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ESSAY

LAWYERING FOR SOCIAL JUSTICE

NAN D. HUNTER*

It is an honor, albeit a sad one, to be invited to write this Essay in commemoration of Tom Stoddard and as commentary on his final publication.

I first met Tom in the late 1970s, when we both joined the Board of Directors of the Lambda Legal Defense and Education Fund. Both of us were American Civil Liberties Union staff attorneys, Tom for the New York Civil Liberties Union (NYCLU) and I for the Reproductive Freedom Project in the national office. Later, for the last half of the 1980s, Tom was the Executive Director of Lambda during the same period that I was Director of the ACLU Lesbian and Gay Rights and AIDS Projects. Much of my professional life has been spent in tandem with Tom's, and his absence creates a giant gap in that world.

Not many of us are pioneers, but Tom Stoddard was. He fought for equality for lesbian and gay Americans before it was respectable; he was proudly out as a gay man before it was professionally safe to be out; and he taught one of the first courses centering on the rights of lesbians and gay men in any American law school. He lived to see the lesbian and gay civil rights struggle take its place with others as a campaign for human dignity and justice.

Tom's final Essay, *Bleeding Heart: Reflections on Using the Law to Make Social Change*,¹ is a reflection on the relationship between litigation, legislation, and the possibilities for law to operate as "culture-shifting" rather than merely "rule-shifting." As with everything Tom did, it is eloquent and engaging. Although I shall disagree with some of his conclusions in this commentary, I want to point out first the reasons why I accord particular respect to Tom's views on this subject.

* Associate Professor of Law, Brooklyn Law School. Thanks for comments, insights, and support to Stacy Caplow, John D'Emilio, Lisa Duggan, Lani Guinier, Susan Herman, Minna Kotkin, Bill Rubenstein, and Elizabeth Schneider; and for research assistance to Marielle Berg. A special thanks to Walter Rieman, Tom Stoddard's spouse, not only for inviting me to participate in this commemoration of Tom's work, but, more importantly, for bringing deep love and great happiness to Tom's life.

¹ Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. Rev. 967 (1997) [hereinafter *Bleeding Heart*].

Tom was a master of both legislative advocacy and litigation. His earliest public interest work was in the legislative arena. From 1977 until 1986, he served as Legislative Counsel and then-Legislative Director of the New York Civil Liberties Union. He also taught legislation courses, as well as sexual orientation law courses, at New York University School of Law, his alma mater.

One of his major legislative achievements for the NYCLU is alluded to briefly and modestly in *Bleeding Heart*. Tom was instrumental in the enactment of the law that added sexual orientation to the categories protected under New York City's Human Rights law. When then-Mayor Ed Koch signed the legislation in 1985, he sent the pen he used for the signing to Corporation Counsel Fritz Schwarz. Schwarz sent the pen on to Tom, telling him that he was the one who deserved it the most.

In 1986, Tom became Executive Director of Lambda Legal Defense and Education Fund and guided the explosive growth of that organization from a one-room office in the ACLU building to the sophisticated law reform group that it now is. As the head of Lambda, Tom oversaw an active litigation unit, which formed the core of Lambda's work.²

One of the issues on which Tom was a leader was gay marriage. He spoke out forcefully for its importance long before it became a cause celebre. Seeking to promote discussion within the lesbian and gay community about the pros and cons of prioritizing that issue, he and then-Lambda Legal Director Paula Ettelbrick conducted debates in several cities about whether litigation challenging the marriage laws was a wise strategy. Those debates were a model not only of civility, but of a thoughtful effort to democratize the discussion and the decisionmaking before undertaking high stakes litigation.³

In 1993, the controversy over whether lesbian and gay Americans should be allowed to serve openly in the armed forces erupted like a volcano when incoming President Clinton announced his intention to lift the ban. Tom was drafted by gay rights groups anxious to put forward the best effort that the community could muster, and he accepted the post of Director of the Campaign for Military Service. In that moment of political and legal crisis, all the realms of advocacy (legislation, litigation, and administrative) that Tom discusses in

² Lambda describes itself as "carry[ing] out its legal work principally through test cases selected for the likelihood of their success in establishing positive legal precedents." Lambda Legal Defense and Education Fund, *About Lambda* (1997) (on file with author).

