Lobbying to lawsuits: optimistic biases and tactical transitions in the movement for LGBT equality

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LOBBYING TO LAWSUITS:
Optimistic Biases and Tactical Transitions in the Movement for LGBT Equality

by

Katherine Zuber

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Submitted to the University at Albany, Statue University of New York
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DEDICATION

For Mamie & Grandpa George

My love. My strength. And my in-house editors.
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ABSTRACT

This research examines the question of strategic choice in the context of the gay and lesbian rights movement. Although social movements often combine legislative, electoral and legal strategies to effect change, systematic legal efforts on behalf of gay rights did not emerge until well after a concerted lobbying and legislative campaign arose. Why did a politically powerless group seeking rights turn to litigation much later than we might have expected? A targeted case study of gay activism in Boston confirms that political opportunity is an important external factor that shapes strategic choice. However, the impact of these structural factors is mediated by activists’ systematic optimistic bias, or the tendency to exaggerate opportunity and minimize constraint for the purpose of sustaining social movement activities. By situating the question of strategic choice in a multidimensional framework, the analysis indicates that activists tend to capitalize on defeat in one institutional venue in order to facilitate mobilization in another. In addition to illustrating the productive effects of political and legal loss, the implications for cause lawyering are discussed. Contrary the myth of rights, which holds that lawyers naively rely on courts to bring about social change, this research indicates that gay activist attorneys voiced concerns about law’s limitations while effectively representing gay interests inside (and outside) the courtroom.
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CHAPTER 1

INTRODUCTION

On June 26, 2013, the United States Supreme Court invalidated Section Three of the Defense of Marriage Act (DOMA), a law barring federal recognition of same-sex marriage. At the time of the Court’s decision in United States v. Windsor, twelve states and the District of Columbia permitted same-sex couples to marry, while more than thirty states banned marriage by either a constitutional amendment or state law.\(^1\) In writing the Court’s majority opinion, Justice Anthony Kennedy reasoned that the Due Process Clause of the Fifth Amendment required the federal government to recognize same-sex marriages already permitted by the States. Not do so would impede upon the States’ sovereign authority to regulate marriage and deprive gay men and lesbians of their constitutionally protected liberties. Although Kennedy’s opinion fell short of recognizing a constitutional right for same-sex couples to marry, its effect was to ensure that all legally married persons, opposite-sex and same-sex couples alike, enjoyed access to the federal benefits of marriage.

Immediately following the Court’s pronouncement, leading LGBT organizations praised the Windsor decision as “an enormous victory” (GLAD 2013), “profoundly important” (Lambda Legal 2013), and “a significant leap forward” (NGLTF 2013), yet many pledged to continue litigating marriage bans in other states. Less than one week after the decision was handed down, Lambda Legal filed a motion for summary judgment seeking marriage equality in New Jersey (Garden States Equality v. Dow), at the same time the American Civil Liberties Union filed three

\(^1\)Six states (DE, NH, NY, RI, MN and VT) and Washington D.C. legalized same-sex marriage by passing legislation; three states (MA, CT and IA) issued favorable court decisions; and three additional states (MD, ME and WA) voted yes via a statewide referendum. See www.freedomtomarry.org. Last accessed April 29, 2014. States with restrictions on same-sex marriage prior to Windsor included AL, AK, AZ, AR, CO, FL, GA, HI, ID, IL, IN, KS, KY, LA, MI, MS, MO, MT, NE, NV, NJ, NC, ND, OH, OK, OR, PA, SC, SD, TN, TX, UT, VA, WV, WI and WY. At the time the decision was handed down, New Mexico was the only state lacking a prohibitive statute or constitutional provision. See Ford 2014.
new federal marriage cases in Pennsylvania (Whitewood v. Wolf), North Carolina (Fisher-Borne v. Smith), and Virginia (Bostic v. Schaefer). According to James Esseks (2013), Director of the ACLU LGBT & AIDS Project, the goal in filing these cases was to bring the issue of state marriage bans back to the Supreme Court. And so they did. By the time the justices agreed to hear Obergefell v. Hodges in January 2015, eighty-five lawsuits were pending in state (31) and federal (54) courts (Lambda Legal 2015). The most obvious and immediate effect of the decision in Obergefell was to legalize same-sex marriage nationwide.

In light of the Supreme Court’s role in the struggle over marriage equality, it is instructive to consider how activists got there in the first place. Although litigation seems like an obvious choice for politically powerless groups seeking rights, systematic legal efforts on behalf of gay people did not emerge until the 1970s, well after a concerted lobbying and legislative campaign arose (Clendinen and Nagourney 1999; Bernstein 1997; D’Emilio 1998; Vaid 1995; Brigham 1987; Marotta 1981). This disconnect—reflected in the formation of separate political and legal organizations, agendas, donors and activists—leads to my research questions: when did gay rights activists turn to strategic impact litigation and why did they refrain from pursuing such tactics earlier?

In answering these questions, I advance the following argument. First, in the absence of a support structure for legal mobilization, I argue in chapter 2 that gay rights litigation remained unplanned and uncoordinated throughout most of the 1970s. By painting the initial development of the gay and lesbian rights movement in broad strokes, I demonstrate the evolution of social movement tactics, from a reliance on medical professionals and a politics of respectability in the early 1950s, to direct action protest in the late 1960s. Throughout this time period, negative

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2 A petition for a writ of certiorari was filed on November 14, 2014. It was granted by the Court on January 16, 2015.
interactions with the legal system combined with a loosening of societal constraints to make direct political (but not legal) intervention possible. Beginning in the 1970s, activists throughout the country introduced gay rights legislation at the state and local level. Responding to the unique political circumstances within each city, these individuals and groups pursued a wide range of tactics designed to pressure state and local lawmakers to alter policy. As such, I look beyond the broader national context in which movements form to highlight the importance of state and local factors in shaping strategic choice.

Second, I argue that, despite some progress in the political arena, gay rights activists generally remained skeptical about using courts to achieve social change. Indeed, prior to the 1970s, ordinary gay people tried to avoid law and litigation whenever possible, knowing that a legal loss (and its commensurate publicity) was all but imminent. This high unlikelihood of success was exacerbated by the absence of gay legal groups, attorneys, and funding (dubbed “the support structure for legal mobilization” by Charles Epp) to help fight homophobic bias in court. As a result, mainstream activists routinely capitalized on legal losses to mobilize support in the political arena. In addition, they developed low-visibility strategies, particularly in the areas of police repression and child custody, designed to avoid litigation all together.3 Suffice it to say here that early activists responded to law and litigation in creative, if not unusual, ways.

Despite this overarching pattern of development, it goes without saying “that the politics and character of the gay and lesbian community in virtually each city or town are unique,” (Vaid 1995: 107). To better understand how local political conditions shape strategic choice, chapters 3 and 4 examine the development of political and legal strategies in Boston, respectively. In chapter 3, I argue that institutional access, support from leading political figures, and the nature

3 Alison Gash (2015) uses the term “low-visibility strategies” to refer to tactics that limit the influence of backlash by diminishing public awareness around litigation. As used here, the term refers to a range of tactics designed to avoid litigation outright, including pleading guilty to avoid the publicity of a trial or settling in court.
of the opposition facilitated legislative and electoral strategies on Beacon Hill. Although the prospects for change remained dismal, activists pointed to other factors (such as an increasing number of cosponsors) as evidence that lobbying was efficacious, that support for gay rights legislation was growing, and that victory was imminent. In the end, this “systematic optimistic bias” (Gamson and Meyer 1996) helped to sustain social movement activities in the absence of formal policy change. However, the emergence of a concerted backlash compelled activists to reconsider the need for litigation. Beginning in 1978, following the success of several anti-gay ballot initiatives at the polls, gay rights activists found themselves in the unusual position of being on the defensive (rather than the offensive). Disadvantaged by the majoritarian political process, yet facing an increasingly conservative judiciary, local attorney John Ward founded Gay and Lesbian Advocates and Defenders in what can only be described as a period of constricting opportunity. Drawing attention to the “mismatch” between objective and perceived opportunities (Kurzman 1996), I argue in chapter 4 that GLAD was established in response to perceived changes not in the structural position of the state, but rather in the social movement constituency’s willingness to fight back. In addition to illustrating growth in the support structure for legal mobilization, this chapter highlights the role of grassroots attorneys who recognized the limits of litigation as a strategy for social change, but nonetheless viewed legal strategies as an important corollary to the rights-based activism taking place outside the courtroom.

In addition to exploring how and when opportunities matter for social movements, this research engages a longstanding debate on the role of courts in movements for social change. Whereas the “believers” in this debate envision courts (especially the United States Supreme Court) as the ultimate protector of minority rights, the “skeptics” respond that the judiciary is constrained by its structural position in the dominant political order. Although I revisit this
debate below, it is not for the purpose of taking sides. Rather, I argue that the institutional focus on courts causes both sets of scholars to lose sight of the activists who make decisions about whether and when to litigate and their reasons for doing so.

The Court as a Countermajoritarian Hero??

The origins of the countermajoritarian debate can be traced back the United States Supreme Court’s decision in Brown v. Board of Education. In Brown, the Court declared an end to racially segregated public schools. Since then, scholars have used the decision to render the Court the ultimate protector of minority rights. According to Neier (1982):

Brown was a spectacular demonstration that a depressed minority might prevail in the courts, that the usual trappings of power did not predetermine the results of litigation . . . A cause might lack the strength to prevail in the legislatures or to make officials in the executive branch listen to it seriously, but the courts—so the word went out with Brown—would pay more attention to its justice than to its resources.

Consistent with this understanding of the courts, the “believers” argue that minority groups are wise to pursue litigation because it obviates the need to build majority support in the legislature, and because access and influence are not dependent on economic and political resources. Although lobbying requires extensive funding and insider connections, disadvantaged groups can utilize courts to change the law and advance their cause. A second claim advanced by proponents of this view is that unelected judges who serve during good behavior are free to act in the face of public opposition. Although elected officials fear the political repercussions of supporting unpopular causes, judges are uniquely situated to fight for the rights of disadvantaged groups.

On the opposite side of this debate, the “skeptics” argue that historians, legal scholars, political scientists, sociologists, and journalists have all assumed Brown’s significance in the absence of critical interrogation (Klarman 1994). In addition to rewriting Brown’s legacy, these scholars have questioned whether courts are in fact deserving of their countermajoritarian

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4 Klarman (1995) is credited with coining the term “countermajoritarian hero.”
reputation. According to Bickel (1962), the “countermajoritarian difficulty” arises “when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive,” thereby thwarting “the will of representatives of the actual people,” (16-17). Since publication of Bickel’s book, *The Least Dangerous Branch*, scholars have struggled to justify the exercise of judicial review in a democratic society. The rationale traditionally advanced by proponents of judicial review is the protection of minorities from tyrannical majorities; however, it is unclear whether this theoretical justification is an accurate depiction of what the Court actually does and how it operates.

Among the first scholars to empirically test this assertion was Robert Dahl. Finding that the Court rarely overturned policies enacted by law-making majorities in Congress and the White House, Dahl (1957) concluded that judges were generally unresponsive to the interests of minority groups. In cases where the Court was responsive to minority interests, Barnum (1985) found that these decisions correlated with changes in public opinion. Specifically, he found that an increase in popular support led to favorable decisions in the areas of school desegregation, interracial marriage, women’s rights and abortion. However, the absence of support led to negative rulings on busing, affirmative action, and sodomy reform. Because the Court acted to defend minority rights only when they were popularly supported, this line of research calls into question the countermajoritarian function of the court (see also Hutchinson 2005; Lovell 2003; Friedman 1998; Mishler and Sheehan 1996, 1993; Graber 1993).\(^5\)

Although they reach different conclusions, both sets of scholars concentrate on structural factors to craft their arguments. According to the “believers,” tenured justices are insulated from

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\(^5\) Even the justices themselves have acknowledged the influence of public opinion on their decision-making. According to a memorandum taken from the private papers of Justice William O. Douglas, Felix Frankfurter conceded that he would have voted to uphold public school segregation in the 1940s because “public opinion had not then crystallized against it,” (quoted in Klarman 1995).
political pressure and are thereby free to defend the rights of unpopular minorities. In response, the “skeptics” counter that the appointment process limits judicial independence. According to Dahl, presidents who appoint an average of two Supreme Court justices during a normal four-year term have ample opportunity to “tip the balance” of the Court in their ideological favor. In addition, Congress can threaten to override unpopular decisions, or to remove the Court’s jurisdiction over certain areas of the law. Perhaps the most notorious example of such court-curbing activities took place in the 1970s when Congress attempted to remove the Court’s jurisdiction in cases involving busing, school prayer and abortion (Clark 2011; Baucus and Kay 1982). Finally, in the absence of enforcement powers, the skeptics have argued that the Court is dependent on congressional and/or presidential cooperation in order to ensure compliance with its decisions (Rosenberg 2008).

More recently, disagreement over whether and when the court acts as a “countermajoritarian hero or zero” (Lain 2004) has spilled over into research on gay rights litigation. To date, much of this research has focused on the Supreme Court’s involvement in sexual privacy cases, including its decision in Lawrence v. Texas. In Lawrence, the Court overturned the 1986 case of Bowers v. Hardwick and invalidated state sodomy prohibitions nationwide. Not surprisingly, the case has been analogized to Brown v. Board of Education (Tribe 2004; Eskridge 2004) and Loving v. Virginia (Karlan 2004) for instilling optimism about the future of gay rights litigation in the United States. But whatever the effects of Lawrence on mobilization efforts, the “skeptics” respond that it was not a countermajoritarian decision. Thus Klarman (2005) observed:

In the seventeen years between Bowers and Lawrence, public opinion went from opposing the legalization of homosexual relations by fifty-five percent to thirty-three percent to supporting legalization by sixty percent to thirty-five percent. Many states, either through legislative or judicial action, nullified laws criminalizing same-sex sodomy. Several states and scores of
cities added protection for sexual orientation to their antidiscrimination laws. Nearly two
hundred Fortune 500 companies extended job-related benefits to gay partners, as did several
states and scores of municipalities for their public employees. The Hawaii Supreme Court
invalidated a ban on same-sex marriage, and the Vermont Supreme Court ruled that same-sex
couples must at least be permitted to form ‘civil unions.’ In the 1990s, hundreds of openly gay
men and women were elected to public offices, and gays and lesbians entered mainstream
culture on television, film, and music; in 1998, an openly gay man won a Pulitzer Prize for the
first time. In 2003 the Episcopalian Church ordained its first openly gay bishop (443-444).

Although *Lawrence* may have represented an important legal victory for the gay and lesbian
rights movement, Klarman and others (Hutchinson 2005) have argued that it did not embody the
countermajoritarian ideal. To the contrary, the decision reflected social and cultural changes that
made successful litigation on behalf of gay rights possible.

Worse than that, Gerald Rosenberg in his book *The Hollow Hope* concludes that courts
are not only constrained by public sentiment, but that activists who succumb to the “lure of
litigation” are “misled to celebrate the illusion of change,” (2008: 427). After reviewing
favorable same-sex marriage decisions in Hawaii (*Baehr v. Lewin*), Vermont (*Baker v. Vermont*)
and Massachusetts (*Goodridge v. Department of Public Health*), Rosenberg concludes that gay
rights litigators fell short of their goal to achieve full marriage equality, that they inadvertently
provoked the opposition, and that a legislative strategy would have been less likely to produce
backlash. In concluding, he writes that social reformers who turn to courts are prone to
substitute “the myth of America for its reality,” (emphasis added, 422). In addition to steering
activists towards an institution that is constrained from helping them, litigation siphons off
crucial resources needed to organize politically.

Ironically, this conclusion places Rosenberg on the same side of the countermajoritarian
debate as his adversaries. Indeed, there is a common tendency among both the “believers” and

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6 According to Rosenberg, conservative groups began lobbying efforts on both the state and federal levels
immediately following *Baehr*. In addition, numerous states and Congress adopted measures designed to prevent the
recognition of same-sex marriage. For a response to the backlash thesis see Keck 2009.
the “skeptics” to view activists who litigate as blind adherents to what Stuart Scheingold (2004) termed the myth of rights. The myth holds that litigation results in a judicial declaration of rights; that courts can be used as a resource to assure these rights; and, finally, that a judicial declaration of rights is equivalent to meaningful social change. The problem with the myth, of course, is that it links litigation, rights and remedies directly to social change, despite the Court’s inability to actually create social change. Consequently, Scheingold writes: “the problem with litigative approaches may be less with the strategy than with the strategists. They are misled by the myth of rights toward a fundamental misunderstanding of the politics of change and, more specifically, toward exaggerated expectations about the political impact of judicial decisions,” (emphasis added: 95). Instead of trumpeting legal rights as the be-all and end-all of social reform efforts, Scheingold urges reformers to “capitalize on the perceptions of entitlement associated with rights to initiate and to nurture political mobilization” (131).7

Since publication of The Politics of Rights, it has been argued that civil rights workers (Sarat and Scheingold 2006; Wasby 1995), antipoverty lawyers (Lopez 1992), environmentalists (Neier 1982), and gay rights activists (Rosenberg 2008) have all fallen prey to the “myth of rights.” For example, historian Marc Stein (2010: 267) has argued that early gay rights activists “viewed the Supreme Court as the branch of the federal government most likely to aid their cause, in part because the justices were appointed for life and were therefore insulated from unfavorable popular opinion, in part because of activists’ assessment of the Court’s role in recent civil rights struggles, and also because of their faith in the Constitution.” However, I argue that this assertion is problematic for two reasons. First, it obscures the fact that systematic litigation

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7 This is where disagreement between the two sides resumes. Because Rosenberg views the relationship between legislative and legal strategies in zero-sum terms, he argues that litigation will impede social change by siphoning resources and directing activists away from more effective strategies. In contrast, Scheingold argues that activist can capitalize on rights entitlements to facilitate political action.
on behalf of gay rights did not emerge until the late 1970s and early 1980s, nearly twenty years after a concerted lobbying and legislative campaign arose. Second, utilizing the myth of rights to explain strategic choice places political naïveté at the center of the decision to litigate. Instead of treating activists as blind adherents to the myth of rights, it is necessary to examine the complex social, political and cultural factors which influence the decision (not) to litigate. In recent years, resource mobilization theories and the concept of political opportunity structure have been used to analyze the institutional factors that shape strategic choice. However, it is my contention that these purely structural explanations cannot tell us much about why minority groups pursue litigation unless they include a focus on the political subjectivities of social movement actors. In other words, we must know what social movement actors think and how they feel in order to understand their interactions within a broader structural context (McCann 1996).

**Why Not Litigation??**

*The Political Disadvantage Thesis*

Drawing attention to many of the same structural attributes of the courts as “the believers,” the political disadvantage thesis aims to explain why minority groups use litigation rather than legislation to achieve their goals. In its original formation, the political disadvantage thesis holds that marginalized groups utilize litigation because it requires only one individual acting in his or her capacity as a litigant to bring a case, thereby lowering the threshold to collective action (Lawrence 1991; Zemans 1983; Handler 1978; Cortner 1968). Moreover, the theory posits that elected officials are unlikely to act on behalf of groups which are unpopular or discriminated against. From this perspective, disadvantaged groups are more likely to choose litigation because it is the most accessible route to social change, and because they are unlikely to attain their goals through the elected branches of government.
Elaborating on this thesis, litigation might seem like an obvious choice for gay rights activists. For starters, gay people are vastly outnumbered in the electorate. The most widely cited estimate of 10% is a measure of the percent of men between the ages of 16 and 55 who engage in predominantly same-sex sexual encounters (Kinsey, Pomeroy and Martin 1948). Although some scholars have argued that the 10% estimate is low, it is still reasonable to conclude that gay men and lesbians are severely disadvantaged by the majoritarian political process.

In addition to being outnumbered, gay people are despised (Sherill 1996). According to the General Social Survey, 70% of the people surveyed in 1973 described same-sex sex as “always wrong” and another 7% as “almost always wrong” (General Social Survey 2013: 12; See also Bowman, Rugg and Marsico 2013; Loftus 2001; Yang 1997). Only 11% of those surveyed indicated that homosexual sex was “not wrong at all.” The results of this survey for the years 1973 to 2012 are reported in Figure 1.1. Surprisingly, the number of respondents indicating disapproval for same-sex sexual encounters did not drop below the fifty percent mark until after 2003. Read in the context of the political disadvantage thesis, Figure 1.1 raises the following question: if a vast majority of Americans and, by extension, elected officials disapproved of homosexuality, why did gay rights activists initially choose legislation over litigation?

[Insert Figure 1.1]

Resource Mobilization and Political Opportunity Structures

Beginning in the 1970s, resource mobilization scholars were among the first to question the underlying assumptions of the political disadvantage thesis. Advancing a purely structural

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8 Unfortunately, the National Opinion Research Center did not begin measuring attitudes toward gay people until 1973. Based on the trends reflected in Figure 1.1, however, it is reasonable to assume that gay people were not particularly well liked in previous decades.

9 Figure 1.1 does not report values for people who responded “sometimes wrong” or “don’t know.”
understanding of law, resource mobilization scholars argued that minority groups are disproportionately excluded from access to legal remedies because they lack the money, expertise and knowledge to initiate test case litigation. As Ruth Cowan (1976: 383) observed regarding the women’s rights movement, “Success in the judicial arena, as in other political forums, hinges on the organization and mobilization of resources.” From this perspective, litigation strategies are determined by the amount and kind of resources available to an aggrieved population, such that an increase in resources leads to an increase in legal mobilization activities (McCarthy and Zald 1977; Jenkins and Perrow 1977; Galanter 1974).

Assuming that a “negatively privileged minority is in a poor position to initiate a social protest movement through its own efforts alone,” the earliest resource mobilization scholars argued that social movements are dependent on resources supplied by external sponsors (Oberschall 1973: 214). For example, Epp (1998) argues that the American Fund for Public Service, the Ford Foundation and the Southern Regional Council all provided major grants to support the NAACP’s litigation campaign. In addition to funds for litigation, the “support structure for legal mobilization” consists of rights-advocacy organizations dedicated to the establishment of new rights, as well as able-bodied lawyers. Without these tripartite resources in place, Epp argues that a legal rights revolution is unlikely to occur.

Although funding, organizations and competent attorneys certainly influence one’s ability to mobilize legal rights, “activists do not choose goals, strategies, and tactics in a vacuum,” (Meyer 2004: 127). Moving beyond an exclusive focus on resources, political process scholars have explored the relationship between social movements and their surroundings. As Tarrow (1994, 17) notes, “People join in social movements in response to political opportunities and then, through collective action, create new ones.” In this way, the context in which a movement
emerges influences its development and potential influence over time. Scholars working in this tradition have defined specific dimensions of the political opportunity structure to include institutional access, the configuration of power among elites, the presence or absence of allies, a decline in the state’s capacity or willingness to repress dissent, and movement-countermovement interactions. According to Andersen (2005), these structures influence movement outcomes by opening and closing space for action, thereby making some strategies and tactics more appealing than others (also see Gamson and Meyer 1996).

Surprisingly, the concept of political opportunity has not been particularly useful in explaining major political and legal developments in the movement for LGBT equality. Noting the proliferation of gay rights groups in the immediate aftermath of the 1969 Stonewall Riots, McAdam (1996) writes: “It is difficult . . . to identify any specific change in the institutional features of the system that suddenly advantaged gays . . . In fact, the movement was preceded by a highly significant electoral realignment that can only be seen as disadvantageous to gays. I am referring, of course, to Richard Nixon’s ascension to the White House in 1968, marking the end of a long period of liberal Democratic dominance in presidential politics,” (emphasis added). Similarly, Barclay and Fisher (2006) examined the total number of openly gay public officials (zero), as well as the total number of states with sodomy prohibitions (forty-six), before concluding that “nonlegalistic tactics were not realistic and actionable for lesbian and gay rights activists in 1971.” And yet anti-discrimination measures were successfully enacted in 1972 by Ann Arbor and East Lansing Michigan, as well as San Francisco and New York (Clendinen and Nagourney 1998). By 1985, approximately seventy-five state and local jurisdictions enacted measures prohibiting discrimination (NGTF 1985), even though there were fewer than twenty openly gay or lesbian officials elected to public office (Haider-Markel 2010). If the total number
of gay public officials indicates that access to policy-making forums was limited, why did activists initially choose legislation over litigation?

In answering this question, I argue that existing research on opportunity suffers from two main shortcomings. First, most analyses tend to focus on the national opportunity structure at the expense of state and local factors that also shape movement outcomes. As McAdam, McCarthy, and Zald write in their 1996 edited volume, scholars are “guided by the same underlying conviction: that social movements and revolutions are shaped by the broader set of political constraints and opportunities unique to the national context in which they are embedded,” (emphasis added). However, this focus on the national level obscures more localized factors that also shape opportunity. For example, in her study of the animal rights movement, Einwohner (1999) demonstrates how structural opportunities are shaped by the local practices social movements target for change. When a particular practice is considered necessary by practitioners (such as animal experimentation by biomedical researchers), or is central to one’s sense of self (such as hunting), then opportunities for protest are limited. However, when a particular activity is not seen an institutional requirement (such as the fur retail trade), or is peripheral to self-definition (such as going to the circus), opportunities for change are greater.

Building on Einwohner’s theoretical framework, it can be argued that opportunities are contextually specific and contingent (Suh 2001). For starters, national, state and local opportunity structures often point activists in conflicting directions. Indeed, when changes at the national level seem to signify constricting opportunity, state and local structures may offer a more promising way forward and vice versa. A related observation is that opportunities may not always be located in the structural position of the state, but rather in the perceived strength of social movement forces. For example, the Iranian Revolution of 1979 was not precipitated by
“state breakdown” but by significant growth in the opposition movement (Kurzman 1996; Kuran 1989). Finally, if opportunities open or close space for action, so do the perceived needs of the social movement constituency. In other words, social movements may emerge to fill a void created by negative policies and practices. As Gamson and Meyer (1996) have thus observed, analyzing the meso and micro-levels of opportunity is necessary to understand why certain movements arise at certain times, particularly in the absence of more general opportunity at the national level.

Second, scholars who study political opportunity focus almost exclusively on objective structural measures, such as the number of openly gay public officials and whether there is a Democratic president (Meyer and Minkoff 2004). Although changing structural arrangements can (and certainly do) open and constrain space for action, “opportunity is filtered through participants’ interpretations,” (Suh 2001: 437). In other words, “There may be no such thing as objective political opportunities before or beneath interpretation—or at least none that matter; they are all interpreted through cultural filters,” (Goodwin and Jasper 1999: 33). In the context of the civil rights movement, Professor Charles Payne has thus observed that “Changes in the structural underpinnings of racism wouldn’t have mattered if Black Mississippians weren’t willing to challenge the system,” (1995: 21). An illuminating route of inquiry, then, is to explore the interaction between objective structural opportunities and their subjective interpretation (Suh 2001; Sawyers and Meyer 1999; Gamson and Meyer 1996; Kurzman 1996).

The Subjective Interpretation of Objective Opportunities

Recognizing the importance of collective interpretive processes, social movement scholars have introduced the concept of collective action frames, or action-oriented sets of beliefs and meanings that inspire and legitimate the activities of social movement organizations (Benford
and Snow 2002). As a mechanism for producing social meaning, collective action frames mediate between the structural requirements of opportunity and action. Overall, they perform three cognitive functions (Benford and Snow 2002), namely to identify injustice and attribute blame to a particular set of social actors (diagnostic framing), to propose strategies to redress the problem (prognostic framing), and to inspire people to take action (motivational framing). As McAdam, Tarrow and Tilly (1996: 5) have observed, “people need to feel both aggrieved about some aspect of their lives and optimistic that, by acting collectively, they can redress the problem. Lacking either one or both of these perceptions, it is highly unlikely that people will mobilize even when afforded the opportunity to do so,” (emphasis added). Consistent with these observations, social movement scholars have demonstrated a positive correlation between successful mobilization and the belief that collective action will result in social change (Hirsch 1990, Oliver 1985; Klandermans 1984; Seeman 1975; Forward and Williams 1970). According to Snow et al. (1986), optimism about the outcome of a collective challenge mobilizes potential supporters by promoting political efficacy and highlighting the benefits of participation.

Because activists must convince potential supporters that action leading to change is possible, one of the key claims advanced here is that social movement participants routinely (if not strategically) overestimate the degree of political opportunity. As Gamson and Meyer have observed, “Unrealistic perceptions of the possible can actually alter what is possible . . . If movement activists interpret political space in ways that emphasize opportunity rather than constraint, they may stimulate actions that change opportunity, making their opportunity frames a self-fulfilling prophecy,” (1996: 287). In the literature on social movements, scholars have thus found that activists not only ignore constricting opportunity, but also perceive opportunity even when none exists (Einwohner 2003; Suh 2001; Sawyers and Meyer 1999; Kurzman 1996). While
many of these studies have focused on the broader political context in which social movements arise, there is little research on the interplay between opportunities at the national, state and local levels, particularly in the United States. Because local opportunity structures are embedded in national ones, it is common for activists to encounter a conflicting set of cues in the external environment. When they do, the imperatives of collective action predispose activists to counteract constraints and facilitate action by overestimating the degree of political opportunity.

Although “systematic optimistic bias” causes activists to exaggerate opportunity and underestimate constraint, a more general claim of this research is that the attribution of opportunity is mediated by participants’ subjective interpretations. In other words, the emergence of a social movement and its tactical repertoire requires a “change in consciousness,” (McAdam 1982: 48-51). Drawing from sociolegal scholars, I argue that legal consciousness, or the ways in which law is experienced and understood by a group of people, helps to explain when, why, and under what circumstances social movements turn to litigation. Writing in 1998, Ewick and Silbey identified three types of legal consciousness including “before the law,” “with the law,” and “against the law.” Individuals who are “before the law” experience or conceive law as objective, autonomous and even majestic. Their deference to legality can (and often does) mask the opportunity to use law and litigation as a conduit for social change. In contrast, those who find themselves “with the law” tend to approach law as a game—as a terrain of conflict where existing rules can be manipulated for personal gain. Finally, those who stand “against the law” view law as arbitrary and capricious—as a product of disparities in power and privilege that make it necessary to resist legal intervention. Even though “the same social actor may express different forms of legal consciousness at different times and in different situations,” (Hull 2003: 631), how individuals conceive law is generally related to their social status. Indeed,
marginalized groups (such as ethnic and racial minorities) tend to view law critically as an unprincipled source of power and privilege. “To state the obvious, those who are most subject to power are most likely to be acutely aware of its operation,” (Ewick and Silbey 1998: 235).

Although existing studies have focused on ethnic (Abrego 2011) and racial (Nielsen 2000) minorities, people with disabilities (Engel and Munger 2003), and the working class (Hirsch 1993), the general theory of legal consciousness can be applied to understand how the experiences of ordinary gay men and lesbians resulted in distrust of the dominant legal system. Indeed, a central claim of this research is that gay rights activists initially opposed litigation as a result of their skepticism towards law and legal institutions. In other words, their reluctance to use law derived as much from opportunity and resource constraints as it did from the belief that judges were biased towards gay people and that negative precedent could make change even more difficult. As a result of their cynicism toward law, the dominant legal strategy among gay people was to avoid litigation all together, evident in the case of lesbian mothers who went into hiding to avoid losing custody of their children in court; gay men who pleaded guilty to charges of sodomy and solicitation to avoid the publicity of a trial; and gay couples who signed relationship contracts because suing to get married was considered impractical, improbable and futile. This ambivalence toward litigation was exacerbated by the tendency among activists to reframe courtroom failures not as constricting opportunity but as justifications for action in the political arena. Prior to the formation of a support structure for legal mobilization, gay people viewed law as a source of oppression rather than a tool for social change.

Overview of Methodology and Chapters

The twin goals of this research are to (1) detail the emergence of legal strategies in the gay and lesbian rights movement and (2) explain why activists initially deferred litigation. The analysis
expands upon the concepts introduced in this chapter and elaborates a theoretical framework that helps to explain how resources, the subjective interpretation of structural opportunities, and framing processes interact to influence and shape strategic choice.

Consistent with the literature on social movements, this study is overwhelmingly focused on analyzing context, or the specific situational factors that shape political struggle (McCann and Dudas 2006; Goodwin and Jasper 1999; McCann 1996). Following a generalized treatment of the gay and lesbian rights movement between 1950 and 1972, I use a single-case study to further develop theory on how and when opportunities matter for social movements. According to Eisenhardt and Graebner (2007), theory building from case studies “is a research strategy that involves using one or more cases to create theoretical constructs, propositions and/or midrange theory from case-based, empirical evidence,” (25). As a form of inductive reasoning, this approach requires the researcher to integrate extant literature, theory and case data for the purpose of developing constructs and advancing knowledge. Although this type of research is subject to charges of particularism—or the concern that my findings may not be generalizable beyond the context in which they were obtained—differences among state political institutions and electoral alignments can actually help to explain variance across cases. Moreover, “case studies are valuable not just because they provide more concrete images of practical strategic relations but also because they allow us to identify the complex, diverse ways in which legal advocacy has figured into particular struggles,” (McCann 1994: 151). Since legal consciousness “partakes of both the particularity of a situation and the overall context in which the situations requires,” (Merry 1990: 5; Ewick and Silbey 1998), the study of legal consciousness and strategic choice necessitates “systematic attention to the specific circumstances in which law is mobilized,” (McCann 1994: 286). My “bottom up” inquiry into the understandings, aspirations
and experiences of local activists thus illustrates how tactical action is mediated by the subjective interpretation of structural opportunities.

Detailed historical and qualitative research methods were employed to answer the questions outlined above. These include textual analysis of published opinions issued by state and federal courts between 1969 and 1986 with the potential to advance or defend gay rights.\textsuperscript{10} Gay newspaper coverage was also tracked and its content analyzed. Articles, editorials and opinion letters published by \textit{Gay Community News} between 1973 and 1986 were supplemented by a more random collection of articles published in other leading gay newspapers including \textit{The Advocate}.\textsuperscript{11} I also traveled to Boston to gather information on Gay and Lesbian Advocates and Defenders and its organizational precursor, the Boston Boise Committee. In addition to collecting internal reports, memos, meeting minutes, pamphlets and newsletters, I conducted ten semi-structured interviews with eleven activists who were involved in these organizations. These interviews probed activists’ understandings and recollections of the factors influencing movement participation and strategic choice, and of the personal implications of rights-based activism. Finally, empirical research by other scholars and activists was acquired and used in traditional fashion.

The argument proceeds as follows. In chapter 2 I lay out a brief history of the gay and lesbian rights movement beginning in the 1950s and ending in the late 1970s. Drawing from primary and secondary sources including books, journal articles, and memoirs, the first half of this chapter illustrates how legislative and judicial strategies were initially foreclosed by McCarthy Era pressures. Because of society’s evaluation of homosexuality as immoral, sinful,

\begin{footnotesize}
\textsuperscript{10} See the Appendix for a discussion of how these cases were identified and selected.

