

Beyond *The Hollow Hope*:

The Promise and Challenges of Studying Gradual Sociolegal Change

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Abstract

In this paper, I critique the focus of Gerald Rosenberg's *The Hollow Hope* on the ability of courts to deliver top-down, sudden, large-scale changes in social policy by arguing for an alternative theoretical treatment of courts and a shift in the empirical focus of the scholarship on litigation and impact. I posit that courts, and particularly lower and mid-level courts that have the greatest day-to-day impact on people's lives, are neither policymaking institutions *à la* Dahl and Rosenberg nor guardians of principle *à la* Dworkin - rather, they serve as intermediaries of intra-societal practices and mediators of state-society relations. Treating courts as fora for the negotiation and reconfiguration of sociolegal practices underscores the degree to which the impact of litigation and adjudication is meant to (and likely to) take the form of gradual yet consequential processes of change as opposed to sudden, top-down transformations in regime policymaking. I deliver this argument as follows. I begin in Section II by briefly elaborating this alternative theory of court-centered social change. In Section III I then outline six mechanisms of gradual sociolegal change that escape the gaze of *Hollow Hope*-style scholarship. Finally, in Section IV I conclude by addressing some epistemological challenges inherent in implementing the foregoing approach.

1 Introduction: The Hollowness of *The Hollow Hope*

Mozart: “It’s the best opera yet written. I know it! Why didn’t they come?”

Salieri: “I think you overestimate our dear Viennese, my friend. Do you know that you didn’t even give them a good bang at the end of songs, to let them know when to clap?”

~*Amadeus* (1984)

Like the Viennese aristocracy portrayed in Milos Forman’s excellent film, political scientists enjoy “bangs” at the end of songs, at least insofar as the “bangs” represent clear causal relationships and the songs represent organized bundles of data subjected to empirical analysis. We fear lying at the mercy of causal skeptics, and by articulating a limited set of crisp, causal hypotheses to assess the impact of sudden, consequential events, we hope to disarm our critics with a silence-inducing *coup de grace*.

Gerald Rosenberg’s *The Hollow Hope* indulges the “bang”-seeking political scientist by forwarding a clear research question (“can courts autonomously bring about sudden, large-scale social policy change?”) a clear answer (“no”), and clear measurement strategies (ex. “what percentage of schools in the American south were racially integrated in the years immediately following the Supreme Court’s 1954 *Brown v. Board of Education* decision?”). Rosenberg’s argument, namely that courts are incapable of furthering large-scale changes in social policy absent the cooperation of purse-wielding legislatures or sword-wielding executives, has spurred vigorous interest thanks in no small part to its polemical cogency. Indeed, much (though certainly not all) of the subsequent public law scholarship has critiqued or engaged with Rosenberg on his own terms by (1) appropriating a narrow conception of “impact” (large-scale policy change), (2) testing a linear conception of causation (court decision → policy change), and (3) focusing on the U.S. Supreme Court. For example, Matthew Hall (2010)’s study of Supreme Court power challenges *The Hollow Hope*’s conclusions¹ via a more sophisticated series of applications of Rosenberg’s original research design.

To be fair, this engagement is with a broader and more longstanding intellectual heritage than just Rosenberg’s contribution. Even *The Hollow Hope* owes much to Robert Dahl (1957)’s argument that the judicial appointment mechanism ensures that the Court will rarely be able to stray from the policy preferences of lawmaking majorities, as well as to Robert McCloskey (2005)’s study of the Court’s attempts to maintain a nation-building role throughout American history via the flexible accommodation of shifting sociopolitical needs. Nevertheless, if citation counts are of any indication, *The Hollow Hope* has taken on a life of its own.²

¹Hall (2010) finds, *inter alia*, that when the Court’s rulings can be directly applied by lower courts their policymaking impact is greater than when they require the lateral support of the political branches. But in testing this revised version of Rosenberg’s thesis, Hall relies on much of the same data (and this is intentional, for Hall aims to facilitate a comparison to *The Hollow Hope*).

