Legal Framing and Social Movement Research: An Overview and an Assessment

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Abstract

The aim of this paper is to explore the issue of legal framing in the context of social movements. Up until recently, most of the social movement literature on framing has subsumed law within ‘political framing’ rather than exploring legal framing as a type of framing in its own right (Pedriana 2006). The paper begins by surveying the developing literature within political science, sociology and socio-legal studies on legal framing (Marshall 2005; Pedriana 2006; Smith 2007; Hilson 2009; Vanhala 2009a and 2009b) and, in doing so, sets out a number of different typologies associated with such framing: replacing non-legal by legal frames; competing legal versus non-legal frames within the same movement; competing legal frames by opposing social movements; and competing legal frames within the same movement. In developing these typologies, the paper draws upon a variety of existing studies, ranging from abortion (Oliver and Johnston 2005), women’s employment laws (Pedriana 2006; Marshall 2005) through gay marriage (Smith 2007), to the disability movement (Vanhala 2009a and 2009b), and the use of an international law frame by the anti-nuclear movement (Hilson 2009). To these, it adds one more in the shape of the US movement against sodomy laws.

The analysis of the various types of legal framing in the first half of the paper sets the scene for the second part, which attempts to draw some general conclusions about legal framing. It begins by exploring the nature of legal framing and what we mean by it. It argues, inter alia, that there has perhaps been a tendency to confuse the issue of legal framing with institutional deployment: the temptation is to elide rights with legal framing and the courts; however, normative framing involving rights can equally be deployed in a legislatively institutional context in order to try to achieve social change. The second part then proceeds to explores the connection between legal framing and a number of other key concepts in work on law and social movements, including for example legal opportunity (Hilson 2002; Andersen 2005), resources and ideology. To what extent is framing dependent on positive legal opportunity? Are some instances of legal framing better seen in terms of ideology (Oliver and Johnston 2005)? Related to this, the paper also considers the ways in which existing studies have explored legal framing in terms of whether law plays the part of the dependent variable and framing the independent variable, or vice-versa.
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1. Introduction

Although framing is given considerable attention in the current literature on social movements (Snow and Benford 2000), the issue of legal framing has remained comparatively less well studied (Pedriana 2006). The aim of this paper is thus to provide legal framing with the focus it deserves. The paper begins with a brief introduction to framing and its place within law. It then proceeds to examine some of the newly developing social science literature on legal framing in order to see whether common issues and patterns have begun to emerge (Benford and Snow 2000). Discussion of this literature takes place within four categories: replacing non-legal by legal frames; competing legal versus non-legal frames within the same movement; competing legal frames by opposing social movements; and competing legal frames within the same movement. These categories or typologies are not in themselves meant to be significant: they are merely a convenient way of presenting and developing a series of case studies of legal framing from the literature (the disability movement, the UK anti-nuclear movement, gay marriage in the US and Canada, abortion, and US women’s employment laws), to which this paper adds one more (US sodomy laws).

Looking back on these case studies, the second half of the paper then considers what they tell us about the nature of legal framing and its relationship with other variables from the law and social movement literature such as legal opportunity, resources and ideology. The lessons to be learned are brought into sharp focus by the very fact that more than one movement is discussed: if there is a problem with the emerging literature on legal framing, it is that it has typically lacked a cross-movement component, with most if not all of the research involving dynamic, single movement, occasionally cross-national studies; perhaps not surprisingly, as a result, few of these studies have actually devoted much attention to legal framing more generally.

2. Introducing Framing and Law

Framing has been described by Benford and Snow (2000) as ‘meaning work’. It is a process in which social movements are ‘actively engaged as agents in a struggle over the production of mobilizing and counter-mobilizing ideas and meanings’ (Benford and Snow 2000: 613). It is also a contentious process insofar as ‘it involves the
generation of interpretive frames that not only differ from existing ones but that may also challenge them’ (Benford and Snow 2000: 614)

Pedriana has addressed how it is that law fits within this view of framing, arguing that ‘law is a central meaning-making institution within which challengers do ‘interpretative work’ … and socially construct their grievances, identity and objectives” (Pedriana 2006: 1723) Others such as Benford and Snow have claimed that civil rights are a type of ‘master frame’; in other words, they function as a type of generic “master algorithm” that works across all movements, as opposed to movement-specific collective action frames, which may be derived from master frames (Benford and Snow 2000: 618).³ Pedriana (2006) takes this further by arguing that not just rights but law more generally is a master frame. He also stresses that legal framing is a dynamic rather than a static process, involving considerable interaction and contestation between and within movements:

Because law’s dominant symbolic framework of rules, rights and obligations sets boundaries on how collective actors conceive of their grievances and goals, ongoing disputes over the proper construction of legal symbols is likely to take place both within a given movement itself and between the movement and its external environment. Disputes over the meaning or existence of rights provide perhaps the best illustration of such contested processes (Pedriana 2006: 1728).