³ See William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 *Yale L.J.* 1623, 1635-37 (1997).

Bleeding Heart converged with a force unequalled in the history of the lesbian and gay rights movement. His role and his vantage point were unique.

Perhaps my strongest memory of Tom is of a man of enormous dignity. He embodied a mixture of thoughtfulness and principle that one rarely sees in leaders in the public arena. Many persons inside and outside of Lambda turned to him for advice and counsel through the hectic days of the late 1980s, when hysteria about AIDS threatened to trigger massive violations of civil liberties. Indeed, his personal stature was so undeniable that his very presence in the movement helped to give it dignity and stature as well.

In *Bleeding Heart*, Tom brings his life's experiences to bear on an issue that is both enduring and compelling: how lawyering does or does not advance movements for equality. Tom argues that reforms won in the legislative arena, with their majoritarian imprimatur, are more likely to lead to what he calls "culture-shifting," or the transformation of social norms, than are litigation victories. He advocates that social change lawyers "upend our traditional preference for judicial activity and embrace the special advantages of legislative change."⁴ He closes by urging lawyers to give as much weight to the dialogic process as to either of the two arenas per se, arguing that they should prioritize work that will speak directly and forcefully to the broader public.⁵

My commentary on these arguments has three parts. In Part I, I argue that the litigation-legislative dynamic is more structurally complicated than the description in *Bleeding Heart* suggests, and highly contingent on the historical moment. For elaboration, I describe the history of the women's law reform movement, perhaps the one most closely parallel to the lesbian and gay rights movement in its historical timing and context. In Part II, I will comment on what I think is one of the most significant aspects of the *Bleeding Heart* argument: the implicit assumption that lesbian and gay rights advocates have the potential to regularly win in the legislative arena. Lastly, in Part III, I offer some thoughts on how one can more consciously seek a culture-shifting practice of law.

I

COMPLEXITY AND CONTINGENCY

I do not believe that as a general rule one can ascribe culture-shifting moments to one arena—legislation or litigation—more than

⁴ *Bleeding Heart*, supra note 1, at 991.

⁵ See *id.*

the other. Breakthrough moments in law occur rarely but not randomly, regardless of arena. They usually follow long periods of incremental, often nearly imperceptible, social change occurring at a glacial pace. When they do occur, they crystallize what has gone before at the same instant that they propel social structures forward. Law is unique in that it has the power of coercion: it seeks to lock in the very change that it signifies.

It is impossible to completely separate these arenas analytically, for multiple reasons. I agree that majoritarian legislative victories can be more politically stable than judicial interpretations of the Constitution, despite the fact that enactment of any statute is subject to nullification by the process of judicial review. Note, however, that the distinction between the arenas of change (legislative or judicial) is not the same as the distinction between sources of law: statutory, or legislature created, versus constitutional, or (mostly) judge created. *Bleeding Heart* invokes as archetypes the enactment of a statute versus the interpretation of the Constitution. In my view, however, the single most common and powerful activity within social change lawyering has become the use of litigation to secure enforcement and expansive interpretation of statutes.

The primary example of a culture-shifting statute cited in *Bleeding Heart* is the 1964 Civil Rights Act. At the time of its enactment, the Civil Rights Act was culture-shifting for the South, but became so nationally because of judicial interpretation primarily. Congress and the public viewed the new statute as one that would end racial apartheid, which most of the country saw as a problem of the South.

