emerging social movement of welfare rights activists. However, it did not supplant the recipient activists’ own articulation of their goals. Rather, as the primary counsel for the National Welfare Rights Organization (NWRO), Sparer had an important opportunity to learn directly from welfare recipient activists the narratives of their experiences and how those experiences fueled their own activism.⁴⁵ Two years after Sparer’s welfare “bill of rights” appeared in print, the NWRO offered its own set of goals for the movement:

- (1) Adequate Income: A System that guarantees enough money for all Americans to live dignified lives above the level of poverty;
- (2) Dignity: A system that guarantees recipients the full freedoms, rights and respect as all American; citizens;
- (3) Justice: A Fair and open system that guarantees recipients the full protection of the Constitution; and
- (4) Democracy: A system that guarantees recipients direct participation in the decisions under which they must live.⁴⁶

In contrast to Sparer’s initial articulation, the NWRO’s goals—unfettered by concerns about legal viability—made direct, substantive claims on the state for an adequate income and human dignity, as well as claims for procedural protections.

Importantly, the NWRO’s statement of goals had an impact on the frames articulated by the lawyers involved in the movement. In particular, after his initial 1965 law review article setting out a series of procedurally-oriented litigation goals, Sparer’s connection to the welfare recipient movement seems to have influenced the frames that he later raised as a movement lawyer. By 1969, writing in the *New York Times*, Sparer was not simply arguing for civil and political protections such as privacy and freedom of movement. Instead, he took up NWRO’s call

⁴³ Edward V. Sparer, *The Role of the Welfare Client’s Lawyer*, 12 UCLA L. REV. 361, 366-67 (1965).

⁴⁴ *Id.* at 375-77.

⁴⁵ For a discussion of the NWRO’s own processes of framing, see Reese & Newcombe, *supra* note 23, at 299-305.

⁴⁶ DAVIS, *supra* note 7, at 45; see also GUIDA WEST, *THE NATIONAL WELFARE RIGHTS MOVEMENT: THE SOCIAL PROTEST OF POOR WOMEN* 39 (1981) (emphasizing decent jobs and adequate pay for workers, and adequate income for non-workers).

for substantive rights, claiming a “right to live,” i.e., a right to welfare or a guaranteed minimum income.⁴⁷ Sparer wrote:

We guarantee income to farmers for not producing crops. We guarantee subsidies to railroads and to oil companies. It seems to me only reasonable that we should guarantee the subsidy of life to those who are starving and to those without shelter or medicine—reasonable not only on humanitarian grounds, but because there is a Fourteenth Amendment, which guarantees equal protection of the laws.⁴⁸

The iterative process through which this later version of Sparer’s frame developed is typical of social movement processes.⁴⁹ As Sparer recognized, a lawyer’s job is not simply to develop a viable legal theory and use it as the basis for imposing a frame on a social movement, but to work with a movement to develop a frame that has resonance in all of the venues in which the social movement hopes to effect change.

With historical hindsight, we know that the “right to live” frame for urging a guaranteed minimum income and equal protection of the poor went only so far. Successes in court were limited, and shifting political winds undermined many hopes for policy gains that might have established a basic entitlement to welfare based on a right to live.⁵⁰ In many respects, however, the frame was a success. For several years, the frame helped motivate and galvanize a movement of poor people, a notoriously difficult population to organize.⁵¹ Further, while litigation efforts fell short of the ultimate goal, there were nevertheless important incremental successes using this frame, including the Supreme Court decision in *Goldberg v. Kelly*, recognizing the dire impact on welfare recipients of summary benefit cut-offs.⁵² The back-drop of the “right to live” frame certainly played a role in the majority’s view of the due process issues raised in that case, and surfaced directly and indirectly in other judicial decisions of the time as well.⁵³

III. “HUMAN RIGHTS” FRAMING IN THE TWENTY-FIRST CENTURY

For the time being, the “right to live” frame has run its course as a viable frame for achieving a guaranteed minimum income and is now readily confused with the “right to life” frame adopted by anti-abortion activists. As noted above, successful frames must resonate with

⁴⁷ DAVIS, *supra* note 7, at 37-38 (quoting Israel Shenker, *Guarantee of Right to Live is Urged*, N.Y. TIMES, Sept. 28, 1969, at 40).