²A Google Scholar citation count finds that Rosenberg’s book has been cited over 2,750 times, making it one of the most-cited social scientific works in public law. See: <http://scholar.google.com/scholar?hl=en&q=the+hollow+hope>.

This is a perilous state of affairs, for despite what Rosenberg demands of the concept of courts, judicial institutions are not meant to serve as cannons for social change. And when we study them as if they were, we should not be surprised when they fail to deliver the much-anticipated “bang.”

In this paper, I argue for an alternative theoretical treatment of courts and a shift in the empirical focus of the scholarship on litigation and impact. I posit that courts, and particularly lower and mid-level courts that have the greatest day-to-day impact on people’s lives, are neither policymaking institutions *à la* Dahl and Rosenberg nor guardians of principle *à la* Dworkin - rather, they serve as intermediaries of intra-societal practices and mediators of state-society relations. Treating courts as fora for the negotiation and reconfiguration of sociolegal practices underscores the degree to which the impact of litigation and adjudication is meant to (and likely to) take the form of gradual yet consequential processes of change as opposed to sudden, top-down transformations in regime policymaking. I deliver this argument as follows. I begin in Section II by briefly elaborating this alternative theory of court-centered social change. In Section III I then outline six mechanisms of gradual sociolegal change that escape the gaze of *Hollow Hope*-style scholarship. Finally, in Section IV I conclude by addressing some epistemological challenges inherent in implementing the foregoing approach.

2 Judicial Institutions as Fora for Sociolegal Practice

Below the abstractions of the apex-centric Dahlian conception of the Supreme Court as a national policymaker and the Dworkinian conception of courts as “forums of principle” (Dworkin 1985) lies the empirical reality of the day-to-day regulation of social practice, particularly by low and mid-level courts. As William Novak (1996: 8) writes, “at bottom, governance is not primarily a matter of philosophy, plutocracy, or bureaucracy. It is a constitutive public practice - a technology of public action with its own history, structures, and rationales that produce as much as they are produced by economics, ideology, and culture.” Novak’s assessment, which takes the 19th century United States as its referent, remains relevant today: As Michael McCann (1994: 15) argues, “there is no essential reality of law to discover independent of multiple partially constitutive legal practices.” The analytic focus thus shifts from structural openings for the exercise of political agency by contingently powerful supreme courts to the iterated and collective reshaping of sociolegal practices within judicial fora during periods of normal (though certainly not static) politics.

This practice-centric theory of courts and legal rules has its foundation in the legal positivism of H.L.A. Hart and Joseph Raz. A defining characteristic of an ideal-typical legal rule, Hart and Raz argue, is its ability to serve as an authoritative guide for social practice by partially replacing a process of ad-hoc, situation-by-situation evaluative reasoning with a process of general reliance on the rule because it is endowed with the

authority of the law (Raz 1990: 49-84).³ Yet for legal rules to effectively order social practice, they must be received, interpreted, and enforced, and it is in this light that courts play an essential social function. For even in homogenous communities characterized by the legal codification of social convention, some individuals, by accident or out of divergent factual interpretations of said rules, will violate a legal rule or disagree regarding its proper interpretation, which should sometimes spur litigation (Raz 1990: 159-161). Yet beyond this enforcement and precisising function, courts serve as fora for the instillment of what Hart (1961: 57) termed the “internal point of view,” or the appropriation of “a critical reflective attitude to certain patterns of behavior as a common standard,” characteristically expressed “in the normative terminology of ‘ought’, ‘must’, and ‘should’, ‘right’ and ‘wrong.’” Via the judicial process, courts shape and regulate social practice and promote a fundamental perspectival shift through the appropriation of the internal point of view.

The foregoing framework places its analytic focus on the iterated interactions between society and partially constitutive judicial fora. The reception and recognition of Hartian primary rules of obligation and power-conferring secondary rules is a gradual process; the appropriation of the internal point of view requires prolonged socialization; and the transformation of what Karl Llewellyn (1930) would call “paper laws” into entrenched Razian exclusionary reasons for action does not occur overnight. Yet the proximity between the lower tiers of the judicial system and social actors, and the frequency of interaction between them, is likely to engender a plethora of such mechanisms of gradual sociolegal change, to which we now turn.