\textsuperscript{11} The managing editors of \textit{Gay Community News} treated the paper as a “forum for liberation” that “did not want to take any opinions or ideas or assumptions for granted” (The History Project 2011). According to Amy Hoffman, GCN included men and women from different age groups and classes, which facilitated the paper’s expansive commitment to historically marginalized subgroups within the LGBT community.
\end{footnotesize}
and depraved, early homophile groups—such as the Mattachine Society for men and the Daughters of Bilitis for women—believed it was necessary to work through medical experts, public health officials and other professionals to gain support for their cause. Through the politics of respectability, which emphasized political propriety and dominant moral codes, they sought greater acceptance for the idea that gay people were worthy of equal treatment, dignity and respect. The chapter then turns to a consideration of the gay liberation movement of the late 1960s and its emphasis on direct action protest. Even though Nixon’s ascent to the White House marked a “highly significant electoral realignment that can only be seen as disadvantageous to gays” (McAdam 1996), the 1968 presidential election signified only one aspect of the opportunity structure. Indeed, a loosening of societal constraints accompanied by the counterculture of the 1960s emboldened activists to pursue confrontational activism. Conditioned by their status as outsiders, gay liberationists developed three alternative frames to the politics of respectability (Valocchi 1999). The first, a diagnostic frame, identified the systemic nature of oppression including militarism, capitalism, heterosexism, and racism. The second, a prognostic frame, emphasized sexual liberation, with a particular emphasis on deconstructing the restrictive sexual categories of the dominant culture. And the third, a motivational frame, sought to mobilize supporters through demands for gay power. Believing that “every dimension of the existing system was bankrupt,” gay liberationists relied on outsider tactics to achieve both cultural and political change (Marotta 1981).

As sociologist Steven Valocchi (1999) has observed, the language of gay liberation “envisioned a world where oppressive institutions would be smashed” but offered no viable strategy for achieving that goal (66). As early as 1969, when members of the Gay Activists Alliance organized around a bill to prohibit employment discrimination on the basis of sexual
orientation, rights-based claims became central to the movement for equality. Although the push for civil rights spread like wildfire throughout the country, litigation remained unplanned and uncoordinated throughout most of the 1970s. In documenting activists’ initial reluctance to pursue judicial strategies, the second half of chapter 2 provides a general survey of gay rights litigation, beginning with the Stonewall Riots in June 1969 and ending with the Supreme Court’s decision in *Bowers v. Hardwick* (1986). Even though some early victories were achieved in the areas of free speech (*One, Inc. v. Olesen*, 1958) and association (*Stoumen v. Reilly*, 1951), and the Homosexual Law Reform Society challenged (unsuccessfully) the deportation of homosexual aliens in court (*Boutilier v. Ins*, 1967), not all litigation aimed at producing social change is “planned litigation.” According to political scientist Stephen Wasby (1984), formal litigation campaigns require knowledgeable attorneys, extensive financing, and careful coordination among multiple issues. In the absence of what Charles Epp has called a support structure for legal mobilization, this chapter indicates that early gay rights litigation was not a conscious effort to change the law but rather a last-ditch attempt to avoid persecution. By studying case law during this time period, we can begin to understand how gay men and lesbians experienced law in their everyday lives, and the reasons why they felt particularly threatened by the courts. In the end, a confluence of factors contributed to the delayed onset of strategic impact litigation including overt judicial bias, the high unlikelihood of success, and the presence of only a small number of lawyers willing to litigate gay rights. Although political majorities remained intolerant of gay people, activists reframed legal losses as a justification for mainstream political strategies.

Turning to a more in-depth examination of local opportunity structures in chapter 3, the analysis shifts to a detailed case study of movement organizing in Boston. Although New York City and San Francisco have garnered the lion’s share of scholarly attention, the dominant
narrative emerging from these two cities has obscured the local histories of movement organizing. Rather than assume the significance of structural opportunities at the national level, it is necessary to understand how local actors perceived changes in the external environment. To that end, chapter 3 examines the decision to pursue a gay civil rights bill on Beacon Hill where Boston-area college students, journalists and intellectuals viewed several localized factors as conducive to legislative change. Among them was the emergence of gay and gay-friendly politicians, the absence of coordinated opposition outside mainstream political institutions, and the perceived openness of the system. Even though political majorities remained intolerant of gay people nationwide, local activists pointed to other factors—such as an increasing number of cosponsors and shifting vote margins in the legislature—as evidence that lobbying was efficacious, that support for gay rights legislation was growing, and that victory was imminent. This is not to say that activists were misguided, inexperienced or guessed poorly about which strategies to pursue and when. To the contrary, overstating opportunity was a rather shrewd way of legitimizing social movement activities in the absence of formal policy change.

Borrowing from the ideological material of the homophile movement, the architects of mainstream political strategies in Boston embraced three collective action frames: the first was a motivational frame that relied on notions of individual responsibility and collective obligation to mobilize supporters; the second was a prognostic frame which drew on the values of respectability to present a more positive image of the social movement constituency; and the third, which was also a prognostic frame, emphasized the importance of working inside the system to achieve reform. Although each of these frames helped legitimate and make institutional tactics possible, their unintended consequence was to blame gay people for movement failures and marginalize others who did not conform to dominant sex and gender
norms. In addition to highlighting macro and micro-level interactions within social movements, this chapter draws attention to the affective dimensions of framing. Indeed, I demonstrate how a politics of respectability combined with the emphasis on responsibility and reform to produce widespread feelings of alienation, apathy and indifference in the gay community. Over time, this constellation of feeling states undercut grassroots mobilization efforts and provided the context in which professional lobbyists and eventually lawyers came to dominate the movement for social change.

Despite growing support on Beacon Hill, the political and legal landscape facing activists shifted dramatically in 1977 when Anita Bryant announced a campaign to rescind a gay rights ordinance in Dade County, Florida. Though the ordinance itself was not unprecedented—indeed, twenty-nine cities had already passed some type of law protecting gay men and lesbians from discrimination—Anita Bryant’s Save Our Children campaign “tapped into a wellspring of public opposition to the notion of gay rights,” (Andersen 2005: 35). Less than six months after its initial passage, the Dade County ordinance was repealed by a margin of over two to one. Inspired by these events, gay rights opponents repealed similar ordinances in Saint Paul, Minnesota (April 1978), Wichita, Kansas (May 1978), and Eugene, Oregon (May 1978). Recognizing the vulnerability of gay rights legislation at the polls, local activists began calling for a new approach to social change, one that did not depend on the “power of the people” for its success.

There to answer that call was a small group of gay activist attorneys who relied on their technical skills and expertise to facilitate gay legal claims. Turning to the emergence of the gay legal movement in Boston, chapter 4 examines the founding of Gay and Lesbian Advocates and Defenders (GLAD). Although growing concern over the Christian Right was certainly evident in Boston, the major impetus behind GLAD’s founding was an undercover sting operation targeting
gay men at the Boston Public Library. Rather than a *weakening of the state*, growing anger over *intensified police harassment* signified to local attorney John Ward an increased willingness to fight back. Capitalizing on the movement’s renewed energy in the wake of a concerted backlash, Ward founded GLAD to help fill the *unmet legal needs* of the gay community. In addition to documenting growth in the support structure for legal mobilization, this chapter presents a general overview of GLAD’s litigation efforts from 1978 to 1982. Contrary to the myth of rights, these attorneys did not fall prey to the ideals of law. Instead, they voiced concerns about law’s limitations while simultaneously translating routine injustice into opportunities for social change.

In assessing the efficacy and effects of legal mobilization, scholars tend to count “wins” relative to “losses,” or to analyze the effects of favorable precedent on future movement goals and strategies. Drawing from law and society scholars, I argue that the benefits of legal mobilization extend beyond judges’ formal decisions to include changes in legal consciousness (McCann 1994). Indeed, gay activist attorneys used litigation, both intentionally and sometimes unintentionally, to challenge dominant legal meanings and symbols within and outside the LGBT community. With respect to GLAD, this was especially true in cases involving sodomy, solicitation and lewd conduct. Rather than disparage gay men for cruising, as mainstream political activists had done, GLAD’s attorneys invoked equal protection arguments and privacy rights to defend the rights of the accused. In this way, legal strategy responded to the unique hardships confronting gay men and lesbians while simultaneously tapping into core legal principles. Although the emphasis on privacy and equal protection has since been criticized for obscuring gay difference (Franke 2004), these arguments were used effectively to combat laws and legal practices that relegated gay men and lesbians to a second-class status.
The conclusion, Chapter 5, draws out the larger implications of this research and identifies several areas for future study.
Figure 1.1

Attitudes About Same-Gender Sex: 1973-2012

Source: Author’s Analysis of Data from the 2012 General Social Survey, pp. 12
CHAPTER 2

LITIGATION DEFERRED:

POLITICAL AND LEGAL MOBILIZATION IN HISTORICAL CONTEXT: 1950-1972

Beginning in the early 1950s, gay men and lesbians came to view themselves as a legitimate minority living within a hostile mainstream culture. This conception of gay people as a sexual minority gave focus to early organizing efforts by directing activists to pursue civil rights (Vaid 1995). However, the strategies pursued by activists were dependent on the opportunities and resources available to them, as well as framing processes. Although each of these factors can be (and often are) treated separately, the challenge is to sketch the relationship between them. In this chapter, I demonstrate how the subjective interpretation of objective opportunities combined with indigenous resources to influence civil rights strategies throughout three stages of the movement: 1950-1969, the homophile movement; 1969-1972, the gay liberation movement; and 1972 onwards, which marks the beginning of the gay mainstream movement. Although activists pursued a wide range of strategies during each of these periods, litigation remained unplanned and uncoordinated throughout most of them. Drawing from detailed historical analyses, as well as an original dataset of gay rights cases, the second half of this chapter argues that the nature of court proceedings, coupled with the relatively high unlikelihood of success, fueled the development of a critical legal consciousness within the gay and lesbian community. Although political majorities remained intolerant of gay people, negative interactions with the legal system caused activists to look more favorably upon the elected branches of government.


The beginning of the gay and lesbian rights movement is often pinpointed to an exact time and place: Saturday June 28th, 1969 on a sidewalk in New York City. On that fateful morning, a
group of gay people—namely homeless street youth and drag queens—banded together in an unusual show of force to protest a police raid on a dark, dingy and otherwise unremarkable gay bar in Greenwich Village. Although the Stonewall riots are often celebrated as the most influential event in LGBT history, scholars have argued that an identity premised on gay sexual difference emerged much earlier than 1969. According to historian John D’Emilio (1993), societal transformations induced by industrialization and accelerated by global warfare created new space for the emergence of a gay and lesbian subculture. More specifically, D’Emilio argues that the expansion of wage labor near the turn of the twentieth century enabled gay men and lesbians to escape the confines of the heterosexual family unit and to pursue same-sex emotional and sexual relationships. During World War II, sex segregation in the armed forces continued to disrupt traditional patterns of gay social life. As Engel notes, “the disruption in the social environment caused by the war provided the opportunity for homosexuals to meet, to realize others like themselves existed, and to abandon the isolation that characterized the homosexual lifestyle of the pre-war period,” (2001, 24). To summarize this now familiar narrative, gay identity emerged at the turn of the twentieth century, developed into a community during and immediately following World War II, and solidified only after Stonewall.

A closer look at the Mattachine Society demonstrates how early attempts to subvert dominant understandings of homosexuality made political mobilization possible. Prior to the Mattachine’s founding in 1950, dominant institutions constructed gay men and lesbians as immoral, abnormal and deviant human beings, perhaps as something even less than human. The book of Leviticus declared homosexuality an abomination and the story of the destruction of the city of Sodom was interpreted as its punishment (Flippen 2011). Additionally, formal law stipulated harsh punishments for homosexual acts. The colonial legal codes prescribed death for
sodomy, while laws prohibiting disorderly conduct, public lewdness and solicitation were used to prosecute same-sex eroticism well throughout the twentieth century (Franke 2004; Rosen 1980-1981). To make matters worse, the medical profession labeled homosexuality a disease. Although some medical authorities argued that homosexuality was hereditary, others claimed it was a mental illness that could be cured through psychiatric treatment. In the face of moral condemnation, legal sanctions and medical diagnoses, many gay men and lesbians internalized the negative definitions imposed on them by society. As D’Emilio notes, “the fear of discovery kept the gay world invisible. It also erected barriers against self-awareness and made it difficult for women and men to find entry into the homosexual subculture,” (1998: 13).

Beginning in the early 1950s, the Mattachine Society formed with the express purpose of questioning these socially imposed definitions of homosexuality. Spearheaded by a group of seven gay men from Los Angeles, the Mattachine Society sought cultural and political liberation for all gay men and lesbians. As Marxists who traveled in left-wing political circles, the founders set out to develop a systematic analysis of the oppression gay men and lesbians faced. But in the absence of an already developed framework, they were forced to extrapolate from their own experiences. According to D’Emilio (1998: 64), these seven men “exchanged stories of coming out, of discovering cruising places and bars, of the years of loneliness . . . [T]hey posed questions: How did one become a homosexual . . . Were homosexuals sick?” Out of these discussions arose an understanding of “homosexuals” as an oppressed cultural minority, forced into dominant social roles as husbands and fathers by their participation in the heterosexual nuclear family. In the absence of a positive, alternative model to help make sense of their experiences, the founders believed that gay men and lesbians remained isolated and therefore largely unaware of each other’s existence.
In an attempt to break down the barriers of social isolation, the founders sponsored informal discussion groups and meetings. Individuals who participated in these groups, many of whom were close friends or acquaintances of the founders, were encouraged to explore the causes and consequences of their sexuality. According to historian Toby Marotta (1981: 9-10), Mattachine Founder Harry Hay “believed that homosexuals had to organize so that they could explore their sexuality, become aware of how it equipped them to contribute to a more humane society, and prepare to join with other organized minorities in the struggle to replace capitalism with socialism.” Through ongoing and continued discussion, also known as consciousness-raising, rank and file members helped develop the notion of a sexual minority. Unlike those imposed by religion, law and medicine, the minority group frame celebrated and affirmed gay difference while supporting the idea that gay people were members of a distinct homosexual culture, separate from but still equivalent to the dominant heterosexual culture.

The formation of the minority group frame, which reconfigured gay people as worthy of equal treatment, dignity and respect, encouraged civil rights strategies based on changing the law. In February 1952, a plain clothes police officer entrapped Dale Jennings, one of the founding members of the Mattachine Society, in a Los Angeles park (D’Emilio 1998: 70-71). Rather than plead guilty to “lewd and dissolute behavior,” as was usually the case, the founders created the ad hoc Citizens Committee to Outlaw Entrapment to challenge the arrest in court. Although the Committee publicized Jennings’ trial by circulating flyers and issuing press releases, its efforts remained focused on police harassment rather than defending public sex or solicitation more broadly (Meeker 2001). Emboldened by a positive response to the Committee, the founders decided to incorporate in California as the Mattachine Foundation, a not-for-profit organization that would conduct research into homosexuality as part of an educational campaign
for civil rights. In early 1953, the Mattachine Foundation mailed letters to members of the Los Angeles City Council and School Board, inquiring about their views on police harassment and sex education in public schools. Although seemingly moderate by today’s standards, such brazen attempts to defend the rights of gay people were unprecedented in the 1950s, leading to an expansion in the group’s membership and the proliferation of local chapters throughout the country (D’Emilio 1998).

Despite the Mattachine Society’s initial foray into politics, the restrictive political and social climate of the McCarthy Era impeded the group’s efforts to openly pursue civil rights strategies. According to Rubin (1993), “Congressional investigations, executive orders, and sensational exposés in the media aimed to root out homosexuals employed by the government,” at the same time the FBI “began systematic surveillance and harassment of homosexuals,” (5). As a result, newly elected leaders of the Mattachine Society dissuaded local chapters from utilizing mainstream legal channels. For example, when a Los Angeles chapter agreed to take on entrapment cases with “significance to the whole minority,” its decision was vetoed by the newly formed Coordinating Council. According to the Mattachine’s own attorney, “the very existence of a Legal Chapter, if publicized to society at large, would intimidate and anger heterosexual society . . . It would be detrimental to the Mattachine Society to let the public know of the existence and activities of the Legal Chapter; and it would probably bring more pressure on the Society if the heterosexual felt that the homosexual, whom he hates, was trying to change the laws to suit himself” (quoted in D’Emilio 1998: 82). Heeding the attorney’s warning, the Coordinating Council offered to refer entrapment victims to private attorneys instead.

Similar reasoning prevented the organization from pursuing legislative reform as well. In August 1953, Dave Finn, who was chairman of a committee chartered for the express purpose of
pursuing sodomy reform, cautioned members to avoid any activity that would attract the ire of society. In a pamphlet published by the committee, Finn wrote: “Any organized pressure on lawmakers by members of the Mattachine Society would only serve to prejudice the position of the Society . . . It would provide an abundant source of hysterical propaganda with which to foment an ignorant, fear-inspired anti-homosexual campaign,” (quoted in D’Emilio 1998: 83). Instead of gaining institutional access to challenge discriminatory laws directly, the organization enlisted the help of psychologists, psychiatrists and lawyers to change society’s understanding of homosexuality. According to Valocchi (1999), these men and women were “approached quite gingerly” and asked to speak or lobby on behalf of gay people. Evelyn Hooker, for example, a well-known American psychologist, spoke at professional conventions on homosexuality, as did sexologist Alfred Kinsey. Although the number of such professionals remained small, they enhanced the credibility of early homophile leaders and helped influence public attitudes toward homosexuality.

Subsequent leaders of the Mattachine Society also refashioned the minority group frame, rejecting the notion of gay difference in exchange for an emphasis on sameness. For example, Marilyn Rieger, a guild member from Los Angeles, criticized the notion of gay difference during a 1953 democratic convention to restructure the organization: “We know we are the same, no different from anyone else,” she explained. “Our only difference is an unimportant one to the heterosexual society, unless we make it important,” (quoted in D’Emilio 1998: 79). Similarly, the leader of a Mattachine discussion group in Long Beach, California wrote in the group’s newsletter that gay people were no different from straight people except in their “private sexual inclinations,” (quoted in D’Emilio 1998: 113). This emphasis on sameness was paired with a politics of respectability to help gain acceptance for gay people. Women, for example, were
advised to conform to conventional standards of female dress while men were instructed to cut their hair and keep their beards trimmed short. According to historian Martin Meeker, this effort to project a “respectable public image was a deliberate, strategic move designed to promote fair representation in the media” and to gain legitimacy for the group’s cause (2001: 90)12

In addition to encouraging appropriate standards of dress, the respectability frame shaped debates about how gay men and lesbians should conduct themselves sexually. Indeed, increased scrutiny of gay sex prompted criticism of the community’s public sexual culture, including gay men who cruised (or searched) for sex in public. In his book *Gay New York*, Historian George Chauncey (1994) describes the significance of cruising to gay male social life. According to Chauncey, “Cruising parks and streets provided many young men . . . with a point of entry into the rest of the gay world, which was sometimes hidden from men looking for it by the same codes and subterfuges that protected it from hostile straight intrusions,” (180). In other words, cruising and its attendant rituals provided gay men with the opportunity to make sexual contacts and even develop friendships in hidden situations. To this end, gay men carved out zones of privacy for sex within public spaces—behind stall doors and locked cubicles, in densely wooded areas, or in parked cars. Although far removed from the public eye, well-known cruising spots in the gay community became popular hunting grounds for plainclothes policemen. According to Chauncey, the police “periodically conducted sweeps and mass arrests of suspected homosexuals in the parks, either to increase their arrest statistics, to get some publicity, or to force men to

12 Although most scholars tend to criticize the Mattachine Society for its accommodationist stance, Meeker argues that the “presentation of a respectable public face was a deliberate and ultimately successful strategy to deflect the antagonisms of [the Mattachine’s] many detractors,” (2001: 81). Indeed, this particular strategy allowed the organization to publicly challenge discriminatory attitudes while broadening the Mattachine’s services to include counseling and legal help as well as job referrals. Still, these self-affirming activities were hidden behind the mask of respectability, causing most people to see only the quasi-public face of the organization.
remain more covert in their cruising,” (183; See also Rosen 1980-1981). Not surprisingly, internal discussions about “public sex” were often linked to concerns about police entrapment.  

Although the Mattachine Foundation successfully challenged police entrapment in the case of Dale Jennings, subsequent leaders tried to distance themselves from the issue. For example, in a keynote speech given to the Third Annual Convention of the Mattachine Society, Ken Burns identified “techniques of harassment, blackmail, and entrapment” as one of the “problems of the homosexual” (Burns 1956: 286). However, he disparaged the “anywhere, anytime, anybody” attitude of “some homosexuals,” and defended the need for laws to promote “public decency.” In outlining the group’s political agenda, Burns also embraced the model penal code, which privileged private consensual sex in the context of a general criminal code revision. “The Report of the American Law Institute has pointed the way toward legal reform and we concur in its decisions,” he explained. “Those who are not yet mature enough to adequately decide for themselves and those who are compelled by force to submit must be protected . . . What consenting adults do in private, however, is their own business as long as they don’t injure themselves or others.”

Like the Mattachine Society, the lesbian organization Daughters of Bilitis, which formed in San Francisco in 1955, also distinguished between police harassment and public sex. In the group’s newsletter The Ladder, one member wrote: “We believe that the practical solution to the problem [of legal reform] is to judge sex activity on the grounds of whether or not society is harmed. Homosexual activity between consenting adults in private is not harmful to society. However, there must necessarily be protection given the public . . . against indecent public behavior. We are not asking for license, but rather a realistic approach to an ever-growing  

13 I use quotations around “public sex” to signify the invisibility of these encounters. Indeed, most of them were in fact far removed from the public eye.
problem,” (Anonymous 1959: 330). Although efforts to compartmentalize the issues of legal reform, police entrapment and public sex aimed to reassure straight people that gay people did not threaten dominant sexual mores and values, gay men who came into contact with the law were stigmatized as a result. In an article published by *One Magazine*, Dale Jennings proclaimed that “to be accused is to be guilty,” (Jennings 1953: 310). Following his arrest in Los Angeles, Jennings observed “a certain smugness in many of our own number regarding arrest, which I myself shared until that badge loomed in my face and the handcuffs locked my wrists together. We homosexuals have said in effect: ‘I never expose myself to danger. I never speak to strangers, go to questionable places or do anything that might give me away. Those who do, ask for it and deserve what they get.’” According to this line of thinking, gay men who were arrested were foolish, promiscuous and irresponsible, rather than the victims of entrapment.

Despite widespread harassment, local gay and lesbian communities continued to blossom in cities including San Francisco, Los Angeles, Austin, New Orleans, Atlanta, Miami, Minneapolis-St. Paul, Chicago, Philadelphia, New York and Boston (Clendinen and Nagourney 1999). According to Wald, Button and Rienzo (1996), urban settings provided the physical and psychological space necessary to develop a strong subculture. For example, Murray (1979) notes how the emergence of friendship ties and sexual relationships in gay urban neighborhoods facilitated “a sense of peoplehood and the willingness to visibly belong to such a people.” Additionally, cities provided gay men and lesbians with a measure of unparalleled safety. According to Weinberg and Williams (1974), gay men and lesbians living in rural areas were far more fearful of exposure, intolerance and discrimination than their urban counterparts.14 Finally,

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14 More recent research has shown that an increasing number of LGBT individuals are choosing to move to the suburbs for reasons relating to work, education, home ownership, and recreation (Harmon 2003; Kirkey and Forsyth 2001; Mendelsohn 1995; Lynch 1987). Many of these scholars view the move away from urban centers as a shift in
cities gave rise to the social and cultural institutions which facilitated gay consciousness. These included gay-oriented (and sometimes owned) businesses, community centers, churches, health clinics, movie theaters, restaurants, social clubs, political organizations, pride festivals, cruising strips, bathhouses, and bars. The latter are often referred to as “the central institution in gay social life” because gay men and lesbians utilized them to socialize, meet with friends and establish sexual contacts (Lynch 1987; Weinberg and Williams 1974; Harry 1974).

Working from within these urban centers, homophile leaders created the newspapers, magazines, social centers and organizations upon which to build a cohesive gay and lesbian community. Groups including the Mattachine Society and the Daughters of Bilitis provided public forums where gay men and lesbians could come together to discuss topics ranging from the causes of same-sex attraction to current research and writing on the subject of homosexuality (Clendinen and Nagourney 1999; D’Emilio 1998; Esterberg 1994). In this way, early homophile groups functioned as support groups, providing gay men and lesbians with a venue for open expression, information sharing, consciousness-raising and emotional support. At the same time, however, they functioned as political groups, publishing magazines and newsletters, providing speakers for radio and television shows, and working with professionals—mainly psychiatrists, psychologists, medical doctors, clergy and academics—to improve society’s attitudes toward gay people.

Although homophile groups cultivated the resources needed to make Stonewall possible, a loosening of societal constraints facilitated direct political intervention as well. By the mid-1960s, the federal judiciary was guided by a vision of “rights-based constitutionalism,” which led judges to offer increased protection for minority rights (Keck 2004; Goldman 1997).

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identity, one in which sexuality is less prominent. Nonetheless, it is equally plausible to suggest that this suburban influx is the result of an older generation seeking to leave behind the hustle and bustle of city living.
Similarly, passage of the 1964 Civil Rights and 1965 Voting Rights Acts marked a concerted effort on the part of Congress to combat entrenched forms of inequality (McCann and Dudas 2006). Finally, the civil rights movement, which reached its apex in 1965 (Morris 1984; McAdam 1982), engendered activism on the part of other marginalized groups including women’s rights (Minkoff 1997) and gay rights activists. At the 1965 meeting of the Eastern Regional Conference of Homophile Organizations, Mattachine D.C. leader Frank Kameny cited “the example of the Negro” to argue that “our major efforts should be directed at changes of law, regulation and procedure, whether brought about through legislative means or judicial ones,” (quoted in Valocchi 1999: 63). In addition, Kameny enlisted Mattachine D.C. members Jack Nichols and Lilli Vincenz to help pressure the organization into adopting an “anti-sickness” resolution. In a direct challenge to the medical establishment, the resolution declared that homosexuality was “not a sickness, disturbance, or other pathology in any sense, but merely a preference, orientation, or propensity, on par with, and not different in kind from, heterosexuality” (Clendinen and Nagourney 1999: 202). Although these actions exacerbated tensions between militants and their more conservative counterparts, the anti-sickness resolution presented a direct challenge to dominant understandings of homosexuality by positioning gay people, rather than straight professionals, as the predominant experts on homosexuality.

Consistent with Kameny’s call to pursue legal reform through whatever means possible, changes at the national level caused some activists to argue in favor of court-based strategies. In July 1965, Clark Polak, leader of the Philadelphia-based Janus Society, declared in a letter to *Drum Magazine* that law reform would “not be effectuated through the State Legislatures” because “few elected legislators are willing to risk a brand as one who advocates perversion,” (quoted in Stein 2010: 148). Drawing attention to the Supreme Court’s decision in *Griswold v.*
Connecticut (1965), which invalidated a ban on the use of contraceptives as a violation of the right to privacy, Polak wrote: “We see the solution within the Federal Court system, with the Supreme Court as the final voice. The Connecticut birth control decision points the way— invasion of privacy.”

Beginning in 1966, the Janus Society and its subsidiary, the Homosexual Law Reform Society (HLRS), became one of the first homophile groups to initiate test case litigation on behalf of gay rights. For three years the organization provided assistance in cases involving blackmail in Pennsylvania, public sex in Ohio, and bar licenses in Florida (Stein 2010: 148-151). In addition to the HLRS, the ACLU reversed its stance on homosexuality following Griswold, adding sexual privacy to its already long list of causes in August 1967. In a policy statement issued by the national office, the ACLU declared that “the right of privacy should extend to all private sexual conduct, heterosexual or homosexual, of consenting adults,” (quoted in Stein: 162). Although Griswold provided gay rights supporters with potentially useful arguments in court (Andersen 2005), the size of the opening in the opportunity structure remained unclear— just how far, exactly, did the right to privacy extend?

A re-examination of the Court’s opinion in Griswold suggests that activists may have been unduly optimistic in their assessment of the opportunity structure. Although Justice Douglas located the right to privacy in the “penumbras” and “emanations” of the Bill of Rights, he did not envision that right to include sexual activity outside of marriage. According to Douglas, Connecticut’s statute barring contraception operated “directly on an intimate relationship of husband and wife,” (Griswold v. Connecticut, 1965 at 482). After referring to the rights of “married persons” and of “married couples,” Douglas concluded by emphasizing the sanctity of marriage: “Would we allow the police to search the sacred precincts of marital
bedrooms for telltale signs of the use of contraceptives,” he asked rhetorically. “The very idea is repulsive to the notions of privacy surrounding the marriage relationship,” (ibid., at 486). Adding insult to injury, Justice Goldberg wrote in a concurring opinion that the Court’s decision “in no way interfered with a State’s regulation of sexual promiscuity or misconduct,” (ibid., at 498-499). Quoting Justice Harlan’s dissent in an earlier birth control case, Justice Goldberg wrote: “Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State must not only allow, but which always and in every age it has fostered and protected.”

Given the language used in Griswold, why did gay rights activists pursue litigation further? In an attempt to answer this question, historian and gay rights activist Marc Stein has argued that activists were influenced by their faith in the Constitution. “Homophile activists routinely promoted the notion that the rights of homosexuals were protected by the Constitution, not pausing to acknowledge that, as interpreted by the courts, the Constitution offered limited protection to [gay men and lesbians],” (Stein 2010: 141). As well shall see, however, this account fails to capture widespread skepticism on the part of the gay community concerning law and legal institutions. Alternatively, Andersen (2005) has argued that the potential damage caused by Griswold to gay rights claims was tempered by the fact that the most incendiary language was confined to Goldberg’s concurring opinion and therefore lacked precedential value. In other words, activists maximized opportunity and minimized constraint by discounting the overall force of Goldberg’s concurrence. Rather than focus on the potentially damaging language deployed by the justices in Griswold, activists lauded the decision for breaking new legal ground in the area of sexual privacy more generally.
Despite the “favorable” outcome in *Griswold*, the goal of advancing gay legal claims was quickly abandoned in that aftermath of *Boutilier v. INS* (1967). Clive Boutilier was a Canadian national whose application for citizenship was denied after he admitted to the Naturalization Examiner that he had been arrested for sodomy. Boutilier’s attorney, Blanch Freedman, challenged the dismissal, arguing that the 1952 Immigration and Nationality Act, which excluded aliens “afflicted with psychopathic personality,” did not encompass homosexual aliens. Both HLRS and the ACLU submitted amicus briefs in support of Boutilier, arguing that homosexuality was not psychopathological (HLRS brief) and that gay men and lesbians should not be deported for engaging in private, consensual conduct (ACLU Brief) (Stein 2010). Following an analysis of the 1952 law, however, Justice Clark concluded that Congress “beyond a shadow of a doubt . . . intended the phrase ‘psychopathic personality’ to include homosexuals,” (*Boutilier v. INS*, 1967 at 120).

In the end, the Court’s decision in *Boutilier* constricted the opportunity to pursue gay rights litigation, particularly at the federal level. Although the Court would go on to recognize new constitutional rights involving interracial marriage (*Loving v. Virginia*, 1967), birth control (*Eisenstadt v. Baird*, 1972) and abortion (*Roe v. Wade*, 1973), the justices seemed to agree with District Court Judge Albert Bryan that homosexuality was “no portion of marriage, home or family life” protected by these decisions (*Doe v. Commonwealth’s Attorney* 1975). Following the devastating loss in *Boutilier*, activists once again expressed doubts about using litigation to advance gay rights. In 1967, *Drum Magazine* declared that, “In the United States the courts have held that moral legislation, in most cases, is a matter for each state to decide independently,” (quoted in Stein 2010: 267). The following year, the HLRS announced that it, too, would pursue sodomy reform through a legislative strategy in Delaware. Three years later, a Texas lawyer
wrote in *The Advocate* that future constitutional challenges to sodomy laws were not “worthless,” but that “the chance of law reform by means of the legislature are better now than they have ever been” (quoted in Stein 2010: 267). In sum, the Court’s decision in *Boutilier* pointed activists away from the judiciary towards mainstream political institutions.

**Framing Gay Liberation: 1969-1972**

What started as an ordinary night at a gay bar in Greenwich Village ended in a riot that sparked a “gay revolution” (Carter 2010). As the primary and most public institution in gay social life, gay bars were frequently raided by police (Klages 1984; Chauncey 1994; Rosen 1980-1981). According to Loughery (1998), these raids followed a predictable pattern: police entered the premises, stopped activity, and arrested bar managers and patrons. In some cases, the names and addresses of the arrestees were printed in the local paper. Although police generally raided the Stonewall Inn once a month, events took an unusual turn in the early morning of June 28, 1969. According to several eyewitness accounts, patrons gathered outside on the sidewalk while police interrogated employees about selling alcohol without a license (Armstrong and Crage 2006; Engel 2001). “It was initially a festive gathering,” explained *Village Voice* reporter Lucian Truscott, until the “paddywagon arrived and the mood of the crowd changed . . . Beer cans and bottles were heaved at the windows, and a rain of coins descended on the cops . . . From nowhere came an uprooted parking meter—used as a battering ram on the Stonewall door.” Two nights of rioting ensued, four policemen were injured and thirteen people were arrested.

In order to understand when and why Stonewall occurred, it is necessary to explore the interaction between localized factors and the political subjectivities of gay men and lesbians. Although Nixon’s ascent to the White House marked a “highly significant electoral realignment that can only be seen as disadvantageous to gays” (McAdam 1996), the 1968 presidential
election signified only one aspect of the political opportunity structure confronting activists. At the state and local level, the New York State Commission on Revision of the Penal Law penned a resolution to exempt “deviant sexual intercourse” between consenting adults from criminal liability (Rosen 1980-1981). The following year, in April 1966, New York City police officers were instructed to “avoid entrapment” and “secure witnesses” anytime they arrested an individual for “homosexual solicitation” (Rosen 1980-1981: 169). Taken together, these developments at the state and local level signified a loosening of constraints on gay social life that ultimately keyed expectations for social change. Reflecting on Stonewall’s occurrence less than two years later, gay liberationist Don Teal wrote: “The call of a liberation movement appealed, in summer 1969 . . . to a variety of young or young-minded American homosexuals whose sole common denominator was impatience. They had shed, or were shedding, all vestiges of homosexual shame . . . They were ready for a confrontation with anybody who might challenge or even delay their right to do so.”

Immediately following the raid on Stonewall, early homophile groups supplied the skills and resources needed to capitalize on the event. Craig Rodwell, owner of the Oscar Wilde Memorial Book Shop, called on local media contacts to secure mainstream media coverage of the ensuing riots (Armstrong and Crage 2006). Similarly, Mattachine New York circulated flyers throughout the gay and lesbian community, criticizing Mayor John Lindsay’s administration and calling for an end to police harassment (Teal 1995: chapter 2). In November 1969, at a meeting of the Eastern Regional Conference of Homophile Organizations, the NYU Student Homophile

15 As Teal himself points out, this explanation is consistent with the theory of rising expectations, initially proffered by classical movement scholars to explain the emergence of political protest. According to Teal, “protests blossom forth when the oppressed social conditions are slightly ameliorated, when they seem to be on the road to improvement, offering hope and promise for change, but creating frustration in those impatient for the change and still suffering under less than tolerable conditions,” (34) This explanation also draws attention to the role of emotions in the construction of political opportunity, which remains an avenue for future study.
League sought to commemorate the riots by organizing an annual demonstration (Armstrong and Crage 2006). Tapping into an extensive network of homophile media and mailing lists, they urged other groups to “take advantage of this unparalleled opportunity for action.” In June 1970, local activists responded to this call for action by organizing pride parades in New York, Los Angeles and Chicago.