This very much sets the scene for the categories which follow in the sections below, where – particularly in sections 4-6 – these kinds of dynamic disputes are very much in evidence.

3. Replacing Non-legal with Legal Frames

In truth, there is any number of examples that might be given of the first category, involving the replacing of non-legal by legal frames. This is because – beginning with the US civil rights movement, but soon diffusing to many movements beyond it – individuals began to understand and construct their situation in terms of a breach of their rights, where in the past they may have seen it in other, non-legal, terms. However, with reference to the most recent literature on law and framing, the two examples that will be discussed here involve the Canadian disability movement, and the UK anti-nuclear movement. Both studies are largely concerned with a framing transformation that has occurred over the last decade or so.

The disability movement

In her study of the disability movement, Vanhala (2009a and 2009b) has described how the movement has largely moved away from a medical model of disability to one based on a social model, in which rights framing plays a key role. Under the medical model, disability is constructed as a medical condition, deserving of public sympathy and charity; if disabled individuals were denied access to work or leisure opportunities under this model, they were quite likely to regard this as an unfortunate consequence of their own individual situation. With the social model of disability in contrast – which in Canada grew, in part, out of a developing awareness of the
Canadian Charter of Rights and Freedoms – disadvantage became re-articulated as discrimination (Vanhala 2009b); the ‘problem’ was no longer seen to rest with the individual disabled person but rather with society, which typically failed to make sufficient accommodation for the disabled. Vanhala’s central argument is that – alongside other variables (for example legal opportunity and resources) which have been used to help explain why social movements employ particular strategies such as litigation, lobbying and so on (Hilson 2002) – framing also plays an important part. Thus in the disability movement, the new rights framing made litigation as a strategy an obvious choice.

The UK anti-nuclear movement

During the Cold War, the UK anti-nuclear movement typically framed the problem of nuclear weapons as one which required the solution of unilateral disarmament, in contrast with the UK Government’s preferred policy of nuclear deterrence (Hilson 2009). It has been suggested that where, as with this situation, contradictory ideologies are at loggerheads, then a movement may have to engage in a process of ‘keying’ or reframing in order to meet on accepted ideological territory (Snow and Benford 2000). The anti-nuclear movement thus began to reframe its arguments around the illegality of the Government’s position on nuclear weapons as a matter of international law. Although there were signs of such an approach in earlier decades at, for example, Greenham, this legal reframing became a more powerful possibility after the legal opportunity presented by the International Court of Justice (ICJ) Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (1996).4

This legal framing, which replaced the earlier, largely non-legal unilateralism one, was played out in a number of different settings, including ‘citizen’s weapons inspections’ and acts of civil disobedience at military bases. The former typically involve boiler suited re-enactments of the sort of weapons inspections seen in the media coverage of Saddam Hussein’s Iraq – only this time at UK establishments with nuclear weapons. The latter typically involve the Ploughshares wing of the anti-nuclear movement committing criminal damage and trespass onto military bases with a view to being arrested and having one’s ‘day in court’. Both activities invariably refer to the illegality of nuclear weapons under international law with reference to the ICJ Advisory Opinion – whether as part of the citizen’s inspection with the former, or as part of the defence argument against criminal prosecution with the latter.

4. Competing Legal v Non-Legal Frames Within (and Without) the Same Movement

Gay marriage

In her study of the framing of same-sex marriage in the US and Canada, Smith (2007) found that there were competing frames within the lesbian, gay, bisexual and transgender (LGBT) movement in relation to ‘gay’ marriage. The ‘rights frame’ constructed “the issue of same-sex marriage as a question of discrimination against citizens based on their sexual orientation” (Smith 2007: 9). In doing so, it made considerable efforts to emphasise the similarities between the historical disadvantage and discrimination faced by the LGBT community and those involved in earlier civil
rights struggles. The ‘queer culture frame’, in contrast, is against same-sex marriage on the grounds that it fails to recognise difference and simply assimilates homosexuals within patriarchal, heterosexual norms. Far from wanting to sign up to the mainstream, queer theorists prefer a more radical, subversive challenge to conventional society (Smith 2007). The corollary of this is that, while the rights frame is an obviously legal one, the queer culture frame – because it is against hetero-legal mobilisation – can be viewed as non-legal. Of these competing, within movement frames, Smith observes:

inter-frame competition and conflict within queer communities over same-sex marriage have been submerged by the impact of the legally dominated rights frame … because of the powerful model of legally mobilized civil rights, it is difficult for the competing queer frame to make itself heard within the movement, let alone in the ways in which the demands of the movement are framed to the larger society (Smith 2007: 8).