As the bill went through the legislative process, most public attention focused on the sections dealing with voting, public accommodations, and the authority of the Attorney General to enforce equal protection of the laws.⁶ The public accommodations section "was easily its most controversial provision, and arguably its most radically transforming one for the South."⁷ As a result of that portion of the statute, "the destruction of Jim Crow in public accommodations would occur with surprising speed and virtually self-executing finality."⁸ The continuing nationwide impact of this statute thirty-five years later, long after the end of de jure segregation, flows from such judicial decisions as *Griggs v. Duke Power Co.*,⁹ in which the Court

⁶ See Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy, 1960-1972*, at 133 (1990).

⁷ *Id.*

⁸ *Id.* at 154.

⁹ 401 U.S. 424 (1971).

interpreted the statute to reach widespread employment practices that were facially neutral, but racially subordinating in their effects.

Although the 1964 Civil Rights Act prohibited sex as well as race discrimination, it was not culture-shifting on the basis of sex. As *Bleeding Heart* points out, the addition of "sex" to the prohibited bases for discrimination was a ploy to derail the bill by legislating for a form of equality that its opponents thought would be viewed as absurd.

Structural factors determine whether legislation or litigation dominates an equality movement at any given moment: the roles of the state and the market as allies or foes; the nature of the rights being sought; and the broader political climate in each arena. The history of women's rights law illustrates the complexity of this dynamic.

Although women began using the new statute immediately to challenge employment exclusions, the culture-shifting moment in law came in 1973, with the Supreme Court's decision in *Roe v. Wade*.¹⁰ Like *Brown v. Board of Education*,¹¹ *Roe v. Wade* was a challenge to the power of the state, at the level of state law. Also like *Brown*, it was a moment of high drama, not only because it culminated the efforts of a major social protest movement, but also because in its wake not a single state abortion statute remained constitutional.

Yet, the heyday of women's rights constitutional litigation was stunningly short, especially when one examines equality doctrine, rather than the privacy line of cases reflected in abortion litigation. The test for challenges to sex-based classifications—whether the classification is substantially related to an important governmental interest—was initially adopted in 1976¹² and reaffirmed last year.¹³ For eleven years (1983-1994), the Supreme Court decided no cases on Fourteenth Amendment sex discrimination grounds.¹⁴

What followed *Roe*, like what followed *Brown*, was the emergence of statutory law as the dominant force in the field. By statutory law, I mean both legislative enactment and litigation enforcement. Instead of a string of blockbuster test cases, a complex interrelationship developed between actors and institutions in the field of women's

¹⁰ 410 U.S. 113 (1973).

¹¹ 347 U.S. 483 (1954).

¹² See *Craig v. Boren*, 429 U.S. 190 (1976).

¹³ See *United States v. Virginia*, 116 S. Ct. 2264 (1996). Opinions differ as to whether the Court finetuned the intermediate scrutiny test by elaborating on certain aspects of it, such as that the state's justification must be "exceedingly persuasive" and not generated *post hoc*, or whether the test as so refined amounts to strict scrutiny without the Court admitting it.

¹⁴ See Barbara Allen Babcock et al., *Sex Discrimination and the Law: History, Practice and Theory* 239-40 (2d ed. 1996).

rights law. The issue of pregnancy discrimination provides a good example. During the 1970s, test case litigation challenged exclusions of pregnancy from public benefits programs on Fourteenth Amendment grounds, an issue that feminist advocates lost before the Supreme Court when it ruled that discrimination between "pregnant persons and non-pregnant persons" did not constitute discrimination based on sex.¹⁵ Essentially the same claim litigated under Title VII produced essentially the same reasoning and result.¹⁶ In response, advocates sought and in 1978 achieved enactment of the Pregnancy Discrimination Act¹⁷ (PDA), an amendment to Title VII. The adverse constitutional decision remains good law.

The PDA in turn led to a generation of cases involving exclusions of women workers from certain jobs (usually high paying) because of asserted hazards to a fetus;¹⁸ and to the highly contentious question of whether the PDA required employers to accord equal treatment, or allowed them to accord special treatment, to pregnancy as a disability. After the Supreme Court resolved that question,¹⁹ advocates sought enactment of a mandate requiring that employers provide leave after childbirth, a bill that was stalled by Presidential veto until 1993, when the Family Medical Leave Act²⁰ became law.