In the weeks and months immediately following Stonewall, the militancy displayed by rioters inspired the formation of new groups including the Gay Liberation Front (GLF). Founded by Martha Shelley, Jim Fouratt, Bob Kohler and other New York-based activists, the GLF adopted a multi-issue approach to social change. According to co-founder Martha Shelley, “those of us in GLF felt that the struggles should be united: the black civil rights movement, the struggle against the Vietnam War, the women’s movement, feminist politics, socialist politics,” (quoted in Valocchi 2001: 458). As a diagnostic frame which sought to identify injustice and attribute blame to dominant institutions, this “oppression is everywhere” frame emphasized the multi-faceted nature of gay subjugation and encouraged alliances with other oppressed groups. In August 1969, for example, several members of the Gay Liberation Front participated in the anti-war, anti-draft activities of Hiroshima-Nagasaki Week (Teal 1995: 36).

The GLF relied on two additional frames to help channel gay people into action. The first was a motivational frame which sought to mobilize supporters by emphasizing gay power. Modeled on the demands of the Black Panther party, the gay power frame was an extension of the message “Gay is Good.”¹⁶ According to Valocchi (1999), the slogan “Gay is Good” was first articulated at a 1964 meeting of the Eastern Regional Conference of Homophile Organizations. Its purpose was to combat the idea that gay men and lesbians were morally corrupt and sick with

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¹⁶ It is possible that frame diffusion between the Civil Rights and Gay Rights Movements occurred as a result of overlapping membership. For example, GLF member and GAA co-founder Marc Rubin worked on the Mississippi Freedom Summer project, led voting demonstrations, and was arrested for leafleting in Mississippi (Bell 1971: 91).
a more positive, self-affirming message. However, this strategy changed as a politics of respectability gave way to demands for gay power. “What is gay power,” asked Bob Martin, a member of Columbia University’s Student Homophile League. “It is essentially Pride; it is standing up for one’s beliefs . . . it is refusing to hide . . . it is demanding to be recognized as a powerful minority with just rights which have not been acknowledged; it is an insistence that homosexuality has made its own unique contribution to the building of our civilization and will continue to do so,” (quoted in Teal 1995: 60).

A third frame permeating the gay liberation movement was a prognostic frame which emphasized the values of sexual liberation to facilitate confrontational activism. Influenced by the new-left counterculture, this particular frame politicized same-sex eroticism while challenging dominant sex and gender norms. The GLF’s statement of purpose made these goals explicit: “We are a revolutionary group of men and women formed with the realization that complete sexual liberation for all people cannot come about unless existing social institutions are abolished. We reject society’s attempt to impose sexual role and definitions of our nature,” (Bateman 2015). Similarly, in A Radical Manifesto—The Homophile Movement Must be Radicalized!, the GLF declared that “established heterosexual standards of morality are immoral” and that “homosexuals, as individuals and members of the greater community, must develop homosexual ethics and esthetics independent of, and without reference to, the mores imposed upon heterosexuality,” (quoted in Teal 1995: 38). Consistent with these objectives, the organization advocated for societal transformation, including the destruction of dominant sex and gender norms, and an end to the oppressive institutions of marriage and family.

In contrast to a politics of respectability, these frames authorized and encouraged direct action protest. The gay power frame, for example, was rooted in notions of gay pride and a
positive self-image. Writing in the premier issue of GLF’s newspaper *Come Out!*, Dr. Leo Louis Martello captured the frame’s essence. After reassuring gay men and lesbians that homosexuality was not the problem, that society’s attitude towards it was, Martello offered “five steps to a positive self-image.” They included participating in a zap, or public confrontation, as well as coming out to one’s friends (quoted in Valocchi 1999: 63-64). According to Engel (2001: 43), “Coming out symbolized a total rejection of the negative definitions which society inflicted on the homosexual and substituted both acceptance and pride in one’s gayness.” In this way, the public expression of gay difference was perceived as a radical challenge to dominant institutions and social norms. Although early homophile activists had been reluctant to pursue such visible forms of protest, this new generation of activists distinguished itself as “younger, louder and ruder” than its predecessor (Clendinen and Nagourney 1999: 47).

Another example of the consequences of the gay power frame is the movement’s assault on the psychiatric establishment. Prior to Stonewall, early homophile leaders consulted with the psychiatric community to lobby on their behalf and help change public attitudes toward homosexuality. Post-Stonewall, however, activists challenged the medical establishment by “zapping” professional meetings, challenging doctors to participate in consciousness-raising sessions, and serving on panels at conferences to actively contest the sickness label (Marcus 1992: 222-225). In May 1970, for example, members of the Gay Liberation Front in San Francisco disrupted the annual convention of the American Psychiatric Association, which included homosexuality on its official list of mental disorders. During a session entitled “Transsexualism vs. Homosexuality: Distinct Entities?” gay liberationist Gary Alinder shouted down the panelists: “You are the pigs who make it possible for the cops to beat homosexuals. They call us queer; you—so politely—call us sick. But it’s the same thing,” (Clendinen and
Nagourney 1999: 200). When psychiatrist Dr. Irving Bieber responded that he “never said homosexuals were sick,” only that they suffered from “displaced sexual adjustment,” another protestor shouted out, “That’s the same thing, motherfucker!”

Early homophile leaders also endorsed a more radical protest strategy in the immediate aftermath of Stonewall. Although he tried unsuccessfully to challenge employment discrimination in court, and worked tirelessly to support passage of a nondiscrimination ordinance in the Nation’s Capital, Mattachine D.C. leader Frank Kameny commented on the appropriate use of militancy in gay liberation. “I don’t believe in picketing until you’ve tried negotiation,” he explained. “On the other hand, if you’ve tried negotiation and gotten nowhere and then tried picketing and gotten nowhere, then . . . I’m perfectly willing to go along to the next step—which is probably some sort of confrontation that possibly mildly oversteps the bounds of the law. If that doesn’t serve, I’m willing to go further, although I do draw the line at violence,” (quoted in Teal 1995: 73-74).

Although the frames developed by the Gay Liberation Front supported outsider strategies, the organization ceased to exist in 1972 (Bateman 2015). While some attributed the group’s demise to an organizational structure which privileged participatory democracy over hierarchical forms of decision-making (Clendinen and Nagourney 1999), others blamed the Front’s multicultural approach for siphoning off crucial resources needed to win gay rights (Teal 1995: chapter 5). According to Jim Owles, many of the group’s allies on the Left were “viciously anti-homosexual,” and had shown “no mercy to homosexuals they had taken in,” (quoted in Teal 1996: 89). Frustrated by the decision to donate $500 to the Panther 21 defense fund, Owles and several other dissident members formed the Gay Activists Alliance. According to cofounder Arthur Bell, the Gay Activists Alliance would not endorse any political party, candidate or
organization “not directly related to the homosexual cause” (1971: 23). Instead, the group would adopt a single issue focus, starting with a bill to prohibit discrimination based on sexual orientation in employment.

In the end, the decision to organize around a fair employment bill marked the beginning of mainstream political organizing. Although other issues—such as the APA’s designation of homosexuality as a disease—continued to be important, employment discrimination and sodomy reform took on increasing significance. While numerous groups pursued gay rights legislation throughout the country, variation in state and local opportunity structures—and the subjective experiences of social movement actors—led to significant differences in the nature of political organizing. In the next section, I draw on several examples from the literature to illustrate the connection between local political conditions and the fight for antidiscrimination laws. However, an examination of the frames used to support these strategies is reserved for chapter 3.

**Legislative and Electoral Strategies in the Gay Mainstream Movement**

Beginning in 1971, with the introduction of gay rights legislation in New York City, activists throughout the country sought to include “sexual orientation” as a category in local antidiscrimination legislation. Table 2.1 contains a comprehensive list of state and local jurisdictions that enacted such laws. As the table illustrates, approximately seventy-five local jurisdictions enacted nondiscrimination laws between 1972 and 1984. In addition, executive orders prohibiting discrimination in public employment were issued in Pennsylvania (1975), California (1979), New York (1983) and Ohio (1983). The protections afforded to gay men and lesbians pursuant to these laws varied from state to state and city to city. While the vast majority
prohibited discrimination in public (and sometimes private) employment, others provided protections in public accommodations, housing, and credit.\footnote{Decentralization accounted for differences in implementation as well. For example, Cupertino and Santa Barbara, California adopted resolutions in the absence of enforcement procedures, acts that amounted to little more than policy statements in support of gay rights (Pearldaughter 1979). Other cities including Minneapolis, Detroit and Seattle established administrative agencies with the power to issue cease and desist orders. Only human rights commissions in places like Palo Alto and San Mateo County, California had the authority to investigate complaints and facilitate conciliation efforts. However, not even the presence of a commission guaranteed protection from discriminatory harm. The Washington, D.C. Office of Human Rights, for example, was described by the Anti-Sexism Committee of the National Lawyers Guild as a “bureaucratic boondoggle” in need of “revised personnel procedures and greater accountability to the community” (quoted in Pearldaughter 1979: 55). The ability to pursue discrimination claims was therefore dependent on an agency’s caseload, competent personnel, and the presence of a willing complainant.}

[Insert Table 2.1]

From the outset, the jurisdictions most likely to pass nondiscrimination ordinances were small, college towns and cities including Ann Arbor and East Lansing, Michigan; Yellow Springs, Ohio; Pullman, Washington; and Chapel Hill, North Carolina. Not surprisingly, gay student groups served as catalysts for reform in these areas, providing emotional and social support to members, hosting educational and social functions on campus, and pressuring state and university officials for change (Eskridge 1997). In other cities, non-student groups spearheaded reform efforts. In New York, for example, the Gay Activists Alliance sought passage of a local ordinance prohibiting discrimination in employment. According to Clendinen and Nagourney (1999: 52), the Gay Activists Alliance chose a fair employment bill for its first mission “because it didn’t have a prayer of passing. It was not a goal but a cause around which to organize movement, with protests, petition-gathering and, hopefully, publicity.”

Since the group’s main objective was to mobilize supporters rather than secure legislation, the group pursued a range of strategies designed to increase media attention and expand the scope of conflict. In addition to endorsing candidates, educating members and circulating petitions, members of the Gay Activists Alliance “zapped” public officials with
questions about their support for antidiscrimination policies. For example, GAA activist Marty Robinson confronted New York City Mayor John Lindsay at the one hundredth anniversary of the Metropolitan Museum of Art. Climbing the steps to the newly renovated museum, Robinson handed the mayor a pamphlet protesting job discrimination and demanded to know when he would speak publicly on the issue (Teal 1995: 121; Bell 1971: 52). As another example of confrontation, members demonstrated outside Councilwoman Saul Sharison’s apartment building, demanding open hearings on the gay rights ordinance. According to Bernstein (1997), the demonstration, which was intended to be peaceful, turned bloody when Tactical Police Force officers arrived on the scene, beating protestors with their clubs. Although closed hearings may have been the more effective (or expedient) approach to reform, low-key tactics did not facilitate the organization’s goal of raising consciousness and mobilizing supporters. Consequently, the group supported confrontation, “despite its potential dilatory effect on achieving policy change,” (Bernstein 1997: 545).

The fight for antidiscrimination legislation in Washington, D.C. contrasted sharply with the battle in New York City. Whereas the Gay Activists Alliance pursued a hybrid approach, blending insider and outsider strategies to attract media attention, Mattachine D.C. leader Frank Kameny took a behind-the-scenes lobbying approach. As a World War II Veteran with a Harvard Ph.D., it is no surprise that he felt comfortable working inside the system. Drawing inspiration from Bayard Rustin, Martin Luther King and other civil rights leaders, Kameny firmly believed in the value of legal reform. Beginning in 1971, he lobbied Mayor Walter Washington and members of the District's City Council to prohibit sexual orientation discrimination. By 1973, he successfully persuaded Councilwoman Marjorie Parker to include “sexual orientation” in her
amendment to the local human rights ordinance (Eskridge 1997: 926). With key support from the Mayor, Parker’s bill passed quietly and without controversy.

Nearly one thousand miles to the northwest, gay rights ordinances in Minneapolis-St. Paul enjoyed quiet yet forceful backing from Steve Endean, founder of the Gay Rights Lobby. According to Clendinen and Nagourney (1999: 226), the Lobby was “an organization which existed mainly in Endean’s head. There was no other staff, no budget and no actual office, and Endean regarded a night working the Sutton Place coat check as the place and time to let the crowd know that there was a gay political lobby group forming, and to get the names of as many men as possible on a list . . . Men sometimes gave him 25 cents to watch their jackets and $10 to lobby the state.” Like Kameny, Endean shared an utmost respect for politics, volunteering at eighteen as an aide for state and local political candidates (Lambert 1993). He was also “coached in the method and manners of legislative lobbying by Denis Wadley, the closeted gay president and chief lobbyist of the Minnesota Americans for Democratic Action,” (Clendinen an Nagourney 1999: 228). In June 1973, Endean successfully cajoled City Council candidates to pledge their support for a gay rights ordinance in exchange for campaign volunteers. Nine months later, the newly elected, overwhelmingly Democratic City Council voted to prohibit discrimination based on sexual preference in housing, public accommodations, education, and employment.

Low-key tactics were also influential in the adoption of antidiscrimination ordinances in Eugene and Portland, Oregon. In Portland, an informal coalition of gay-oriented businesses hired a lobbyist to advocate for a local ordinance prohibiting discrimination in public employment. According to Bernstein (1997), activists in Portland enjoyed easy access to the polity because of their status as white, middle-class professionals. In Eugene, activists also relied on discreet
tactics designed to minimize exposure, including holding secret meetings with individual council members. The ordinance passed in 1977, however, conservatives immediately sought to repeal the law by way of a referendum. Even though this type of opposition was unprecedented, local activists remained confident in their ability to defeat the initiative. As one observer remarked:

There are many reasons to believe that such a campaign might be effective in preserving a civil rights law for gay people in the face of a massive campaign of bigotry . . . For one thing, Eugene is a small town, which increases the possibility of contacting a large segment of the voters. For another, it is a traditionally liberal college town, with an enormous student community . . . a very large and diverse feminist community, and an active leftist community. Also working in favor of gay people is the fact that this referendum is appearing on a primary ballot. This means that gay civil rights will not be the sole focus of people’s attention in the weeks before the election. Voters will be trying to decipher a lot of issues, which should mean that there will be few voters who turn out solely to vote against civil rights. In Oregon, a primary election also usually means a large proportion of liberal voters make it to the polls, a factor which should help rather than hinder the gay community.

Two insights can be gleaned from the foregoing passage. First, local factors outweighed any consideration of the national and even state context in which the anti-gay ballot initiative was carried out. Indeed, repeal of the state’s sodomy prohibition was not even mentioned when assessing the likelihood of success. Second, the author employed an “optimistic rhetoric of change” to reassure gay rights supporters that victory was imminent (Gamson and Meyer 2004). Because the ordinance was later repealed by a two to one margin, it is tempting to dismiss such remarks as naïve. However, the only alternative to overstating opportunity was to quit and go home, which most activists were not willing to do.

Prior to the emergence of a concerted backlash in the late 1970s, insider strategies were facilitated by the emergence of openly gay public officials as well. In April 1974, Kathy Kozachenko was elected as an openly gay member of the Ann Arbor, Michigan City Council. Her predecessors, Jerry DeGrieeck and Nancy Wechsler (both of whom came out after being elected), helped oversee passage of Ann Arbor’s non-discrimination ordinance. In November
1974, Elaine Noble became the first openly gay candidate elected to a state legislature. While serving her first term in the Massachusetts State House, she and then-closeted Barney Frank co-sponsored a bill to prohibit discrimination in employment, housing and public accommodations. Following Noble’s lead in December 1974, Minnesota State Senator Allan Spear came out in an interview with the Minneapolis Star. Upon retiring, Spear called passage of the 1993 Human Rights Act Amendment his “proudest legislative accomplishment,” (Boothe 2000). Finally, in November 1977, Harvey Milk was elected to the San Francisco Board of Supervisors. During his short time in office, Milk sponsored and successfully passed an ordinance prohibiting discrimination in employment, public accommodations, education, housing, and credit.

By 1974, when Kathy Kozachenko became the first openly gay candidate elected to public office, gay rights activists were not simply working inside the system, they were becoming the system. By then, passage of gay rights legislation and the election of openly gay candidates had become principle objectives of the movement. And yet, legal strategies on behalf of gay rights remained unplanned and uncoordinated. In the next section, I examine gay rights litigation between 1969 and 1986 in order to illustrate the use of two unconventional legal strategies. First, in the areas of employment discrimination and sodomy, I demonstrate how activists capitalized on legal losses in order to mobilize support for legislative and electoral strategies. Second, I document a strategy of avoidance in cases involving sodomy and solicitation, as well as child custody disputes. Overall I argue that negative interactions with the law created uncertainty about using courts to achieve social change while facilitating mainstream legislative and electoral strategies.

Litigating Gay Rights
A survey of gay rights litigation between 1969 and 1986 reveals the tenuous legal position of the gay and lesbian community. Figure 2.1 illustrates the total number of published decisions involving gay rights at the state and federal level (including the United States Supreme Court) between 1969, when the period of gay liberation began, and 1986, when the United States Supreme Court upheld a Texas law criminalizing sodomy.\textsuperscript{18} A cursory look at the figure confirms that the amount of litigation on behalf of gay rights increased steadily in both state and federal courts, although litigation in the former consistently outweighed the latter. In addition, the data indicate that gay litigants generally fared worse in state courts than they have in federal courts. Between 1969 and 1980, gay litigants were more likely to receive a favorable hearing at the federal level, although the odds of winning in either institutional venue remained dismal at best.

[Insert Figure 2.1]

Another way to examine the data is to consider the issues that were most likely to be litigated. The top three most widely litigated issue areas are presented in Table 2.2. Consistent with the push to enact anti-discrimination ordinances in state and local legislatures, cases involving discrimination in employment, public accommodations and housing were brought with the greatest frequency. Of these, employment discrimination was the most common type of discrimination. Indeed, 84 percent of all discrimination cases involved gay men and lesbians who lost their jobs or who were denied employment as a result of their sexual orientation. Somewhat more interesting, however, is the success rate in these cases. Although state and local legislative bodies were most likely to pass employment nondiscrimination laws, legal challenges to employment discrimination typically fared worse than challenges to discrimination in either

\textsuperscript{18} For a more detailed explanation of how these cases were identified and collected, see the Appendix.
housing or public accommodations. The success rate for litigation in these areas was 34 percent, 50 percent and 71 percent respectively.

[Insert Table 2.2]

Child custody battles marked the second most widely litigated issue area. Of note about these cases is that they arose as an increasing number of gay men and lesbians exited straight marriages in the 1970s. According to historian Dan Rivers (2013), the threat of parental estrangement in the 1950s and 1960s was sufficient to keep most gay men and lesbians from leaving heterosexual marriages and fighting for custody of their children. In the 1970s, however, three factors contributed to the surge in child custody cases including a growing sense of pride among gay people (Martin and Lyon 1972), the emergence of the feminist movement (Hunter and Polikoff 1975-1976), and the development of a legal support system to assist gay parents in fighting for custody of their children (Rivers 2013). Still, in the absence of laws protecting their rights as mothers and fathers, gay parents fought an all too often losing battle in court. Indeed, only 35% of the cases litigated in this area involved clear victories for gay parents.

The third most common type of litigation involved the arrests of gay men for sodomy, solicitation, or lewd and lascivious conduct. Generally, these arrests were made by plain-clothes police officers conducting surveillance in popular cruising areas. According to one observer in the 1970s, “Police enticement and entrapment of homosexuals are still common in many American cities and account for the vast majority of the homosexual arrests made every year” (Fisher 1972: 134). Not surprisingly, sodomy reform constituted a main focus of early organizing efforts. However, policy change was more likely to emanate from state legislatures rather than courts. Between 1961 and 1986, twenty-five states enacted legislation overturning sodomy laws (Andersen 2005: chapter 4), whereas only two states repealed their sodomy prohibitions via a
judicial declaration of rights. Not surprisingly, the vast majority of gay men tried to avoid rather than embrace the court system, a point I return to in the next section.

**Mobilizing (and Avoiding) Legal Losses: An Unconventional Approach to Litigation**

Upon closer examination of gay rights litigation it becomes apparent that the high unlikelihood of success generated reluctance in the gay community about using courts to achieve social change. In the absence of an express statutory prohibition, litigants in employment discrimination cases confronted the common law precept that employers had the right to hire and fire whomever they wanted (Warner 1981; Rivera 1979). Further precluding the likelihood of success, judges refused to interpret Title VII of the 1964 Civil Rights Act, which prohibited discrimination in employment based on sex, to include discrimination based on sexual orientation. In *Smith v. Liberty Mutual Insurance Co.* (1975), for example, the District Court agreed with the insurance company that the intent of the 1964 Civil Rights Act was “to guarantee equal job opportunities for males and females,” not to forbid discrimination based upon sexual preference. The same year *Smith* was decided, Title VII claims were barred by the Equal Employment Opportunity Commission on the grounds that Congress did not intend to include a person’s sexual practices within the meaning of the term sex (Rivera 1979). “You have to have laws on which to base your litigation,” explained one activist. “And we had no rights as gay people,” (Interview with Roberta Stone and Amy Hoffman).

The community-wide response to gay teacher cases reveals how legal losses in the area of employment generated widespread support for legislative and electoral strategies. In determining whether gay men and lesbians were “fit to teach,” judges considered whether homosexual

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19 The two states were New York (*People v. Onofre, 1980*) and Pennsylvania (*Commonwealth v. Bonadio, 1980*), respectively. Although the United States District Court ruled that a Texas law criminalizing sodomy was unconstitutional in *Baker v. Wade* (1982), the decision was eventually overruled by the Court of Appeals in light of *Bowers v. Hardwick* (1986).
conduct had an adverse effect on parents, students and fellow teachers, and whether such conduct took place in close proximity to the classroom. In *Morrison v. State Board of Education* (1969), the California Supreme Court required school officials to demonstrate a reasonable connection between sexual orientation and job performance. However, superficial application of the standard resulted in few legal victories for gay teachers. In *Moser v. State Board of Education* (1972), for example, the California appellate court distinguished *Morrison*, observing that Morrison’s conduct, which had taken place between two consenting adults at home, had occurred in private and was noncriminal, whereas Moser’s conduct, which had taken place in a public restroom, was the opposite. Although the nature of Moser’s conduct was admittedly different, the Court made no attempt to demonstrate its effect on parents, students or teachers, or on Moser’s ability to actually do his job.

Not surprisingly, inconsistency in these cases undermined the notion that a fair application of legal principle would result in similar cases being decided similarly. For example, after reviewing “A Decade of Gay Teacher Cases,” one observer emphasized the refusal of lower courts to agree on the Morrison standard (Stivison 1979). Drawing attention to high reversal rates and the occurrence of countless dissents, the commentator concluded that “ten years of litigation around the rights of gay teachers had done little more than produce a mess.” According to the same observer, “the frustration of case-by-case battling increased the interest in gay rights bills, ranging from city and county ordinances, state laws, and federal legislation.” The Supreme Court’s refusal to review gay teacher cases also increased support for legislative and electoral strategies. Reflecting on the Court’s denial of certiorari in *Gaylord v. Tacoma School District* (1977) and *Gish v. Board of Education* (1977) Gay Community News maintained that “The Court simply provided a better case for gay rights legislation on the state level.” Moreover, the
editorial proclaimed: “This pattern of decisions makes it clear that the Supreme Court—for years the last well of hope for minority groups—will not involve itself on the issue of gay rights,” (The US Supreme Court (Again) 1977). By referring to the Court as “the last well of hope for minority groups,” the editorial tacitly confirmed its countermajoritarian function in relation to other oppressed groups, presumably Blacks, women and religious minorities. However, the observation that the Court would “not involve itself on the issue of gay rights” indicates that activists did not expect the Court to intervene favorably on their behalf. Rather than blindly follow the Constitution and the courts, activists simply looked elsewhere for change.

Given the intransigence of both the courts and the EEOC, gay political groups made persistent efforts to mitigate employment discrimination in other ways. In addition to lobbying for gay rights legislation, the National Gay Task Force solicited policy statements from various employers on the rights of gay people. Numerous employers including AT&T, IBM, Citibank, ABC, CBS, NBC, Bank of America, Procter & Gamble, Avon Products and Eastern Airlines responded to these efforts by adopting anti-discrimination policies in hiring and firing (Wise 1980). Additionally, activists sought official meetings with high-ranking public officials to emphasize the need for national legislation. One such meeting took place at the White House in March 1977 where Frank Kameny recounted the problems experienced by gay men and lesbians in seeking security clearances (Clendinen and Nagourney 1999: 287-290). Noting that activists “received little encouragement from the courts,” one scholar concluded near the end of the 1970s that “advocates of gay rights must continue to look to the efforts of such groups as the NGTF for needed reforms in the area of employment,” (Rivera 1979).

Legal losses in cases involving arrests for sodomy, solicitation and lewd and lascivious conduct elicited a similar response from the gay community. Surprisingly, litigants in the 1970s
did not always challenge the constitutionality of sodomy laws. Instead, some argued that the
conduct in question fell outside of the law’s purview. For example, In Arizona v. Mortimer
(1970), the defendant, who was arrested for mutual masturbation, argued that the State’s law
proscribing lewd and lascivious acts applied only to those acts which were “committed in an
unnatural manner.” In rejecting this argument, the Arizona Supreme Court held, “that the act of
masturbation by one adult male upon another adult male is an act committed in an unnatural
manner;” and that, despite a “rising school of thought which decries the stigma placed by society
upon homosexual activity . . . homosexual activity is and was considered unnatural.” Another
strategy for combating sodomy laws without challenging their constitutionality was to argue that
such laws applied only to nonconsensual acts. In United States v. Buck (1975), for example, the
lower court maintained that Washington D.C.’s sodomy prohibition applied “only to
nonconsensual acts of sodomy, be they public or private.” In rejecting this argument, however,
the D.C. Court of Appeals said there was “no holding of the Supreme Court or of any appellate
court in this jurisdiction” to support that contention. Although generally unsuccessful, these
arguments suggest that the litigant’s main objective was not to overturn the State’s sodomy
prohibition, but rather the much narrower goal of avoiding a conviction.

Another possible defense in cases involving sodomy and solicitation was entrapment;
however, entrapment was also difficult (if not impossible) to prove. As a result, sympathetic
attorneys routinely advised gay men not to challenge their arrests in court. In Boston, for
example, local attorney Richard Rubino rarely used entrapment as a defense: “I would only use
an entrapment defense if my back was against the wall,” he told Gay Community News. “The
stumbling block is predisposition. It’s almost impossible to get a judge to believe that you didn’t
know the place where you were arrested was a cruising spot,” (quoted in Miller 1976a). Rather
than challenge sex-related charges in court, Rubino asked the judge for a continuance without a finding instead, a practice fellow attorney John Ward described as “a little bit short of guilty,” (Interview with John Ward). If the judge granted a continuance without a finding, then gay men who were arrested were authorized to serve probation without pleading guilty. So long as they followed the terms of their probation and avoided any new offenses, the charges against them were usually dropped (Jordan Marsh Arrests 1974). According to Rubino, the main goal in these kind of cases was not to overturn the State’s sodomy prohibition, but rather to prevent the individual client “from getting a criminal record,” (quoted in Kyper 1974).

Unlike trial courts, which generally could not deflect the issue, the United States Supreme Court declined to hear cases involving state sodomy prohibitions well throughout the 1960s (Poore v. Mayer, 1964; Chamberlain v. Ohio, 1966; Robillard v. New York 1966). Regrettably, when the Court did intervene, it was largely to the detriment of the gay community. In Doe v. Commonwealth’s Attorney (1976), the Supreme Court summarily affirmed Virginia’s anti-sodomy statute. The case originated after Associate Justice William Douglas told a group of gay rights activists “that a sodomy challenge might succeed if the litigants could show that they were in genuine jeopardy of persecution under the law and that they lived otherwise impeccable lives,” (Andersen 2005: 66). Two male plaintiffs, represented by the ACLU and backed by the National Gay Task Force (Miller 1976b), sought to test this hypothesis by challenging Virginia’s sodomy law in federal court. In addition to arguing that they feared arrest because they regularly engaged in private, consensual sodomy, the plaintiffs advanced First Amendment and privacy arguments as well. In rejecting these arguments, however, the district court held that the right to privacy did not encompass “homosexuality . . . since it is obviously no portion of marriage,
home or family.” On March 19, 1976, the Supreme Court summarily affirmed the lower court’s decision, just one year shy of Anita Bryant’s Save Our Children Campaign.

The decision in *Doe v. Commonwealth’s Attorney* elicited many of the same responses outlined above. Given their role in facilitating litigation, members of the National Gay Task Force remained unduly optimistic in their assessment of the legal landscape. For example, co-director Bruce Voeller conceded the decision was “depressing,” but maintained that it did not change the state of existing laws (Miller 1976b). In calling for litigation at the state level, Voeller claimed that future challenges might prevail in states where married couples were exempt from the law, and where the issue of “discrimination against single people” could replace the “right to privacy approach.” Similarly, Boston attorney Nancy Gertner sought to encourage future gay legal claims by claiming that the decision lacked precedential value. “By simply affirming the lower court decision, it leaves the law in a confused state,” she told Gay Community News. “The Court has acted in keeping the status quo, but it is not necessarily committing itself to it,” (Supreme Court Decision Stirs Wide Reaction 1976). Although Voeller looked to state courts for future relief, Gertner hoped to see continued litigation at the federal level. “I’d like twenty-five cases to come up,” she said. “The Supreme Court itself might change its mind. Perhaps it felt that this was just not the right case.”

In contrast, others who were less invested in the legal process expressed outrage over the decision. In an editorial with the headline “Now What?” *Gay Community News* called *Doe v. Commonwealth’s Attorney* “the most disgraceful judicial conduct by any court in the United States during this century” (Editorial: Now What? 1976). In contemplating next steps, the

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20 A summary affirmance does have biding precedential effect; however, because the Court disposes of the case without explaining its reasoning, the holding is limited. In *Hardwick v. Bowers* (1985), the United States Court of Appeals explained, “A summary affirmance represents an approval by the Supreme Court of the judgment below but should not be taken as an endorsement of the reasoning of the lower court.”
editorial highlighted the “need for electing public officials with social consciousness, ones who will hopefully appoint ideologically compatible jurists.” Clearly, litigation did not offer a promising way forward. “Gay people have belabored on this issue far too long and far too hard to allow the efforts of years to be evaporated through this obscene ruling. Our fights will continue, if not in the courts, than in the legislatures.” Finally, after disparaging the decision as a “retreat on rights” and “bad news for the country and the future,” the editorial concluded on a foreboding note: “Whether the court’s action was a singularly conspicuous manifestation of prejudice by the justices, or whether it is but the beginning of a retrogressive trend to begin America’s third century, remains to be seen. Although it does not signal the end of Gay Liberation, it does suggest new tactics.”

Unfortunately for gay rights activists in the 1970s, President Richard Nixon had already begun to shape the judiciary in his own image. During the 1968 presidential campaign, Nixon promised to appoint justices who would appreciate the basic tenets of “law and order,” who would see themselves as “caretakers” of the Constitution and not as “super-legislators,” and who were “strict constructionists,” (Abraham 1999: 9-10). Not surprisingly, all four Nixon appointees voted against hearing oral arguments in Doe v. Commonwealth’s Attorney (Miller 1976b).\(^2\) As a result, some people viewed the decision as “predictable,” rather than surprising. Writing in Gay Community News, Professor Richard Steinman (1976) of the University of Southern Maine claimed to have “the greatest respect for the intellectual acuity and courage of . . . the National Gay Task Force and American Civil Liberties Union leaders, but not for their ability as tacticians of change. For who could have reasonably concluded, after surveying Nixon’s most infamous legacy—a conservatively stacked Court—that Nixon’s great damage could have been reduced,

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\(^2\) Nixon appointees including Chief Justice Warren Burger and Associate Justices Harry Blackmun, Lewis Powell and William Rehnquist voted to deny certiorari. Justice Brennan, Justice Marshall and Justice Stevens, however, noted probable jurisdiction and would have set oral argument (Doe v. Commonwealth’s Attorney, 1976).
eliminated or neutralized at this point in history?” Following the appointments of Chief Justice Warren Burger and Associate Justices Harry Blackmun, Lewis Powell and William Rehnquist, Steinman concluded that litigation in this particular instance should have been deferred.

Why, then, did activists appeal the lower court’s decision? According to Steinman, the National Gay Task Force failed to assess available resources against growing resistance to change, thereby misreading the opportunity structure. “Many of your readers might understandably conclude that an analysis such as mine comes easy with hindsight,” he explained. “But that is precisely what is so valuable about the simple and dependable strategy of making an assessment of resources and resistances before one acts: hindsight is unnecessary for the analysis provides foresight. The alternative, as we have just tragically seen, is trial and error.” Although Steinman was of the mindset that a legal loss could have been avoided with a little more forward thinking, his remarks capture the difficulty in decoding the opportunity structure. As Andersen (2005: 96) points out, activists “can do no more than make educated guesses based on the available information,” and the available information was ambiguous at best. Indeed, there was no clear precedent indicating how the Court would rule on this issue, in large part because the justices refused to address sodomy prohibitions in the past. Furthermore, the expansion of the right to privacy in Eisenstadt v. Baird (1972), which established the right of unmarried persons to possess contraception, and Roe v. Wade (1973), which upheld a woman’s right to an abortion, caused some activists to believe that even a conservative judiciary would act favorably with respect to the privacy rights of gay men and lesbians. As one observer remarked, Doe v. Commonwealth’s Attorney marked “a significant change from the previous pattern of decisions in which the high court had expanded the concept of the constitutional right to privacy” (Miller 1976b).
This disagreement surrounding the wisdom of litigating *Doe v. Commonwealth’s Attorney* suggests that the political and legal landscape is saturated with conflicting signals that tend to point activists in opposite directions. Although the emergence of an increasingly conservative judiciary signified constricting opportunity in the legal arena, the tightening of constraints was offset by the expansion of the Court’s privacy jurisprudence. Moreover, the tendency to discount the heteronormative conception of sexual freedom developed in *Griswold* and its progeny (Stein 2010) resulted in even more positive assessments about how the Court would rule on sodomy. Although some activists may have been led astray by their faith in the Constitution and the Court, it is more likely that they interpreted political space in ways that simply emphasized opportunity. According to Gamson and Meyer (1996), this tendency to overestimate opportunity is “generally healthy” for social movements because it encourages and sustains action in the face of intractable odds. In other words, “systematic optimistic bias,” which may or may not be deployed strategically by activists, can stimulate actions, change opportunity, and alter the course of the movement.