⁴⁸ *Id.*

⁴⁹ Mayer N. Zald, *Culture, Ideology, and Strategic Framing*, in COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS 261, 270-71 (Doug McAdam et al. eds. 1996) (“Social movements not only draw upon and recombine elements of the cultural stock, they add to it. The frames of winning movements get translated into public policy and into the slogans and symbols of the general culture.”).

⁵⁰ See R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS 131-32 (1994) (reflecting broader and longer lasting spending cuts for poverty programs); see generally DAVIS, *supra* note 7.

⁵¹ See MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT (rev. ed. 1996).

⁵² *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

⁵³ See, e.g., *Rothstein v. Wyman*, 303 F. Supp. 339, 346-47 (S.D.N.Y. 1969).

their time, place, and cultural context.⁵⁴ The “right to live” frame, never particularly strong, is a casualty of changing contexts.

Searching for alternatives, a number of activists and scholars now propose that a “human rights” frame may further the goals of social movements concerned about alleviating poverty. As anthropologist Sally Merry recently observed, “[f]or social movements, human rights are simultaneously a system of law, a set of values, and a vision of good governance.”⁵⁵ This tripartite nature of human rights gives it particular strength as a platform from which lawyers can reach audiences, shape opinions, and productively contribute to social movement goals. Like the “right to live,” the human rights frame is sufficiently broad to encompass both viable legal theories and mobilization that involves other mechanisms beyond litigation. In the context of the twenty-first century, if not always in the twentieth, “human rights” has the hallmark of a master frame.

In recent years, several domestic legal organizations have embraced a human rights framework for their work. This article focuses on two of those organizations: the Maryland Legal Aid Bureau (MLAB) and the National Law Center on Homelessness and Poverty (NLCHP). These organizations operate at different levels of delivery of legal services. The MLAB is a direct service organization with offices throughout Maryland, serving a local clientele with a range of problems largely arising from issues of poverty.⁵⁶ The NLCHP, in contrast, is a Washington, D.C.-based public interest law firm focused on “impact” litigation and advocacy. Rather than provide direct services through intake, the NLCHP serves as a back-up center to local advocates and activists.⁵⁷ Neither of these organizations was founded based on a human rights frame; in each case, the frame was adopted later. For both, according to the groups’ own reports, the human rights frame has enabled them to engage more directly with social movements while also using their expertise as lawyers.⁵⁸

A. *The Maryland Legal Aid Bureau (MLAB)*

According to its website, “[i]n 2009, Maryland Legal Aid became the first legal services organization in the U.S. to formally embrace human rights as the central operating principle for its work.”⁵⁹ This shift grew out of MLAB’s 2008 to 2009 strategic planning process—a rich process that engaged not only MLAB attorneys but also clients in thinking about MLAB’s ways of approaching its work. Funded by the Legal Services Corporation, MLAB is a statewide provider of legal services with ten local offices serving twenty-four counties, receiving about 45,000 requests for assistance each year.⁶⁰ When developing prior strategic plans and priorities, MLAB

⁵⁴ See, e.g., Reese & Newcombe, *supra* note 23, at 295 (noting that “cultural conditions shape framing processes”).

⁵⁵ Sally Engle Merry et al., *Law From Below: Women’s Human Rights and Social Movements in New York City*, 44 LAW & SOC’Y REV. 101, 102 (2010).

⁵⁶ For a more complete description see MLAB’s website at <http://www.mdlab.org/>.

⁵⁷ For more about NLCHP, see the organization’s website at <http://www.nlchp.org>.

⁵⁸ See Maria Foscarinis & Eric Tars, *Housing Rights and Wrongs: The United States and the Right to Housing*, in BRINGING HUMAN RIGHTS HOME: PORTRAITS OF THE MOVEMENT 149, 150-51 (Cynthia Soohoo et al. eds. 2008); J. Peter Sabonis, *Using a Human Rights Framework at Maryland Legal Aid*, 44 CLEARINGHOUSE REV. 450, 451-52 (2011).

⁵⁹ MLAB, www.mdlab.org/celebrate%20100%20years (last visited Apr. 8, 2011).