If one maps this story alongside the history of the African American civil rights movement, certain patterns emerge. The first is that a shift away from primary reliance on constitutional litigation to secure equality rights has already occurred. The current strategy of moving rapidly between arenas raises new questions for advocates, equally charged as those set forth in *Bleeding Heart*.

Other factors complicate any brightline distinction between legislative and litigation arenas. Discursive communities arise in the interstices of courts, legislatures, and enforcement agencies. The lawyers and others who work in, and against, and back and forth between these institutions create and disseminate understandings of the law that then circulate in all those institutions and in the broader society.²¹

One extremely valuable function of litigation in a world of statutory dominance is to preserve the outsider perspective as against the insider, the Beltway player. Legislative and administrative advocacy

¹⁵ See *Geduldig v. Aiello*, 417 U.S. 484 (1974).

¹⁶ See *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

¹⁷ Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1994)).

¹⁸ See, e.g., *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

¹⁹ See *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

²⁰ Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified at 29 U.S.C. §§ 2601-2654 (1994)).

²¹ See generally Harold A. MacDougal, *Lawyering and the Public Interest in the 1990s*, 60 *Fordham L. Rev.* 1 (1991).

requires one to seek the principled compromise. The litigation perspective is important both so that someone who has engaged with the on-the-ground effects of law is able to bring her concerns to bear when the principled compromise is being fashioned and because, later, litigation challenging those compromises may be necessary to achieve forward movement.

Second, both structural and historical contingencies powerfully shape the social impact of lawmaking. Constitutional interpretation is both more restricted and more powerful than legislation. It is restricted in that constitutional issues are limited to the judicial branch for their interpretation and to state action for their scope. As a result, Congress can "fix" statutory interpretations that cut against equality, as it did in *General Electric Co. v. Gilbert*,²² which it cannot do for constitutional interpretations such as *Geduldig v. Aiello*.²³ However, the highly rationalized texts that emerge from such adjudications, as contrasted with the often contorted structure of legislative codes, give the courts' decisions far more rhetorical power and symbolic punch.

This structural fact coincided during the 1980s and early 1990s with the historical accident that Congress was generally receptive to equality claims,²⁴ while the federal courts grew increasingly conservative. In 1976, the Court imposed an intent requirement for equal protection claims,²⁵ in effect eliminating most disparate impact claims under the Constitution and making civil rights statutes a source of stronger protection, even against state agencies, than the Constitution.

As *Bleeding Heart* notes, breakthrough moments require reinforcement to sustain cultural shifts,²⁶ but that is true regardless of the arena in which they occur. Reinforcement efforts often shift back and forth between arenas, and there is no magic in moving from judicial breakthrough to legislative reinforcement, or vice versa.

Third, and more deeply, women's rights law illustrates the importance of the roles of the state and market and the nature of the rights being sought. Unlike in civil liberties cases, in women's rights work the adversary is not usually the government; the government is often an ally. The traditional civil liberties concern has been with the power

²² 429 U.S. 125 (1976).

²³ 417 U.S. 484 (1974).

²⁴ For example, Congress enacted the Civil Rights Restoration Act in 1987 to "fix" the narrowing construction of certain civil rights statutes that the Court announced in *Grove City College v. Bell*, 465 U.S. 555 (1984); the Fair Housing Amendments Act in 1988; the Americans with Disabilities Act in 1990; and the Civil Rights Act of 1991, also to "fix" a decision of the Court narrowing the scope of Title VII in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

²⁵ See *Washington v. Davis*, 426 U.S. 229 (1976).