The wisdom of litigating sodomy prohibitions notwithstanding, the Court’s refusal to intervene favorably on behalf of gay rights generated skepticism about using court-based strategies to achieve social change. In the next section, I analyze the legal treatment afforded to gay and lesbian parents to illustrate in greater detail how negative encounters with the law caused ordinary gay men and lesbians to avoid rather than embrace litigation. In addition to examining this so-called strategy of avoidance, I document the rise of gay legal groups designed to help lesbian mothers and gay fathers fight for custody of their children. As we shall see, the main objective of these groups was not to pursue test case litigation, but rather to shield gay and lesbian families from legal intervention.
Cases involving child custody disputes marked the second most widely litigated issue area. As in the case of employment discrimination, antigay bias made it unlikely that gay and lesbian parents would prevail in court, except this time the stakes were much higher. Indeed, when gay parents exited straight marriages with the intent of rebuilding their lives, they faced the immediate and real danger of losing custody of their children. In highly publicized cases, such as that of Mary Jo Risher, the legal prejudice against lesbian and gay parents exerted an impact far beyond the courtroom. Believing that their families would be torn apart by the uneven administration of justice, an untold number of gay and lesbian parents agreed to settle out of court (Rivers 2013). Consequently, the cases detailed in this section are illustrative of the legal treatment afforded to gay and lesbian parents, but they represent only a small fraction of people who feared legal intervention into their familial lives.

Consistent with the legal treatment afforded to gay people in employment discrimination cases, the standard most likely to be applied in child custody cases was routinely manipulated by judges to deprive gay people of their parental rights. Depending on the state in which litigation occurred, the best interests of the child standard required judges to consider the wishes of the parents; the child’s relationship with his or her parents; the physical, emotional and educational needs of the child; each parent’s capacity to meet those needs; and a variety of other factors.\(^ {22} \)

Although this standard permitted a holistic assessment of each child’s situation, admitting to a homosexual relationship was generally sufficient for a judge to limit or revoke custody. In *Roberts v. Roberts* (1985), for example, the Court of Appeals of Ohio ruled that simple knowledge of a parent’s homosexuality harmed a child, referring to homosexuality as “errant sexual behavior which threatens the social fabric.” As another example, a trial court judge in

\(^ {22} \) For an excellent summary of these early cases see Hunter and Polikoff 1975-1976.
Washington ruled that granting custody to a lesbian mother was not in the best interest of her children because the father might refuse to visit them (Koop v. Koop 1972). Still others reasoned that children being raised in same-sex households might be “teased by their peers” (Towend v. Towend 1975). In addition to privileging heteronormative family structures, judges in these cases routinely expressed moral disapproval of gay lifestyles.

If the outcome in these cases wasn’t bad enough, the court proceedings from which they emerged were embarrassing, intrusive and painful for gay parents. In one of the earliest known cases involving a lesbian mother, Ellen Nadler was forced to reveal the names of her former partners (Nadler v. Superior Court 1967). Citing legal proscriptions against sodomy, Assistant District Attorney Ernest F. Winters indicated that these women “may be felons” and that “continued association with felons has been grounds to deny custody to a parent” (quoted in Rivers 2013: 63). Trial transcripts indicate that judges also subjected gay parents to questioning regarding the intimate details of their sex lives. In Hall v. Hall (1974), for example, the judge demanded to know how “the sex act between lesbians was accomplished,” and whether “oral copulation” was considered “normal” (quoted in Rivers 2013: 69). “In some of the cases, the judges are downright voyeuristic in the questions they ask,” explained an activist. “They really do say, ‘Whaddaya do in bed?’” (Avicolli 1976).

Even when gay parents were awarded custody of their children, they were often forced to choose between their children and their partners. For example, in Schuster v. Shuster (1974), Sandy Schuster was directed to stop living with her partner, Madeline Isaacson, in order to maintain custody of her children. Consistent with the judges’ decree, the two women moved into an apartment complex where they rented adjacent units (Ball 2012). Similarly, a judge directed Cam Mitchell to stop living with her partner to keep custody of her three children (Mitchell v.
Mitchell 1972). In fact, the only time Mitchell could see her partner was when her children were away at school or visiting their father. Still other women were forced to renounce their lesbianism in court. In 1973, the Supreme Court of North Carolina awarded custody to Susan Durham only after a psychiatrist testified that she “could have had a disorder in 1968 which was not present in 1971,” and that Durham no longer exhibited “abnormal tendencies.” After signing an affidavit repudiating her lesbianism, the judge awarded Durham custody under the condition that a social service agency would visit her home every six months to investigate “the children’s condition, surroundings and progress.”

Judges also ordered gay parents to stop advocating on behalf of gay rights. In 1974, the Superior Court of New Jersey restricted the visitation rights of Bruce Voeller, co-director of the National Gay Task Force, to every other Sunday and on holidays (In re J.S. & C.). In making this determination, the Court cited testimony from Dr. Richard Gardiner that Voeller’s “involvement in the gay movement had become an obsessive preoccupation.” Additionally, the judge said that Voeller “involved the children in his attempts to further homosexuality” by taking them to gay pride events and allowing them to draw pictures of people holding signs saying “Gay is proud,” “Join us!!” and “We want equal rights!!” Drawing on the stereotype of homosexual recruitment, the judge concluded: “These pictures present themes which would not occur to children of this age without prodding and indoctrination by an adult.” Although Dr. Gardiner testified that “there was very little chance that exposure to a homosexual environment would alter the children’s sexual orientation,” and that Voeller’s children were “well adjusted,” the judge prohibited Voeller from being in the presence of his lover during visitation, from sleeping with any individual other than a lawful spouse, and from involving his children in “any homosexual related activities or publicity.”
Compounding the legal problems confronting gay parents was the absence of competent attorneys willing to represent them—a key component of the support structure for legal mobilization. According to gay activist attorney Cindy Rizzo, it was common for “small town domestic” attorneys who “didn’t know anything about gay stuff” to represent lesbian mothers (Author’s Interview with Cindy Rizzo). “It still happens today in a lot of cases,” she explained, “but it certainly happened a lot then. People would go to their family lawyer, or the town’s lawyer, and they would, you know, represent them but they didn’t know what they were doing.” In one instance, the attorney of a woman who was denied custody of her two-year-old son actually expressed approval for the Court’s decision. In an interview with Gay Community News, Tulsa attorney Phil Frazier said the outcome in Potter v. Potter (1982) was “not unfair” to lesbian mothers because “they knew full well what the circumstances were when they chose that lifestyle,” (Clark 1982). Frazier’s depiction of homosexuality as a choice suggests that even the people who agreed to represent them were biased against gay people.

Recognizing the perils of litigation, lesbian mothers deployed low-visibility tactics with the intent of avoiding litigation. In a 1975 law review article, Nan Hunter and Nancy Polikoff described the particulars of this strategy. Beginning “with the premise that a judge is often likely to be predisposed against a lesbian mother,” Hunter and Polikoff reasoned that an attorney could “best serve his or her client by making every attempt to keep a case from going to trial” (715). One way to accomplish this goal was to demonstrate that the father himself was “less than a perfect custodian.” To this end, the article stated: “Investigation might well uncover relevant aspects of the father’s behavior which could prove embarrassing to him if revealed in court. Men who fear loss of their jobs or of their prestige may be more willing to stay out of court altogether than to face public exposure.” A second option for lesbian mothers was to trade alimony and
even child support for custody. “Although such a concession could create serious financial problems for women who are not economically self-sufficient, they should explore every alternative source of support before rejecting this route.” Finally, during the pre-litigation stage, the mother’s attorney could “emphasize to opposing counsel those cases in which lesbian mothers have prevailed. Success in . . . securing a reasonable settlement . . . may be predicated on the other party’s understanding that his fight for custody will be difficult, lengthy and, therefore, expensive.”

Despite their best efforts to avoid a trial, gay parents frequently found themselves in court. Beginning in the 1970s, a network of lesbian mother activist organizations formed in response to their increased visibility. However, the main purpose of these groups was not to pursue test-case litigation, but rather to provide emotional and financial support to lesbian mothers.23 For example, the Seattle-based Lesbian Mothers’ National Defense Fund helped defray the cost of litigation by organizing and publicizing local fundraising events. In addition to paying legal fees, the group kept a rolodex with the names of sympathetic lawyers and expert witnesses willing testify on behalf of lesbian mothers. In New York, the lesbian activist organization Dykes and Tykes sponsored a six-week training program in partnership with the National Lawyers Guild to help train members in paralegal and peer counseling. One result of the workshop was a pamphlet explaining how to choose a lawyer, how to navigate custody court procedures, and how to attract support from the local gay and lesbian community. In Philadelphia, the group Custody Action for Lesbian Mothers (CALM) provided free legal representation to gay parents by referring them to pro bono attorneys, but only when these women could not keep their cases from going to trial. According to co-founder Mikki Weinstein,

23 This discussion of lesbian mother activist organizations draws heavily from Rivers’ book Radical Relations: Lesbian Mothers, Gay Fathers & Their Children in the United States since World War II. See chapter four specifically.
CALM’s main objective was “not political.” CALM’s main objective “was to help the mother get her children or keep her children or have adequate visitation,” (quoted in Avicolli 1976).

Although gay and lesbian families enjoyed few legal victories in the time leading up to the Supreme Court’s decision in *Bowers v. Hardwick* (1986), it’s worth pointing out that these cases laid the groundwork for the emphasis on parental and domestic rights which continues to dominate the contemporary gay and lesbian rights movement. Long before any organized legal movement sought to decriminalize sodomy, lesbian mothers were fighting for custody of their children in court. However, litigation was deployed by these women mainly as a last resort to protect their families, not as a social movement strategy to achieve civil rights.

**Summary**

Writing about the Civil Rights Movement, sociologist Francesca Polletta (2000: 385) once stated that “The machinery of litigation, the interviews, the affidavits, the court appearances, all were opportunities for black people to tell their stories of oppression endured, threats withstood, fear surmounted.” While such a statement may ring true for some litigants, the flip side is that legal proceedings can be as demoralizing as they are encouraging, intrusive as they are comforting and disappointing as they are rewarding. Capitalizing on legal victories—and even increased mobilization efforts as a result of legal defeats—obscures the reasons why gay rights activists avoided courts in the first place. The analysis in this chapter suggests that negative interactions with the legal system, coupled with inadequate legal resources, caused movement organizers to look more favorably upon the elected branches of government than they did the alleged protectors of minority rights. It was not until the emergence of a concerted backlash that the need for litigation became increasingly appealing, a point I take up in the next chapter.
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Source: National Gay Task Force. 1985. “Gay Rights Protection In the United States and Canada.” Table reprinted in Eskridge (1997). A listing with blanks across all columns indicates that detailed information was not available at last posting.
Figure 2.1:
Published Court Decisions Involving Gay Rights in Federal and State Court: 1969-1986

Source: Author’s analysis of data on the total number of gay rights cases decided by state and federal courts: January 1, 1969 – December 31, 1986.
Table 2.2
The Three Most Widely Litigated Issue Areas: 1969-1986

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<th>Anti-Gay Rights Decision</th>
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<td>31 (38%)</td>
<td>50 (62%)</td>
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<td>Employment</td>
<td>23 (34%)</td>
<td>45 (66%)</td>
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<td>Public Accommodations</td>
<td>5 (71%)</td>
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<td>Housing</td>
<td>3 (50%)</td>
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<tr>
<td>Child Custody &amp; Visitation</td>
<td>20 (35%)</td>
<td>37 (65%)</td>
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<tr>
<td>Crimes of Moral Turpitude</td>
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<tr>
<td>Sodomy</td>
<td>9 (50%)</td>
<td>9 (50%)</td>
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<tr>
<td>Solicitation</td>
<td>7 (50%)</td>
<td>7 (50%)</td>
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<tr>
<td>Lewdness &amp; Indecency</td>
<td>3 (21%)</td>
<td>11 (79%)</td>
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</table>

Source: Author’s analysis of data on the total number of gay rights cases decided by state and federal courts: January 1, 1968 – December 31, 1986.
CHAPTER 3

WHERE THERE’S A WILL, THERE’S A WAY (OR AN OPENING):

POLITICAL OPPORTUNITY IN THE BOSTON MOVEMENT

“Maybe we are just too optimistic. You can’t imagine the down it would be to find out.”

-GCN Editorial, August 25th, 1973

On November 7, 1989 the Massachusetts General Court approved a gay civil rights bill, extending legal protections to gay people in the areas of employment, housing, credit and public accommodations. Its passage marked the end of a seventeen-year struggle to achieve formal equality in Massachusetts, which was second only to the State of Wisconsin in enacting gay rights legislation. Although Boston is routinely overlooked as a hotbed of gay rights activism, local college students, journalists, politicians and lawyers played a crucial role in the development of mainstream political and legal strategies in Massachusetts. According to former congressman Barney Frank, “The Boston movement was intensely political from the beginning, and intelligently so. These were not people who thought the most important thing to do was have a demonstration, though marches were part of it. These were people who got involved . . . [and] who understood the value—I believe correctly—of insider connections as well as political organizing,” (quoted in Neyfakh 2013). Consequently, studying the Boston movement can enhance our understanding of the contemporary gay and lesbian rights movement generally, as well as the decision to pursue civil rights strategies specifically.

What factors influenced this decision and how were civil rights strategies framed by social movement actors? In answering these two questions, this chapter examines the gay and lesbian rights movement in Boston beginning in 1973, when the first anti-discrimination bill was introduced in the Massachusetts General Court, and ending in 1977, when Anita Bryant
spearheaded a campaign to rescind similar legislation in Dade County, Florida. As in other cities, the 1970s drive for civil rights was dependent on the formation of a cohesive gay and lesbian community in the 1950s and 1960s. Indeed, two of the groups that formed in the immediate aftermath of Stonewall pressured elected officials to introduce gay rights legislation on Beacon Hill. Although national political majorities remained intolerant of gay people, several localized factors caused activists to look favorably upon the elected branches of government including access to public officials and the nature of the opposition. However, the frames used to target the institutions most closely associated with rights provision normalized and desexualized the LGBT experience. By emphasizing the values of responsibility, respectability and reform, these frames marginalized certain subsections of the gay and lesbian community and exacerbated tensions within the social movement constituency.

**Building a Community**

Long before a gay rights bill was introduced in the Massachusetts General Court, Boston gave rise to a well-established network of gay bars, baths, theaters and cruising strips. Jacques, arguably the oldest gay bar in Boston, was founded in 1938 by the notorious club owner Henry Vara. Although Jacques started out as a lunchroom serving beer and wine in the Bay Village, it transitioned into a venue for drag performers in the mid-1940s (Blanding 2003). Upon his death in 1960, Vara ceded the bar to his two sons, Henry Jr. and younger brother Carmine. Together they owned and operated several gay bars throughout the city including The Other Side, Cha Cha Palace and the Punch Bowl. Founded in 1965, The Other Side was notable as the first discotheque to allow same-sex dancing in Boston. Located just across the street from Jacques, the area surrounding the two bars was described by a former patron as a “gay heaven,” as a place where gay people could go when they “could still be fired from their jobs, forced to move,
arrested for no reason, committed to a mental hospital, and even lobotomized” (Busnach 2011). Across town, in the Financial District, was The Saints. Owned and operated by a lesbian collective, The Saints created a safe yet public space for women to dance, meet new friends and establish sexual contacts. Equipped with pinball machines, a pool table and a dance floor, local activist Amy Hoffman remembered The Saints as a “lesbian pleasure palace,” and “the best lesbian bar anywhere, ever” (Hoffman 2007: 46). Indeed, lesbians came from all over the city to socialize at The Saints and to escape the reality of straight repression. “That was the magic of it,” Hoffman later recalled. “At The Saints we were all intriguing, we were all desirable, we were all stars, even though in the rest of the world we were dorks and loners—queers, in fact.”

Despite their significance to gay social life, several groups formed as alternatives to the bar scene. In 1957, Prescott Townsend formed a local chapter of the Mattachine Society. Like its counterparts in Los Angeles and New York, Boston Mattachine organized consciousness-raising sessions, sponsored lectures on homosexuality and published a newsletter (Shand-Tucci 2003; Shively 2002). Inspired by the Stonewall Riots, several new groups formed in late 1969. Among them was the Student Homophile League, founded by MIT student Stan Tillotson; the Homophile Union of Boston, which grew out of Boston Mattachine; and a local chapter of the Daughters of Bilitis (History Project n.d.). Despite differences in organizational size and membership, participants in these groups engaged in a wide range of social and political activities. HUB, for example, was described by co-founder Don Meuse as “a civil rights and service organization for homosexual women and men in the Greater Boston and New England area,” as well as “a liaison and educational agent to society as a whole” (Meuse 1973). In addition to lobbying lawmakers and making religious, medical and legal referrals, HUB organized bi-weekly meetings, hosted informal rap groups (similar to consciousness-raising
sessions) and sponsored social outings. Similarly, DOB was involved in “public education, law reform, speaking engagements and in educating the public in general about gay life and oppression.” In addition, the group sponsored softball games, potluck dinners and gay dances (Focus On: Sherri Barden 1973).

Aside from gay social and political groups, communication networks were also established. In 1971, “the most radical journal of sexual liberation in America” was founded in Boston (Clendinen and Nagourney 1999: 125). Known for its provocative writing on gay male sexuality, Fag Rag was denounced on the floor of the United States Congress as “the most loathsome publication in the English language” (Hoffman 2007: 4-5). Two years later, in June 1973, a general interest newspaper was established for the purpose of improving “communication between the various gay organizations and the gay individual” (Introduction 1973). On the front page of its first issue, Gay Community News pledged to “fill the need for quick current information” by listing “all of the events and information of interest to the gay community in one publication” (emphasis in the original). Although initially styled as a two-page, mimeographed calendar of events, the paper quickly developed into a sixteen-page, typeset community newspaper. At its peak, the publication boasted subscribers in all fifty states and nearly twelve foreign countries (Hoffman 2007: xiv).

In addition to print media, three local radio stations featured gay programming. Beginning in 1972, Boston University’s student-run FM station, WBUR, aired Gay Way Radio every Thursday night at nine o’clock (Gay Radio 1974). Hosted by local activists Elaine Noble and Anne Maguire, listeners called the show to discuss a variety of topics ranging from sodomy reform, gay rights legislation and lesbian mother custody battles to antigay violence and entrapment. Beginning in 1973, rock radio station WBCN-FM aired Lavender Hour. Hosted by
“Littlejohn” Scagliotti, *Lavender Hour* focused on “entertainment” and “the cultural side of gay liberation,” rather than “the movement” (Gay Radio 1974). Finally, WCAS broadcast the show *Closet Space* beginning in 1974. Hosted by media activist Loretta Lotman, the show featured promotional announcements for gay organizations, interviews with gay rights activists and a five-minute slot for news. In addition to facilitating communication within and across the gay community, these shows helped foster feelings of connectedness. As one listener remarked to Scagliotti, “Being locked behind my closet door after telling my parents I was gay, I find your show a godsend. I find myself every month glued to the radio in my room by myself, waiting with anticipation words of hope and many times of joy. It never fails to lift my spirits and renew my strength,” (Gay Radio 1974).

Medically oriented institutions were established in Boston as well. Beginning in 1971, the Homophile Community Health Services Center provided therapy and counseling services to depressed and suicidal patients in the basement of the Arlington Street Church. In just five short months, the HCHS reported seeing over 220 clients and answering over 1,200 telephone calls (Focus On: HCHS 1973). Two years later, HCHS announced the opening of the Institute of Homophile Studies at its new office on Boylston Street. In a features article written for Gay Community News, representatives from the Institute explained its purpose was to offer courses for “educating straight people, particularly professionals,” and to “enable gay people to explore their own history” (An Experiment in Education 1973). Adding to this array of public health services was the Fenway Community Health Center. Founded in 1971 by a group of politically active students and community residents, Fenway Health started out as a one-day-a-week drop-in center in the basement of a building owned by the Christian Science Church (Martorelli 2012). Like HCHS, the Fenway Community Health Center tailored its counseling and education
services to meet the needs of a distinctly gay clientele, such as providing anonymous STD screenings, education and treatment. Aside from providing an alternative to public VD clinics, Fenway Health eventually gave rise to Boston’s AIDS Action Committee.

In the absence of a gay and lesbian community center, local churches provided the free space needed to organize a movement. Located in Boston’s Back Bay neighborhood, the Arlington Street Church was a Unitarian Universalist church where groups including HUB, DOB, the Student Homophile League and the Boston Gay Men’s Chorus frequently held meetings. Similarly, the Charles Street Meetinghouse functioned as a small, makeshift community center in Boston’s Beacon Hill neighborhood. Between 1973 and 1974, the church operated a coffeehouse where gay leaders met to discuss issues such as police entrapment, intra-organizational conflict, and the need for an emergency response system within the gay community (Active Gays Brunch 1974; Entrapment Discussed 1974; Goldfine 1974). Still others frequented the coffeehouse more regularly to pick up a copy of *Gay Community News*, or to meet informally with friends. Free from the direct supervision of dominant groups, these churches provided safe spaces for gay people to come together, plan social movement activities, and socialize. Moreover, their inclusion of gay people challenged dominant society’s depiction of homosexuality as immoral, and served as an alternative to the bar scene.

Two final points are worth mentioning about Boston. First, more than one person I interviewed said Boston was more like a small town than a big city (Author’s Interview with Chris Westphal; Author’s Interview with Richard Burns). Consequently, everybody knew everybody in the activist community and many people served within and across the same organizations. For example, writers at *Gay Community News* were also members of the Homophile Union of Boston, the local Daughters of Bilitis, the Boston Lesbian and Gay Political
Alliance and Gay and Lesbian Advocates and Defenders. Second, Boston also had a reputation for being less separatist and more accepting of women than either New York or San Francisco. Some activists speculated that this was because Boston was smaller than New York. According to Amy Hoffman, fewer people prevented the proliferation of groups, in turn, forcing gay men and lesbians to work together (Author’s Interview with Stone and Hoffman 2014). An alternative explanation is that personal relationships forged in gay bars and other community institutions mitigated inter and intra-organizational conflict. Whatever the reason, by 1972, Boston’s gay and lesbian community was considered “more advanced than any other in the country,” (Clendinen and Nagourney 1999: 125).

Localized Opportunity and the Emergence of Legislative and Electoral Strategies

The first gay rights bill was introduced in the Massachusetts General Court in January 1973, less than one year after local officials in Ann Arbor and East Lansing Michigan voted to prohibit discrimination based on sexual orientation in employment, housing and public accommodations. In Boston, the impetus to file gay rights legislation emanated from the Boston DOB and HUB. Both groups formed subsequent to Stonewall in the summer of 1969, and both pursued a wide range of social and political activities. Shortly before the 1972 general election, members circulated a joint questionnaire asking every candidate whether they would sponsor a gay rights bill. Believing that more senior officials would ultimately take the lead on the issue, Barney Frank (both a political novice and closeted candidate) answered yes to their survey. “I was the only one who said yes,” he later told the Washington Blade. “So that’s how I became the prime sponsor of the legislation. I was the only one,” (quoted in Chibbaro 2011). Despite his contemporary reputation as a progressive reformer, Frank started out as a rather reluctant leader of the gay and lesbian rights movement. Knowing that he could not be openly gay and still get
elected, Frank made the conscious decision to support gay rights without disclosing his sexual orientation. “Not to do that would be totally dishonorable,” he later recalled (quoted in Zengerle 2012). In January 1973, just two months after being elected to his first term in office, Frank filed one of the first pieces of gay rights legislation in Massachusetts.

From the time gay rights legislation was introduced in 1973, to the time of its passage in 1989, over fifty different bills aimed at proscribing discrimination against gay men and lesbians were introduced in the state legislature (Cicchino et al. 1991). Generally, these bills sought to prohibit discrimination on the basis of sexual orientation in employment, public accommodations and insurance. Separate legislation called for the repeal of Massachusetts’ antiquated sex laws including those proscribing open and gross lewdness, fornication, crimes against nature, and unnatural acts. While the former would create legal remedies for people discriminated against because of their sexual orientation, the latter sought to repeal laws used to single out gay men and lesbians for harassment. To help guide these bills through the legislature, an ad hoc lobbying committee formed in 1973 under the initial leadership of HUB President Bob Dow and DOB member Laura Robin. As predecessor to the Massachusetts Gay and Lesbian Political Caucus, members of the group Gay Legislation had virtually no experience lobbying or legislating in the State House. What emerged from their self-taught efforts was a three-prong strategy focused on documenting discriminatory harm, supporting gay-friendly politicians and cultivating ties with political elites.

Upon closer examination of the strategies deployed in Boston, it becomes apparent that activists’ choices were influenced by localized factors, including the nature of the opposition. Prior to the emergence of Anita Bryant’s Save Our Children campaign, the opposition in Boston was limited to routine opposition from lawmakers, as opposed to organized opposition outside
the polity. For example, the need to document discriminatory harm was born of a tendency among lawmakers to feign ignorance of the problem. In March 1974, members of the Joint Committee of the Judiciary argued that the state’s prohibition on sodomy should be upheld not because it was effective in deterring criminal behavior, but because it was rarely enforced (Gay’s Appear Before Committee 1974). Not surprisingly, such arguments reflected broader societal understandings of gay people. Indeed, sociologist Ernest Van den Haag (1976) dismissed the need for gay rights legislation, indicating in a review of The Homosexual Matrix that there was “no over-all discrimination against homosexuals,” that they were “accepted in most industries . . . even when flaunting their sexual preferences.” Published by Harper’s Weekly and reprinted by Gay Community News, Van den Haag went on to say that the issue was “not protection of homosexual individuals against unwarranted loss, injury, humiliation, or inconvenience, but the attempt to force society to grant approval to all preferences or forms of behavior, and thus to deny it the right to defend and protect its traditions and institutions—sexual, moral, aesthetic, or social.”

In response to the outright denial of discrimination, members of the ad hoc Legislation Committee set out to document its occurrence. In January 1974, the group published a call in Gay Community News, asking people to come forward if they had been “denied housing, commercial rental space, a mortgage, insurance, credit, good medical care, the right to visit a lover in the hospital, bonding, fair treatment in court, visitation rights to our children or custody of them, union membership, etc. or if you have been arrested on a sex crime charge or open and gross lewdness,” (Have You Been Discriminated Against 1974). Once collected, these stories were delivered to the appropriate legislative committees as evidence that discrimination did exist, and that a gay civil rights bill was needed. Supporting these efforts was a small group of
activists who testified before the legislature in person. For example, members of the House Judiciary Committee listened as HUB President Bob Dow recounted the time he was denied a drivers license because he was dishonorably discharged from the Navy. Still others reported discrimination by the Checker Cab Company, the Massachusetts Mental Health Center, the J.J. Nissen Baking Corporation, and other local businesses (State Hearings on Gay Rights Bill 1974).

A second strategy used by opponents to undercut support for gay rights legislation was predicated on special rights discourse. In 1975, State Representative William A. Connell wrote to the Massachusetts Senate that a bill prohibiting discrimination in public employment was unnecessary because existing civil service laws already prohibited “discrimination against anyone for any reason” (Brill 1975b). In this way, Connell used special rights discourse to convey the notion that gay people would enjoy special treatment if the legislation were to pass. Drawing attention to activists’ incentives, he continued: “The motivation of those who want this needless, special legislation comes from a desire to give the impression to the citizens of the Commonwealth that the homosexual/lesbian life-style has the approval of the Massachusetts legislature.” Two years later, Senator David Locke berated his colleagues in the upper chamber for “catering to a small, militant, and vocal group of avowed homosexuals” after the State Senate voted favorably on a bill to prohibit discrimination in public employment. “This isn’t civil rights at all,” he exclaimed. “This is putting the stamp of approval on something that has been immoral and unnatural since the dawn of man,” (Senate Stands Firm 1977). In addition to characterizing gay people as unnatural, the Senator’s antigay rhetoric rejected sexual orientation as a legitimate civil rights category.

Not surprisingly, gay rights supporters responded to these arguments by downplaying the symbolic significance of reform. For example, when confronted with the argument that changing
laws would signify state support for homosexuality, Representative Barney Frank described a bill barring discrimination in employment as protecting “nothing but the right to work” (quoted in Brill 1977a). Drawing attention to the economic (as opposed to social and cultural) impact of the legislation, he asked fellow legislators whether they would prefer to see more people on the welfare rolls or more people working (Anatomy of Defeat 1974). Similarly, Representative Saundra Graham indicated that if state legislators were unwilling to provide job protection for gay people, then they should be willing to support them with welfare benefits (Brill 1977b).

Although scholars have criticized political insiders for minimizing the symbolic effects of legislation (Cicchin et al. 1991), this rhetoric—which sought to reframe employment nondiscrimination laws as effective cost-saving measures—was necessary to neutralize the impact of special rights discourse.

Turning to the second prong of the civil rights strategy in Boston, activists sought to build electoral support for gay and gay-friendly politicians. Although Barney Frank’s election provided the initial opportunity to introduce gay rights legislation, subsequent interactions with elected officials vindicated this choice of strategies. For example, gubernatorial candidate Michael Dukakis pledged to support gay rights legislation while campaigning in 1973; Secretary of State Paul Guzzi obtained signatures to secure his nomination from party delegates by canvassing the Gay Pride Parade in 1974; And Representative Elaine Noble became the first openly gay candidate ever to be elected to a state legislature. Immediately following the 1974 general election, GCN’s editorial board surmised, “that starting this year, supporting gay rights in politics is not going to be half the liability some politicians though it would be,” (Editorial: The Election 1974).
In addition to positive interactions with elites, Massachusetts’ liberal political reputation made it easier to argue that mainstream political institutions were open to change. Referring to Massachusetts as “The One and Only,” political commentator David Brill (1974a) summed up the 1974 general election this way: “It couldn’t have happened anywhere else in the county, and wouldn’t even have happened here four years ago: A gay member of the state legislature, a Secretary of State whose most loyal supporters were gay activists, and two candidates for Governor who actually courted gay voters.” Drawing attention to the success of almost every pro-gay or gay-supported candidate, Brill concluded, “The fear that many state legislators had of losing re-election if they supported gay rights legislation was just unfounded.”

Outside the State house, the absence of organized opposition also facilitated the use of mainstream political strategies. In May 1976, Amherst became the first town in Massachusetts to pass an ordinance barring discrimination on the basis of sexual orientation. Although debated in the presence of nearly two hundred and forty residents, not a single individual or group spoke out against the measure (Amherst Votes Gays Legal Protection 1976). Nor did opposition materialize at the state level. To the contrary, the gay civil rights bill enjoyed consistent (if not tepid) support from leading political figures including Governor Michael S. Dukakis, State Secretary of Education Paul Parks and Boston Mayor Kevin White. At a legislative hearing in February 1977, all three men testified in support of gay rights legislation without facing any concerted opposition (Brill 1977a). Finally, both political parties refrained from taking a definitive stance on the issue, which suggests that partisan control of the legislature did not signify any meaningful degree of opportunity or constraint.24 In the absence of pressure from

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24 This changed in 1980 when the Democratic Party Platform demanded increased support for federal programs that were “more sensitive to the needs of the family, in all its diverse forms,” as well as an end to discrimination “based on race, color, religion, national origin, language, age, sex or sexual orientation.” In contrast, Republicans omitted
party leaders, it was generally assumed that elected officials on both sides of the aisle could be persuaded to vote favorably on the issue.

Finally, with respect to the third prong of the strategy in Boston, activists focused on cultivating personal ties with political elites. The rationale supporting this approach was twofold. First behind the scenes lobbying was considered necessary until more politicians were willing to speak publicly on the issue of gay rights. According to Boston City Council member Larry DiCara, who helped arrange meetings between gay leaders and the local police department, private meetings generally did not “make headlines . . . [but] a less-publicized means of reform was often the most effective” (quoted in Brill 1975a). Second, pressure politics helped to offset the gay community’s numerical disadvantage in the political arena. Drawing attention to the “empirical reality” that gay men and lesbians constituted only a small subsection of the electorate, one observer noted the difficulty in persuading straight candidates to support gay rights issues. “Gayness and gay rights stances in candidates are really minor considerations beside the necessity to master the substantive issues of broader concern to ordinary folk, assuming that the end of electoral politics is to get elected . . . The other principal form of democratic politics, that of the pressure group, appears more promising, at least until we take over the world,” (A. Nolder Gay 1974a).

Examples of pressure politics abound. In one widely publicized instance, Elaine Noble capitalized on her status as a state legislature to facilitate change at the local level. During the 1975 mayoral election, Noble agreed to endorse Boston Mayor Kevin White in exchange for a campaign promise to sign an executive order prohibiting discrimination against gay people (Mixner and Bailey 2000: chapter 2). In May 1976, the Mayor issued a “Statement of Equal

any reference to sexual orientation while reaffirming “the traditional role and values of the family in society.” Both platforms are available online at http://www.presidency.ucsb.edu/platforms.php.
Opportunity,” prohibiting all municipal agencies from discriminating “on the grounds of race, creed, age, sex, sexual preference, ancestry or national origin in regard to any matter pertaining to employment.” (Boston Mayor Issues Executive Order 1976). Three years later, in February 1979, Mayor White also appointed the city’s first liaison with the gay community. Reflecting on the significance of this event nearly five years later, one observer concluded that “Any substantive gains we have made or will make in the future will come as a result of our ability to influence the political process . . . The enthusiastic response that has greeted us . . . is further evidence of the political maturing of the gay and lesbian community in Boston” (Marcus 1983).

Despite some initial gains, localized opportunity structures did not translate immediately into success. A brief survey of the bill barring discrimination in public accommodations helps to illustrate why. Between 1973 and 1976, the bill received a favorable report from the Senate Commerce and Labor Committee. Favorable treatment was due in no small part to the support of Committee Chairman Allan R. McKinnon (D-Weymouth). In April 1977, however, McKinnon was promoted to Majority Whip after Senate Majority Leader Joseph DiCarlo was expelled for extortion. Unfortunately, McKinnon’s replacement as Committee Chairman, Senator Robert D. Wetmore (D-Barre), declined to give the bill a favorable report, despite voting favorably on gay rights legislation in the past. The bill eventually died in the House Ways and Means Committee where it was sent for reconsideration. Although one might speculate as to why Wetmore declined to give the bill a favorable hearing, the more significant point is that a simple and yet unexpected change in committee leadership was sufficient to spell disaster for a gay rights bill. Even though

25 The liaison position was established following a meeting with local officials to discuss a massive string of arrests at the Boston Public Library, as described in chapter 4. Those present at the meeting on May 2, 1978 included Stephen Dunleavy, special assistant to Mayor Kevin White; Robert Wasserman, assistant to Police Commissioner Joseph M. Jordan; Representative Barney Frank; Reverend Edward Houghen of the Metropolitan Community Church; and local attorneys John Ward and Richard Rubino (City Officials Discuss Arrests at Library 1978). Boston Mayor Kevin White formally established the position in February 1979.
activists could take the necessary steps to turn strategy into action, they could not control for the messiness that was politics as usual.