However, while the legal, gay rights frame thus won through as the dominant frame within the movement in both the US and Canada, Smith proceeds to argue that frames have to be accepted within the broader political discourse. In other words, they must also be accepted outside the movement in the sense of what has been labelled as ‘resonance’ (Snow and Benford 1992). In Canada, the rights frame was successfully employed in the Halpern case which endorsed gay marriage, and the decision met with little resistance in a country where liberal tolerance had become a defining national marker. In the US, in contrast, similarly successful pro-gay marriage cases such as Goodridge soon faced a backlash. The gay rights movement faced a powerful counter-movement in the shape of the Christian Right, which, according to Smith, put forward a morality-based counter-frame (Smith 2007). Under this frame, homosexuality is constructed as sexually deviant, morally wrong and a threat to traditional, American family values; and same-sex marriage is portrayed as an affront in so far as it involves state endorsement of illegitimate and destabilising lifestyles.

How then does one categorise this counter-frame within a legal/non-legal typology? At first sight, like the queer culture frame, it might be considered non-legal in that it is against the use of minority ‘special rights’ claims in general (Smith 2007) and the legal, gay rights frame in particular. However, while the queer theory frame eschews the use of law altogether in the marriage context, the morality frame might still be regarded as legal in so far as it places state heterosexual marriage laws within a tradition of Judeo-Christian, religious law. Under this latter view, although it is an anti-rights frame, it is still a legal frame because it constructs state marriage law as legitimate only insofar as it reflects Biblical law (and thus within a conventional male and female relationship). In addition, if, as Goldberg-Hiller and Milner (2003) do in their study of gay marriage in Hawai‘i, one focuses on the ‘special rights’ frame, this can be seen as a legal, derogatory, counter-frame to the ‘equal rights’ frame put forward by the LGBT movement. Special rights are, as they describe them, ‘invocations of rights that seek to oppose or to qualify other forms of rights mobilization by reference to the excessive quality of the original rights claims’ (Goldberg-Hiller and Milner 2003: 1076). Rather than countering with a specific type of constitutional right or indeed religious law, the special rights frame essentially holds a mirror up to the initial gay equal rights frame in an attempt to deflect the claim back as an example of special interest pleading rather than ‘normal’, rights
based universality. However, as Goldberg-Hiller and Milner (2003) point out, the special rights frame has also, ironically, been employed by the LGBT movement against the Christian Right, arguing that heterosexual marriage, in denying universal access, is itself a form of ‘special right’.

5. Competing Legal frames by Opposing Movements (and Within Them)

Abortion

As Oliver and Johnston (2005) have pointed out, movements on both sides of the US abortion issue have adopted the civil rights master frame, with the pro-life movement stressing the right to life of the fetus and the pro-choice movement emphasising the right of the woman to make her own reproductive choices. It is principally on that basis that abortion has been placed within this section as an example of competing legal rights frames being put forward by opposing movements. However, if one digs beneath the level of master frames, the picture becomes rather more complicated, and in truth, abortion might equally have been placed within the next section, which examines competing legal frames within the same movement.

Roe v Wade (1973), the central US Supreme Court judgment on abortion, in fact contains three separate frames on abortion. The first is the women’s right to choose, based specifically on the right to privacy within the US Constitution. The second is the medical model of abortion – dominant pre-Roe and in other jurisdictions such as Britain – under which abortion is constructed as a technical, medical procedure and a decision to be taken by doctors rather than as a matter of the woman’s choice. And the third is the right to life of the fetus, which is not protected directly, but is rather reflected in the ‘State’s interest’ in potential human life.

Although Roe was in that sense a judgment which attempted to give something to everyone, it is more typically the choice or privacy frames which are singled out when the case is discussed (Stetson 2001). However, while much of the ‘pro-abortion’ movement and all of the feminist sub-set of this movement (Staggenborg 1991; Stetson 2001) support the former, broader master frame – the narrower privacy frame has proved much more controversial. While many within the pro-choice movement have continued to employ the privacy frame, numerous others have attacked it. MacKinnon (1987) has been one of the frame’s most vocal feminist critics. She argues that the liberal privacy doctrine presumes that the public realm of the state should not interfere with the realm of private freedom. In the abortion context, the state should thus keep out of private decisions over reproduction such as contraception and abortion. However, MacKinnon attacks the artificiality of the liberal public/private divide, arguing, from a radical feminist perspective, that for women, the private sphere is a realm of domination by men rather than one of freedom. Abortion facilitates women’s sexual availability to men and denies them a legitimate reason for refusing sex. In other words, far from upholding a women’s right to privacy and freedom, abortion protects men’s freedom (MacKinnon 1987).