²⁶ See *Bleeding Heart*, supra note 1, at 986-87.

of the state and abuses by the government. For women, the bigger problem was often the absence of a remedy in the law to use in non-governmental arenas, which the state traditionally recognized as private. Women repeatedly sought to invoke state power against private enclaves that lacked regulation.²⁷ Thus, although this is something of an overgeneralization, one can say that the thrust of women's rights law reform in the last twenty years has been the enactment and implementation of (mostly) federal legislation and its application to non-governmental structures, primarily the workplace and, to a lesser extent, the family (e.g., child support and domestic violence laws).

Lastly, more imbedded structures and policies remain resistant to women's rights claims. Barriers to full social equality for women today are usually not explicitly sex-based but embody highly gendered assumptions or stereotypes. Challenges to gendered structures—sex-linked but not sex-determined²⁸—can be difficult to fit into a classic “based on sex” equality analysis.

Institutionally, the biggest difference in the location of successes between lesbian and gay rights law and either race or sex equality law has been vertical rather than horizontal, i.e., there has been much greater activity at the state than at the federal level on sexual orientation issues, whether one examines either legislation or litigation. In criminal law, the Supreme Court's decision upholding a sodomy statute in *Bowers v. Hardwick*²⁹ sent lesbian and gay rights advocates to state courts, where, using state constitutional grounds, there has been striking success.³⁰ In family law, the breakthroughs on marriage,³¹ functional family recognition,³² and domestic partner benefits provi-

²⁷ See Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law, in The Politics of Law: A Progressive Critique* 151, 154-57 (David Kairys ed., rev. ed. 1990).

²⁸ See Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 *Harv. C.R.-C.L. L. Rev.* 79, 138-49 (1989).

²⁹ 478 U.S. 186 (1986).

³⁰ State courts in Kentucky, Tennessee, and Montana rejected the logic of *Bowers v. Hardwick* to strike their own state sodomy laws in, respectively, *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996); and *Gryczan v. State*, No. 96-202, 1997 WL 370249 (Mont. July 2, 1997).

³¹ See *Baehr v. Lewin*, 852 P.2d 44 (1993).

³² Binding legal recognition of family relationships between same-sex partners has been most common in second parent adoption cases. See, e.g., *In re M.M.D. & B.H.M.*, 662 A.2d 837 (D.C. 1995); *In re Tammy*, 619 N.E.2d 315 (Mass. 1993); *In re B.L.V.B. & E.L.V.B.*, 628 A.2d 1271 (Vt. 1993). More generally, see *In re Kowalski*, 478 N.W.2d 790 (Minn. Ct. App. 1991) (according guardianship status to lesbian partner); *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (N.Y. 1989) (finding gay male couple to fall within definition of “family” for rent control regulation purposes).

sions³³ have all occurred at the state or local level. And for employment and public accommodations, virtually the only successes have occurred at the state level.³⁴

II PARIAHS NO MORE?

One of the most controversial arguments in *Bleeding Heart* is implicit: underlying a call for a shift to prioritizing legislative strategy is the belief that gay equality claims *can* be achieved, with a regular if not inevitable degree of success, by majoritarian means. This is a provocative premise.

Until now, advocates for lesbian and gay rights have asserted that homosexual citizens meet the indicia for political powerlessness associated with the requisite criteria for recognition as a suspect class in equal protection law.³⁵ Indeed, advocates have argued that lesbians and gay men often constitute "pariahs" in the pluralist bazaar, invoking Bruce Ackerman's description of groups so stigmatized that the ordinary give and take of coalition politics cannot afford them a fair opportunity to protect their interests.³⁶ *Bleeding Heart* does not relinquish that claim, but it does raise the question of whether a group that can function effectively in the normal political process can invoke a suspectness claim based on process failure.

There are signs that opponents of equality are finding increased difficulties in using anti-gay electoral strategies. Indeed, perhaps the most significant, least noticed, aspect of the controversy surrounding the Colorado anti-gay initiative, declared unconstitutional by the

³³ See generally Craig A. Bowman & Blake M. Cornish, Note, A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances, 92 Colum. L. Rev. 1164 (1992).