In addition to political contingencies, gay rights opponents exploited the legislative process in an effort to obstruct enactment of the gay rights bill. Indeed, sending a bill to the House or Senate Rules Committee was a convenient if not popular way to dispose of gay rights legislation without having to vote on it. Another dilatory tactic was to propose amendments that rendered certain bills ineffective. In 1975, for example, Representative Charles W. Long of Dover, Massachusetts successfully introduced an amendment to delete whole sections of a bill prohibiting discrimination in public employment. As amended, the bill served only to define sexual orientation as “the character of being heterosexual, bisexual, or homosexual, that is, of being inclined towards an emotional and/or physical attachment to a person of the opposite sex and/or of the same sex, whether or not such attachment occurs,” (House Bill No. 2849: 1975). Ironically, this meaningless piece of legislation passed in the House (Brill 1975d), only to be defeated by the Senate (Mass. Bill Survives First Senate Test 1976).

“An Act Repealing Prohibitions Against Certain Sexual Acts” did not fare much better in the legislature. Introduced every year alongside the antidiscrimination measure, the bill to repeal sex laws outright attracted fewer co-sponsors and rarely if ever made it out of committee. However, gay rights supporters remained optimistic in their assessment of the legislation. For example, after New Hampshire enacted the model penal code in 1975, Gay Community News acknowledged the failure to enact sodomy reform in Massachusetts, but questioned the utility of a general criminal code revision. According to the editorial, the bill to repeal sex laws was unsuccessful on Beacon Hill, but lobbying on behalf of gay rights legislation aimed to “raise consciousness,” “affect parochial attitudes” and “force people to change,” (New Hampshire
Dilemmas 1976). By comparison, the model penal code, which placed sodomy reform within the broader context of criminal law reform, silenced gay voices, decreased gay visibility, and left dominant cultural values intact. Drawing attention to the educational value of lobbying, the editorial asked: “Is it worth changing a law if we have to become invisible to do it?”

Gay rights leader Frank Kameny believed that it was. In a direct response to the editorial, the Mattachine D.C. founder admonished *Gay Community News* for jeopardizing reform by encouraging highly publicized tactics. “Laws are lasting,” he explained. “But publicity attendant upon their enactment—like all publicity—is transient. Five or ten years from now, both the public furor in California and the total silence in New Hampshire (and elsewhere) will have vanished . . . . But the sodomy law repeal will still be there.” Whether “accompanied by massive publicity,” “intensive gay-related legislative debate,” or only “minor publicity,” Kameny urged gay rights supporters to select strategies based on local political conditions. “One uses the methods which will get the thing done, and those methods vary enormously from one jurisdiction to another and from one set of circumstances to another,” he explained. Although Kameny disparaged the editorial for promoting public education and consciousness-raising at the expense of formal policy change, an alternative interpretation does present itself, one that is consistent with the argument that activists tend to interpret political space in ways that emphasize opportunity over constraint. Indeed, the editorial’s main purpose may not have been to encourage highly publicized tactics that delayed reform, but rather to mobilize supporters and maintain efficacy in the absence reform. As Meyer and Minkoff have observed, “activists are by disposition unduly optimistic about opportunities, and do not necessarily calculate with any rigor the likely prospects for successfully mobilizing or generating policy reform; they just keep trying and sometimes succeed in engaging a broader public,” (2004, 1464).
Although an open moment for change existed at the state and local level, there was significant disagreement over the appropriate response. These disagreements turned on how activists should present themselves to the public and whether they should pursue institutional or extra-institutional tactics. Turning now to the discursive processes underlying mobilization, I argue that opportunity was translated into action through the development of three collective action frames. The first, a motivational frame, relied on notions of individual responsibility and collective obligation to mobilize supporters. The second, a prognostic frame, drew on the values of respectability to encourage a more positive image of the social movement constituency. And the third, a prognostic frame which focused on reform, highlighted the importance of working inside the system to achieve piecemeal change. Although each of these frames helped legitimate and make institutional tactics possible, they also marginalized gay people who did not conform to dominant cultural norms. In the next section, I analyze the development and articulation of these frames in the pages of Gay Community News. As in the past, frame disputes arose between assimilationists, who supported working within the system to achieve civil rights, and liberationists, who sought more radical, cultural change in the form of sexual freedom. Although these two approaches are not mutually exclusive, competing visions of the good life resulted in sustained conflict over social movement goals and strategies.

Framing Civil Rights Strategies: Responsibility, Respectability and Reform

(Or, The Three Rs)

Responsibility

Beginning in the early 1970s, the responsibility frame was deployed by activists to nurture a sense of duty among potential supporters and to facilitate participation on its behalf. To this end,

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26 These frames emerged as the emphasis on gay liberation gave way to an emphasis on rights. As the objectives of the movement evolved, so too did the frames used to translate opportunity into action.
they engaged in a high level of claims-making about the value and effectiveness of political participation, including voting, letter writing, and giving money to gay political groups. For example, in one of the earliest editorials written by *Gay Community News*, the political arena was described as a place “where sheer numbers speak loudly” and where “politicians supporting gay rights need proof of support” (React!! 1973a). Written in response to the public endorsement of gay rights legislation by State Senator Robert Hall, the editorial urged every member of the gay and lesbian community to contact their representatives. “The cumulative effect of such support will eventually encourage other reluctant legislators to join the fight for gay rights,” the editorial explained. Two months later, in December 1973, Representative Barney Frank maintained during a public forum at the Charles Street Meetinghouse that “five genuine letters” of support could “change a legislator’s vote” on the issue (Brill 1973a). Although Frank may have downplayed the obstacles to reform, he promoted traditional forms of participation by capitalizing on their alleged effectiveness.27

Because increased participation was critical to the success of gay rights legislation, the responsibility frame was driven by the understanding and perception that committed activists made up only a small fraction of the gay and lesbian community in Boston. Following an appeal for volunteers in November 1974, *Gay Community News* found that the people most likely to respond were “already involved in so many other parts of the gay struggle. They want to do what they can, but simply have too little time or too little money to even continue their own specific activities,” (Editorial: Think Again 1974). Warning that people could not “continue when they

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27 This rhetorical strategy is consistent with research demonstrating a positive correlation between successful mobilization and the belief that collective action will result in social change. According to Snow et al. (1986:470), optimism about the outcome of a collective challenge enhances the probability of participation by promoting self-efficacy (see also Hirsch 1990, Oliver 1985; Klandermans 1984; Seeman 1975; Forward and Williams 1970). As such, this research links social psychological considerations, once abandoned by social movement scholars, with the resource mobilization perspective.
are spread too thin in activities,” the editorial relied on notions of individual responsibility and collective obligation to spur action: “Liberation is a struggle for all the people—it must also be of and by all the people . . . If you sit there and think [the work] is all going to get done anyway, and that someone else will do it if you don’t help—think again.”

The writers at *Gay Community News* were not alone in feeling like their efforts went unsupported by the broader community. In a letter to the editor with the caption “A Small Plea: A Little Reminder,” soon-to-be Gay Legislation Director Joe Martin complained “that so few gay people were performing any work for . . . the movement. Be it volunteering at the café of the Meetinghouse, working on the campaign of a pro-gay candidate for whichever political office, court-watching or in some other way helping a law firm with gay-related cases, aiding in the drafting of gay rights legislation, lending a hand to Elaine Noble’s ‘Gay Way’ radio program, channeling energy into the Daughter of Bilitis or the Homophile Union of Boston or this periodical or whatever, the work of a lot of gay people for the benefit of other gay people remains desperately needed.” In addition to stressing the various ways in which gay men and lesbians could get involved, Martin’s letter suggested that the benefits of individual participation would accrue to the whole community.

Although the responsibility frame was used to generate money, labor and votes in support of gay rights legislation, it had the unfortunate consequence of redirecting blame for legislative failure away from elected officials toward gay people themselves. For example, in an article entitled “Support for Legislation,” local writer Ann Wadsworth pointed an accusatory finger at the gay and lesbian community. “How many of you can claim to have been aware of what gay legislation came before the Massachusetts legislature last year?” she asked. “By what margin bills were defeated? How your senator or representative voted? Who your senator and
representative are?” (Wadsworth 1974, emphasis in the original). In addition to questioning people’s level of political knowledge, Wadsworth drew on notions of individual responsibility to induce action. “It is not enough that a number of committed gays who are way out of the closet continue to put themselves on the line time after time,” she explained. “Legislation is a job for all of us because the laws affect all of us—those who are out and fighting, those who are not out and possibly afraid, and those who perhaps don’t consider legislation a real issue because they have not had a firsthand hassle with the law.” Although Wadsworth sought to use the language of responsibility to compel action, she expanded the frame to include a focus on culpability. Emphasizing the failure to enact gay rights legislation at the state level, Wadsworth continued: “[T]he laws against us stand, and no one but ourselves can convince the legislators on Beacon Hill of the need for their immediate change, especially since many legislators have stated that they have not supported passage of legislation for homosexuals because they were not aware that any of their constituents were concerned about it.” In a moment of rhetorical flourish, she concluded, “Now whose fault is that?”

To many observers, the problem with Wadsworth’s question was that it seemed to accept legislators’ excuses for not supporting gay rights as genuine. For example, when Gay Way Radio host Elaine Noble asked Senator Chet Atkins why he voted against the gay rights bill, Atkins responded that none of his constituents cared about the legislation or else they would have contacted him about it (Atkins: Write 1973). Although this response was common among legislators, it was clearly a blame avoidance technique used to scapegoat the gay and lesbian community for legislative failure (Weaver 1986). In addition to electoral subterfuge, low turnout rates reinforced the notion that gay people (rather than elected officials) were curtailng the movement’s overall progress in the legislature. For example, in September 1974, political
columnist David Brill (1974b) lamented that fewer than three hundred people—or "about one-tenth of the number of persons you’d find in all the gay bars in Boston on a Friday night"—attended a legislative hearing on Beacon Hill. Noting the community’s dependence “on a relatively small number of persons to do its work on legislation,” Brill asked: “Is the Legislature to be blamed if no one is willing to come out to work for themselves?”

The accusatory tone manifest in these remarks signified activists’ growing frustration over the lack of participation in the movement. Although most gay people recognized the need for legislation, only a small fraction of the community actively supported its passage. Still, activists’ frustration often unraveled into stern rebuke, which seemed to guilt or shame (rather than inspire) people to action. For example, after gay rights supporter and Congresswoman Bella Abzug was defeated in a Senate primary race in September 1976, Gay Community News admonished gay people for not voting. “Gay people, clamoring for legislative changes on the state and national level, have clearly been less diligent in electoral participation than other minority groups, and it shows. This type of civic failure is irresponsible and inexcusable. . . In urging our readers to vote, GCN is asking everyone to keep in mind that if gay people do not participate in the electoral process, they have little right to criticize what it produces.”

Although activists sought to mobilize supporters using the language of responsibility, the internal attribution of blame spurred resentment within the gay and lesbian community. In a short-lived column entitled “Speaking for Myself,” GCN writer Allan Stewart pointed the proverbial finger back at activists. “I’m sick of ‘Gay Lib’ and gay activists on political ego trips,” he explained. “I’m tired of the hypocrisy, deceit, bitchiness, and outright exploitation of the gay community in the name of gay liberation. I’ve had it with self-appointed ‘spokespersons’ who dare to speak for me and the gay community without knowing for whom and for what they
are speaking, or what the gay community needs and wants.” According to Stewart, activists were “bright and articulate,” fully committed to “fighting for gay rights and gay liberation,” but they were also “lousy in bed,” which signified to Stewart their growing ambivalence towards sex. He continued:

You may say there is no correlation between a person’s activism and his sexual performance. Someone is sure to say it is not important; that placing so much emphasis on the sexual act is sexist and sick . . . [But] I won’t buy any of these weak excuses. There should be a decided, positive correlation between a person’s gay activism and his response to sex, like it or not! When you plow through all the rhetorical garbage, the main point (perhaps the only point, but certainly the basic one) of gay liberation and gay rights is sexual: the freedom to have sexual relationships with a person of the same sex. And without that, there is nothing, zero, zilch. Let’s quit and go home.

Although Stewart was participating in a broader critique of the movement’s sex-radicalism (or lack thereof), he went on to contest the notion of collective obligation: “Gay activists everywhere complain bitterly of lack of support from the gay community, but they don’t deserve the support they get. It is only because many of us are willing to overlook, for a time, their serious faults that they get any support at all! Or we believe in the end result, and are willing to support that, and let the loud-mouts take what credit they wish.”

Stewart was not alone in his criticism. According to David Jernigan (1988) “attacks” on gay leaders were “endemic” throughout the 1970s and 1980s. “Leaders have faced charges of immaturity, of puerile fascination solely with things sexual, of being untrustworthy, of not being really committed to gay people, of not being ‘really gay,’ or conversely, of being ‘too gay.’” These attacks were regularly directed at Elaine Noble who told The Advocate in January 1978 that she was in a “no-win situation with gay people. If I tried to be the best politician I could be, some gay people gave me flak because I wasn’t being gay enough or responding enough to the gay community,” she explained. “The gay people who were unhappy with me were only a handful of individuals, but a handful’s enough to make your life miserable,” (quoted in Gregory-
Lewis 1978). According to both Jernigan and Noble, the internalization of gay stereotypes stimulated personal attacks on gay leaders. However, the foregoing analysis suggests that these attacks were motivated by the language of responsibility as well, particularly when accompanied by the internal attribution of blame. Rather than nurture a sense of duty among movement sympathizers, the responsibility trope spurred condemnation of social movement actors and exacerbated tensions within the gay and lesbian community.

**Respectability**

A second frame deployed by activists to facilitate mainstream political organizing is best characterized as a politics of respectability.\(^\text{28}\) As previously detailed in chapter 2, the emphasis on respectability emerged in the 1950s when early homophile leaders sought to gain acceptance by challenging dominant cultural constructions of homosexuality as immoral, depraved and sinful. In an era when stereotypical images of gay people permeated films, newspaper articles and books, and when the mental illness model of homosexuality still reigned supreme, claims to respectability had potentially subversive implications. From the perspective of homophile leaders who espoused this view, the concept of respectability signified self-esteem, human dignity and pride. Consequently, it allowed gay people to challenge negative representations of homosexuality in straight society, and to participate in the cultural construction of their own sexual identities. But while adherence to respectability enabled the Mattachine Society and other groups to counter homophobic images and structures, it also led to condemnation of certain practices within the gay community. Perhaps the most pertinent example in this regard was the arrest of Dale Jennings, and the subsequent attempt to separate the issues of police entrapment and public sex (see chapter 2).

\(^{28}\) The following critique of respectability politics is informed by the work of Evelyn Brooks Higginbotham, which highlights the crucial role of Black women in turning African American churches into drivers of social change.
As was the case in the 1950s, reform efforts in the 1970s were predicated on a politics of respectability. Rooted in a desire to cultivate a positive public image of the social movement constituency, a politics of respectability emphasized the dominant values of political propriety, monogamy and love. As such, it sought to prevent unfair and biased portrayals of gay people from dominating the attitudes of straight people. However, it also drew exclusionary lines around the social movement constituency. Indeed, the enormous concern for straight people’s perceptions of the gay community “prompted scathing critiques against nonconformity to proper values,” (Higginbotham 1993: 194). In Boston, a politics of respectability found expression in communitywide debates over zaps, pride parades, modes of dress, and cruising. By examining gay and lesbian newspaper coverage of these debates, we can begin to understand how a politics of respectability, which helped make institutional tactics possible, also led to the marginalization of nonconforming gay people.

In Boston, one of the earliest debates surrounding a politics of respectability occurred in June 1973 when the group Gay Media Watch orchestrated a zap on the weekly television show *Mass Reaction*. Taking advantage of the show’s Q&A format, Charles Shiveley initiated the zap during a segment on boxing, asking why men couldn’t learn to love instead of hurt one another. Uncertain about how to respond, John Williams punctuated the moderator’s stunned silence by asking why the station afforded so little coverage to Pride Week; followed by Elaine Noble who demanded an answer to their questions. To this the moderator finally responded that gay people had not been ignored, and that they risked “scaring the horses” by “protesting too loudly” and making themselves “too public,” (Confrontation at WNAC 1973.)

Although the intended purpose of the zap was to improve mainstream media coverage of the gay community, some observers believed it had the opposite effect. For example, in a letter
to the editor, Jack Ligruck (1973) disparaged the zap as an ineffective and counterproductive strategy. “On at least two occasions in the course of this show, individuals of or for the Gay Community tried to interject their subject into the program, but they were shut off without benefit of a reply to their inquiries,” he explained. “Disruption, regardless of the form it takes, serves only to lose potential champions for our side and increases the massive number of people we are forced to convince.” In addition, Ligruck argued that the zap reinforced negative images of gay people. “Those who watched the program have a good idea which behavior made the better impression,” he explained. “True, the moderator helped in shaping the bad portrayal made on Mass Reaction, but we certainly presented him the opportunity.”

Published in July 1973, Ligruck’s letter was part of a larger debate about how activists should conduct themselves politically. Although some people emphasized the effectiveness, necessity and even therapeutic value of confrontation, others warned that disruption would only perpetuate harmful stereotypes about gay people. 29 This viewpoint was typified in a letter to the editor published by Gay Community News, immediately following the disruption of a panel discussion sponsored by the Association for Psychoanalytic Medicine. According to its author, “the proper way to discredit” the panelists, including psychiatrists Irving Bieber and Charles Socarides, would have been to “point out the highly arguable conclusions, assumptions, and logic which the doctors used to construct their hypothesis that ‘gay is sick,’” (Ritchie 1976). However, by “shouting down their opponents,” the protestors served only to “strengthen the popular idea that homosexuals are ruled by their glands rather than by their heads.” In addition to emphasizing the need for dispassionate, reasoned deliberation, the letter invoked gay stereotypes

29 GAA co-founder Arthur Bell emphasized the psychological dimension of confrontation when he likened zaps to “activism therapy.” In a personal account of the gay liberation movement in New York City, he wrote “Although zaps may not have the long-range therapeutic value of a series of sessions with an analyst, they do tend to release poison gases and clear the head” (1971: 70). His comments suggest that confrontational forms of protest can be therapeutic in allowing participants to express anger, frustration and even rage over social inequality and injustice.
to disparage the zap, concluding that “If homosexuals want straight society to see the weakness of the ‘gay is sick’ school of psychiatry and take the gay rights movement seriously, then they should discourage any further demonstrations like the one in New York City. After all, persons who try to scream down their critics are sick—and not to be respected.”

Aside from being “sick,” others disparaged confrontation by characterizing participants as immature. For example, several gay men from the Fort Hill Faggots collective were admonished to “grow up” after staging a confrontation at Sporters Café (Brill 1976b). Like many other gay bars in Boston, Sporters denied admission to drag queens and other nonconforming gays by enforcing a policy against costumes. When the Fort Hill Faggots sought to challenge this policy by wearing women’s clothing into the bar, they were quickly escorted outside by police. Immediately following the demonstration, GCN writer David Brill disparaged the “invasion” as “stupid and irresponsible.” Relying on rights discourse to make his point, Brill said the question was “not whether Sporters should or should not actively deny drag queens admittance . . . The question [was] whether or not the drag queens should respect the entertainment rights of others.” Elaborating on this point, P.J. Martin urged the gay and lesbian community to “be rational and calm” in its response to the zap. In a letter to the editor he wrote, “You go to a public bar or restaurant to relax and escape problems and not to encounter confrontation. A person’s desire for absolute freedom of attire should not overturn the majority of other customers’ desire for peace and tranquility in a public bar. Discrimination based on sex and race . . . should not be compared to and confused with type of clothing worn in public.” In addition to marginalizing sexual

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30 By dressing in drag, the Fort Hill Faggots were not attempting to pass as women, nor did they necessarily identify as transgender or transsexual. To the contrary, they were engaging in a political tactic called “gender fucking,” in which “elements of both male and female dress were worn together in order to confuse the gender signals given by those pieces of clothing.” (Cole 2000: 88; see also Cummings 1976). For more on the politics of self-presentation during the gay liberation movement see Hillman 2015.
minorities within the gay and lesbian community, Martin’s letter distinguished between gay bars as sanctuaries and gay bars as politicized spaces.

Not surprisingly, a common response to confrontation was to redirect movement energy towards more socially acceptable channels. For example, when the Fort Hill Faggots threatened to picket Sporters and organize a boycott, GCN’s managing editor, Lyn Rosen, encouraged them to “meet with bar owners” instead (Rosen 1976a). The proposed meeting took place on September 21st, 1976 in the offices of Gay Community News. After nearly two hours of deliberation, Sporters agreed to poll patrons on whether drag queens should be admitted to the bar. However, management reserved the right to enforce a dress code. Although the “drag issue” remained far from over, Rosen (1976b) praised the meeting as proof that the gay and lesbian community could “calmly and sanely solve its disputes.”

As another forum of public contestation, the respectability frame permeated debates over gay pride parades as well. In Boston, the first official gay pride parade was held on Saturday, June 26, 1971. As a distinctly political event, participants marched through the streets of Boston, stopping at four carefully selected targets along the way (Boston Pride Guide: History Supplement 2015; Shively 1986; T.O.D. 1975). At Jacques, demonstrators read a list of demands which included better toilet facilities for women, more fire exits, and a female bartender to ensure better treatment of lesbian patrons. At police headquarters they called for an end to entrapment, and denounced religious persecution on the steps of St. Paul’s Cathedral. Finally, the parade ended with a rally on Beacon Hill where a statement was read demanding the repeal of Massachusetts’ antiquated sex laws. According to parade organizer Charles Shively (1986), each
target was selected because it represented gay oppression in some way, and because gay people needed to be made aware of “how unacceptable life in the ghetto was.”

Despite the inaugural parade’s highly politicized nature, the ad hoc Planning Committee announced in May 1974 that the “defensive march” would be replaced by a “Mardi Gras theme, with accent on fun and colors” (Zap, Elephant and Action 1974). In addition to developing workshops, street theater and consciousness raising sessions, members of the committee sought to organize a carnival, schedule bands, and even rent an elephant. Despite their goal of attracting more people to Pride Week, the Committee’s proposal met with sharp criticism in the community. Indeed, many people doubted whether the parade could be simultaneously social and political, celebratory and militant. Not surprisingly, such doubts were rooted in the belief that participants who marched in “costumes” (or drag) would serve only to reinforce gay stereotypes.

“If the Gay Community is going to be recognized as one of responsible make-up, we must put our best foot forward when appealing to the public for support,” one observer remarked. “Why can’t we have a show of strength in the parade wearing acceptable garb and conducting ourselves in sober fashion? Then in the evening let the dance or house party take on a Mardi-Gras aura where the public is not so apt to see us at play,” (Ligruck 1974).

In the end, this plea to act respectability in public and play in private signified enormous concern for straight people’s perceptions of the gay community. Indeed, there was a constant, underlying concern that unfair and biased media coverage of these events would perpetuate harmful stereotypes about gay people. Such fears were manifest in an editorial published by The Boston Ledger, which criticized the inclusion of drag performers in the parade “as a poorly

31 Although parade demonstrators made claims toward the state, evidenced by their presence outside the State (and Station) House, they also challenged dominant cultural meanings by targeting gay bars and religious institutions. The inclusion of state and non-state targets along the parade route suggests that activists sought not only to effect institutional change and legal reform, but to disrupt cultural norms and meanings that constructed gay men and lesbians as second-class citizens and social pariahs.
chosen tactic because it merely underlined the image that many people have of a homosexual as a one-dimensional drag queen,” (reprinted in React 1973b). According to the editorial, “Gay Pride Week was an important event in Boston’s gay community . . . bringing gay men and women together, giving them a chance to discuss mutual problems openly and frankly.” However, people in the straight community would only “remember a bunch of men dressed up as cheap looking women with lots of lipstick and padding, walking down Commonwealth Avenue in tight dresses and blowing kisses to the gaping crowd.” Despite the fact that fewer than five drag performers marched in the parade, the editorial concluded that, “A parade of transvestites just didn’t win for the Boston homosexual community the respect it deserves.”

In the end, lack of control over straight media caused many people to view the parade as a “dangerous political arena” (Rose Flower 1976). In a forum entitled “Are Pride Marches Valid in 1978?” Kenneth Ramandine (1978) criticized the parade for alienating straight supporters. “By demonstrating and parading around town spouting political jargon and calling for people to grant us our civil rights, we get nowhere,” he explained. “Straight people are tired of being bombarded with rhetoric about gay pride, gay lifestyles, gay liberation, gay rights, and gay bars.” Therefore, Ramandine concluded, gay people should “drop the marches and the political rigmarole and get on with the business of living,” by which he meant securing “a good job, a good home, and someone to love” and “fitting into the mainstream of society.” Still others criticized the parade for its inability to produce meaningful social change. “Gay parades are fine,” explained one observer from Worcester, “but the power of a letter to Congressmen or Congresswomen holds more hope for our gaining our rights . . . Before we take off for the fun of a Gay Pride parade, we should be sitting down and writing a letter to our local legislators in support of the pending legislation,” (Rice 1985).
Concern for straight people’s perceptions of gay people influenced debates about individual appearance as well. This concern dated back to the 1950s, when members of the Mattachine Society pledged “to observe the generally accepted social rules of dignity and propriety at all times . . . in conduct, attire, and speech,” (Mattachine’s Membership Pledge reprinted in Blasius and Phelan 1997: 283-284). However, constraints on self-presentation eventually gave way to the countercultural revolution of the 1960s. According to Hillman (2015), gender-bending styles, which combined elements of both male and female dress, were developed by gay liberationists to challenge dominant gender roles and stereotypes. However, their nonconformist attire generated conflict with older, well-established gays. This clash became apparent in January 1976, following publication of David Goodstein’s Opening Space Column in The Advocate.32 According to the former Wall Street broker, “media freaks” were perpetuating harmful stereotypes about gay people through their public persona and self-presentation. “The straight media pay attention to them because they confirm the stereotypes they’re looking for,” wrote Goodstein. “Our people resent them for the same reason. They appear unemployable, unkempt and neurotic to the point of megalomania.” Although several contributors to The Advocate criticized the Opening Space column as “distorted and highly reactionary in tone and intent” (Walker 1976), others agreed with Goodstein that activists’ outward appearance sabotaged their cause. According to Philadelphia-based activist Don Carter (1976), “Mr. Goodstein was partly right; many gays are unkempt and, therefore, quite probably unemployable.” Drawing attention to the importance of gay publications in shaping straight

32 Goodstein purchased The Advocate in January 1975. According to Walker (1976), the paper’s focus then “shifted from developments within the organized community to the prefab personalities . . . of a larger media world” including Patty LaBelle, Bette Midler, and the Pointer Sisters. Indeed, the one year anniversary edition “devoted ten pages to discussing winter vacation spots and another seven pages to an interview with Lily Tomlin” (Clendinen and Nagourney 1999: 255). Despite criticism, Goodstein continued to decrease news coverage of organized events, turning The Advocate from a reliable news source into a profitable gay magazine.
attitudes, Carter disparaged ads and photos featuring gay men as “disreputable: untrimmed beards on men for whom any beard is unbecoming; weird, dirty-looking, wrinkled clothes . . . Sure there are exceptions,” he explained, “and certainly there are straights who look as bad, but we are fighting for *us* and should improve *our* image.”

In addition to encouraging appropriate standards of dress, the emphasis on respectability shaped debates about how gay men and lesbians should conduct themselves sexually. Indeed, increased scrutiny of gay sex prompted criticism of the community’s public sexual culture, which could include not only drag queens marching in the Gay Pride Parade, but also gay men who cruised for sex in public places. In Boston, these concerns were manifest in a front page article which warned of “a plot by statehouse politicians to discredit the gay movement by means of deployment of state police decoys in public rest areas” (Entrapment a Plot 1974). Quoting HUB member David Brill, the article encouraged gay men seeking sexual partners to “make some sort of alternative arrangements” and to refrain from doing “anything in public.” From this perspective, legislative failure derived not from antigay bias, but from gay sexual behavior. Thus, the article concluded, arrests for cruising were being “used as an indictment against the gay rights movement” that would “greatly retard our cause in the legislature.”

Infuriated by the article’s claim that cruising marked “the soft underbelly of the gay movement,” local activist John Kyper called attention to its exclusionary logic. In a letter to the editor, Kyper (1974) wrote that state lawmakers considered gay sex to be “equally disgusting and illegal regardless of whether we do it with strangers in public or with lovers in the privacy of our homes.” Echoing the concerns raised by Dale Jennings nearly twenty years later, Kyper argued that mainstream activists did little to aid the victims of entrapment: “Too many gays are too concerned about their Respectability to get involved in cases where there is the slightest breath
of scandal, even when the victim has suffered a gross violation of human rights.” In attempting to draw a more inclusive boundary around the social movement constituency, Kyper indicated that gay people, regardless of their sexual proclivities, shared a common history of prejudice and harassment. “If we are serious in our attempts to change these laws and outlaw discrimination, we had best not apologize for anyone’s sexual behavior,” he explained.

Another example of frame contestation can be found in an article written by the historian Michael Bronski. Writing in GCN’s “Speaking Out” column, Bronski (1977) described efforts by the Gay Athletes Union of Long Beach University to stop gay men from cruising by conducting surveillance of public restrooms. According to Bronski, the “jock patrol” was “reflective of a move to attain some sort of respectability—to find acceptance in the straight world on their terms.” Rather than accept these terms, however, Bronski disparaged the campaign as a form of gay-on-gay oppression. “Just because this is done in the name of ‘what is good for gay people’ does not make it any different than being harassed by the police for the same activity,” he explained. “It should be remembered that our sexuality makes us all outlaws. It does not matter if we have sex in a public restroom or in the privacy of our bedroom—in either case it’s illegal. To forcibly prohibit people from engaging in a form of sexuality under the pretext of ‘cleaning up our image’ is in the end self-defeating and hypocritical.”

Surprisingly, the proponents of respectability expressed concerns not only about how straight society would perceive gay people, but about how gay people would perceive each other. According to this reasoning, less sexualized images of the gay community would appeal to a greater number of people who did not view sexuality as the cornerstone of their identity, or who were turned off by the centrality of sex to gay social life. This perspective was detailed in a short-lived column entitled “This Side of the Closet,” which related the coming out experience of
a young college student. Contrasting gay bars, bathhouses and cruising strips to the annual “Symphony in the Park” series, the columnist described a group of gay men whose public (yet respectable) presence in Central Park facilitated his identification with the gay community. The column is worth quoting at length because it details how public interactions between gay people shaped individual conceptions of what it meant to be gay:

At the last concert a new group arrived about the same time we did, and I watched as they set up their patch of ground. First a layer of cardboard boxes, extending into a long thin rectangle. Then green tablecloths on top, followed by green and white paper plates, green napkins, white plastic silverware, plastic wine glasses, a large floral centerpiece with two smaller ones flanking it, and all the other accoutrements of a formal dinner party . . . This new group had a lot of spirit to go along with their class. As each member showed up, there were kisses all around . . . There was talking and sharing and laughing and loving . . . I thus came to accept the prospect of life totally within a gay world, for surely straight friends would shun me if (when) they found out. It could be, I saw, a happy existence with friends of both sexes. An existence where people are able to relate to each other rather than being limited to the bar games they play . . . An existence of mutual support rather than isolated loneliness. An existence where I would not have to hide what I am, pretending to be something I’m not. For this I might be willing to divorce the straight world (or let them disown me) by accepting homosexuality in myself.

Drawing a connection between public sexual culture and gay people’s self-image, the columnist concluded that gay people “should be watchful of our public behavior. Not to avoid infuriating our straight peers . . . but to be careful of the image we present to other gays still in the closet” (A. Nother Gay 1976). Similarly, Bill Agosto (1981), a founding member of the First Unitarian Universalist Church of Houston, proclaimed in a letter to Gay Community News that more gay people would come out “if they didn’t have to deal with the sexually obsessed minority of the gay community.” According to Agosto, “the vast majority of gay men and lesbians, without undervaluing sex, value chastity and the quality of their love above sex, and that, consequently, coming out to the opposite image seems more a denial of self to them than staying the closet.”

In the end, repeated condemnation of nonconformity and sexual promiscuity betrayed the assimilationist leanings of a politics of respectability. On one hand, the frame countered societal
depictions of gay people as immoral, promiscuous and depraved, in turn making institutional tactics possible. On the other hand, the respectability frame marginalized gay people who did not conform to the dominant sex and gender norms. To admonish gay men for cruising, or to insist that parade-goers conduct themselves in a somber fashion, was to ignore the meaning of these experiences to ordinary gay men and lesbians. As a result, the frame generated tension between mainstream supporters pursuing civil rights and nonconforming gay people who bucked societal norms and practices.

Reform

As indicated by the foregoing analysis, the third and final frame used to facilitate civil rights strategies placed a heavy emphasis on reform. Virtually all histories and analyses of the movement emphasize the ideological split between institutionally-oriented activists seeking rights and those advocating cultural transformation through more radical forms of protest (Altman 1982; Escoffier 1985; Epstein 1987; Gamson 1995; Vaid 1995). This split became increasingly apparent following the Stonewall Riots of 1969, when the in-your-face tactics of gay liberationists clashed with the assimilationist leanings of early homophile leaders.33 While describing the transition from gay liberation to gay rights is beyond the scope of this chapter, it is sufficient to point out the assumptions upon which a reformist strategy was predicated. Perhaps the most significant of these assumptions was the belief that activists could affect meaningful

33 Although Stonewall is often celebrated as the most influential event in LGBT, as well as the start of the gay liberation movement, those present at the riots were not the first to promote gay liberationist values. From its inception in the 1950s, Mattachine Founder Harry Hay embraced (if not formulated) gay liberationist principles when he advocated on behalf of a distinct homosexual culture, one that was separate from but still equivalent to the dominant heterosexual culture (D’Emilio 1998). Nor was Stonewall the first riot to occur in response to police repression. Indeed, police raids on Compton’s Cafeteria in San Francisco and the Black Cat in Los Angeles provoked uprisings in 1966 and 1967, respectively (Armstrong and Crage 2006). Public demonstrations predated Stonewall as well. For example, early homophile leaders demonstrated outside the United Nations in April 1965 to protest the Cuban government’s treatment of homosexuals. The following month, in May 1965, members of the East Coast Homophile Organization picketed outside the Civil Service building, the State Department, the Pentagon, and the White House to protest federal employment discrimination. Although activists dressed in respectable garb, these demonstrations were unprecedented in encouraging and promoting gay visibility (Clendinen and Nagourney 1999; D’Emilio 1998). Consequently, I want to state explicitly that the roots of militancy run deep in this movement.
social change by working inside the system to achieve legal reform (Rimmerman 2002; Vaid 1995). Consequently, reformers viewed dominant political institutions as the appropriate venue for social change, and appealed to constitutionally prescribed values such as the right to be free from discrimination. Moreover, this strategy was premised on the belief that if activists were successful in changing the law, then gay men and lesbians would enjoy the same rights and privileges (and perhaps even status) as straight people in society. By comparison, the radical or militant wing of the movement sought cultural transformation through direct action protest, institution building and a radical restructuring of dominant sex and gender norms. At the very least, this meant building alternative institutions within the gay community as independent sources of power, and challenging dominant cultural constructions of gay people from outside mainstream political channels. In Boston, these two approaches entered into what sociologist Aldon Morris (1984: 39) might call “a turbulent but workable marriage.”