⁶⁰ Sabonis, *supra* note 58, at 450.

had always polled its clients, asking, “What *legal* services do you need?”⁶¹ In 2008, however, MLAB lawyers deliberately opened the door to a reframing of MLAB’s work by asking their clients simply “What are your *needs*?”⁶²

Peter Sabonis, a lawyer at MLAB who spearheaded this planning process, reports that asking this new question yielded new answers. By taking the focus of their inquiry away from legal needs, as articulated by their clients, MLAB learned of new areas of need where they might be creatively engaged as lawyers. In particular, whereas clients had previously prioritized family law as the area where they most needed legal services, clients responded to the new, broader question about their needs by identifying a much broader roster of concerns—“not only representation in eviction matters, but also *affordable housing*; not only reversal of compensation denials, but also *living wage jobs*; not only access to Medicaid benefits, but also *affordable* health care.”⁶³ Sabonis observed, before MLAB’s shift, “[w]e were almost like technicians, while our clients wanted economic rights.”⁶⁴

Driven by the more complete range of needs identified by their clients, MLAB began exploring a human rights frame for its work. MLAB committed, as well, to go beyond rhetoric in its implementation of the frame. According to Seri Wilpone, chief attorney of Legal Aid’s Southern Maryland office, the frame affects both the Bureau’s approach to its legal work and its relationship with clients: “Clients tell us they have needs for basic human rights, and for us to make lasting changes for them, we need to keep human rights norms in mind as we look at legal remedies—poor housing, poor remuneration, unaffordable medical treatment.”⁶⁵

The lawyers at MLAB understand that the human rights frame is distinct from a legal theory, despite some overlap. According to Sabonis, “[t]o us, international human rights treaties were not tickets to more client friendly United Nations and regional forums, although those forums could be utilized where necessary or appropriate. They also were not supremacy clause trump cards to be played in court when our own statutes failed to provide remedies, although again this was an option. [Rather,] [w]e saw incorporating human rights treaties into our work first as a mind-set that revived the best of our legal services roots.”⁶⁶

However, there are important ways that the frame affects MLAB’s day to day casework, and MLAB lawyers are looking for approaches to creating more overlap between their specific legal theories and their human rights mission. The most important and obvious impact of their new framework is the impact that it has had on case selection. Like all legal aid and legal services offices, MLAB is overwhelmed with cases; they do not have even a fraction of the staff that they would need to service all of their potential clients.⁶⁷ To maximize efficiency and effectiveness, they develop case priorities and touchstone criteria that assist overworked lawyers in making timely decisions concerning representation. The adoption of the human rights framework has had

⁶¹ Jeri Zeder, *Shifting the Focus: Using a Human Rights Approach to Reframe Legal Services*, NORTHEASTERN L. MAG., Winter 2009, at 26.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Human Rights Framework*, MLAB, <http://www.mdlab.org/Human%20rights> (last visited Apr. 8, 2011).

⁶⁶ Sabonis, *supra* note 58, at 451.

⁶⁷ See generally LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2009), http://www.lafla.org/pdf/justice_Gap09.pdf (addressing the difference between the legal assistance necessary to meet the needs of low-income people and the legal assistance that is currently available).

a significant impact on staff-level conversations concerning case selection, since MLAB lawyers are now evaluating whether and how a particular case might contribute to an identified human rights goal encompassed by their overall mission, rather than viewing the cases in terms of their individual merits and typologies.⁶⁸

MLAB lawyers are also exploring the extent to which the human rights frame might be integrated more directly into longstanding domestic legal theories.⁶⁹ To facilitate this process, MLAB lawyers met on December 10, 2010, Human Rights Day, to review several sample case files and brainstorm about ways in which human rights norms might be relevant to litigation.⁷⁰ Importantly, at least one judge in Maryland has indicated that she would like to receive briefing related to human rights and international law relevant to the cases before her.⁷¹

Finally, others have observed that the human rights frame, while grounded in twenty-first century culture, brings MLAB's mission back in line with the broad agenda of 1960s legal services, the movement that Ed Sparer helped develop. Says Cathy Albisa, Executive Director of the National Economic and Social Rights Initiative, "Forty years ago, legal services were an essential source of law reform, . . . [now] there's a new opportunity to rebuild it—and legal services organizations such as Legal Aid can reclaim this historic stage."⁷²

B. The National Law Center on Homelessness and Poverty (NLCHP)

Founded in 1989, NLCHP is one of the few domestically-focused legal organizations that employs a human rights attorney as part of its staff.⁷³ NLCHP's overall mission—"to prevent and end homelessness by serving as the legal arm of the nationwide movement to end homelessness"—is framed in terms of legal representation and client-centered process.⁷⁴ At the same time, NLCHP has adopted the human rights frame as a means to further this mission. According to NLCHP's website, "Housing is a basic human right. Upholding it in the U.S. means ending homelessness."⁷⁵

Maria Foscarinis, the founder and Executive Director of NLCHP, came to the belief that the human rights frameworks held important potential for her organization's work in the U.S. through her participation in the U.N.'s 1996 Istanbul Habitat II conference on the human right to housing. A small group of advocates working on issues of homelessness in the U.S. attended.