However, the privacy frame has been attacked not just by radical feminists, but also by socialist feminists, who, like MacKinnon (1987), have argued that framing a right to abortion in terms of privacy and liberty may stop negative prohibition of abortion
but does little to provide positive access to it, especially for the marginalised poor and women of colour. Along these lines, the finger is typically pointed at the privacy basis of Roe for having failed to prevent subsequent court decisions from upholding funding cuts for abortion services.14 abortion, being a private matter, does not necessarily require public financial support.

Many feminists have thus sought to reframe the abortion issue as one involving the constitutional right to equal protection or non-discrimination rather than privacy (MacKinnon 1991; Colker 1991; Siegel 1992). In terms of US constitutional law, there is a precedential stumbling block for such an approach, insofar as the Supreme Court has historically adopted the view that, because women uniquely face pregnancy, laws which treat them differently in relation to it are not necessarily discriminatory (Colker 1991; Siegel 1992). However, this has not prevented feminists from arguing that abortion laws violate equal protection because, for example, forced motherhood will impact more significantly on women (MacKinnon 1991).

Yet others, particularly socialist feminists, have criticised legal rights framing altogether in relation to abortion – whether the relevant right be one based on privacy or equality – for being too individualistic and insensitive to collective social needs and responsibilities (Brown 1983; Harding 1984). In a cross-national study of abortion politics in the US and Sweden, Linders has also suggested that the US framing of the issue provided the US counter-movement with an easier target to that in Sweden, where there has been little in the way of US, post-Roe retrenchment (Linders 2004). In the US the ‘right to choose’ frame set women up as culpable, strong and autonomous free agents as compared with the weak, innocent fetus (Linders 2004). In Sweden in contrast, rather than an individualist rights frame, abortion was supported via a social democratic framing in which women were portrayed as driven to abortion out of social and economic despair (Linders 2004). While this robbed women of agency, in similarly framing women and fetuses as victims, it also denied the counter movement the ability to characterise women as selfish and whimsical in their reproductive decision-making.

6. Competing Legal Frames Within (and Without) the Same Movement

US women's employment laws

Pedriana (2006) discusses how the women’s movement in the US faced a competing set of legal frames in relation to employment laws involving women in the workplace. From the early 1900s until the early 1960s, the women’s movement had adopted what Pedriana calls a ‘protective’ frame in arguing for protective employment laws specifically for women, designed to shield them “from dangerous and unfair working conditions” (Pedriana 2006: 1719). However, with the, to some extent unexpected insertion of sex discrimination alongside race into Title VII of the 1964 Civil Rights Act (Pedriana 2006), this historical legal frame was confronted by a new ‘equal treatment’ frame. As Pedriana explains, both frames constructed women in legal terms, but with a different perspective on gender roles at work:

One frame – “equal treatment” – favoured the end of unnecessary and draconian sex classifications under law that restricted women’s employment
opportunities. The other legal frame – “protective treatment” – simultaneously wished to retain sex classifications that offered genuine protections exclusively for women” (Pedriana 2006: 1735).

There were thus competing legal frames within the women’s movement. In the end, Pedriana describes a process of frame ‘transformation’, with the equal treatment frame winning through. Issues of protection did not, of course, disappear entirely: protection around pregnancy for example remains a feature of employment laws; however, protective policies are now firmly situated within the equal treatment frame.

Marshall’s (2005) research into sexual harassment in the workplace is also concerned with US gender-related employment laws. Marshall’s empirically-based study looked at the way in which women framed their experience of sexual harassment at work. The origins of the laws on sexual harassment lay with the feminist movement, which according to Marshall, ‘bridged’ the experience of sexual harassment to the civil rights frame of racial discrimination. Sexual harassment, in other words, became framed as an example of sexual discrimination and the relevant behaviour was proscribed as a result. However, in interviewing women to investigate their experience of harassment, Marshall discovered that there were both competing feminist frames and compatible but alternative management or human resources frames in play. Thus the feminist ‘injustice’ frame found itself in competition with a freedom of sexual expression frame: not all women were convinced that their ‘virtues’ needed protecting from men at work. The management frame, in contrast, was, like the injustice frame, anti-harassment, but in order to protect the organisation rather than from any real concern about discrimination as such.

US sodomy laws

Not all instances of competing legal frames within a movement end up with transformation in favour of one frame in the way seen in Pedriana’s (2006) study above. In the case of US laws against same-sex sexual activity for example, one finds competing legal frames within the gay movement, and while one may appear to have won through legally, it has not stopped competing legal frames from being put forward by elements within (and without) the movement. The same-sex sexual activity example also demonstrates, as we saw with abortion, that a closer regard to precise constitutional framing arguments reveals a much more complex and messy framing picture than a focus on the meta-level of master frames might suggest.