Beginning in 1973, with the introduction of gay rights legislation on Beacon Hill, legal reform served as the movement’s guiding principle and objective. As in other cities, the accompanying emphasis on rights gradually replaced an earlier challenge to dominant sex and gender roles. Although formal equality remained elusive, activists pointed to other factors as evidence that lobbying was efficacious, that support for gay rights legislation was growing, and that victory was imminent. For example, David Brill (1974c) pointed to media responsiveness, roll call votes, and the absence of organized opposition to defend civil rights strategies in Massachusetts. “The major straight press has been giving gay efforts a decidedly improved treatment, locally and nationally,” he declared.

—The broadcast media is listening and responding in terms of policy and programming;

—The Senate vote on our anti-discrimination legislation was double what it was the year before. This pattern, if repeated in 1975, would spell legislative victory;
—Organized religion has been greatly sensitive to the rights and needs of gay people. Witness that the New York Catholic Archdiocese led the opposition to the anti-discrimination bill before the New York City Council, while the Boston Globe reported that the Boston Archdiocese ‘is opposed to discrimination of any kind’ when asked about our legislation on Beacon Hill;

—Incumbents and candidates for major public offices know that they must take a stand on the ‘gay issue’—and are just beginning to realize the political power of gay people and their friends.

By highlighting the incremental nature of reform, Brill sought to reaffirm the value of civil rights strategies. However, the legislative victory he spoke of would remain elusive well into the 1980s.

Despite growing optimism on Beacon Hill, the rumblings of discontent could be heard elsewhere. Indeed, a growing number of gay right supporters lamented the spread of apathy and indifference within the gay community, particularly as the electoral model of politics replaced a more confrontational style of protest. By 1975, general romanticism of “the good old days” signified a widespread belief in the movement’s decline. For example, Jon L. Clayborne, the first African American elected to the board of the National Gay Task Force, contrasted the “turbulent late sixties and early seventies” to the staid “complacency” of a subsequent era. “History will not deny me my chance to wallow in the good ole days,” he proclaimed in Gay Community News. “The Stonewall Revolt, in June of 1969, not only relieved thousands of gays of self-hatred and self-deprecation, but it also initiated activities that exposed society’s mistreatment of homosexuals and set about destroying the misconceptions.” By comparison, the movement in 1975 seemed to be entering “a dormant state.” Although Clayborne professed that “gay organizations and their leaders” were partly to “blame for the lack of enthusiasm” surrounding gay liberation activities, he found “far more fault in the majority of homosexuals who are not only apathetic, but don’t give a damn as well . . . If gay liberation falters in the seventies it will be because a group of people really did not care to help themselves.”
By 1976, a string of legislative and electoral setbacks at the national level emboldened the critics of reform. On the electoral front, gay rights supporter Bella Abzug was defeated in a Senate primary race against Daniel P. Moynihan (Lynn 1976). Adding insult to injury, the Democratic Party rejected a gay rights plank in their platform (Clendinen and Nagourney 1999). In a letter to the editor, Mark Silber (1976), President of the Gay Academic Union of Florida Atlantic University, attributed these losses to “apathy, complacency and indifference” in the gay community. As Silber pointed out, the National Gay Task Force had “spent enormous amounts of money at the Democratic Convention in New York City; they rented out a two-room suite in the Statler-Hilton, printed tons of literature which was mostly all thrown into the trash cans, and recruited dozens of individuals to get delegates to sign a petition.” Even so, the Democratic Party failed to adopt a pro-gay plank, and only the efforts of “gay demonstrators” made the news. “Now is not the time for the Gay Liberation Movement to become a pre-Stonewall Homophile Movement,” warned Silber. “The historical record is clear—progress is best achieved by grassroots gay activism and militancy. A reformist strategy is, at best, slow and expensive.”

Like the Democratic National Convention in New York City, the Supreme Court’s ruling in *Doe v. Commonwealth’s Attorney* exemplified the limits of reform (see chapter 2). Reacting to the decision in April 1976, Boston University Professor Charles Shively argued that litigation was a poor substitute for institution building. “We cannot depend on nine straight men for our liberation,” he told *Gay Community News*. “Nor can we depend on gay appointments to the Supreme Court for our liberation . . . We must build our own institutions with our own community from which no court, congress, or president can ever move us,” (Supreme Court Decision Stirs Wide Reaction 1976). John D’Emilio, who was then a graduate student at Columbia University, also reacted to the decision. According to D’Emilio, “court cases and
legislative lobbying efforts” limited mass participation by making “gay activism the property of a few well-trained professionals,” people who could “devote a large measure of their time to lobbying campaigns that need careful direction and a full-time commitment.” By comparison, most gay people did “not have the time or the skill needed for these highly specialized tasks.” Consistent with the literature on social movements, D’Emilio attributed de-mobilization to professionalization, which can limit participatory opportunities and hinder the disruptive capacity of social movements (Andrews 2001; Ganz 2000; Howard et al. 1994; Schwartz and Paul 1992; Jenkins and Eckert 1986; Piven and Cloward 1977; Friedland 1976; Helfgot 1974; Gerlach and Hine 1970).34 Although D’Emilio recognized growing disinterest in the movement, he blamed collective failure on the structural determinants of participation, rather than the apathy and indifference of gay people.

Aside from lamenting the “professionalization of reform,” (Moynihan 1965), D’Emilio argued that institutionalized tactics were limiting because they left oppressive institutions intact. In other words, an emphasis on reform failed to challenge the heterosexual order in any meaningful way. This criticism was part of a larger critique of the civil rights paradigm, which substituted the feminist-inspired challenge to dominant sex and gender roles with the demand to live free from discrimination (Vaid 1995). According to D’Emilio, gay liberation required “more than the end of the sodomy laws” and “the protection of our civil rights.” It required an attack on “all of the ways and all of the areas in which heterosexuality receives favored status:”

That includes marriage and tax laws; it includes the content of children’s books and the curriculum of our schools at every educational level. It requires us to fight against the

34 Despite their negative impact on mobilization outcomes, highly professionalized organizations generally maintain themselves over longer periods of time, particularly when the social movement constituency becomes complacent (Taylor 1989). According to Staggenborg (1988), professionalized organizations are more likely to persist than their informal counterparts due to their reliance on paid staff and leaders, as well as their superiority in attracting foundation founding. As a result, however, professionalized groups are also more likely to pursue institutionalized as opposed to militant direct-action tactics.
dichotomization of sex roles which define women only in terms of a role within a hetero­sexual family. It means the end of child-rearing practices and environments in which children absorb a model of heterosexual intimacy as a normal and gender hierarchy as natural. These goals imply something other than raising the status of gay men and women to one of equality with heterosexual men and women. It implies a transformation of the society which confers differing statuses on men and women, on gays and straights.

Consistent with this line of reasoning, D’Emilio argued that gay rights could be won without dismantling the moral and sexual hierarchies which stigmatized gay people in the first place. As a result, he called on gay rights supporters to “attack,” “delegitimize” and “demystify” oppressive institutions such as the two party system, and to “openly and disrespectfully challenge . . . the authority of medical ‘experts’ . . . who try to define standards of health and sickness that should be self-determined.” This critique of the heterosexual order, far from being novel, was reminiscent of the frames used by gay liberationists to encourage direct action protest in the immediate aftermath of Stonewall.

As indicated by the foregoing analysis, disagreements between assimilationists and gay liberationists were inevitable. However, countless rhetorical attempts were made to reconcile the civil rights framework with gay liberationist values, beliefs and even tactics. D’Emilio, for example, argued that radicals needed “to talk and reason with those gay people who are still committed to working within the system,” and to analyze “in a persuasive manner the reasons why reform-oriented tactics don’t take us all the way to liberation.” Similarly, in the days leading up to the 1976 presidential election, an editorial in Gay Community News stressed the need for “alternative political action,” while still paying homage to the work of mainstream political activists (Editorial: Alternative Political Action). According to the editorial, rising acceptance of gay people was not the result of “voting for the most supportive candidate,” but rather of the “marches, presses, legislative committees, and community groups that showed
legislators we had the power worth soliciting.” In navigating the assimilationist/liberationist divide, the editorial continued:

Many of those people now working within the governmental structure . . . are doing important work and no one can deny that we still need gay civil rights laws on the books. But it is doubtful that laws will ever be passed without major consciousness-raising happening first. This is not an editorial denigrating the work of those who have chosen to work within the system and who feel that voting is an important way to make social changes. This is an editorial to support those who prefer to spend their energy on alternative solutions, who fight the effects of the larger community’s refusal to grant our rights. People who establish support groups—a coffeehouse, a peer counselor, an afternoon rap group—and organize their community around specific issues perform an invaluable service. Long after laws have been passed and politicians have come and gone, these kinds of community services will be needed to help gays deal with the day-to-day problems of living in a predominantly heterosexual society.

By defending civil rights as a necessary precursor to formal equality, the editorial paid tribute to the activities of mainstream political organizers. However, community organizing and institution building were seen as important corollaries to this approach. Unlike civil rights, which could coexist alongside homophobic attitudes, community institutions were needed to provide safe, alternative and supportive spaces for gay people. D’Emilio agreed, arguing in the aforementioned article that gay people needed to “create as much alternative space as possible,” including gay-run coffeehouses and community centers. “If we rely solely on the courts,” he explained, “we allow those in power to deny us our freedom.”

At the local level in Boston, the age-old conflict between radical and reformist thinking came to a head in December 1977, following the indictments of twenty-four men in Revere, Massachusetts on charges of statutory rape with boys between the ages of eight and fifteen.35 Although only one case ever saw the inside of a courtroom, the “Revere sex scandal” precipitated an acrimonious debate over social movement goals and strategies. During the trial of Dr. Donald Allen, a prominent Boston-based psychiatrist, David Thorstad (1979), who later

35 Dubbed the Revere sex scandal, the arrests were widely seen as part of District Attorney Garrett Byrne’s strategy for re-election in Suffolk County. For a comprehensive treatment of the “Boston Sex Scandal,” see Mitzel 1980.
became an active member of the North American Man/Boy Love Association, claimed that the main goal of gay liberation was “the achievement of sexual freedom for all – not just equal rights for lesbians and gay men, but also freedom of sexual expression for young people and children.”

In addition, Thorstad argued, the movement had “unnecessarily circumscribed its field of battle” by adopting a narrow focus on the civil rights of consenting adults in private. “We are seeking fundamental human rights (to a job, housing, and accommodations in public locales),” he explained, “but we are also demanding an end to persecution based on our determination to express our human sexual potential, whatever form it may take.” Opposite Thorstad, GCN staffer Nancy Walker (1979) dismissed the emphasis on “sexual freedom for all people” as a “cover-up slogan” for men who wanted to “fuck children,” and whose only interest was “their own sexual gratification.” According to Walker, gay liberation was “primarily, if not entirely, a matter of achieving equal rights” for gay people.

Although this debate was clouded by the emotionally charged issue of cross-generational sex, that did not prevent Cambridge resident Dee Michel from seeking common ground. In a Speaking Out letter, Michel (1979) tried to reconcile the “difference of opinion between the don’t-rock-the-boat stance of Nancy Walker . . . and the more challenging views of David Thorstad.” In doing so, he drew a now-common distinction between gay liberation and gay rights. “Gay rights is a much more narrow concept than gay liberation,” he explained:

It is political in the narrowly-defined sense of having to do with electoral politics. It is working to pass antidiscrimination laws and measures that guarantee the equality of homosexuals and heterosexuals under the law. This end is achieved through lobbying, letter-writing, and electing politicians who are ‘good’ on gay issues, etc.

Gay liberation is a movement encompassing political action in the narrow sense and social action (which some people consider political) in a wider sense. It means being free from all forms of gay oppression: laws that discriminate implicitly or explicitly; heterosexist images on TV, in the movies, in books and newspapers; pressure to conform to heterosexual/nuclear family standards from family, friends and psychiatrists. Positively, it means being gay and
feeling good about it and being able to be openly gay anywhere. These ends can be met by means as different as coming out to one’s family and spray-painting GAY IS GOOD on the walls of a public building. Not only is gay liberation more all-encompassing than gay rights, but since it seeks to do away with more aspects of our current society, it is thus more threatening to the order of things.\(^{36}\)

Admittedly, Michel tiptoed around the issue of cross-generational sex, choosing instead to focus on the broad ideological differences between radicals seeking cultural reconstruction and reformers seeking rights. However, he tried to reconcile the two approaches by highlighting their complimentary potential. “Imagine . . . some radical activists thinking a particular gay rights bill pointless,” he explained:

They might nevertheless work to build a demonstration for the bill, realizing that the visibility of lesbians and gay men and the attendant publicity the event would generate would further their wider cause of gay liberation. Both coffee klatches with middle-class homemakers and draft-card burning by crazy radicals ended the War in Vietnam. Gay oppression will be ended by both well-suited lobbyists in the State House and by outrageous cross-dressers in the streets.

Although mainstream political activists were generally (if not genuinely) concerned that confrontational protest would discredit the movement, Michel sought to allay these fears by emphasizing collaborative opportunities with gay radicals. Rather than undermine mainstream political organizing, demonstrators could help generate publicity and increase public awareness, in turn strengthening the bargaining position of political insiders on Beacon Hill.

Despite efforts to mediate relations between radicals and reformers, the social movement constituency remained deeply divided over the turn to civil rights strategies. In the context of greater institutional access, it is not surprising that many gay men and lesbians grew increasingly wary of confrontational activism. However, the emphasis on reform resulted in the mainstreaming of only some gay people. As Urvashi Vaid (1995) notes in her book *Virtual*

\(^{36}\) This understanding of the assimilationist/liberationist divide is widely accepted today. For a similar treatment of the issue, see Vaid (1995, chapter six).
Equality, “Assimilation was an option for those who were willing to mute their queerness: to ‘not tell’ or to pass. For those on the queer margin, like effeminate gay men or butch lesbians, sexual heretics, and gender rebels, the new center still offered an uncomfortable and unsafe refuge,” (182). As such, Vaid urged gay rights activists to keep the electoral strategy in proper perspective. “Electoral work cannot substitute for grassroots political power, but, indeed, must be seen as a means by which a constituent base can be organized. In other words, engagement in elections is not the endpoint or pinnacle of a social change strategy, it is merely a tool,” (128).

Constricting Opportunity:

Dade County Florida and The Rise of the Christian Right

The limits of legislative and electoral strategies became painfully obvious in June 1977, following the repeal of a gay rights ordinance in Dade County, Florida. Six months earlier, when Dade County became the first southern city to ban discrimination on the basis of sexual orientation, Conservative Christian singer and spokesperson for the Florida Citrus Commission Anita Bryant announced that she would mount a campaign to repeal the ordinance through a ballot referendum. “We are not going to take this sitting down,” she declared after the Dade County Commission voted to pass the ordinance by a five-to-three margin. “The ordinance condones immorality and discriminates against my children’s rights to grow up in a healthy, decent community,” (Bias Against Homosexuals Is Outlawed in Miami 1977). True to her word, Bryant formed an organization called “Save Our Children” to spearhead a petition drive. After collecting more than three times the number of signatures needed to place a referendum on the ballot, Bryant harkened back to Nixon’s “silent majority,” expressing her confidence in the electorate. “Homosexual acts are not only illegal, they are immoral,” she explained. “And through the power of the ballot box, I believe the parents and the straight-thinking normal
majority will soundly reject the attempt to legitimize homosexuals and their recruitment plans for our children,” (quoted in Clendinnen and Nagourney 1999: 299).

From the outset, gay leaders generally underestimated (or perhaps consciously downplayed) the opposition. Despite rancorous debate and the presence of nearly five hundred opponents at the bill’s final hearing in January (Miami Gay Bill Passes 1977), local resident Mark Silber (1977) celebrated passage of the ordinance as an unequivocal victory. “Maybe it’s more strategic and expedient to quietly pass gay legislation unnoticed and without fanfare, but it’s so much more rewarding to see our enemies despair in defeat,” he explained. Similarly, Miami activist Alan Rockway praised the opposition for galvanizing the gay community and bolstering their cause. “One of the main things that’s always argued against ordinances like this one is that no one can really prove that there is discrimination against gays. In this case, the venom of the opposition proved it,” (quoted in Miami Gay Bill Passes 1977). Wittingly or unwittingly, Rockaway also hoped that activists could “turn on the opposition to attacking us like this in Lauderdale too, where we are running a candidate for mayor.” Even the National Gay Task Force was sanguine in its assessment of the referendum, describing Anita Bryant as “the perfect opponent” in an April 1977 mailing. “Her national prominence . . . insures national news coverage for developments in the Dade Country struggle, while the feebleness of her arguments and the embarrassing backwardness of her stance both makes her attacks easier to counteract and tends to generate ‘liberal’ backlash in our favor,” (Clendninen and Nagourney 1999: 300). Rather than be alarmed, activists both discounted and embraced the opposition.

In Boston, more than one hundred and twenty-five people turned out at the Charles Street Meeting House to discuss how the gay community should react to Anita Bryant’s Save Our Children campaign. Surprisingly, those in attendance agreed to double down on the existing
approach by forming three new committees: one which would conduct a lobbying and letter writing campaign directed at government officials; another which would conduct “either an organized boycott or a letter writing campaign” against companies supporting Anita Bryant; and another which would undertake fundraising (O’Connor 1977). Even more surprisingly, the Boston Advocates for Human Rights (BAHR), which also grew out of the meeting, counseled against the boycott. In a letter to the editor, founding member Ken Withers (1977) explained that the only way to defeat Save Our Children was to do so politically. “We must direct our campaign in the same direction as Anita Bryant: toward the government,” he explained. “The Florida Citrus Commission cannot guarantee gay rights. Only the government is in a position to do so.”

Consistent with this understanding of the social movement terrain, Withers disparaged the proposed boycott as “a milky-liberal response to an issue that needs united, vocal, public action,” while supporting BAHR’s campaign to “educate the public, gain access to the media, and guarantee the passage of legislation.”

Unfortunately for activists, Anita Bryant’s repeal effort “tapped into a wellspring of opposition to gay rights,” (Andersen 2005: 35). Less than six months after its initial passage, Dade County residents voted by a margin of 78 percent to 22 percent to repeal the ordinance (Clendinen and Nagourney 1999: 308). Emboldened by her success, Bryant embarked on a nationwide tour to promote the repeal of similar laws in other localities. By the end of 1978, gay rights ordinances were repealed by voters in Saint Paul, Minnesota, Wichita, Kansas and Eugene, Oregon. In addition, California Assemblyman John Briggs introduced a voter referendum compelling the removal of gay teachers from public schools (Clendinen and Nagourney 1999: chapter 27). According to Andersen (2005), these ballot initiatives “were part of a larger mobilization of ‘New Right’ activists” who coalesced around the issues of legalized abortion, the
rising divorce rate, the Equal Rights Amendment, school prayer, and homosexuality. As a testament to their success, state lawmakers responded by filing “backlash bills,” making it illegal for gay people to be hired as state police, correctional guards, probation officers and nurses in Pennsylvania (‘Backlash Bill Passes Pennsylvania Senate 1977); expressing moral disapproval of gay student groups in Texas (Texas Legislature Approves Anti-Gay Statement 1977); reinstating penalties for homosexual conduct in Arkansas (Arkansas Reinstates Sodomy Penalties 1977), New Hampshire (New Hampshire Senate Passes Anti-Gay Bill 1977) and New Jersey (Marko 1978); and allowing public schools to fire or refuse to hire anyone who engaged in “public homosexual activity” in Oklahoma (Murdoch and Price 2001: 252-254). At the federal level, Congressman Larry McDonald introduced legislation preventing the Legal Services Corporation from subsidizing gay rights litigation (Brill 1977c) and giving employers the right to decide whether to hire gay people (Richards 1979). Alarmingly, such efforts were backed by the Christian Voice, a newly formed fundamentalist lobby which boasted four Capitol Hill lobbyists, a congressional advisory committee, one hundred and thirty thousand members, and a million-dollar budget (Anti-Gay Lobby Formed in Washington 1979; Liebman 1982).

Upon the realization that gay rights could be legislatively taken away, political insiders professed to learn an important lesson, namely that they should avoid taking their case to the public. In an interview in *Christopher Street*, Ethan Geto, the New York-based political strategist who was recruited to run the Dade County campaign, made clear that asking the majority to respect the rights of a minority was a senseless endeavor. Drawing a comparison to the Civil Rights Movement, Geto asked what would have happened to the 1965 Civil Rights Act if voters in Selma, Alabama had been presented with a referendum. “Of course they would have taken away blacks’ civil rights,” he explained. “A referendum is a lousy vehicle to extend or expand
the rights of a minority,” (quoted in Clendinen and Nagourney 1999: 311). Similarly, a general consensus emerged at the 1977 Gay Leadership Conference that “the subject of gay rights—after the Dade County Debacle—should never again be placed on the ballot” (Denver Conference Rejects Fund-Raising Group 1977). Among those supporting this sentiment was not only Ethan Geto, but also California gay activist Jim Foster, who founded the Alice B. Toklas Memorial Democratic Club in 1971 and worked alongside Geto in Dade County, as well as Massachusetts State Representative Elaine Noble. In closing remarks, Noble urged gay rights supporters to shift their focus away from the states to the federal level. “I think that we’re discovering that state-by-state votes exhaust us,” she explained. “Our main thrust must be on the federal level.” At a separate conference entitled “Backlash: What to Do About It,” Minnesota State Senator Allan Spear argued that gay rights was “simply not a winnable issue on a popular referendum virtually anywhere in the United States . . . We did not lose in St. Paul because we did anything wrong,” he explained. “We lost in St. Paul because the people of this country are not, at this point, willing to affirm gay rights at the polls” (quoted in Wood 1978). Noting the success of Anita Bryant’s Save Our Children campaign, Spear concluded that a “painstaking, long-term educational effort” was needed to confront the “very deep, very troubling issues involving morality and sexuality.”

Activists in Boston agreed. Three weeks after the vote in Dade County, Florida, Co-Director Bruce Voeller told a crowd of nearly one hundred and seventy-five people gathered at the Arlington Street Church that the National Gay Task Force was launching a million-dollar fund-raising drive, as well as a campaign to educate people through labor unions, schools, social groups and churches (Hurley 1977). In addition, Voeller called for a large scale voter registration drive and urged everyone to write to Congress, the President and the media. Two groups emerged out of the meeting, including News Media Action and the Massachusetts League of Gay
Voters. While the former would monitor straight media coverage of gay issues, the latter would visit gay bars and other meeting places to register gay voters. As one observer remarked, “Most speakers called for gay people to take legislative action in the wake of the Dade County repeal, but the need for better education on gay life seemed to receive even more emphasis,” (ibid).37

Amidst cries for increased legislation, letter writing and education, growing support for litigation could also be heard. Drawing attention to the limits of both the referendum and recall, the latter of which could be used to remove Dade County Commissioners and others who supported gay rights legislation from office, one observer pointed out that “the civic-minded (or the stupid) could write or repeal their laws through the ballot box” in nearly half of the fifty states. Writing in GCN’s Speaking Out column, Robert Etherington (1977) remarked that gay rights were “not the will of the people;” that “questions of civil rights and liberties should never be the subjects of popular referenda;” and that gay people would “probably have to depend on the courts for their liberties,” even though Nixon’s appointees had “proven to be frail reeds on which to lean.” “Let those who will, shout ‘Power to the People!’” Etherington exclaimed. “But I will continue to agree with [Henry Louis] Mencken that the People are inflammatory dolts from whom the Republic must be saved.” In the wake of Anita Bryant’s Save Our Children campaign, the extent to which gay people were disadvantaged by the majoritarian political process was thrown into stark relief.

More forceful support for litigation could be found in an article published by Gay Community News in October 1978, just five months after voters in Eugene, Oregon elected to

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37 One year later, in June 1978, Ed Hougen (1978), minister of the Metropolitan Community Church in Boston, announced in a Speaking Out letter that the Massachusetts Caucus for Gay Legislation was also “conducting a massive voter registration, voter education, and voter turn-out drive.” The total number of groups popping up in the wake of Anita Bryant’s Save Our Children campaign suggests that local get-out-the-vote efforts were both sporadic and disjointed in Boston.
repeal their own gay rights ordinance. According to Larry Harris (1978), the referenda demonstrated the obvious limits of legislative activity:

Gay activists in recent years have focused their efforts on legislative tactics: lobbying with local governments for protective legislation, running for office as openly gay candidates, endorsing and supporting sympathetic straights who are running for office. And the payoff from these activities has been significant . . . But legislative activity has its limitations, as the referenda have demonstrated: what is given can be all too easily taken away. An alternative or complementary approach would be to go into court in an attempt to protect gay rights as an endangered species of human and civil rights. A court decision on constitutional grounds is not subject to repeal at the polls—short of an actual amendment to the Constitution.

Although Harris seemed confident that constitutional rights could not be rescinded as easily as legislation, he acknowledged the concerns many gay people had regarding the legal system:

By and large, gay activists have avoided the courts, an understandable policy in light of homosexuals’ past experiences as defendants. It is also not always clear what can be gained by going into court, since the goal of gay rights is rather a broad one and the courts generally prefer to deal with the narrowest possible questions of law. In Massachusetts, though, and probably in certain other jurisdictions, the time may be ripe for gays to go into court as plaintiffs with a single, well-defined objective: to have the so-called ‘sodomy laws’ declared unconstitutional.

In making the case for litigation, Harris articulated the concerns many gay people had about using law as a tool for social change, based largely on their negative interactions with the legal system. However, he insisted that a legal campaign aimed at challenging state sodomy laws had a strong chance of succeeding, particularly in Massachusetts. Consistent with the tendency to emphasize opportunity over constraint, Harris identified and then dismissed many of the objective obstacles to litigation, including the Supreme Court’s decision in Doe v. Commonwealth’s Attorney. Without so much as mentioning the Court’s summary affirmation, Harris claimed that the lower federal court had based its decision on “a very peculiar reading” of Griswold v. Connecticut, and had all but ignored the Court’s decision in Baird v. Eisenstadt. Furthermore, Harris downplayed the heteronormative implications of the Court’s privacy
jurisprudence in order to suggest that an alternative outcome was possible. Drawing attention to the recent appointment of Ruth Abrams and Paul Liacos to the Massachusetts Supreme Judicial Court, both of whom “could be expected to take a strong stand against legal intrusion into private conduct,” Harris claimed that it was “unlikely” that the Supreme Judicial Court would reach a similar conclusion. “The defeat in Virginia is neither a precedent nor, necessarily, an omen,” he explained:

If it can be established in court, as seems probable, that laws proscribing sex between consenting adults in private are constitutionally invalid, why go on trying to persuade legislators to repeal them? The court is more likely to consider the issue on its merits, and would do so without the histrionics of electioneering. Once the court has reached its decision within a constitutional framework, there would be no repealing through legislation or initiative petition.

Despite an increasingly conservative judiciary at the federal level, this overtly positive assessment of the legal landscape was grounded in the political realities of Massachusetts. Indeed, courts seemed to offer a preferable (if not ideal) substitute for the political process, particularly in the wake of a concerted backlash.

**Summary**

The emergence of political strategies in Boston between 1972 and 1977 is symptomatic of the broader shift away from direct action protest immediately following Stonewall to an emphasis on reform politics. In Boston, this shift was reinforced by several localized factors including access to elected officials and the absence of organized opposition. However, the rise of Anita Bryant’s Save Our Children campaign marked a significant turning point in the movement for LGBT equality. Confronted with an increasingly hostile political climate, local activists were forced to reconsider litigation as a mechanism for social change, and not just as a tool of oppression. In the next chapter, I turn to a consideration of how one man’s perception of the opportunity structure led to the formation of Gay and Lesbian Advocates and Defenders. Because GLAD is one of the
oldest and largest organizations dedicated to gay rights litigation in the country, its formation and subsequent development is crucial to an understanding of gay rights litigation more broadly.
CHAPTER 4

“A FACTORY OF KINGS”

BOSTON AND THE EMERGENCE OF A GAY LEGAL MOVEMENT

Seeking reelection in 1978, Suffolk County District Attorney Garrett Byrne called a press conference to announce the discovery of the so-called “Revere Sex Ring.” According to the veteran prosecutor, twenty-four men had been indicted on over one hundred felony charges involving sex with boys aged 8 to 13 (Mitzel 1980: 27). These indictments, he warned, were “just the tip of the iceberg.” Many, if not hundreds more, were involved in the alleged sex scandal. Turning to the public for help, Byrne established a hotline, urging “outraged citizens” to report any individuals suspected of having homosexual contact with minors. On its first day of operation, the hotline received over one hundred phone calls from anonymous persons who, in Byrne’s words, wanted to “provide more information about the present case and about similar crimes,” (Aloisi 2012: 159). Despite the fear and hysteria surrounding Garret Byrne’s witch hunt, a handful of local activists conspired to fight back.

On December 9, 1977, several members of the radical Fag Rag staff formed the Boston/Boise Committee (B/BC). Named after a similar sex scandal which rocked Boise, Idaho in 1955, the group pledged to bring an immediate end to the hotline, and to work towards protecting the legal rights of the accused. Their first action was a mass meeting of seventy-five people to discuss plans for future action. A few days later, three members of the B/BC met with the Assistant District Attorney, Thomas Dywer, to vocalize their concerns. Although Dwyer promised to reevaluate the need for the hotline, he announced the following day that it would remain open. When a public demonstration on City Hall failed to alter this policy, the B/BC turned to John Ward, Boston’s only openly gay attorney, to obtain an injunction. The night

38 This timeline of events was taken from Mitzel 1980.
before Ward appeared in Suffolk County Superior Court, he received a threatening phone call from First Assistant District Attorney Jack Gaffney: “If you dare show up in court tomorrow, we’ll make sure you never practice law in this town again,” Gaffney warned (Mitzel 1980: 39).

Undeterred by Gaffney’s threat, Ward proceeded to court only to discover that the issue was moot. On December 28th, 1977, the District Attorney’s office voluntarily suspended the hotline. Although Garret Byrne’s Office never publicly admitted that this decision was made in response to the B/BC’s injunctive effort, many gay people saw it that way. As such, the hotline’s termination was celebrated as a clear legal victory in Boston. However, victory proved ephemeral. Two months later, in March 1978, local police initiated an undercover sting operation at the Boston Public Library. As the *New York Times* observed:

The library asked police to crack down after it was swamped by complaints from men who said they had been approached by homosexuals. In 10 days, the police arrested a college professor, company executives, school teachers, students and doctoral candidates. Most were charged with open and gross lewdness, but a few were also accused of prostitution. The solicitation occurred in the men’s room in the basement of the library’s $23 million, five-year-old addition in Copley Square (90 Men Seized in Boston Library for Solicitation as Homosexuals).

Infuriated by these arrests, John Ward founded Gay and Lesbian Advocates and Defenders to challenge police repression in court. In this chapter, I explore the initial turn to litigation by analyzing GLAD’s founding during a period of what can only be considered constricting opportunity. Although state and federal courts remained hostile to gay legal claims, and the police spearheaded a systematic attack on gay men, renewed energy in the gay community caused John Ward to perceive a strong need for litigation. Contrary to scholarly belief, GLAD’s attorneys and early board members did not blindly adhere to the myth of rights. Instead, they voiced concerns about law’s limitations while simultaneously translating routine injustice into meaningful opportunities for social change. In providing a general overview of GLAD’s
founding, this chapter illuminates the complex relationship between objective opportunities and their subjective interpretation; documents growth in the support structure for legal mobilization; and details the emergence of gay activist attorneys. However, before turning to an examination of GLAD’s founding, I begin with a brief overview of early gay rights litigation in Boston.

**Early Attempts at Litigation**

As in other cities throughout the country, gay rights litigation in Boston remained unplanned and uncoordinated throughout most of the 1970s. During this time, not only was the federal bench becoming increasingly conservative, but the Massachusetts’ state court system was known to be poorly organized and highly politicized. In the words of former Secretary of Transportation, James Aloisi (2012: 30), “Massachusetts courts in the 1970s operated as a balkanized collection of fiefdoms, sustained by 417 separate and uncoordinated budgets, ‘each subject to the patronage and back-scratching that had given Massachusetts such a bad name in the fifties and sixties.’ Although the state’s highest court—the Supreme Judicial Court—was highly regarded, the trial court system, anchored by the Superior Court, was generally recognized as an inefficient patronage heaven.”

Despite the sheer incompetency and growing hostility of state and federal courts, respectively, the Reverend Randy Gibson attempted to facilitate gay legal claims by inviting civil rights consultant Nat Denman to speak at the Charles Street Meetinghouse in October 1974 (Johnson 1974a). Although Denman was not an attorney, he was a self-taught activist in the Fathers’ Rights Movement who worked for the ACLU and instructed men on how to represent themselves in court. Applying these lessons to the gay and lesbian community, Denman told those present at the meeting that “anyone with $15” could file a lawsuit in federal court. However, what Denman failed to mention was that *pro se* litigants typically fared worse than
their represented counterparts. A typical case was that of Allison Mitchell who filed assault and battery charges against the manager of a straight bar after being forcibly ejected for dancing with another woman. Although Mitchell waited two weeks for a hearing, she arrived in court only to discover that the manager had never been subpoenaed. In a front page article with the headline “Charges Dropped” (1973) *Gay Community News* declared that “Allison’s big day in court turned out to be her introduction to the bureaucracy that is the judicial system.” Convinced that “she did not want to spend the rest of her life in the halls of justice,” Mitchell told *Gay Community News* that her “current involvement in the gay and lesbian community was much more meaningful than any time that would have been wasted in court.”