3 Court-Centered Social Practice: Six Mechanisms of Gradual Sociolegal Change

From the foregoing theoretical framework we can derive at least six mechanisms of gradual court-centered sociolegal change. By *court-centered*, I do not necessarily mean that the dynamics outlined are *court-authored*; rather, I mean that these mechanisms occur through, and are at least partially shaped by, the forum of judicial institutions. These mechanisms are not mutually exclusive, and indeed several logics of gradual sociolegal change are likely to be operating at any given moment in political time. Further, these mechanisms need not be complementary or mutually-reinforcing - some may operate orthogonally or in tension with each other. Yet regardless of their relative orientations, the mechanisms’ unifying characteristic is that they are ever-present features of normal politics, and while they may be activated during periods of rapid sociolegal change, their causal effects are much more likely to be incremental and cumulative.

³In more technical language, authoritative laws provide exclusionary and content-independent practical reasons, or reasons for action.

3.1 Learning the Regime's Discourse

Few social movements are able to bring about comprehensive social change without the assistance of regime insiders (see Skerentny 2002).⁴ Yet to obtain the allegiance of sympathetic bureaucrats and policymakers, advocates for social change can benefit from couching their demands in a non-threatening language to quell fears of radicalism. The legal discourse, imbued as it is with technocratic jargon and the traditionalism of custom and precedent, is the language of the established regime, and consequently its use diminishes the fears of regime insiders that the social movement represents an existential threat that must be resisted *in toto*. By structuring the type of arguments and claims admitted in the case before them, courts offer activists opportunities to incrementally learn how to make claims in a way that maximizes the likelihood that politically powerful actors and ruling coalition members will lend a sympathetic ear.

To be sure, by domesticating claims for reform courts may co-opt social movements and quash their radical potential, as William Forbath (1989) and others have argued in the context of *Lochner*-era labor disputes. But litigation need not be the exclusive or even the predominant strategy of social activists.⁵ As negotiations couched in conservative regime discourse between social leaders and the ruling coalition are institutionalized via the judicial forum, activists on the street can continue to galvanize supporters with more radical ideological messages.

3.2 Seeing Like a State

As James Rogers (2001) and others have noted, courts perform an information-diffusion mechanism for the regime.⁶ The initiation of litigation, the tenor of oral arguments, and the content of case outcomes provide measures of social engagement and dissatisfaction with existing policies. In James Scott (1998)'s language, judicial institutions enhance the "legibility" of society.⁷ As these court-transmitted signals of potential social discontent are collected and interpreted by bureaucrats, they provide policymakers with an important assessment of the congruence between legal rules and community needs. In fact, there is reason to believe that courtroom disputes may provide a more focused social signal than elections. By their very structure, elections bundle issue areas together, forcing voters to make a single choice rather than a series

⁴Writes Skerentny (2002: 5) in his study of the post-WWII minority rights revolution: "One theme throughout this study is that while white men dominated government, by no means were social movements and advocates excluded . . . The images of the minority rights revolution are mostly of mainstream Euro-American males and minority advocates, wearing suits, sitting at desks, firing off memos, and meeting in government buildings to discuss new policy directions."

⁵In the context of litigation for marriage equality, a qualitative study of Lambda Legal lawyers found that they were "well aware that the struggle for legal reform does not begin and end in the courtroom" (quoted in Keck 2009: 175).

⁶As Rogers (2001: 96) elaborates, "what the Legislature loses to judicial policy-making it more than makes up from the informational service that the Court provides in helping the Legislature to secure its own policy goals."