³⁴ Eleven states and the District of Columbia have adopted statutes prohibiting discrimination on the basis of sexual orientation. See Cal. Lab. Code § 1102.1 (West Supp. 1997) (employment); Conn. Gen. Stat. Ann. §§ 46a-81c to -81d (West 1995) (employment and public accommodations); D.C. Code Ann. §§ 1-2512 to -2519 (1981) (same); Haw. Rev. Stat. § 378-2 (1993) (employment); Me. Rev. Stat. Ann. tit. 5, §§ 4552-53 (West 1997) (employment and public accommodations); Mass. Gen. Laws Ann. ch. 151B, § 4 (West 1996) (employment); Minn. Stat. Ann. § 363.03 (West 1991) (employment and public accommodations); N.J. Stat. Ann. §§ 10:5-4, -12 (West 1993) (employment and public accommodations); R.I. Gen. Laws §§ 28-5-1 to -3 (1995) (employment); Vt. Stat. Ann. tit. 3, § 961(6) (1995) (same); id. tit. 21 §§ 495(a), 1726(a)(7) (Supp. 1996) (same); Wis. Stat. § 106.04 (Supp. 1997) (housing and public accommodations discrimination); H.B. 421, Regular Sess. (N.H. 1997) (approved June 9, 1997; effective Jan. 1, 1998) (employment and public accommodations).

³⁵ See, e.g., *Watkins v. United States Army*, 847 F.2d 1329, 1348-49 (9th Cir. 1988), vacated, 875 F.2d 699 (9th Cir. 1989) (en banc).

³⁶ See Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 732 (1985).

Supreme Court in *Romer v. Evans*,³⁷ was how atypical it was. Most anti-gay voter initiatives in the 1990s have been defeated at the polls or have failed to obtain the necessary number of signatures to qualify for placement on the ballot; the Colorado provision was an exception.³⁸ One can contrast that to the late 1970s, when a wave of newly enacted civil rights provisions were repealed by popular vote.³⁹

The obvious response is that advocates for lesbian and gay equality have made enormous strides, but this success is fragile and highly uneven. The most stunning variation is geographic: laws guaranteeing equal rights for sexual minorities have become standard in urban settings, but are still atypical in states that are not highly urbanized. A recent study comparing cities with gay rights ordinances to all cities found a stark breakdown by size of city:

Population	% of all cities	% of cities with rights laws
< 25,000	83.2	0.2
25,000 – 49,999	9.4	2.8
50,000 – 99,999	4.7	5.9
100,000 – 249,999	1.8	13.7
250,000 – 499,999	0.6	42.5
500,000 – 1,000,000	0.2	56.3
> 1,000,000	0.1	75.0

The need for heightened scrutiny remains strong in most situations, but it may be that the lesbian and gay rights claim of a systematic political process breakdown, such as to trigger heightened scrutiny, is no longer viable in certain local jurisdictions.

³⁷ 116 S. Ct. 1620 (1996).

³⁸ Of the five statewide anti-gay ballot initiatives that have gone to voters during or since the 1992 election, only one—Colorado's—won a majority. See Human Rights Campaign, No Statewide Anti-Gay Ballot Initiatives to Appear in November (last modified July 6, 1996) <<http://www.qrd.org/qrd/orgs/HRC/no.statewide.antigay.inits-07.02.96>>. In addition, an initiative in Florida was kept off the ballot on the ground that it violated the state's "single subject" rule. See *In re Advisory Opinion to the Attorney Gen.*, 632 So. 2d 1018, 1019 (Fla. 1994). See generally Jeffrey Schmalz, *Gay Politics Goes Mainstream*, N.Y. Times, Oct. 11, 1992, § 6 (Magazine), at 18.