Thus, in Lawrence v Texas, the US Supreme Court overruled its previous ruling in Bowers v Hardwick to strike down Texan laws prohibiting sodomy. At first sight, this might be seen as an example of a ‘gay rights’ master frame in action, with a homosexual plaintiff, Hardwick, relying on his rights under the Constitution to have the sodomy laws struck down. However, a more detailed reading reveals that, just as the Supreme Court had denied the plaintiff’s ‘right to privacy’ (hereafter, generally, ‘privacy’) frame in Bowers, ruling that the US Constitution does not “[confer] a fundamental right upon homosexuals to engage in sodomy”, so in Lawrence the Supreme Court, in overruling Bowers, generally favoured a privacy rights frame. Nevertheless, although the privacy rights frame may thus appear to be legally ascendant in terms of current judicial precedent, the adoption of this frame has been widely contested within the LGBT movement and beyond.
Perhaps the most obvious contest is between the ‘privacy’ frame and the ‘right to equal treatment’ or non-discrimination frame. Under the privacy frame adopted in Lawrence, same-sex sexual relations are regarded as lying within the private realm which has nothing to do with the state and should thus remain free from state interference; they should thus not be prohibited by law. Under the equal treatment frame in contrast, it very much depends on whether one frames sodomy laws as discriminatory on grounds of sex (whereby sodomy laws – though typically only if not facially neutral – discriminate against say gay men engaging in relevant sex with men because women would not be prosecuted under such laws for engaging in similar activities with men), or on grounds of sexual orientation (whereby homosexual sex is constructed as being on a par with heterosexual sex and thus, if mainstream heterosexual sex is not legally proscribed, neither should mainstream homosexual sex be). Under the latter, sexual orientation approach, the equality frame therefore places an equal moral value on and endorses gay sex in a way that is not required by the privacy frame: with the latter, a space is still reserved for those on the Christian Right who regard same-sex sexual activity as morally reprehensible and inferior to heterosexual sex within marriage; gay sex is not endorsed as morally equal, but it is tolerated so long as the activity remains private (Bamforth and Richards 2008). This may be one possible explanation for why the Supreme Court adopted the narrower privacy frame. Another is that the equality frame would have been, in frame extension terms, too easily extended across to the area of gay marriage discussed earlier. While it is possible to argue for gay marriage within a privacy frame, it is arguably more obviously public than sexual activity, because the marriage ceremony and registration is a public act which is endorsed by the state (Bamforth and Richards 2008).

Others have argued that Lawrence is in fact more nuanced than the above discussion might suggest. While Lawrence does favour a privacy frame, it has been claimed that the Supreme Court’s judgment in fact contains, within this privacy frame, both a ‘liberty’ (or autonomy) and an ‘equality’ (or recognition) frame (Note 2005). In other words, the suggestion here is that, far from seeing Lawrence as a zero-sum game of either all liberty or all equality, it should be viewed in terms of a more equivocal mixing of liberty and equality, with threads of both present, inviting future courts to pull harder on one strand or the other as they see fit (Note 2005).

Those on the queer theory side of the movement also contest the privacy rights framing within Lawrence, though not on the basis of a preference for an equality frame in its place. As we saw above in relation to gay marriage, queer theorists are suspicious of an equality frame that would tie them in to heterosexual norms – here of acceptable sexual behaviour. However, they are suspicious of the privacy frame adopted by the Supreme Court in Lawrence for similar reasons. In stressing the right to privacy within intimate relationships behind closed doors, the Court implicitly favours a certain type of gay sexual activity – one that takes place in a loving, stable relationship, and in private. Queer Theorists resist this however, on the basis that it excludes more random sexual encounters and those which take place in public spaces such as cruising (Ruskola 2005). It may provide liberty in other words, but it is sexual liberty of a rather sanitised and domesticated type (Franke 2004). They have also argued against privacy frames on similar grounds to those presented by certain feminists against abortion described earlier – in other words that in focusing on the
private realm, privacy as a frame fails to recognise the very public consequences, in terms of power and domination, that flow from an insistence that homosexuals will be left alone so long as what they do remains hidden with ‘the closet’. As Thomas argues:

The rhetoric of privacy has historically functioned to perpetuate the oppressive policies of the “closet”: privacy is the ideological substrate of the very secrecy that has forced gay men and lesbians to remain hidden and underground, and thus rendered them vulnerable to private homophobic violence. There is no reason to think we can rid privacy of its sedimented history (Thomas 1992: 1510).23

For his part, post-Bowers, Thomas argued neither for a privacy nor an equality rights frame, but rather for one which placed less emphasis on rights and more on an abuse of state power. Insofar as he was prepared to argue for a rights frame, it was one based on a general individual right to bodily integrity and a more specific right to be free from state-sponsored, homophobic violence (Thomas 1992). The concrete right within the US Constitution which he claims was breached by state sodomy laws and which cashes out this right, was the Eighth Amendment right to be free of cruel and unusual punishments. Sodomy laws could be regarded as breaching this right because of the implicit state encouragement such laws give to private violence against and punishment of ‘criminal’ and thus ‘deviant’ homosexuals (Thomas 1992).