⁶⁸ See Sabonis, *supra* note 58, at 453-54; see also *Legal Aid Commemorates Human Rights Day 2010*, MARYLAND LEGAL AID NEWSROOM (Dec. 22, 2010), <http://newsroom1.wordpress.com/2010/12/22/legal-aid-commemorates-human-rights-day-2010/> [hereinafter *Legal Aid Commemorates*] (describing a forum on human rights in which Maryland Legal Aid employees statewide participated).

⁶⁹ Martha F. Davis, *Human Rights in the Trenches: Using International Human Rights Law in "Everyday" Legal Aid Cases*, 41 CLEARINGHOUSE REV. 414, 414 (2007).

⁷⁰ See Sabonis, *supra* note 58; *Legal Aid Commemorates*, *supra* note 68.

⁷¹ See *Human Rights Framework*, *supra* note 65 (reporting that Prince George's Co. Circuit Court Judge Cathy Serrette would "welcome" briefing on international and human rights law).

⁷² *Id.*

⁷³ Others include the American Civil Liberties Union, which has a Human Rights Unit, and Human Rights USA, which focuses on issues of torture.

⁷⁴ *About NLCHP: Lawyers Working to End Homelessness*, NLCHP, http://www.nlchp.org/about_us.cfm (last visited Apr. 8, 2011).

⁷⁵ *Homelessness and Poverty in America: Real Solutions*, NLCHP, http://www.nlchp.org/hapia_solutions.cfm (last visited Apr. 8, 2011).

The meeting was an important turning point in the status of a right to housing under international law. According to Foscarinis, “while the official U.S. government representatives opposed the inclusion of the right to housing in the conference document, fearing that U.S. public interest lawyers would file suit to enforce it, the advocates opposed this official stance and the language was included” in the final version.⁷⁶

After the seed was planted, U.S. participants in the conference continued to collaborate in developing the idea of housing as a human right, participating in a formal follow-up effort funded by the U.S. Department of Housing and Urban Development called “Meeting America’s Housing Needs.”⁷⁷ According to Eric Tars, the human rights staff attorney with the NLCHP, “The initial coalition included grassroots groups such as the National Alliance of HUD Tenants (and their local members), the Chicago Coalition for the Homeless, Beyond Shelter and the Kensington Welfare Rights Union.”⁷⁸ Under Foscarinis’s leadership, this group eventually coalesced to host NLCHP’s first National Forum on the Human Right to Housing in 2003, attended by grassroots groups as well as advocates and co-sponsored by the Center on Housing Rights and Evictions, an international Geneva-based non-governmental organization working on housing issues.

Following this initial meeting, the emerging coalition on the human right to housing joined the new U.S. Human Rights Network (USHRN) when it was launched in 2004, becoming the USHRN Housing Caucus. After holding another National Forum on human rights and housing in the U.S., NLCHP began organizing local and regional human rights trainings in Chicago, Los Angeles, Florida and other regions.⁷⁹ NLCHP hired Eric Tars, its first human rights staff lawyer, in 2006.⁸⁰

Unlike MLAB, the impetus for NLCHP’s implementation of a human rights framework did not come from NLCHP’s client constituents. According to Maria Foscarinis, rather than being pushed in this direction by clients, “[w]e pushed ourselves, because of the urgency of the issues we are dealing with, frustration with the limitations of US law, and the promise of HR as a body of law that directly addresses issues of economic justice head on.”⁸¹ Nevertheless, human rights concepts certainly resonated in a striking way with NLCHP’s constituents, particularly grass roots groups and individuals with direct experiences of homelessness and poverty. Foscarinis reports that many of the attendees at their human rights events have been poor or homeless, and that:

[t]hey had no trouble grasping the concept of human rights, how it applies in the United States, and how it applies to them. In fact, learning about the human

⁷⁶ Foscarinis & Tars, *supra* note 58, at 151.