The slow and expensive nature of litigation caused local advocacy groups to pursue alternative strategies as well. In one highly publicized instance, the group Gay Media Action (GMA) filed a lawsuit against the Massachusetts Bay Transportation Authority (MBTA) after the agency refused to offer the group a reduced public service rate for its Lavender Rhinoceros Campaign (MBTA Off-Track 1974). Designed by the artist Bernie Toale, and submitted to the MBTA by the Charles Street Meeting House, the purpose of the campaign was to raise consciousness by posting pictures of a lavender rhinoceros on city trains and busses. Nine months and countless legal problems later, however, the group decided to forego litigation and simply pay the higher cost of commercial advertising. According to the group’s attorney, “the lawsuit’s chance of success was less important than the need to get the advertising on the subway,” (Johnson 1974b). When the Lavender Rhinoceros Campaign finally debuted on the Green Line in December 1974, GMA member Tom Morganti told *Gay Community News* that the “long legal hassle” had undermined “people’s faith in the campaign,” thereby making it harder for the organization to raise money (*ibid*).
Meanwhile, gay men and lesbians often found creative (if not defiant) ways to codify their relationships without suing for a marriage license in court. Boston University student Bob Jones and his lover Harry Freeman are but one example. Following a formal marriage ceremony at the Old West Church on Cambridge Street, the couple met with local attorney Richard Rubino to formalize their vows. Rather than file a lawsuit against the city clerk—which activists had tried unsuccessfully to do in Minnesota (Baker v. Nelson, 1971), Kentucky (Jones v. Hallahan, 1973) and Washington (Singer v. Hara, 1974)—Rubino drew up a contract combining a partnership agreement with an ante-nuptial agreement. While the former made each partner liable for the other’s debts, the latter indicated how to divide their property in the event of a separation. Rubino also drew up mutual wills and arranged for a legal name change so that both men could share the same last name. “It’s not quite the same as marriage,” Rubino told Gay Community News, “but it’s as close to the same as we can get now” (Hurley 1974).39

Early challenges to Massachusetts’ antiquated sex laws also met with mixed results. In Commonwealth v. Balthazar (1974), the Supreme Judicial Court held that the State’s prohibition against unnatural and lascivious acts was inapplicable to consenting adults in private. The defendant, Richard L. Balthazar, was a heterosexual man who forced an unknown woman to commit fellatio. Although constitutional law professor William Eskridge (2000) has cited Balthazar as invalidating the unnatural and lascivious acts provision of the General Laws of Massachusetts, he does so at the risk of reading determinative legal meanings back into the historical record. Indeed, local activists were more confused than they were encouraged by the

39 Aside from relationship contracts, some gay couples also tried to adopt one another. In In re Adult Anonymous II (1981), a gay couple from New York testified that they wanted “to establish a legally cognizable relationship in order to facilitate inheritance, the handling of their insurance policies and pension plans, and the acquisition of suitable housing.” Although the judge admitted that a “homosexual relationship gave the court reason to pause,” he granted the adoption on the grounds that New York State placed “almost no statutory procedural restrictions on adult adoptions,” and noted that Court of Appeals had recently rescinded the State’s sodomy prohibition.
decision, evidenced by the headlines “Gay Sex Acts Now Legal??” (Johnson 1974c) and “Clapping In Puzzlement” (1974).\textsuperscript{40} In part, activists’ confusion stemmed from the facts of the case, which centered on the use of force as well as the presence of heterosexual litigants. As a result, the Supreme Judicial Court did not explain whether and to what extent its ruling affected the rights of same-sex consenting adults in private. A second contributing factor was the nature of the law itself. Although Balthazar circumscribed Massachusetts’ prohibition on unnatural and lascivious acts, it left the state’s sodomy prohibition intact. “The fact that the sexual statutes overlap, makes the effects of the decision confusing,” explained local attorney Richard Rubino (Johnson 1974c). Consequently, activists continued lobbying elected officials to repeal the prohibition on lewd and lascivious conduct, even after Balthazar was decided.

Less than one year later, the Civil Liberties Union of Massachusetts (CLUM) devised a test case to challenge police entrapment in private settings. The case originated in November 1975 when radio broadcaster John Scagliotti was arrested by a plainclothes detective at the Jolar Movie Theater. In the first class action lawsuit of its kind, CLUM asked the Supreme Judicial Court of Suffolk County to enjoin the Boston Police Department from arresting and prosecuting people for soliciting “unnatural acts” in private. In refusing to certify the class, however, Judge Edward F. Hennessey ruled that CLUM failed to document a sufficient number of related cases. In a post-trial interview, Scagliotti explained why the judge’s reasoning was nonsensical. “Gay people are scared,” he told Gay Community News (Miller 1976c). “They don’t want to be publicly identified after being arrested in a case of this kind . . . In most similar cases, gay

\textsuperscript{40} Confusing surrounding the Balthazar decision persists even to this day. In discussing Massachusetts’ Sodomy law, local activist Amy Hoffman recalled that “Massachusetts actually had a sodomy law on the books in the 70s. Somehow it was still on the books but at a certain point there was a case that got it declared unconstitutional but it still wasn’t repealed.” She promptly directed me to Gary Buseck who, as GLAD’s legal director, could help explain the intricacies of the decision to me.
people, because of fear of exposure, have to go to expensive lawyers, to hush it up in exchange for leniency. Police are taking advantage of this situation and have to be stopped.”

On January 16, 1976, Scagliotti was convicted in Boston Municipal Court for soliciting to commit an unnatural act. On appeal, his attorney Evan Lawson invoked *Balthazar* to argue that “nothing was done against [the officer’s] will” and that the Jolar Cinema afforded a “reasonable expectation of privacy,” (Miller 1976d) In determining whether the cinema was a private place exempt under *Balthazar*, or a public place subject to police investigation, the judge instructed the jury that it was in fact a public place. Scagliotti was eventually found guilty and ordered to pay $500 in court costs, even though the maximum fine for violating the law was $50. Although defeated, Scagliotti remained defiant. “Of course I’m disappointed,” he told *Gay Community News*, “but with a jury like that I never had a chance . . . They’re not going to make me give up. This kind of police harassment can’t be permitted to go on and I intend to do everything that I possibly can to stop it.”

More than a year after Scagliotti was convicted, the Massachusetts Supreme Judicial Court removed the case from the lower appellate court. Encouraged by this decision, Scagliotti’s attorney told *Gay Community News* that the justices might use the case as a vehicle for widening the *Balthazar* decision (Mass. Supreme Court Takes-Up Harassment “Test Case” 1977). In November 1977, the Court handed down a partial victory for gay rights. Although the Justices did not consider the officer’s conduct in the case to be improper, Chief Justice Hennessey ordered a new trial for Scagliotti, stating that the lower court judge had erred when he instructed the jury that the movie theater was a public place (*Commonwealth v. Scagliotti*, 1979). Noting that sexually explicit films were previewed by patrons in small cubicles, the Court defined privacy as “removal from the public view and elimination of the possibility that the defendant’s
conduct might give offense to persons present in a place frequented by members of the public for reasons of business, entertainment, or the like.” As such, a “consensual unnatural act” had to be “committed in a public place in order to be punishable by law.”

Although the case was decided on relatively narrow legal grounds, it was significant in providing gay men in Massachusetts with a new legal defense. Rather than try to prove entrapment, which was nearly impossible for litigants to do, gay men could challenge their arrests by arguing that the alleged crime took place in a private as opposed to public place. In the wake of the Court’s decision, State Representative Barney Frank called on the Boston Police Department to issue a written order explaining to all law enforcement officials that private sex acts were no longer a crime (Rep. Frank Urges Officials to Act on Court Decision 1977). However, Police Commissioner Joseph M. Jordan responded that private sexual acts had been legal in Massachusetts since Balthazar was decided in 1974. In a thinly veiled warning to the gay and lesbian community, the commissioner further indicated that the Boston Police Department would continue to “deploy manpower to control illegal activities such as prostitution, to prevent the performance of sexual acts in public, and to ensure that minors are not being exploited,” (News Notes: Sexual Privacy in Boston 1978).

Unfortunately, the legal victory in Scagliotti was overshadowed not only by the police commissioner’s response, but by the refusal of the Massachusetts Commission Against Discrimination (MCAD) to review complaints based on sexual orientation. In May 1978, Robert MacAuley filed a complaint with the Commission, alleging that his employer subjected him to verbal and physical abuse because he was gay. As the State’s premier civil rights agency, the Commission was authorized under General Law 151B to investigate complaints of discrimination based on race, color, religion, national origin, sex, age and ancestry. Based on a
literal interpretation of the law, the Commission dismissed MacAuley’s complaint, stating that it lacked jurisdiction to investigate claims based on sexual preference. MacAuley then sued the Commission in Suffolk Superior Court, arguing that discrimination against homosexuals could be treated as sex discrimination for the purpose of enforcing the law. In the fall of 1979, the Supreme Judicial Court granted a request for direct review in the case. Although the justices agreed with MacAuley that homosexuality was “sex-linked,” and that “a prohibition against homosexuals might not be out of harmony with G. L. c. 151B,” they cited Smith v. Liberty Mutual (1978) in arguing that they could not supply their own view of what the policy should be.

“We know that the widespread discussion of sex discrimination in recent years has focused on discrimination between men and women,” said the court. “Discrimination based on sexual preference has been excluded. If the scope of the statute is to be extended, it must be done by legislation.”

By the time MacAuley v. MCAD (1979) was decided, John Ward had already announced the formation of Gay and Lesbian Advocates and Defenders. Indeed, the organization had even filed an amicus curiae brief in the case. By that time, Ward had been practicing law for less than two years in Boston. Suffice it to say, there was no how-to guide on how to be a gay activist attorney in the late 1970s. Nor was there a support structure for legal mobilization. In many ways, John Ward was the support structure for legal mobilization. In the next section, I detail the emergence of Gay and Lesbian Advocates and Defenders. In doing so, I draw attention to the creation of indigenous resources which helped make gay rights litigation possible, particularly in the absence of external support. Furthermore, I challenge the notion that lawyers moderate social movement goals and blunt their radical potential. To the contrary, many of the attorneys and non-attorneys involved in GLAD’s founding were deeply committed to the causes of gay
liberation and gay rights, often taking stances on issues that were beyond the pale of mainstream political discourse. Indeed, they figured out how to take an issue like entrapment, which mainstream political organizers seldom touched, and turn it into a legal strategy that, in 2003, would rid this country of its anti-sodomy laws once and for all.

**Mismatched Opportunities and the Founding of GLAD**

*(Or, The Making of a Gay Activist Attorney)*

When John Ward went into private practice in December 1977, he was the only openly gay attorney in Boston. This is not surprising given that gay people could automatically lose their license to practice law if and when their sexual orientation was found out. As the founder of Lambda Legal once put it, “If you were outed at work you were out of work” because individuals who committed crimes (including sodomy) were considered unfit to practice law (Andersen 2005: 29). Ward’s courage was unparalleled among other gay lawyers in Boston. According to fellow attorney Steve Sayers, Ward “was doing it all. As far as I could tell, he was representing everybody. He was the only one willing to be identified as representing gay people,” (Author’s Interview with Steve Sayers). Reflecting on his decision to openly represent gay clients, Ward later said that he was “just too young to be frightened” (Author’s interview with John Ward). But as his friend and former executive director of Lambda Legal, Kevin Cathcart, pointed out, “few people had the guts to be out there doing this work in a very public and visible way,” (Author’s Interview with Kevin Cathcart).

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41 One major exception is Katherine Triantafillou, the first openly lesbian attorney in Boston. Although they collaborated on some cases in the 1980s, Triantafillou represented mainly women and Ward men, though not exclusively. By and large, however, Ward’s practice “was the only game in town. There were other lawyers who were known to represent gay clients but they weren’t serving officially as gay lawyers . . . Brian Moran was one. He practiced with a firm and he just did this little sort of like gay number on the side, but he didn’t pride himself as a gay lawyer. That was a big difference,” explained Ward (Author’s Interview with John Ward).
Prior to GLAD’s founding in 1978, gay attorneys throughout the country were generally cut off from one another. As Ellen Andersen has observed, gay litigators in the 1970s “worked in virtual isolation from each other, because mechanisms for communication and coordination were largely absent. Friendship networks between gay rights litigators were in their infancy. The media rarely covered gay rights issues, probably because very few reached the higher courts. And although the ACLU was taking on occasional gay rights cases, it did not have any staff members dedicated solely to the subject,” (29). This culture of silence and isolation surrounding gay rights litigators was reproduced through their knowledge of people like Harris L. Kimball, a gay attorney from Florida who was disbarred “for immoral conduct unrelated to the practice of law,” (Kimball v. The Florida Bar, 1978). As a result, people like Cindy Rizzo feared the repercussions of coming out at work, particularly if they were employed by a law firm other than their own. “I had just finished my first year of law school. I had heard stories about openly gay people failing to become members of the bar because they were unable to get through the ‘character scrutiny’ examination,” (Rizzo 1980). Although some gay attorneys prevailed in court, Rizzo “didn’t feel like becoming the subject of another test case.” Christine Westphal, who graduated from the New England School of Law in 1978, had also heard stories. “I start law school in 1975 and states like Virginia are barring gay people from admission,” she explained. “So the [gay legal] community forms up around those discussions: what do I do about this? How do I handle this?”

In Boston, two informal support groups emerged for gay attorneys in the late 1970s, one for men and the other for women. As local attorney Steve Sayers observed, the men organized social events which were “held at various lawyers’ homes” throughout Boston. Although “very informal,” participants regularly discussed the challenges of being gay in a straight profession
The group Lesbian Lawyers and Legal Workers served a similar purpose for women, hosting what former member Carol Wessling described as a “three bean salad event” every month. Even though the salad was “terrible,” Wessling described the lesbian lawyers potluck as “filling a void” in the LGBT legal community by “providing resources and ways to get networking done,” (Author’s Interview with Carol Wessling). “We did no legal advocacy,” she explained, “but if someone was looking for help on a case you knew that was where to go.” In addition to putting lesbian attorneys in touch with one another, the group, which generally excluded law school students, facilitated discussions about professional norms and expectations. “They were dealing with questions like how do you make partner in a large law firm? How do you deal with the social obligations of a large law firm? And these are increasingly tricky questions,” explained Christine Westphal.

John Ward was among the attorneys present at the gay men’s social events. From the outset, his approach to lawyering was influenced by personal proclivities, experience and circumstance. As a graduate student in New York, Ward planned on teaching the Classics, including Latin and Ancient Greece, but he quickly “realized that academic life would not be a good fit for me,” (Author’s Interview with John Ward). Upon returning to Boston in the summer of 1973, Ward found himself driving a taxicab. Inspired by events in Washington, D.C., and feeling unfulfilled at work, he considered the possibility of going to law school. “I remember it was around the time that Watergate was heating up,” he explained, “and I thought gosh, I can’t drive a cab my whole life. I’ve got to do something. So I just sort of tentatively applied to law schools, you know, without any real clear idea of where it would lead.” Even after going to law school, Ward remained uncertain about his future. When asked how he decided to become an
openly gay attorney serving the gay community in private practice, Ward told *Gay Community News*:

It certainly wasn’t my idea when I went to law school. I don’t know what my idea was. When I was in law school for awhile, I played with the idea of becoming a big time achiever and going to work for the corporate firms. I got on the Law Review and that sort of thing and I served a clerkship with a Federal judge. But I decided not to work for a big firm, not because of the gay issue, but because generally they’re uptight. So I thought I might find some kind of government job working for the state attorney general or something like that. But nothing turned up so I went into practice and, of course when I went into practice, there was no question in my mind that it would be to help gay people. The idea kind of came naturally to me to kind of have a community practice (Stein 1978).

During our interview, Ward further explained that he was encouraged by an article he read in *The Advocate* about a gay lawyer named Tom Coleman. “It was really quite inspiring to me to see that you could actually do it,” he explained. “After I graduated from law school in 1976 my boyfriend and I drove across the country to L.A. One of the things we did was go and see Tom Coleman. And he was very encouraging about just opening a practice so that’s what I did … I put an ad in Gay Community News, you know, serving the community. So that’s all it took.”

On December 10th, 1977, *Gay Community News* announced the formation of a new law firm, located at 2 Park Square in Boston. In a brief news clipping consisting of fewer than a hundred words, the firm was described as “serving the legal needs of the gay community,” with a particular focus on “cases involving discrimination against gays,” (News Notes: Gay Legal Needs 1977). However, it was also noted that the firm would operate as a “general law practice,” taking cases from the community at large. Initially, Ward specialized in whatever cases “came through the door” including real estate transactions, estate planning and immigration cases (Author’s Interview with John Ward). Over time, however, he became increasingly interested in cases involving entrapment. “I would get this steady stream of men who were caught having sex outdoors,” he explained. “I became more interested in criminal law because that’s what I was
When asked how he dealt “politically and morally” with the issue of public sex, Ward told *Gay Community News*: “I don’t have any problem at all representing people in these cases. When you say ‘public,’ it’s usually, believe me, well-hidden and unless the police are there on safari nobody gets arrested,” (quoted in Stein 1978). Drawing attention to the issue of selective enforcement, Ward exhibited a double consciousness about law and legal conventions. Although he recognized the police as complicit in discrimination against gay people, he still believed that litigation could help “demonstrate seriousness of purpose,” especially when “governmental practices were so bad” as to be blatantly obvious (*ibid*).

Aside from viewing “law as a club” to pressure local officials (McCann 1994) Ward’s approach to lawyering was influenced by his anger and hatred for the system. According to Ward’s longtime friend and fellow attorney, Richard Burns, “John was—and he’d be the first person to tell you this—a very angry guy. He was just so angry about gay oppression, the court system, and police entrapment. And he would use that anger to good ends in court,” (Author’s Interview with Richard Burns). Local attorney Cindy Rizzo also remarked on Ward’s temperament, stating that, because he was older, Ward was somewhat more “mature” than the other activists in Boston. However, she qualified this statement by pointing out that he was also “very Boston, that kind of Irish Boston mature.” According to Rizzo, John Ward “knew people in the courts”:

He looked like them. He sounded like them. He knew a lot of older lawyers too. Some of whom were closeted. Some of whom weren’t. He just had connections in places where young activists like Richard and myself and other people didn’t. And yet he had the same radical politics as all of us. So he was kind of this wolf in sheep’s clothing. He was able to sort of be out there in the mainstream but also be this kind of revolutionary. He used to say to me ‘Oh I

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42 In a letter to the Honorable Scott Marahbarger, District Attorney for Middlesex County, Ward indicated that between 1977 and 1983, he handled “upwards of two hundred” cases involving open and gross lewdness, sodomy, unnatural and lascivious acts, or lewd, wanton and lascivious conduct (*Letter to Hon. Scott Marahbarger* 1983).

43 Ward estimates that he was thirty-four or thirty-five when he went to law school, which means he was closer to forty when he founded GLAD (Author’s Interview with John Ward).
was up at 4 a.m. this morning,’ and when I would respond, ‘John, what were you doing up so early?’ he would say ‘I was up at 4 a.m. plotting revenge!’ I mean that’s what he was like, you know. He was just wonderful and just so full of energy and so smart, my God—so, so smart (Author’s Interview with Cindy Rizzo).

According to the people who knew him best, John Ward used his status as a white, male attorney to infiltrate the ranks of the dominant legal community, rather than to assimilate. Indeed, the expression “a wolf in sheep’s clothing” suggests that John Ward could deceptively fit into the mainstream legal profession while still conducting himself as a gay liberationist. According to GLAD’s former treasurer, Roberta Stone, Ward moved freely in and out of the establishment:

John Ward was an attorney. So there’s somebody who’s in the establishment in a certain way. But he was also in fairy circles. He told this great story about going to court and starting to gesture to the judge and realizing that he had nail polish on. But he was one foot into the establishment and one foot into gay liberation but he realized, and people who started Lambda in the 70s realized, that in order to have the right to be whoever we wanted to be we had to have the basic rights that everyone had.

Although Ward identified as a gay liberationist, he viewed his private practice largely in terms of the individual clients. For example, when representing gay men who were arrested on sex-related charges, Ward did not challenge the constitutionality of the unnatural acts provision. Instead he used the Scagliotti decision to argue that police were arresting gay men in secluded areas, far removed from the public view. Despite the narrow grounds on which these cases were argued, Ward generated changes in the causes and constituencies of the movement. Indeed, the victims of entrapment had never received much sympathy from mainstream political supporters, even as they rallied around the repeal of sodomy laws. While lobbyists and lawmakers generally viewed these arrests as a threat to political progress, Ward perceived them as an opportunity to challenge unjust police practices in court. In doing so, he put the police in the unusual and uncomfortable position of trying to establish the public nature of an alleged offense. Facing new scrutiny from judges and jurors alike, police struggled to tell a story on the stand “that basically
wasn’t true” (Author’s Interview with John Ward). By providing individualized legal services to the underrepresented and underserved, Ward put the police on notice that discrimination against gay people would no longer go unchecked.

The idea of establishing a gay legal advocacy group came to John Ward in the spring of 1978, following widespread protests in response to the police crackdown at the Boston Public Library. On April 1st, 1978, an emergency mass demonstration was held to protest the arrest of over one hundred gay men on charges of prostitution and open and gross lewdness. Circling the library’s front steps, demonstrators waved signs saying: “I May Be Gay But I’m No Cop Sucker;” “Cops Should Arrest Rapists Not Play with Themselves;” “Cops on the Beat Not Beating Off;” and “Entrapment is the Real Problem,” (Brill 1978). The demonstrators then gathered for a rally in Copley Square where the Reverend Ed Hougen encouraged members of the gay community to remain vigilant in protesting harassment. In what was described by *Gay Community News* as a “dramatic display of strength,” the Boston/Boise Committee also held its first major fundraising event at the Arlington Street Church (Boston/Boise Raises $4,000 at Benefit 1978). Gore Vidal, the featured speaker of the event, helped to attract a sizeable crowd of over one thousand people. Together they helped raise more than $4,000 to support the defendants of the Revere Sex Scandal. According to B/BC member Tom Reeves, the money would be used to bring the National Jury Project to Boston, an organization that provided assistance in the selection of unbiased juries, particularly in cases subject to unfair media coverage (Aloisi 2012: 178). Finally, on April 27th, approximately seventy-five people demonstrated outside of a reelection fundraising event for District Attorney Garrett Byrne (Boston 1978). Organized by the B/BC, participants demanded an end to “the witch-hunt” in Boston; retraction of “the lies in the media;” “fair and open trials;” and an “investigation of the nature and timing of these
unconnected indictments,” (B/BC Flyer 1977)\(^4\) Although outraged, protesters were encouraged to conduct themselves peacefully. “HI. WE’RE GLAD YOU ARE DEMONSTRATING WITH US TODAY,” one flyer read. “This is a non-violent action . . . We must keep moving in an orderly way. Don’t argue with anybody . . . WALK WITH PRIDE,” (B/BC Flyer 1978).

Perhaps it is not too surprising that amidst such widespread community outrage local attorney John Ward recognized an opportunity for action. “It was clear to me that the energy was there to do something,” he later explained. “People were pretty agitated and so essentially what I did was sort of capture that energy” (Author’s Interview with John Ward). These remarks highlight a clear “mismatch” between structural and perceived opportunities (Kurzman 1996).

Although the state was spearheading a systematic attack on gay men in the form of police crackdowns, and the federal judiciary was becoming increasingly conservative, renewed energy in the social movement constituency made legal action possible, at least in Ward’s eyes. On September 30th, 1978, Ward called a meeting at the Old West Church in Boston to choose directors for a new organization he called Gay and Lesbian Advocates and Defenders (GLAD in New Defense Fund 1978). According to former executive director Kevin Cathcart, “GLAD was formed so that every time there was a crisis people didn’t have to go and call a meeting and, you know, start organizing in the basement of the Arlington Street Church or at Gay Community News, which is where things tended to take place in Boston,” (Author’s Interview with Kevin Cathcart). In August 1978, an article published by Gay Community News described GLAD’s purpose as providing “for the defense of persons arrested for gay related offenses, to assist gay parents in custody cases as well as aid cross dressers, transvestites, hustlers and other groups that are directly involved in the gay community,” (GLAD in New Defense Fund 1978). What

\(^4\) These demands appeared on a flyer circulated at the B/BC protest, held at Boston City Hall Plaza on December 15, 1978. However, they were representative of the group’s demands more broadly. See the press release announcing the B/BC’s formation (Committee Forms to Protest Police & Media Witch-hunt Against Gay Men 1977)
distinguished this organization from the private law offices of John Ward was its emphasis on cases where the issues were more important than the individual clients.

**Institutionalizing the Support Structure for Legal Mobilization**

GLAD officially opened its doors for business in December 1978. Between January and December of 1979, it raised about four thousand dollars and handled approximately ten cases (GLAD’s Second Annual Report). Its headquarters was located in the private law offices of John Ward, in a conference room no bigger than a closet. With few examples to follow, GLAD’s organizers set out to litigate gay rights. But before strategic impact litigation was even possible, activists had to build the legal infrastructure needed to support it. At GLAD, this entailed staffing a board of directors, raising money, developing organizational networks, and cultivating a system of cooperating attorneys who were willing to litigate gay rights cases for free.

From the outset, GLAD relied on John Ward’s connections to the gay and lesbian community to recruit board members and develop the group’s legal infrastructure. According to Richard Burns, “John sat there at the first or second meeting and said *well I John will be the volunteer executive director. You, Richard, will be the president of the board.* And I said *OK* and John . . . applied for 501(c)(3) status and incorporated us.” In an attempt to represent a range of attitudes in the gay community, Ward recruited a diverse set of activists to volunteer on the first board of directors. Many of them—including Tom Reeves, who later organized the North American Man/Boy Love Association; Ed Houghen, a bisexual minister of the Metropolitan Community Church of Boston whose wife and boyfriend also served on the board; and *Fag Rag* staff member Charles Shively—were all members of the Boston/Boise Committee. “It was an interesting mix of people,” recalled GLAD’s current legal director Gary Buseck, “that today probably couldn’t be the board of an organization like GLAD” (Interview with Gary Buseck).
When asked why he didn’t view the B/BC as a good vehicle for legal advocacy, Ward indicated that its focus on the Revere Sex Scandal was too narrow, and that he ultimately wanted more control over the agenda. As he described it, “the Boston Boise Committee had a lot to do with right of old men to have sex with teenage boys, which was not such a radical idea back then and I wasn’t necessarily opposed to it . . . but we needed a broader focus than that.”

Additional board members were recruited through John Ward’s professional network and friendship ties. GLAD’s current legal director, Gary Buseck, was a student at Boston College Law School when he interned at a civil rights law firm located in the same building as John Ward’s private practice. The way Buseck remembers it, “we must have gotten chatting somehow or somebody must have introduced us. And he of course was looking for anybody to get involved and to participate in the process” (Interview with Gary Buseck). So was GLAD’s President Richard Burns, who used his position as office manager at *Gay Community News* to recruit GCN’s business manager Roberta Stone, features editor Amy Hoffman, and staff writer Cindy Rizzo to GLAD’s Board of Directors. Drawing attention to the importance of organizational ties in mobilizing participants, local attorney Carol Wessling described this process of face-to-face recruiting as getting sucked in. “Sucked in isn’t really fair,” she explained. “We like to call it volunteering, but it’s a lot of work, no pay. It’s sucked in!” (Interview with Carol Wessling). Like Wessling, Burns commented on the importance of friendship ties in initiating and sustaining social movement participation. When asked whether the demands of political organizing interfered with his personal life, Burns responded that it was his personal life. “The friends I made at *Gay Community News*, some of them are still my friends now and it’s over thirty-five years later.” In the context of political activism, feelings of solidarity were rooted in sexual intimacies, as well as a sense of shared principles and mission.
“[W]e didn’t have a lot of boundaries,” Burns explained. “That’s who you had sex with, you know . . . and then we’d go have dinner or go to a bar [after completing a mailing] . . . the distinction between paid and unpaid work was very blurry if you were working in the gay community. It was all for one cause and one mission.”

Although GLAD’s board was comprised of both lawyers and non-lawyers, the lawyers still viewed themselves as activists as well as outsiders to their own profession. As a result, they were unconstrained by established conceptions of professionalism. Thus, when Attorney General Garret Byrne announced the formation of a hotline, and when police started arresting gay men at the Boston Public Library, GLAD’s organizers were among the protestors demonstrating in the streets. According to Burns, “the same people organizing GLAD were organizing demonstrations . . . So it wasn’t like oh we’re litigators, not demonstrators. It was people doing both . . . We were all at those demonstrations and then all involved with GLAD” (Author’s Interview with Richard Burns). Contrary to the argument that lawyers can direct social movements away from militant confrontation and grassroots mobilization (McCann and Silverstein 1998; Menkel-Meadow 1998), people like Burns believed that protesting and lawyering were not mutually exclusive. Although it is true that some attorneys can exert a moderating influence on social movements, clearly not all of them do.

Not every member of GLAD’s founding Board was an attorney, but even the non-attorneys found meaningful ways to participate in the organization. The group’s treasurer, Roberta Stone, was a public school teacher who lived in New York City before moving to Boston. As a member of New York’s Gay Teacher’s Association, she lobbied the Board of Education for the right not to be fired as a gay person. Then, in Boston, she was “coached” to be the business manager at Gay Community News. The way her wife Amy Hoffman remembers it,
“The managing editor said to Roberta do you balance your checkbook? And she said well yeah of course. And he said would you be our business manager?” Stone was recruited to serve on GLAD’s Board of Directors by Richard Burns in 1982. In addition to serving as the group’s treasurer, she worked on various personnel issues including employment policies and evaluations. Her wife, Amy Hoffman, who was also not an attorney, played a crucial role in developing GLAD’s vision. During our interview, Hoffman professed not to have the same “business skills or focus” as her wife. But as Stone quickly pointed out, her “political outlook was very important.” “I think that’s why Richard wanted me,” explained Hoffman. “I was one of the community people.” In many ways, both women saw themselves (and GLAD more broadly) as an intermediary between assimilationists on the one hand and liberationists on the other. “We came out of a gay liberation background and were working towards gay rights which were two different things,” Stone said. “We were kind of the bridge.”

Even the lawyers brought different skill sets with them to GLAD. For example, everyone I spoke to seemed to agree that Gary Buseck was the most knowledgeable about legal issues. “We always wanted him to be a judge,” explained Richard Burns (Author’s Interview with Richard Burns). In his role as president, Burns’ primary job was to raise money for GLAD. “I would pitch donors at events,” he explained. “I’m sure that I never gave a nuanced legal talk. That would be much more Gary who was so good at it.” In addition to public speaking, Buseck wrote legal briefs and argued a considerable number of GLAD’s cases in court. By comparison, former Executive Director Kevin Cathcart never really enjoyed what he called “stand up and talk law,” or “do tons of research and write briefs law”:

45 John Ward also saw himself as an intermediary between the radical and reform elements of the gay community. “From the beginning, there was some tension between what you might call the assimilationists and the liberationists,” he explained. “I thought of myself more in the liberationist camp, although some people might disagree with me. I just wanted us to be able to be who we were without having to make nice all the time, and hide and be good, all that sort of thing,” (Author’s Interview with John Ward).
[T]here’s a lot of stuff out there which is signed by Kevin Cathcart and Gary Busek and let me tell you Gary Buseck wrote those briefs and was the theory person and the brains. He’s a brilliant lawyer. I’m a smart guy but I don’t know if I’m a brilliant lawyer and my goal there [at Glad] and here [at Lambda] was building an organization or an institution that was going to be able to always do more. And, you know, that’s what was attractive [about taking the executive director position]. After being at GLAD for eight years, we’d gone from just me [as the only paid staff person] to seven or eight-and-a-half people (Author’s Interview with Kevin Cathcart).

Although Burns, Buseck and Cathcart were all trained attorneys, their role within the organization was shaped by their own individual proclivities and dispositions: Burns raised funds, Buseck devised strategy, and Cathcart administered the organization. Perhaps somewhat surprisingly, John Ward vacated the executive director position in 1982 after realizing that his personal and professional interests no longer resided with the organization. “I would say by about the early 1980s I realized that I had founder’s energy, that I did not have sustainer’s energy . . . and it was probably just as well if I stepped aside, which I did,” (Author’s Interview with John Ward). After moving to the West Coast, Ward resumed his advocacy on behalf of the underrepresented and underserved, providing indigent defense in death penalty cases. “I wanted to live in San Francisco. It’s as simple as that,” he explained. “And, although I’m not sure I articulated this to myself at the time, I thought it was better to have people with more administrative skills than I had, certainly as executive director – just glad I didn’t create any disasters in that capacity.”

Throughout most of the late 1970s and early 1980s, GLAD’s Board of Directors cultivated the resources necessary to keep the fledgling organization afloat. In the absence of a steady cash flow, the board operated on a strictly volunteer basis until 1982 when Kathy Travers became the first paid executive director. As volunteers, the initial board did “all the nitty-gritty of trying to keep a little organization alive.” According to Gary Buseck:
It was one of those early baby organization working boards where we did everything . . . we did mailings. I mean my biggest memory of GLAD Board was folding and stuffing and sealing and then sitting on the floor and putting things in zip code order . . . We did it. And, at the same time, if anything came along like to write a brief in a case, we just hopped in and did those things. And we did a lot of speaking . . . We would just go and talk wherever we were invited to talk, generally in Massachusetts . . . So that’s what life was. It was speaking—the grunt work of being an organization run by members of the board.

Law school students also played a pivotal role in developing the group’s legal infrastructure. Indeed, people like Urvashi Vaid, who later became the executive director of the National Gay Task Force; Kevin Cathcart, who served as GLAD’s executive director in the 1980s and then as the Lambda Legal’s executive director beginning in the 1990s; Tim McFeeley, who became the executive director of the Human Rights Campaign Fund; and Richard Burns, who served as the executive director of New York City’s LGBT Community Center during the height of the AIDS crisis, all went to law school in Boston. According to lesbian attorney Carol Wessling, Boston was “a factory of kings” where gay law school students trained to become national leaders. In addition to answering phones and identifying potential cases, law school students from Harvard, Boston College, Boston University, Northeastern University and Suffolk University conducted legal research, drafted memoranda on litigation, and organized public speaking engagements.

Before turning to a discussion of GLAD’s fundraising capabilities, I want to point out the crucial role law school students played not only in developing GLAD’s legal infrastructure, but in building the support structure for legal mobilization more broadly. For starters, gay law school students pressured administrators to adopt admissions policies that prohibited discrimination based on sexual orientation. At Harvard, for example, the Committee on Gay Legal Issues pressured the Law School to adopt a policy of nondiscrimination. Upon doing so, administrators also agreed to prohibit law firms from using the law school’s placement office if they discriminated against gay people (Harvard Law Revamps Policy 1979). Similar strategies were
replicated by gay student groups at Columbia University Law School (Columbia Law School Bans Anti-Gay Recruiters 1981); Northeastern University School of Law (NU Law School Bans Discrimination 1981); and Boston College Law School (Faculty Vote Bans Military Recruitment 1982). By 1985, twenty-three law schools responded to a survey administered by the Ad Hoc Committee Opposed to Sexual Orientation-Based Discrimination, a subsidiary of the Association of American Law Schools, indicating the adoption of similar policies (Schultz 1992).

Gay student groups were also influential in altering the curriculum to include gay legal issues. In 1980, when Urvashi Vaid attended her first year of law school at Northeastern University, “there were no textbooks and only a handful of course outlines available on gay and lesbian rights in the laws. Only a handful of schools taught courses in gay and lesbian law; an even smaller number of openly gay lawyers conducted this litigation,” (1995: 130). In New York, members of NYU’s Lesbian and Gay Law Students sought to remedy this problem by proposing a new course entitled “Sexuality and the Law” (McColgin 1981). Designed by local attorney and Lambda board member Thomas Stoddard, the course examined cases in the areas of privacy, free speech, child custody, employment discrimination, immigration, naturalization and the rights of gay people in the military. Because few cases dealt explicitly with gay rights, Stoddard viewed the course as a chance “to look at established constitutional principles through a new prism,” and as an opportunity for creative analysis of leading constitutional cases (quoted in ibid). By 1985, fifty-seven law schools developed similar courses nationwide (Schultz 1992).