The above discussion focuses on the issue of rights framing. However, queer theorists have rightly drawn attention to another key type of legal framing to be found within the relevant sodomy cases, which is concerned, not with rights binaries such as privacy versus equality, but with the ‘act’ versus ‘identity’ binary. In an influential article on Bowers, Halley (1993) argued that the plaintiff was effectively caught by a ‘double-bind’, where the Court,24 in using both an act frame (to refer to sodomy itself) and an identity frame (referring to homosexuals as a group), were able to elide sodomy with homosexuality and gloss over heterosexual expressions of the act (Halley 1993). This same binary is also present in the Lawrence case and is similarly employed there by the Supreme Court to limit the scope of its judgment (Note 2005). Ruskola (2005) has also argued that the framing of Lawrence is wrong because, rather than the privacy frame adopted by the Court, the case should have been argued, and the judgment based on, a right to engage in sodomy, as an act.25 This is at one with Queer Theory’s general antipathy to the idea of fixed, essentialized identities, preferring instead the view that sexuality is a much more fluid affair (Ruskola 2005; Stychin 2008). On this view, it is the act of sodomy that should be protected for all, and certainly not just for homosexuals, as if they could easily be defined as a group.

In any event, what one finds with the gay movement’s sodomy campaigns, is a set of competing legal frames which, unlike Pedriana’s (2006) women’s movement employment law case study, are not finally resolved with one frame eventually winning through. In strictly instrumental legal terms, the privacy rights frame appears to have won through in that the Supreme Court has endorsed this particular frame over the equal treatment one, though as we have seen, both frames are arguably visible within the Lawrence judgment. In addition, other rights frames beyond these two have been argued for – including for example the right to bodily integrity – as
well other legal frames, including out-of-movement ones such as Biblical legal framing, and within movement ones such as the act versus identity frames.

7. Legal Framing – Lessons Learned

The nature of legal framing

Having examined a number of examples of legal framing at work, what then can we conclude about the nature of legal framing? First, while rights and even law more generally might be regarded as a master frame, in studying legal framing it is necessary to proceed below this meta-level of analysis. Nevertheless, what the abortion example illustrates is that going down just one level will often be insufficient: there, below the common rights master frame were the separate pro-choice and pro-life collective action frames, which might lead one to think that the competing frames were between movements rather than within them. However, on closer examination, it was revealed that there are competing legal frames within the pro-choice movement, with many feminists in particular against the dominant privacy frame employed by the Supreme Court in *Roe*.

Second, a number of the case examples demonstrate that legal framing need not just be about breach of rights. Framing in terms of rights in general – and specific constitutional rights in particular – is often, as we have seen in many of the case examples, an important part of legal argument. However, the sodomy laws case study also showed how there are many other important facets to legal frames and framing beyond rights: the act versus identity frames discussed there provide a notable example of this. Similarly, legal framing may allege not a breach of rights, but of law, such as international law in the case of the UK anti-nuclear movement and the ICJ Advisory Opinion, or even Biblical law in the case of the US Christian Right’s legal framing of marriage within the gay marriage debate. In fact, it should come as no surprise that not all legal frames are rights frames: as Kolb has noted, the US Constitution is not ‘unbounded’ in the sense that not all movement goals can be framed or presented in terms of constitutional rights (Kolb 2008).

This second observation leads on to the third, which concerns precisely how legal arguments are framed in court – both by attorneys and also by judges. The sodomy example again helps to illustrate an important point about the exercise of legal framing in court that distinguishes it from political framing, which is that the former is constrained by precedent in a way in which the latter is not. As Andersen (2005) observes, there may be a need for a cultural fit in order for political frames to be resonant; however, the precedential fit required of legal frames in addition to this cultural fit is more demanding. If the only precedents you have to go on are all based on a privacy right, it will be difficult to persuade a court to reframe this into, say, an equal protection frame: the court will typically feel constrained by the need to follow the previous judicial decisions based on privacy.