³⁹ See James W. Button et al., *Private Lives, Public Conflicts: Battles over Gay Rights in American Communities* 68-69 (1997). In 1977, for example, voters eliminated civil rights protections in Dade County, Florida; St. Paul, Minnesota; Wichita, Kansas; and Eugene, Oregon, in rapid succession. See *id.*

⁴⁰ See *id.* at 78 tbl.3-1.

Some rights advocates would go considerably further. Representative Barney Frank has described the United States as "a country that is much less homophobic than it thinks it's supposed to be. It is more racist than it's willing to admit, and less homophobic."⁴¹ Frank analogizes anti-gay animus to anti-Semitism, rather than the socially more difficult issue of racism:

As we've defeated anti-Semitism, I think we're in the process of defeating homophobia. . . . [I]f I'm right on the question of homophobia, that's very relevant for our political tactics, because I think it is now overwhelmingly clear that we should, in the political arena, and in the litigation arena, behave just like everybody else.⁴²

If sexual orientation discrimination were only about sexual orientation, I might agree with Representative Frank's optimism. In my view, however, it is at bottom about gender and anxiety about gender deviance. That set of issues is comparable in its intractability to race, as the women's equality movement has learned.

III THE FIFTH DIMENSION

If I am right that historical contingency—rather than intrinsic institutional characteristics—determines whether litigation or legislation is more likely to be culture-shifting, we are still left with the New Zealand dilemma posed in *Bleeding Heart*. Why did the achievement of legal equality there (apparently mostly by legislation) seem to lead to so little social equality?

Tom posits four criteria for when rule-shifting becomes culture-shifting: a genuinely significant change in the law; public consciousness of the change and its impact; a sense of legitimacy behind the new law; and continuous enforcement. I have no quarrel with any of these, but I think a fifth necessary ingredient is missing: public engagement. By engagement, I mean more than consciousness and more than passive support, even legitimacy. Unless there is significant public engagement in some form, beyond a small cadre of litigators or lobbyists, in the effort to change the law, there is no basis for culture-shifting.

Let us assume *arguendo* that *Bleeding Heart* accurately describes the situation for lesbians and gay men in New Zealand, where few feel comfortable enough to be out despite ample legal protection. It is quite possible that all four of these criteria could have been met in the

⁴¹ Barney Frank, *Bowers + Ten: Litigation, Legislation, and Community Activism*, 32 Harv. C.R.-C.L. L. Rev. 265, 267 (1997).

⁴² *Id.*

enactment of a nationwide law banning discrimination based on sexual orientation and that this law is indeed being enforced, or would be if citizens sought enforcement. Consider by contrast the examples of culture-shifting laws in *Bleeding Heart* and in this Response: the 1964 Civil Rights Act, *Roe v. Wade*, the 1986 New York City lesbian and gay rights ordinance, and the anti-smoking law in New York (but not Paris). Each grew from a base of mobilized public demand, whether litigation or legislation, whether federal or local, whether about equality or public health. On this view, it is no surprise that the 1964 Civil Rights Act did have an immediate culture-shifting impact on race relations, which was the constituency concern from which it grew, and did not as to sex discrimination, which at that time had no comparable social movement base.

In my view, the lesser degree of legitimacy that *Bleeding Heart* ascribes to judge made rather than legislative decisions is better captured by the distinction between an engaged constituency and a passive audience. Consider the Massachusetts gay rights bill, enacted in 1989, and skillfully managed by legislative advocates who sought to minimize public awareness of or involvement in the legislative debates.⁴³ The strategy worked and may have been necessary to achieve victory, but its price was that “[t]he impact of the struggle to enact the Bill on a *cultural* level was virtually nonexistent.”⁴⁴

I would change the injunction in *Bleeding Heart* to prioritize legislative work into one to use any arena for lawyering also as a vehicle for mobilization. Both legislative and litigation arenas have the potential to mobilize and demobilize by empowering those who seek legal assistance or by imposing the role of passive client onto persons who were initially engaged. Both arenas reward repeat players.⁴⁵ In the realm of public interest and civil rights law, one goal should be consciously using one’s legal skills to strengthen the constituency or community organization one represents, to make them more effective as repeat players.