⁷Scott (1998: 183) writes in the context of state-building in southeast Asia that "[l]egibility is a condition for manipulation. Any substantial state intervention in society - to vaccinate a population, produce goods, mobilize labor, . . . requires the invention of units that are visible. . . . Whatever the units being manipulated, they must be organized in a manner that permits them to be identified, observed, recorded, counted, aggregated, and monitored. The degree of knowledge required would have to be roughly commensurate with the depth of the intervention."

of issue-specific selections. Further, the highly politicized nature of electoral campaigns - with their parades of partisan propaganda, spin alleys, and charismatic personalities - diminish the quality of the electoral signal, particularly vis-a-vis specific public policies. By contrast, courts compartmentalize disputes by issue area and focus attention upon specific legal rules, allowing bureaucrats to assess the longitudinal operation of said rules across a wide variety of contexts. Regime insiders may subsequently conclude that statutory tweaking is necessary to accommodate shifting social desires and to pre-empt the rise of contentious political movements.

3.3 Seeing Like a Citizen

The appropriation of the legal discourse is not exclusively a means for social activists to forge channels of communication with the regime. Additionally, the arguments made in court, and the judgments rendered thereby, may also serve to reshape the identities of social actors. Specifically, the language of legal rights invites social actors to see themselves as citizens making a claim against their fellows or against the state instead of being limited to the status of human beings who have suffered moral harm. In the courtroom, the aggrieved's identity- and action-set is expanded: Litigants are informed that they can be (or already are) "victims" or "plaintiffs" who, as "citizens" benefitting from the equal protection of the laws, are endowed with specific legal "rights" and claims to "individual autonomy" or "privacy," and consequently to "remedies" or "damages" in light of a violative act (McCann 1994).⁸ Via this iterated process of reverse-information diffusion (reversed, that is, vis-a-vis mechanism 3.2), courts communicate to social actors which repertoire of rights and actions the state is willing to sanction. Sympathetic judges can then nudge individuals to take up the identity of citizen to creatively leverage these institutional tools for social change. In short, courts enable and encourage individuals to "name, blame, and claim" (Felstiner et al. 1980).⁹ As social activists learn to "see like citizens," they undergo a gradual yet profound identity-shift and become aware that they need not necessarily construct a foundation for social change from scratch.

3.4 Reshaping Open-Textured Law

Historical institutionalists have long argued that legal change need not be limited to the introduction of new, sweeping legal rules - it can also take the form of creative engagement with the existing institutional environment (Hacker 2004; Mahoney and Thelen 2010). Indeed, Hart (1961) emphasizes that all legal rules

⁸As Michael McCann (1994: 48) finds in his canonical study of women's struggle for pay equity in Washington state, "legal rights discourse has provided reform activists a compelling normative language for identifying, interpreting, and challenging the unjust logic of wage discrimination."

⁹As Felstiner et al. (1980: 643; 648; 651) elaborate, "legal victory transform[s] shame into outrage, encouraging the voicing of grievances, many of which may become disputes;" yet "the *attitude* of the disputants may be altered by their minimal role in the courtroom and the way that they are treated there . . . Disputing involves the creation and revision of perceptions and attitudes about oneself, one's opponent, agents, dispute content, dispute process, and dispute institutions and personnel."

possess a residual “open texture” due to the inherent ambiguities of language.¹⁰ This fact can be exploited by litigants and judges to promote gradual sociolegal change. Loopholes within a statute can be filled-in via the extension of the legal rule’s components or via analogical reasoning; rules meant to govern a particular set of social disputes are applied to novel situations that were not considered by their legislative or executive authors; the semantic content of the rules is gradually reinterpreted and adjusted, case-by-case, to accomodate shifting social and linguistic understandings.¹¹

A single snapshot of such incrementalist tweakings of open-textured rules will not strike anyone as “social change,” particularly given that within courtrooms these limited exercises of agency can be couched in the legalistic discourse of law application rather than the policymaking discourse of law creation. As a result, monitoring the creative reshaping of open-textured law is likely to be difficult, minimizing the threat of political backlash. By the time that opponents of social change become aware, perhaps via a lawsuit of their own, that the existing set of legal rules has been slowly but fundamentally reshaped, the reconfigured institutional environment is likely to have already become entrenched within existing social practices.