Fourth, legal framing need not involve the courts. The US socio-legal literature on law and social movements has commented extensively on the ‘constitutive’ character of law, whereby law – in society generally and not just in the courts – helps to shape meaning and identity in people’s everyday lives (Ewick and Silbey 1998; McCann
Such ‘legal narrative’ approaches, adopt a decentred, non-instrumental and social constructionist view of law, rather than placing the courts centre-stage as many lawyers are inclined to. Marshall’s (2005) study of women’s experiences of sexual harassment is very much located within this tradition of scholarship and reveals how women adopted legal frames to make sense of their experiences, but also non-legal ones. Though not within this tradition, the example of citizens’ weapons inspections within the UK anti-nuclear movement also illustrates how legal framing can take place in non-court settings.

Finally, although Pedriana (2006) recognises that litigation is not the only way in which legal rights can become enshrined in law, his focus, in examining legal framing, is very much on legal institutions, which he defines principally as courts and administrative enforcement agencies. Though not discussed in the sections above, a closer examination of both the abortion and sodomy law case studies shows that legal mobilisation in the courts has often been preceded and also followed by attempts at political lobbying to have the relevant rights enshrined within state legislation (Anderson 2005). So should such rights framing be regarded as an example of legal or political framing? If one focuses on the social movement strategy (political lobbying) or the source institution (the legislature) – then it is perhaps best seen as an example of political framing. However, insofar as the source (statute) is a legal one, as is the style of norm (rights), then a legal frame may appear more appropriate. Not of course that all legislative framing will employ the rights frame. Here, the example of abortion law in the UK might be cited as an example: the Abortion Act 1967, as was noted earlier, adopts a medical frame on abortion rather than a rights frame.

Legal framing and its relationship with other variables

In assessing the role of legal framing, it is also worth pausing to reflect on the way in which it relates to some of the other key variables that have been examined within the literature on law and social movements such as legal opportunity and ideology. Legal opportunity structure, like political opportunity structure, is a structural process-based explanation for social movement activity, in contrast with the cultural, interpretive approach associated with framing. In essence, legal opportunity involves a combination of access to the courts accompanied with judicial receptivity. Legal opportunity has been employed, inter alia, as an independent variable to explain strategy use in the form of, for example, litigation as the dependent variable. Vanhala’s (2009a and 2009b) research on framing in the disability movement similarly considers framing as an alternative independent variable, with litigation as the dependent variable. In this respect, Vanhala’s study is fairly typical of approaches to framing in social movement literature more generally, in which mobilisation into the movement, or action by the movement is often presented as being dependent on framing (Marshall 2005). In Marshall’s (2005) study of sexual harassment in contrast, framing plays the part of the dependent variable, with law as the independent variable on which women’s experience of harassment is in part based. Similarly, with a number of the other examples explored above, framing can be seen as, to an extent, dependent on the legal precedent or ‘stock’ – in other words the legal opportunity – that is available. Privacy precedents for example may constrain framing or may, alternatively incite arguments for different frames. However, it would be wrong to regard the traffic as all one way here: framing may well be dependent on legal opportunity to some extent; nevertheless, introducing agency into the picture, framing
and perceptions can also help to shape and see new legal opportunities (Vanhala 2009b).

Associated with ‘resource mobilization theory’, resources have also been examined as a key variable in explaining movement emergence and activity (McCarthy and Zald 1977). This includes legal activity such as litigation: it has for example been argued that litigation as a strategy is largely only a realistic option for resource-rich social movement organisations (Hilson 2002). As for the relationship between resources and framing, again, this might be seen from two directions. First, the ability of a movement to acquire resources – human, financial and otherwise – will typically be dependent on its ability to put forward a successful frame which resonates with potential members (McCarthy and Zald 2001). Legal rights frames might well be one such successful frame. But secondly, instead of being the independent variable in that way, framing could play the part of the dependent variable. In other words, the style of framing one adopts might be seen as in part dependent on the type of resources which a movement organisation possesses: organisation with access to those with legal backgrounds and training – seen as a resource – are perhaps more likely to adopt a legal frame.

Ideology or ideas have also been examined in the literature on law and social movements. Thus, for example, someone holding to anarchist ideology is unlikely to be prepared to adopt litigation as a strategy because of its reliance on state institutions (Hilson 2002). As for ideology and framing, in looking at abortion, Oliver and Johnston (2005) argue for the need to distinguish more clearly between the two. In relation to abortion, they initially mention three ideologies – religious, medical necessity and women’s need – which are subsequently condensed into two – religious and secular (with the medical and women’s ideologies comprising the latter). They then argue against presenting these ideologies in terms of frames. The key frame here is, instead, they argue, the rights master frame, to which both conflicting ideologies subscribe:

> If we think of frames as synonymous with ideologies, we will lack the analytic tools, even the very language, for talking about this fascinating instance of the same frame being tied to diametrically opposed ideologies. If we keep the concepts clearly differentiated, we have some vocabulary and tools for talking about how people present their issues in a public space, and we avoid the danger of simply extrapolating ideologies from their public presentations (Oliver and Johnston 2005: 187).