For a social justice lawyer, repeat clients are groups of people active in the relevant community (which may be an issue constituency or an identity group or a geographic community) who regularly confront hostile policies. They may be repeat clients for litigation work or legislative advocacy or, more likely, for a mixture of both. Because

⁴³ See Peter M. Cicchino et al., Comment, Sex, Lies, and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill, 26 Harv. C.R.-C.L. L. Rev. 549 (1991).

⁴⁴ Id. at 621.

⁴⁵ Marc Galanter, Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change, 9 L. & Soc’y Rev. 95 (1974) (developing concept of “repeat players” in litigation).

they seek equality as a social result, rather than solely reform of the law, they are not constrained by doctrinal thinking. If such a group is unconcerned or dismissive of the importance of law, there is little basis for a synergistic linkage. But if law figures prominently, if not predominately, in a group's approach, the lawyer who links with such a group has the best opportunity to use law as a conscious culture-shifting strategy.

At issue here is not a split between arenas for lawmaking but between models of social justice lawyering. The two major American models have been doctrinal development and client advocacy, one emphasizing the achievement of a certain new principle of law, the other undertaking to serve the legal needs of some defined group. The classic First Amendment test case strategy undertaken by the American Civil Liberties Union illustrates the former, and the in-house organizational lawyer epitomizes the latter (e.g., labor union lawyers). Community legal services offices fall somewhere between, often beginning as the latter but shifting to the former as budget reductions force greater prioritization of impact litigation. Many organizations have developed hybrids. Some in-house legal units function as both corporate counsel and law reform units (e.g., Planned Parenthood Federation of America), while others perform legal services and law reform work, leaving organizational legal matters to retained counsel (e.g., Gay Men's Health Crisis). A number of stand alone test case groups develop ongoing relations with client groups whom they repeatedly represent (e.g., the ACLU Reproductive Freedom Project and the Center for Reproductive Law and Policy).

My concern is not with declaring one specific format to be the correct one, but with the trend of law reform (litigation and lobbying) groups proliferating without linkages to non-law defined groups. Consider the historical progression from the NAACP Legal Defense Fund (LDF), which began as a part of the National Association for the Advancement of Colored People, then separated for tax and organizational reasons;⁴⁶ to the NOW Legal Defense Fund, which, learning the lessons of the NAACP LDF's history, began in tandem with, but always separate from, the National Organization for Women; to the Lambda Legal Defense and Education Fund, which began solely as a law reform group and never had an organizational affiliation with a national political group. Lambda's stand alone origin was a development quite representative of the time in which it was formed (1973), the glory days for judicial breakthrough cases in the Supreme Court.

⁴⁶ See Mark V. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925-1950*, at 98-100 (1987).

A new literature on “critical lawyering,” deriving primarily from clinical law teachers, emphasizes linkages to organized client groups among its other precepts.⁴⁷ This literature and *Bleeding Heart* need to be read together. Both are incomplete. In my view, the engagement principle is the most important predictor of culture-shifting. The critical lawyering literature concurs on that point, but is virtually mute on lawyering in the legislative realm. To critical lawyers, *Bleeding Heart* should serve as a powerful reminder that such an oversight reflects and helps to perpetuate a long outdated understanding of the full parameters of social justice law.

⁴⁷ See, e.g., Luke W. Cole, Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law, 19 *Ecology L.Q.* 619 (1992); Louise G. Trubek, Embedded Practices: Lawyers, Clients, and Social Change, 31 *Harv. C.R.-C.L. L. Rev.* 415 (1996); Lucie E. White, Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak, 16 *N.Y.U. Rev. L. & Soc. Change* 535 (1987-1988); Eric K. Yamamoto, Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America, 95 *Mich. L. Rev.* 821 (1997).