⁷⁷ E-mail from Eric Tars, Human Rights Program Dir., NLCHP, to Martha F. Davis, Assoc. Dean of Clinical and Experiential Educ., Northeastern University School of Law (Dec. 7, 2010, 16:25 EST) (on file with author).

⁷⁸ *Id.*

⁷⁹ Foscarinis & Tars, *supra* note 58, at 152.

⁸⁰ As an experienced human rights lawyer, Eric Tars had previously worked at the human rights law firm Global Rights. For more on his background, see *Staff and Project Areas*, NLCHP, http://www.nlchp.org/staff_project.cfm.

⁸¹ E-mail from Maria Foscarinis, Founder & Exec. Dir., NLCHP, to Martha F. Davis, Assoc. Dean of Clinical and Experiential Educ., Northeastern University School of Law (Dec. 7, 2010, 17:22 EST) (on file with author).

right to housing seemed to be tremendously energizing for all, but especially for those whose own rights were most directly affected.⁸²

NLCHP has more opportunity than MLAB to raise domestic human rights issues on the international stage because they are engaged in impact litigation and advocacy, rather than handling individual cases, and have a dedicated human rights attorney. For example, NLCHP submitted comments to the Human Rights Council on the occasion of its Universal Periodic Review (UPR) of U.S. compliance with international human rights law, and also sent representatives to the UPR hearings as well as to the CERD Committee's review of U.S. compliance with that human rights treaty. NLCHP also helped plan and host the 2009 visit to the United States of the U.N. Special Rapporteur on Adequate Housing. This, then, brings in a new (and for several decades, lost) dimension to domestic civil rights and poverty advocacy, as domestic actors work with the international community to put pressure on U.S. actors to adopt human rights norms.⁸³

C. *Why Human Rights?*

The human rights work of MLAB and NLCHP are, to some extent, the tip of the iceberg, as more and more U.S. public interest organizations stick their toes in to test human rights approaches to their work. A number of legal services organizations, including New Haven Legal Services and Legal Services for New York, have hosted trainings on the subject. Further, law school clinics and general curricula at schools across the country are increasingly geared toward preparing students for a domestic practice that includes a human rights component.⁸⁴ It is worth asking why, and why now.

Some academic observers, writing about the growing phenomenon of domestic use of human rights frames, have speculated that this is an act of desperation in the face of a hostile judiciary, an unfriendly Congress and a vindictive public. For example, in examining the increasing use of international law by public interest lawyers, Professor Scott Cummings averred that:

[t]he international turn is a product of domestic political realignment: inside the United States, the public interest law movement, built upon a symbiotic relationship with the federal government, now finds itself in opposition to the main levers of federal power. It has, therefore, looked outside U.S. borders—not just for legal resources, but also for connections with international struggles to infuse it with a renewed sense of movement energy and political mission. And it is there that U.S. lawyers have found new political allies, as well as opportunities to engage in large-scale reforms that seem only a dim possibility at home.⁸⁵

⁸² Foscarinis & Tars, *supra* note 58, at 152.

⁸³ See Dorothy Q. Thomas, *Advancing Rights Protection in the United States: An Internationalized Advocacy Strategy*, 9 HARV. HUM. RTS. J. 15, 15 (1996).

⁸⁴ See Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT'L L. 505, 505 (2003).

⁸⁵ Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L. J. 891, 1034-35 (2008).

The NLCHP's use of human rights law frames does seem to fit Cummings's model, as it rose initially from frustration with domestic opportunities and draws directly on international movements to revitalize and energize the movement at home. In the case of NLCHP, the initial move in the human rights direction was driven by lawyers, who found later that the frameworks energized their U.S. client communities.⁸⁶

But the other contemporary case study of MLAB suggests a different model of lawyers developing, testing and utilizing frames that simultaneously resonate with clients, contribute to movement building and enrich narrower legal claims. Indeed, years before MLAB adopted a human rights framework, a key ally in the community, the United Workers, had already made a similar shift in focus.⁸⁷

This alternative narrative, of neighborhood lawyers framing issues in conjunction with clients, is not born out of desperation but out of lawyers' desire to maximize their effectiveness by aligning the articulation of legal claims with clients' needs. It does not arise from a search for power and legal leverage, but from deep listening to domestic clients' calls for assistance.