3.5 Providing Modular Repertoires of Change

Scholars of social movements, particularly Charles Tilly (1986) and Sidney Tarrow (1994), have long remarked that contentious politics provide “repertoires” of political change that exhibit “modularity” - that is, they can gradually diffuse territorially and temporally regardless of the ultimate success of the efforts wherein they were generated.¹² Yet even in the domain of more orderly normal politics, the lexicon of legal rights, the judicial maxims delivered in response to said claims, and the political reactions surrounding the judicial process have the potential to become the organizational *lingua franca* of social activists in subsequent attempts to bring about social change and to diffuse to cognate social movements. Even as the NAACP was struggling to force southern policymakers to desegregate schools in the wake of *Brown*, the Supreme Court’s declaration that “[s]eparate educational facilities are inherently unequal” could be leveraged as a rallying cry for the civil rights movement within judicial and non-judicial fora: It articulated an aspirational policy

¹⁰As H.L.A. Hart (1961: 128) writes, “rules will have what has been termed an open texture . . . [this is] a general feature of human language; uncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact. Natural languages like English are when so used irreducibly open-textured.”

¹¹As an example, Frymer (2003: 491; 494) highlights the long-term impact of Congressional reform of the federal rules of civil procedure in the 1930s, which expanded judges’ discretion over civil procedure rules to enable courts to spure the racial integration of labor unions: “judges and lawyers continued to successfully promote . . . changes to federal procedure rules . . . First, revisions to discovery rules in 1970 took away the need for civil rights plaintiffs to have “good cause” in order to obtain employment documents and authorized financial sanctions against defendants who resisted. Second, Rule 23 was officially amended . . . which made it far easier for lawyers to represent a large class of individuals in a single case . . . Third, courts began to interpret Rule 53, which provided for special masters, in a far more expansive manner . . . Some unions were ultimately “bled to death” by litigation expenses and damage awards.”

¹²Tarrow (1994: 42) stresses that despite the failure of widespread protests that spread across several European states in 1848, “over the longer run the new repertoire increased the leverage of ordinary people to challenge rulers and forced rulers to create means of social control more subtle than the cavalry charge or the cannonade. Over the years, parts of the new repertoire became components of conventional politics.”

objective and a realistic reminder of broken promises.¹³ And decades following *Brown* and the cooling of the civil rights movement, feminist and LGBT rights activists as well as sympathetic bureaucrats invoked the “black analogy” to bolster claims for social reform (Skerentny 2002).¹⁴

More broadly, repertoires of change can manifest themselves as semiotic frames, such as visual or linguistic symbols, or as sets of litigation strategies captured within policy memos. To this end, the failure to spur social change via the judiciary can provide blueprints for future activism as advocates develop heuristics of failed litigation, reallocate material resources, and reconfigure litigation strategies accordingly.¹⁵

3.6 Forging Judicial Power *à la Quotidienne*

A burgeoning scholarship has underscored how political fragmentation stands to augment courts’ institutional power (Graber 1993; Ramseyer 1994; Ginsburg 2003). In a parallel, less grandiose vein, courts’ position as intermediaries in quotidian social controversies can spur a wide variety of non-state actors to support judicial empowerment. Because the vector of institutional autonomy is not necessarily endowed with any substantive policy content, such highly consequential processes of institutional empowerment frequently escape analyses of litigation-spurred sociolegal change.

The logic of this mechanism is as follows: One might presume that when two parties are embroiled in a dispute, the party anticipating a loss in court has an incentive to settle. Yet this is not necessarily the case, for as Marc Galanter (1974) reminds us, different classes of social actors come to court with different objectives. Private litigants, or “one-shotters,” usually seek to obtain a favorable resolution in the immediate dispute - in other words, they fight for cases. Conversely, corporate litigants, or “repeat players,” usually seek to obtain long-term policy change - in other words, they fight for rules.¹⁶ Because courts are multi-functional institutions capable of simultaneously settling a particularized dispute and of reshaping open-textured law, both types of actors may benefit by judicial resolution despite its appearance *prima facie* as a zero-sum game. As “going to court” emerges as a focal point solution to local social conflict and judicial actors are provided with the raw material - namely litigation - to exercise incrementalist discretion, their collective status and power is likely to grow. Through the day-to-day practice of municipal regulations and local statutes, this incremental mechanism of judicial empowerment is likely to be just as consequential as one-shot settlements of salient political controversies implicating constitutional law.