However, this is not terribly convincing. After all, both ideology and framing involve ideas about and ways of seeing the world. One would therefore expect them to be intimately connected. Only by sticking to the level of a common master frame can Oliver and Johnston’s argument be sustained. If, as earlier in this paper, one goes down a level, then it becomes clear that different ideologies between the opposing movements help shape very different frames informed by those ideologies: the religious ideology of the Christian Right informs the pro-life frame, and the ideology of feminism informs the pro-choice frame. If one proceeds down a further level, then different ideologies within the feminist movement (liberal, radical and socialist) again give rise to very different legal frames in relation to abortion.
8. Conclusion

The aim of this paper has been to examine the way in which legal framing, as a separate type of framing, has been employed within the literature on law and social movements up until now. In doing so, the paper has sought to make sense of what exactly we mean by legal framing and to explore how it relates to other key variables that have been explored within law and social movements, including legal opportunity, resources and ideology.

If there is a conclusion to be drawn, it is perhaps inevitably that the terrain involved with legal framing is more complex than one might initially have thought. The analysis conducted in this paper will hopefully help in mapping the existing terrain. However, the exercise is far from complete and there remain numerous fruitful avenues for future research on framing. Thus, there remain questions about the relationship between legal framing and movement outcomes, and also about the precise dynamics involved in the diffusion of legal frames. There is also a need for further cross-movement and cross-national studies involving legal framing: while the current paper has sought to achieve something like this at a secondary sources level, this can be no replacement for empirical studies involving primary data in which such approaches are central to the methodology.

NOTES

1 Although a pejorative term, sodomy is used here to refer to US laws in keeping with much of the existing literature on the subject.
2 Cf. Pedriana (2006), which contains the most extensive analysis of existing studies; also Vanhala (2009a and 2009b).
3 See also Snow and Benford (1992).
5 Difference both between lesbian and gays and heterosexuals, but also between lesbian and gays themselves (i.e. queer theorists are against the idea of a singular, essentialised ‘gay’ identity). It should also be added that an anti-marriage stance based on a difference rather than equality frame is not unique to queer theorists – see e.g. Auchmuty (2008), who describes the antipathy of many lesbian feminists to marriage (though with some supporting the UK near equivalent but nevertheless different ‘civil partnership’).
8 For this link between marriage and Christian laws, see further Romero (2006).
9 ‘Special’ here, in other words, is used negatively rather than positively.
10 410 U.S. 113 (1973).
11 See e.g. Stetson (2001).
12 See e.g. Sheldon (1997), who emphasises the dominance of the medical model and the lack of a rights frame in the adoption of the British Abortion Act 1967.
13 The pro-abortion movement has been described as a loose coalition of the women’s movement, single issue abortion activists including doctors, and those from the population movement (Staggenborg 1991; Stetson 2001)
14 E.g. Harris v. McRae, 448 U.S. 297 (1980), in which the Supreme Court upheld the constitutionality of the Hyde Amendment, withdrawing funding for abortion services.
15 Though whether it has done so definitively will be examined further below.
17 478 U.S. 186 (1986).
18 Ibid, at 190.
19 Which is not to say that the Religious Right have accepted Lawrence – far from it. They have generally contested the privacy legal frame with another legal frame based on the sanctity of religious
laws on marriage and sexuality – see Romero (2006), though note that Romero himself adopts a more positive Christian approach to Lawrence.

20 On frame extension, see e.g. Benford and Snow (2000).

21 This is not to say that sexual activity is not also public – as will be discussed below.

22 Though cf. some commentators, such as Jack Balkin, who, in his Blog (http://balkin.blogspot.com/2003_06_22_balkin_archive.html), has claimed that queer theory would favour a privacy over an equality frame (because privacy involves more of a recognition of difference rather than heteronormativity). While it is probably true to say that queer theory would prefer privacy over equality if these were the only two frames on offer here, it is not true to say (for reasons that will become apparent in the main text) that they support a privacy frame more generally, let alone the specific version of the frame favoured by the Supreme Court in Lawrence.

23 See also pp 1455-6.

24 And also Hardwick’s lawyers – Halley (1993).

25 Cf. the subtle echoing and inversion of the Supreme Court’s statement in Bowers, mentioned earlier in the main text.

26 See also Hunt (1990), who points out the tendency to conflate ‘rights’ with ‘litigation’ (at 317).

27 Though in fact they do appear, in places, to present religion as a frame.

REFERENCES