In short, those who see the international turn as a move reflecting a weakness in domestic strategies, focus on lawyers' role in initiating litigation and crafting legal arguments rather than lawyers' role in using legal frames to enhance client organizing. By focusing on the indisputable shifts in power and decreased openness of the federal government to progressive public interest law goals, Cummings's hypothesis underestimates the importance of the dramatic cultural shifts among legal services constituencies that make the human rights frame a resonant one for today.

The data underscores these changes in the zeitgeist. For example, in 1980 the New York Times and the Washington Post published 1,182 and 738 articles, respectively, that contained the keywords "human rights."⁸⁸ By 2000, the number of articles had increased to 2,216 for the New York Times and 1,728 for the Washington Post.⁸⁹ This shift has been accompanied by a significant increase in human rights education.⁹⁰ The Opportunity Agenda's survey and focus group work gauging public receptivity to human rights-based public policy initiatives, also shows not only how far there is to go, but how far American society has come toward recognizing the domestic relevance of human rights norms.⁹¹

IV. CONCLUSION

The case studies above illuminate the different purposes for which activist lawyers may

⁸⁶ See *supra* Part III.B.

⁸⁷ For more information about the United Workers, see the organization's website at <http://unitedworkers.org/2010/10/07/in-these-times-on-the-campaign-for-fair-development/> (last visited Apr. 19, 2011).

⁸⁸ Wade M. Cole, *No News is Good News: Human Rights Coverage in the American Print Media, 1980-2000*, 9 J. HUM. RTS. 303, 311 (2010).

⁸⁹ *Id.*; see also Howard Ramos, James Ron & Oskar N. T. Thoms, *Shaping the Northern Media's Human Rights Coverage, 1986-2000*, 44 J. PEACE RES. 385, 386-87 (2007) (analyzing human rights reporting in *The Economist* and *Newsweek*).

⁹⁰ See, e.g., Anja Mihr, *Global Human Rights Awareness, Education and Democratization*, 8 J. HUM. RTS. 177, 177 (2009); see also Hurwitz, *supra* note 84, at 505.

⁹¹ See generally THE OPPORTUNITY AGENDA, PUBLIC OPINION, STATE POLICY LEADERS' VIEWS ON SOCIAL JUSTICE AND HUMAN RIGHTS (2007), http://opportunityagenda.org/state_policy_makers_report (describing and analyzing interviews of fifty policy leaders in California and Illinois on human rights in America).

utilize framing processes. On one hand, all advocates “frame” issues in order to persuade; litigation provides a specialized example of this, with lawyers adopting a variety of “issue frames,” circumscribed by existing law, in order to persuade individual decision-makers of the merits of their client’s position. On the other hand, activist lawyers may also be engaged in work for and with social movements. Some of this work may involve more technical issue frames intended to appeal directly to judges, but movement lawyers may also yearn to develop and utilize collective action frames that contribute to social movement mobilization.

The examples above highlight the ways in which lawyers attempt to navigate these competing approaches to movement work. Ed Sparer began with frames that were circumscribed by black-letter legal theories and then, influenced by the welfare rights movement, shifted to frames that could potentially serve both purposes, influencing judicial opinion and contributing to collective action. The more contemporary examples involving a shift toward human rights framing reflect a similar effort to find a frame that can effectively serve many purposes and constituencies.

Applying a framing lens to these examples also suggests three lessons for lawyers attempting to negotiate these different roles for lawyers representing social movements.

First, a frame should not be confused or conflated with a legal theory. A legal theory may also serve as a frame, as it did in the NAACP LDEF’s campaign to desegregate the schools and as it does in the gay marriage campaign. However, in many other circumstances such overlap may be impossible to achieve because of the different functions served by legal theories and collective action frames.

Second, because the functions of these concepts are different, creative lawyering is critically important. The black-letter legal viability of a particular theory may be beside the point if it saps the strength of collective mobilization. Because of this, it is important to engage in deliberate and strategic thinking when proposing and developing frames that will straddle legal work and organizing.

Finally, the channels of communication between movement lawyers and social movement activists must remain open and engaged. Again, the example of the evolution of Ed Sparer’s frame for welfare rights demonstrates the importance of such ongoing communication. Issue frames and legal theories selected for their potential impact on decision-makers such as judges may play quite differently with social movement activists. Similarly, legal theories intended to do double duty as collective action frames may be more or less effective as cultural contexts shift. Such frames should be continuously tested for their resonance with, and relevance to, affected social groups if enhancement of social mobilization is one the goals of the legal advocacy.