¹³Similarly, in McCann (1994: 48)’s study of pay-equity reform, he finds that “litigation has been used by movement leaders as a tactical resource to raise expectations among women workers that wage reform was possible.”

¹⁴Writes Skerentny (2002: 14): “these policymakers were always basing their appeals in the universe of social meanings, especially the black analogy, and using policy and discourses originating in black civil rights.”

¹⁵As another instantiation from the struggle for same-sex marriage, Keck (2009: 165) finds that following the passage of a ballot initiative reversing the California Supreme Court’s 2008 pro-gay marriage decision, “SSM [same-sex marriage] supporters have responded with dozens of protests throughout the state, a novel and probably long-shot legal challenge to the amendment, and plans for an initiative campaign to re-amend the state constitution.”

¹⁶As Galanter (1974: 101) concludes, “if RP [the repeat player] is interested in maximizing his tangible gain in a series of cases 1 . . . n, he may be willing to trade off tangible gain in any one case for rule gain.”

4 Conclusion: The Difficulties of Studying Gradual Sociolegal Change

If the foregoing exposition has been persuasive, one might be tickled by the following question: “Why do we continue to debate, engage with, and replicate *The Hollow Hope*’s approach?” We can rephrase this in more constructive terminology by asking: What are the inherent difficulties of gradual sociolegal change that may have driven otherwise eager public law scholars towards Rosenberg’s model? This is a question worth exploring in these concluding remarks, for the study of court-centered gradual sociolegal change is no *panacea*. Indeed, there are several epistemological issues associated with the framework proposed here:

1. *Uncovering potential causal relationships is harder*: As temporal compression is replaced with temporal extension, and as critical junctures are replaced with big, slow-moving, cumulative mechanisms for change (see Pierson 2003), it becomes difficult to surface clear correlational associations indicative of causal relationships. Discontinuities are easy to study because they are so apparent: Amidst an ocean of stochasticity, they jump out like tropical islands. Gradual sociolegal change is like hunting for islands when the ocean is covered by a thick layer of fog.
2. *Specifying causal direction is harder*: Causal inference requires moving beyond correlational evidence and specifying a particular direction in the underlying causal relationship. One seeks to not just declare that X tends to move with Y , but that X is causing Y , at least in part. But as the causal process is stretched out, the problem of endogeneity, or reverse-causation, increases. Contingent factors start to penetrate and complicate the process, and feedback loops can emerge to produce either self-reinforcing, self-sustaining, or self-depleting outcomes (see Mahoney 2000; Falleti and Mahoney forthcoming)
3. *Specifying the set of relevant actors is harder*: Mechanisms of gradual sociolegal change are inherently complex: They involve a greater number and a more diverse set of actors, and consequently an expanded and heterogenous web of social actions and interactions. As a result, no court-centered mechanism of gradual change is likely to result from a single act by a single actor.
4. *Specifying distributive outcomes is harder*: Mechanisms of gradual sociolegal change are likely to produce shifting distributive consequences as their effects take hold. And because such mechanisms are rarely spurred by single acts of deliberate design, they often result in a series of unintended consequences (see Pierson 1996; 2000), problematizing attempts to link the resulting outcomes to specific actions by particular agents in order to proclaim “winners” and “losers.”

My initial retort to the foregoing problems is to express my sympathies. There is no silver bullet that will resolve the difficulties of studying gradual sociolegal change. Nonetheless, if we take said processes seriously, it seems helpful to appropriate a historicist orientation, to make use of qualitative process-tracing methods for causal inference (Collier 2011; Waldner 2012), and to supplement these with longitudinal quantitative analysis where the data is available and the assumption of unit homogeneity appears reasonable. Some will eagerly take on the challenge of pursuing this route, whereas others will continue to prefer greater parsimony in research design. Yet independent of research design choice, if there is one caution that emerges from the foregoing discussion, it is this: Causal complexity does not excuse the facile conclusion that such processes are not empirically consequential simply because they are difficult to observe.

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