In an attempt to support these efforts, law schools also started to provide institutional resources for programs directed at gay rights litigation. In October 1978, the first nationwide symposium on “gay rights under the law” was held at Hastings College of the Law. Co-organized by Hastings Gay Law Students, the Gay Caucus at the University of California at
Berkeley, the Law Student Division of the American Bar Association, and the Anti-Sexism Committee of the Bay Area National Lawyers Guild, the two-day conference featured panels on employment discrimination, military discharge cases, sodomy law reform, age of consent laws, prison censorship, and child custody (need citation). Similarly, New England School of Law sponsored the 1981 National Conference on Women. Although generally committed to women’s rights issues, the conference featured panels on legal challenges to discrimination based on sexual orientation; on career options for lesbians in traditional and non-traditional legal settings; on the legal implications of artificial insemination; and on the difficult task of building a network for lesbian law students (National Conference on Women 1981). Overall, these changes transformed the base of support for gay rights litigation by diversifying access to the legal profession and equipping law school students with the skills they needed to represent gay clients.

Back at 2 Park Square, gay law school students helped institutionalize GLAD’s fundraising apparatus. In the summer of 1980, Jose Gomez, a third-year Harvard Law School student, developed a card file containing the names and addresses of potential donors. “It was a very shoe string operation in the initial years,” explained Ward, “but that’s how we started raising dough,” (Author’s Interview with John Ward). Gomez was hired as GLAD’s Summer Coordinator in June 1980 after John Ward and Harvard Law School entered into an Off-Campus Federal Work Study Agreement. As a result, the federal government subsidized eighty percent of Gomez’s $200 per week salary (Meeting Minutes: June 18, 1980). Although major foundations provided large grants to civil rights organizations (Epp 1998), these same sources of funding were generally not available to gay rights litigators (Andersen 2005). Consequently, GLAD relied almost exclusively on individual contributions to raise money. During its first full year of operation, individual contributions accounted for nearly 68%, or $2,652.94, of GLAD’s total
operating budget (GLAD’s Second Annual Report). The remainder of the money was supplied by the National Education Foundation for Individual Rights, an umbrella organization formed in October 1978 during the first nationwide symposium on gay rights under the law (see above). According to Cindy Rizzo, GLAD’s financial situation was so poor that board members even lent money to the organization. “I lent GLAD $500 dollars,” she explained. “It might as well have been a million dollars in those years. And I did it with my breath held. We were all worried that the organization wasn’t going to survive,” (Author’s Interview with Cindy Rizzo).46

GLAD’s capacity to raise funds grew as activists learned to be more effective organizers. “Many of us were twenty-two and twenty-three and twenty-four,” explained Burns, “so we were making this up. There was no school for boards . . . We were just doing it” (Author’s Interview with Richard Burns). While some honed their organizing skills at Gay Community News—“We always joked and called GCN our graduate school,” explained Cindy Rizzo. “We were all very self-taught activists,” (Author’s Interview with Cindy Rizzo)—others continued learning through GLAD. Indeed, Richard Burns learned the art of event-based fundraising from his friend and fellow board member Vin McCarthy, a successful attorney with the law firm Hale and Dorr. “He taught us the concept of asking people to sponsor an event for fifty dollars and in exchange they would have their name printed on the invitation,” explained Burns. “That was wildly new to us,” (Author’s Interview with Richard Burns). Although these events increased the organization’s legitimacy in the eyes of potential donors, its ability to raise money was hampered by the low visibility of its supporters. “People weren’t out enough,” explained Kevin Cathcart nearly thirty years later. “That’s why it’s easier to raise $16 million dollars for LGBT and HIV legal work in

46 Organizational records indicate that Richard Burns and Roberta Stone also lent money to GLAD in the summer of 1984 in the amount of $30 and $500, respectively (Burns 1984; Stone 1984). Upon repaying the loan, GLAD’s Executive Director Kevin Cathecart informed Burns to “spend it fast, otherwise we will borrow it back,” (Cathecart 1984).
2014 than it was to raise $30,000 dollars in 1984. I’m not going to say it’s easy, but it’s easier—emphasis on the *i-e-r* at the end,” (Author’s Interview with Kevin Cathcart).

Aside from raising money, GLAD developed organizational networks which served as the basis of cooperation among gay rights litigators. During the first national conference on gay rights and the law, John Ward conferred with several other gay attorneys to create the National Education Foundation for Individual Rights (NEFIR), an umbrella organization comprised of GLAD, Lambda Legal, Gay Rights Advocates and the Texas Human Rights Foundation. Although local groups remained autonomous under the NEFIR, its purpose was to facilitate information sharing and the development of a legal brief bank (Stein 1978). As previously indicated, the NEFIR also supplied GLAD a twelve hundred dollar grant during the summer of 1979. Beginning in January 1982, GLAD compiled several editions of the National Lesbian and Gay Attorney’s Referral Directory, which listed state by state the names of nearly one hundred attorneys willing to litigate gay rights cases. Although its main purpose was to provide gay men and lesbians with access to sympathetic legal counsel, the directory also made gay and lesbian attorneys more visible to each other. Finally, GLAD reached out to other gay legal groups in order to “avoid duplicate efforts,” which suggests that organizational networks were utilized to mobilize as well as conserve scarce resources (Meeting Minutes: July 26th, 1983).

Although gay legal groups often shared staff, amicus briefs and information, it was not uncommon for organizations like GLAD and Lambda Legal to engage in turf wars. Lambda was established in 1973 after its founder Bill Thom realized that ordinary gay men and lesbians were in need of legal representation (Thom 2008). By the end of the decade, Lambda was joined not only by GLAD, but also by Gay Right Advocates and the Lesbian Rights Project in San Francisco, as well as the Texas Human Rights Foundation. In the fall of 1983, following a
discussion with Lambda’s Executive Director, Kathy Travers and Cindy Rizzo reported to GLAD’s Board of Directors that Lambda wanted the organization to declare whether its scope was national in focus or limited to New England (Meeting Minutes: September 14, 1983). Lambda’s primary concern in this regard was not over legal strategy or cases, but rather access to a limited pool of potential donors. Even though Gary Buseck was somewhat fuzzy on the details, he compared the process of divvying up turf to “the way the Pope divided the Western Hemisphere between Spain and Portugal. A decision was made at some point that GLAD was going to take responsibility for New England. Lambda was taking responsibility for the rest of the East Coast and to the Mississippi, and Gay Rights Advocates was responsible from Mississippi to the West Coast, although none of us had a lot of resources to fill the territory at that time,” (Author’s Interview with Gary Buseck).

Finally, in the absence of money to hire full-time staff attorneys, GLAD developed alternatives to the direct financing of cases, including building a network of cooperating attorneys to support litigation. These attorneys were not directly employed by GLAD, and almost always volunteered their services, but they provided important legal advice and resources nonetheless. By 1983, GLAD hired Kathy Travers as its first full time paid staff member and executive director; moved out of the law offices of John Ward to a new office on Boylston Street; added several new members to its board of directors; developed an “incredibly bureaucratic” personnel policy (Meeting Minutes: April 20, 1983); and established two new committees including the development and litigation committees. While the former organized fundraising events such as the annual Provincetown Gala and oversaw GLAD’s financial stability, the latter had three primary functions, namely to recommend litigation priorities and

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47 Much like GLAD, other leading civil rights groups including the ACLU and the NAACP Legal Defense Fund relied on cooperating attorneys to conduct litigation on a nationwide scale (Wasby 1984; Rabin 1976).
policies to the board; review requests for legal assistance and determine which cases to accept; and provide technical support to cooperating attorneys (GLAD’s 1983 Annual Report). As GLAD’s extralegal infrastructure continued growing, so too did its capacity for bringing cases. In the next section I provide a general overview of GLAD’s docket from its emergence in 1978 through the mid-1980s, when the United States Supreme Court handed down *Bowers v. Hardwick*. Rather than succumb to the myth of rights, GLAD used litigation to dispel homophobic myths in court, combat prejudice and educate the legal community. Moreover, the “grassroots” lawyering that emerged extended (rather than displaced) civil rights strategies to include the “untouchables,” namely gay men who had been arrested on public sex charges.

**“In Our Own Voices” – GLAD’s First Five Years**

From the outset, GLAD’s programmatic agenda was loosely defined. Indeed, when asked about his overall vision for the organization, Ward responded that his primary focus was on “getting through the next twenty-four hours, keeping the door open . . . I wanted to see GLAD as a legal presence that was taken seriously and I also wanted to see it constantly pushing the agenda of equality” (Author’s Interview with John Ward). Although Ward’s vision for the organization was nonspecific, board members agreed early on to keep the focus on gay rights issues, mainly for the purpose of directing strategy and conserving scarce resources. As early as 1979, the organization positioned itself as an intermediary between gay people on the one hand and a “volatile and little understood area of the law” on the other. In outlining the organization’s “public interest role”, GLAD’s Second Annual Report signified deep distrust in the dominant legal system, rather than a blind commitment to the myth of rights:

GLAD is providing legal representation on issues of significant public interest which traditional law firms are not willing to advocate or do not have the expertise to represent adequately. Without the specialized activities of such public interest law firms as GLAD, the court and administrative agencies either would not be afforded the opportunity to review these
issues of significant public interest or would rely on socially biased data, in detriment not only to the gay and lesbian community, but also to the public in general.

In addition to providing legal representation to the underserved, the report reflected a desire to combat social and cultural bias in the legal system. This orientation toward the law is not surprising when one considers the fact that judges, lawyers and other legal actors were openly hostile to gay litigants, due in no small part to widespread misperceptions and prejudices about gay people. One need look no further than lesbian custody cases in the 1970s to fully appreciate the magnitude of the court’s intolerance. Indeed, a survey of lesbian custody cases in 1978 indicated that many judges viewed lesbians as mentally ill, unpredictable and irresponsible (Hutchins and Price 1978). Furthermore, judges were concerned that children raised in lesbian households were at higher risk for sexual abuse, both by their mothers or their mothers’ partners, and for becoming homosexual themselves. Finally, judges were also troubled by the fact that children growing up in lesbian households might come to view same-sex relationships as socially acceptable. In light of such unabashed homophobia, GLAD orchestrated gay legal claims in a way that was not only central to the development of the law, but to the accurate and informed representation of gay and lesbian interests in court.

Prior to the formation of a litigation committee in 1983, John Ward developed GLAD’s docket with little to no input from the Board of Directors. “To be quite candid, it was pretty much whatever I wanted to do,” he explained. “I mean, I was the lawyer so if I wanted to do a case I could do it,” (Author’s Interview with John Ward). In this way, GLAD operated as “a wholly owned subsidiary” of John Ward’s private practice. If a case walked through the door with public interest implications, “one that would have an effect beyond the certain individual parties involved,” it was redirected to GLAD’s docket (ibid.). Ward’s memory on this point was corroborated by Gary Buseck, who joined the Board of Directors in 1980. “In those early years,
GLAD really was—from 1978 until at least 1983, those first five years—I would say it was all John doing litigation and some others of us probably doing some amicus briefs and public speaking.” GLAD’s capacity to take on a greater number of cases grew alongside the total number of cooperating attorneys. Indeed, it was the presence of a willing attorney, more so than a clear legal strategy, that guided case selection. As Buseck observed in our interview:

It’s hard to remember now when we live in a world where every piece of litigation we bring we almost have to reverse engineer it from the Supreme Court and worry about [things like do] we need to keep this away from the Supreme Court or it needs to be state constitutional law only or this has potential and do we want to bring this and what’s the right next step and how are we going to do this. That wasn’t the way the world was in the early eighties. It was . . . if something comes in the door and it looks interesting, and there’s a lawyer out there doing something, we’re talking about it, people are having to listen to it, judges are having to listen to it. And so there didn’t seem to be as much at stake. I mean, there was everything at stake but not in the same way of like Oh my God, the Supreme Court could kill us for the next generation.

Remarkably, the Supreme Court’s silence on gay rights issues prior to Bowers v. Hardwick was not perceived as an obstacle to gay rights litigation, but rather as creating a permissive legal climate instead. This tendency not to view the Court as threatening helps to explain why even an increasingly conservative judiciary was insufficient to stunt the development of gay legal groups in the late 1970s. Furthermore, the prevailing legal climate allowed GLAD to take on cases even when success was not guaranteed. In part, this is because people like Gary Buseck viewed litigation as an educational tool for challenging dominant views on homosexuality. Although GLAD certainly preferred to win the cases that went to trial, even a legal loss could help educate the dominant legal community about gay rights issues.

Given the tenuous legal position of gay people in the 1970s and 1980s, GLAD’s main objective was not only to “take aggressive legal action” on behalf of gay rights, but also to educate people about those rights. According to GLAD’s second annual report (1979-1980), the organization sought to “inform gay citizens of their rights under the law and to educate the public
at large about the rights of gay citizens under the law.” In part, this objective was premised on the reality that gay people were largely unaware of the rights they possessed under existing law. However, it was also premised on the understanding that successful legal challenges required cultural climate change. In other words, the relationship between law and cultural attitudes was viewed as reciprocal. Although litigation could effectively challenge dominant attitudes, as indicated by people like Gary Buseck, altering the cultural climate was deemed necessary to achieve legal victories. Kathy Travers, John Ward’s successor as executive director, expressed this view of the law in a grant proposal to fund an intensive outreach and education project throughout New England. According to Travers, GLAD’s purpose was twofold. Namely, “To give gay men and lesbians a means to defend ourselves in our own voices in the courts” and “To inform the gay community, the legal community, and the general public of the current status of the law,” (Haymarket Grant Proposal 1983). Drawing attention to the limits of litigation in the absence of cultural change, Travers continued:

Challenges and defenses mounted through the courts are only one step of the process of social change. Favorable litigation results do not occur in a vacuum; they are reflections of the general social and political climate of the times. Tracing a history of judicial decisions and legislative change, one sees a consistent tracking of changes occurring in society at large. The judicial system is often seen as ‘creating’ change in society with landmark decisions (e.g. Roe v. Wade on abortion rights). The impact of such decisions cannot be minimized. Yet even the most far-reaching decisions are the result of previous political change. Future changes in the complexion of the court or in society’s standards can result in consolidation or loss of these advances.

To the extent that changes in public opinion preceded legal victories, Travers recognized the importance of altering cultural attitudes toward homosexuality. Although litigation could influence underlying attitudes and beliefs, judicial decisions often reflected the broader social and political climate. As a result, GLAD’s litigation and education activities were often viewed as mutually supportive (Meeting Minutes: October 1, 1983).
Turning now to the composition of GLAD’s docket, significant resource constraints limited the organization’s capacity to mobilize the law on behalf of gay rights. Between 1978, when the organization was founded, and 1986, when *Bowers v. Hardwick* was decided, GLAD participated in fewer than twenty cases, filing amicus curiae briefs or providing legal counsel in four principle areas of law. As indicated by Table 4.1, these included open and gross lewdness, employment discrimination, first amendment litigation, and child custody. The only remaining case on GLAD’s docket in the 1980s addressed the rights of the criminally accused.

[Insert Table 4.1]

Consistent with John Ward’s anger over police entrapment, and in large part because GLAD was founded in response to political attacks and harassment against the gay community, selective enforcement of public sex laws was a major concern for the organization. Even though much of the literature on the LGBT rights movement has focused on the effort to decriminalize sodomy (e.g. Andersen 2005; Bernstein 2003), GLAD initially focused its attention on men who were charged with lewd and lascivious conduct, rather than “crimes against nature.” One core reason for the emphasis on lewd conduct was that arrests for sodomy were extremely rare. Indeed, it was far more common for gay men to be arrested for smiling at a plainclothes policeman than it was to be arrested for committing sodomy in the privacy of one’s own home. Still, the emphasis on lewd and lascivious conduct left the organization open to charges of being male centered, primarily because lesbians were far less likely to be entrapped or arrested than gay men. As Ellen Andersen (2005) has observed, lesbians avoided these encounters because they were generally “less likely to solicit virtual strangers for sex or to engage in semipublic sexual activity,” (38-39). Instead, they were more inclined to develop romantic friendships through existing social networks (Adam 1987). “Men just unzip and they’re ready,” explained
Roberta Stone, while commenting on the centrality of what she called “the bushes cases” to the gay legal movement. “Women just want to meet somebody and maybe go to dinner with them.”

Even though lesbians were far less likely to be arrested or entrapped than gay men, even the women on GLAD’s Board of Directors recognized selective discriminatory enforcement as a problem. “The cops were obsessed with finding these people who were engaged in sex with each other that was not coerced or anything else,” explained Stone. “It was ridiculous. It wasn’t like somebody preying on anyone else. They went out to meet each other.” GLAD’s involvement in these cases was crucial not only because gay men were unfairly targeted by the police, but because they were often blamed by members of their own community for curbing gay rights. This position was aptly summarized by Ann Weld-Harrington (1977) in a letter to Gay Community News:

I feel like a whole lot of us who have been working in the gay movement for gay rights have been sold out. Sold out by a few people who regard themselves as above the law . . . and who have total disregard for the struggle that is going on around them. It’s unfortunate that an unnatural acts statute remains on the books as defining sex between two men or two women as unnatural. But what is more unfortunate is that some people go further and perform their ‘unnatural acts’ in public, therefore bringing embarrassment to most of us. In case anyone is wondering, the gay bill H.B. 3676 is before the House in August. If it goes down I would like to here and now thank those people who fail to take our movement seriously and who, in essence, are laying a joke on all of us. Enough already!

The problem with such criticism from the community was not so much its derisive tone as its failure to acknowledge that gay men were not flagrantly engaging in public sex. To the contrary, gay men seeking sexual partners often made concerted efforts to locate other gay men in secluded areas. Indeed, “public sex” almost always took place behind a physical barrier—such as bushes, bathroom stalls, or car doors—which generally shielded participants from unsuspecting bystanders, or in remote areas far removed from the public eye. “If people are going to see what is going on in these places, they must intrude,” explained Pat Califia (1994) in his book Public
Sex. “They must actively look for things that will offend them, either by penetrating physical barriers, by setting up covert surveillance, or by posing as potential participants.”

Even though public sex was portrayed by mainstream political activists as a major obstacle to winning gay civil rights, GLAD did not shy away from the issue, not even in cases involving “bad facts.” According to Andersen (2005), “good facts make the harm suffered by a potential client seem more obvious or more egregious while bad facts make the harm seem less obvious or egregious,” (30). Even though a “bad factual case . . . might involve someone arrested for sodomy whose sexual activity had occurred in a public location such as a park,” GLAD nonetheless pursued these cases, usually because of the egregiousness of police misconduct involved. In \textit{People v. McConville} (1981), for example, the arresting officer had been trained in “techniques designed to attract gays,” including “how to look gay” and “how to appear like a potential violator,” (GLAD Briefs: 1981). As indicated by the court’s opinion, the officer, upon entering a May Department Store restroom, “unzipped his pants” and stood in front of a urinal “with his penis out” for over eight minutes. Such conduct was meant to give the impression that the plainclothes officer was either willing to participate in a sexual activity or to observe such activity for the purpose of obtaining sexual gratification.\footnote{John Ward detailed the nature of these interactions and their implications for gay men in a letter to the Middlesex County District Attorney Scott Harshbarger. “It is common practice for certain police departments to assign plain clothes officers to areas known to be frequented by gay men. These officers typically engage people in conversation and by their innuendo and body language invite a touch that results in the arrest of the persons for lewd behavior or even the felony of indecent assault. In another common scenario the plain clothes officer will loiter about for long periods of time as if he were seeking to participate in sexual activity or to observe such activist so as to obtain sexual gratification. If he finally observes some activity, he makes arrests for conduct that would most likely have not occurred had it been clear that a truly unwilling member of the public were present. Because of the nature of the activity and the adverse reaction to it that is common to courts and juries and also because of defendant’s frequent reluctance to endure the embarrassment of trial, it is usually not possible to raise successfully the defense of entrapment, apparent consent, or lack of intent to annoy,” (Ward 1983).} Even though the defendant, John McConville, had “knowingly” and “openly” masturbated in front a plainclothes policeman, GLAD petitioned to file an amicus curiae brief in the case, noting in a 1981 mailing that it could
limit arrests to cases in which the observer was truly offended.\textsuperscript{49} “If the hearing is granted, the Court’s decision will be the law in California and may be very persuasive to the courts of other states,” (GLAD Briefs: Fall 1981). In the end, GLAD’s petition to file an amicus brief was dismissed, McConville was convicted, and the court ordered the Reporter of Decisions not to publish the opinion. However, GLAD remained vigilant in defending a stigmatized group of people who were not only vulnerable to harassment by the police, but who were often cast aside by members of their own community.

With the exception of \textit{McConville}, GLAD secured victories in many of the cases involving lewd conduct. However, “victory” generally took the form of dismissals. In \textit{Commonwealth v. Leonard}, for example, the Superior Court dismissed a complaint for open and gross lewdness at Revere Beach after arrest records compiled by GLAD revealed that the law was selectively enforced against men (GLAD Briefs: 1981). In a related case, \textit{Commonwealth v. M.V.}, GLAD sought expungement of Criminal Offender Record Information retained by the Boston Police Department, particularly in cases where complaints for open and gross lewdness had been dismissed. GLAD’s aim in this particular regard was to ensure that arrest records could not be used to further stigmatize gay men, many of whom feared losing their jobs if their employers found out not only about their arrests but about their sexual behavior with other men. Although it is not clear from the available data whether GLAD achieved victory in this particular case, today people in Massachusetts can have their criminal record sealed if they are not found guilty of a crime (MGL c. 276. s. 100A). Finally, in its first yet longest lasting case, GLAD filed a massive $500,000 civil suit against the Boston Public Library and police officials in response to the undercover sting operation described above. The case took nearly ten years to resolve and

\textsuperscript{49} The lower court initially overturned the conviction, stating that the officer had given no indication that he was or might be offended by McConville’s masturbation. As such, the lower court ruled that the officer’s conduct was “tantamount” to wearing a sign that said “It’s okay to perform lewd acts in my presence.”
finally ended in settlement. However, GLAD continued raising awareness around the issue of entrapment, even after the emergence of AIDS sparked widespread condemnation of gay male sexual practices. Beginning in 1982, the organization distributed a wallet-sized card listing people’s rights in the case of an arrest. Two years later, in October 1984, members of the Education and Outreach Committee organized a public forum concerning police harassment in rest areas and parks (Gay Community to Hold Forum on Police Entrapment In Rest Areas 1984). Titled “Police Harassment & Entrapment of Gay Men in the Great Outdoors” (1984), the event was organized at the Arlington Street Church in response to intensified police sweeps throughout the State. Following a reenactment of police entrapment at the Bird Sanctuary, legal experts and community organizers addressed the crowd of nearly one hundred men. “The police are complaining of a lack of resources when people are raped on the Esplanade,” Richard Burns explained to the audience. “Yet they’re spending time and money arresting adults engaged in consensual acts,” (Bennett 1984). In this way, increased surveillance of gay meeting areas was portrayed not only as discriminatory and unfair treatment against gay men, but as a misappropriation of limited law enforcement resources. Following the outdoor sex forum, Richard Burns and other members of the panel met with Commissioner William Geary of the Metropolitan District Commission to discuss the arrests of gay men at popular gay meeting spots. In response, Geary promised to direct the MDC police not to make arrests in a discriminatory manner, or as a result of entrapment (McFeeley 1984).50

In addition to providing much legal needed assistance to the underrepresented and underserved, GLAD drove the development of law in the area of employment discrimination. As previously indicated in chapter 2, litigants in these cases confronted the common law precept that, in the absence of an express statutory prohibition, private employers had the right to hire

50 The MDC police has since been folded into Massachusetts State Police force (Jacoby 1995).
and fire whomever they wanted (Warner 1981; Rivera 1979). As such, GLAD’s attorneys were in the unenviable position of having to construct new legal meanings out of existing laws, primarily through their participation as amicus curiae, or “friends of the court.” In filing amicus curiae briefs, GLAD sought to provide legal decision makers with information not only about gay people’s lived experience, but about important social science research that undermined prevailing cultural attitudes and challenged dominant stereotypes about gay people. As Law Professor Patrica Falk (1994) has observed, social science research was one of the only “weapons” available to gay rights litigators at this time. Indeed, legal doctrine, historical protection and social consensus were not among the arrows in their quiver. In this way, GLAD relied on amicus curiae briefs not only to float legal arguments, but to inform judges, debunk stereotypes and counter prejudicial decisions.

The first case in which GLAD filed an amicus curiae brief directly implicating the employment rights of gay people was MacAuley v. MCAD (1979). As described above, Robert MacAuley filed a complaint with the Massachusetts Commission Against Discrimination alleging that he was discriminated against in his employment by the management of a restaurant known as the Fan Club. MCAD returned the complaint, stating that it lacked jurisdiction because existing law did not include “sexual preference” as a protected category, but rather only sex. MacAuley then filed a request for mandatory injunction, asking the Suffolk Superior Court to order the Commission to investigate his complaint. Drawing attention to the significance of his case, Gay Community News reported that, if successful, it “would make Massachusetts the first state where homosexuals are protected from discrimination in employment,” (MCAD Won’t Hear Case 1978). On September 12, 1978 MacAuley’s case was argued before Judge DeGuglielmo. However, DeGuglielmo reserved judgment in the case and reported it to the
Massachusetts Appeals Court. In the fall of 1979, a request for direct review was granted by the Supreme Judicial Court, along with GLAD’s motion to file an amicus curiae brief.

The amicus curiae brief filed in *MacAuley v. MCAD* is representative of the socio-legal arguments developed and deployed by GLAD in employment discrimination cases more broadly. For starters, John Ward, one the brief’s main architects, advocated for a broad construction of Massachusetts’ discrimination statute, General Law Chapter 151b. The purpose of the law, he claimed, was to prohibit discrimination, or as Webster’s Third New International Dictionary defined it, “difference in treatment on a categorical basis in disregard of individual merit.” Taking the ordinary meaning of the word as his starting point, Ward argued that the enumerated bases of discrimination—namely race, color, religious creed, national origin, sex, age, and ancestry—were merely illustrative of the types of discrimination that were prohibited under state law. “Such a construction would accomplish the purpose of the statutory language taken as a whole, and should be adopted in preference to a construction that would defeat the legislative purpose,” (*MacAuly v. MCAD, Brief of Gay & Lesbian Advocates & Defenders*).

Moving beyond issues of interpretation, Ward argued that discrimination based upon sexual preference, much like discrimination based on sex, was an arbitrary denial of rights based on outmoded stereotypes. Although much has been made of the analogy between civil rights and gay rights litigators (Meyer and Boutcher 2007), Ward drew almost exclusively from the arguments made by feminist lawyers beginning in the early 1970s. Citing *Califano v. Goldfarb*, which invalidated gender-specific requirements regarding male widowers’ receipt of Social Security benefits, Ward argued that individuals who appeared gay were often the victims of discrimination based on gender stereotypes about how men and women should behave. In

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51 The brief was prepared with the assistance from Suffolk Law School student Cindy Rizzo, who later became a member of GLAD’s Board of Directors, and from the Committee on Gay Legal Issues at Harvard Law School (Gay Legal Group Files Brief in SJC Case 1979).
making this argument, Ward drew the court’s attention to the difficulties many gay people faced trying to pass at work, even though gay people and straight people generally looked the same. “Most homosexuals are indistinguishable in manner and appearance from their heterosexual fellow citizens,” he explained. To substantiate this claim, Ward included a reference to Peter Fisher’s 1972 book The Gay Mystique, which chronicled the early post-Stonewall movement and attempted to explain homosexuality not only to straight people but to gay people still coming out to themselves.52 The brief continued:

For them [gay people who could pass as straight], homosexuality becomes an employment issue only when they choose to make it an issue, see, e.g., Acanfora v. Board of Education, 491 F.2d 498, or when someone else raises the issue, see, e.g., Gaylord v. Tacoma School District No. 10, 88 Wn.2d 286. For some, however, the “image of homosexuality” is always with them, regardless of volitional choice. Such individuals are the victims of discrimination based on “archaic and overbroad generalizations” about the proper behavioral roles for men and women. In this sense, discrimination based on sexual preference is but a sub-set of sex discrimination.

By labeling discrimination on the basis of sexual orientation as actionable sex discrimination, John Ward tailored existing legal categories to fit the specific needs of gay people. Rooted in the feminist critique of dominant gender roles and stereotypes, the underlying proposition was that effeminate men and masculine women should not be penalized for displaying characteristics of the opposite sex. In the absence of a bona fide occupational qualification, this type of discrimination was “no more defensible than disparate treatment based on sex.”53

In addition to statutory claims, Ward argued that excluding gay men and lesbians from existing legal protections deprived them of their right to equal protection of the laws. In

52 Other social science research cited throughout the brief included a sociological account of coming out, law review articles on whether sexual orientation was a suspect classification, and psychological research examining the causes and consequences of homosexuality, just to name a few.
53 In a short footnote near the bottom of page six, Ward indicated that his intent was “not to minimize the difficulty experienced by homosexuals who” could pass at work. Despite their ability to blend in, gay people who did pass confronted their own set of challenges in the workplace such as “ignoring derogatory remarks about homosexuals, being evasive about their weekend activities, and dissembling about meaningful relationships.”  

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developing this particular aspect of the argument, Ward deployed a variant of what legal scholar Pamela Brandwein has called the language of “state neglect.” According to Brandwein (2006), the state neglect concept is associated with a nineteenth-century idea that states have an affirmative duty to equally administer the law and protect the rights (albeit certain rights) of all citizens. Failure to do so results in a rights violation within the meaning of the Fourteenth Amendment. Although John Ward most certainly was not familiar with the work of Pamela Brandwein in 1978, he used similar reasoning to extend equal protection guarantees to private discrimination based on sexual orientation. More specifically, he argued that “the exclusion of homosexuals from the protection of Chapter 151b” barred them from administrative remedies that had been made available to other groups, thus violating equal protection guarantees. Moreover, MCAD’s exclusion of gay people from existing protections conveyed “an unmistakable message to private employers that discrimination on the basis of sexual orientation” was permissible. According to this line of reasoning, failure to include gay people under existing law not only authorized but encouraged discrimination against them. “By refusing jurisdiction here, MCAD implicates itself in acts of private discrimination . . . It matters not, from a constitutional point of view, whether MCAD’s involvement stems from inaction rather than misfeasance,” (emphasis added).

Rounding out the brief, Ward argued that a heightened level of judicial scrutiny was the proper mode of equal protection analysis to apply in the case at hand. His reasoning was twofold. First, employment discrimination burdened fundamental rights including the right to engage in private, consensual sexual activity. Citing Commonwealth v. Scagliotti (1977), the brief indicated that a “consensual unnatural act” had to be committed in a public place in order to be punishable by law. Such reasoning was further substantiated by reference to cases involving reproductive
freedom, namely *Eisenstadt v. Baird* (1972), *Roe v. Wade* (1973) and *Griswold v. Connecticut* (1965). Simply put, by omitting protections for gay people, the state impaired their fundamental right to engage in private, consensual sex. Indeed, a gay person would be deterred from engaging in such activities in order to reduce the risk of discovery. Drawing the court’s attention to the harm inflicted on these individuals by “hiding,” Ward directly quoted Peter Fisher’s *The Gay Mystique*:

The gay person who comes out in straight society stands to gain a great deal more than just the freedom to be himself. There is the relief of not having to hide any longer and the pleasure of being able to speak frankly about himself, his feelings and his way of life . . . Hiding usually requires so little effort that it is rarely felt as a strain, yet every time a homosexual denies the validity of his feelings or restrains himself from expressing them, he does a small hurt to himself . . . Every feeling that was ever restrained, every word that was never spoken, every spark of anger that was quickly suppressed, leaves a lasting mark and seeks another outlet. Many of them do find an outlet, often in self-defeating ways.

It is highly doubtful that members of the Massachusetts Supreme Judicial Court had ever heard of Peter Fisher, a “larger than life” presence in the movement who led some of the Gay Activists Alliance’s most famous zaps in New York City (Humm 2012). Yet through his words and images they gained rare insight into the emotional toll of repressing one’s sexual identity. As the primary vehicle through which these words were transmitted, GLAD’s amicus brief served as a crucial mechanism for informing judges about how their decisions would impact the everyday lives of gay people.

Finally, in covering his bases, Ward argued that the second reason a heightened level of judicial scrutiny was appropriate in MacAuley’s case was because gay people were a discrete and insular minority. Citing one highly influential study on the sociological aspects of sexuality, it was argued that gay people made up no more than ten percent of the population.\footnote{The study was John Gagnon and William Simon’s Sexual Conduct. First published in 1973, the study is often credited with developing a social constructionist approach to sexuality.} Moreover,
homosexuality did not prevent people from contributing meaningfully to society. One by one, the brief discredited antigay stereotypes by way of citing social science research:

Concerns that homosexuality poses a threat to the family, ostensibly through the breakup of marriages or through the molestation of children, are completely unfounded. See, e.g., Lee, Going Public: A Study in the Sociology of Homosexual Liberation . . . Similarly, there is no basis to the proposition that homosexuality as some sort of psychological disorder, interferes with the individual’s ability function at a job. See, e.g., Laner, Permanent Partner Priorities, Gay and Straight; Psychology Today, December, 1975 (interview with Evelyn Hooker).

Finally, the brief pointed out what today seems obvious, namely that a homosexual orientation was not within the control of the individual. “Although experts do not agree on the causes of homosexuality, most scientists have concluded that, once established, a homosexual preference is extremely difficult and costly to alter, if indeed it can be altered.” In short, the brief made clear that gay people met all of the indicia of a suspect class and that the court should apply “the strictest scrutiny.” According to Ward, whether this process was labelled “strict” or “intermediate” was “unimportant.” What mattered was that the exclusion of sexual orientation discrimination could only be justified if differential treatment was substantially related to the object of Chapter 151b. In light of the existing research, Ward concluded that the state’s interest in promoting job efficiency, the family and child welfare were “without relevance.”

What is perhaps most interesting about GLAD’s brief is that its effort to provide social science information to courts occurred at about the same time that courts were turning with increasing frequency to social science in their opinions. According to Law Professor Patricia Falk (1994), who has written extensively on this topic, courts became more receptive to social science as a result of processes both internal and external to the legal system. Outside the courtroom, changes in the academy including an “outpouring of articles and books,” “the appearance of specialized journals,” and the establishment of interdisciplinary courses such as “Psychology and Law” increased judges’ willingness to consider information provided by the
social sciences. The coming together of these two fields accelerated the rate at which judges used social science findings as a source of authority in their opinions. Inside the courtroom, Falk has further argued that social science findings performed several important functions in gay rights cases. Specifically, she observed that opinion authors used social science research for at least four justificatory reasons: to educate third parties about homosexuality and therefore persuade them of the legitimacy of their decisions; to debunk myths regarding gay individuals and rationalize potentially unpopular decisions (for example, to reject the myth that gay parents will molest their children in a dispute over child custody); to invoke the authority of science when presiding over controversial issues; and to shift responsibility for difficult decision making onto authorities outside the legal system.

In light of these justificatory functions, the potential impact of GLAD’s amicus participation on judicial decision-making cannot be overstated, even if it is difficult to quantify or measure. In the end, the Massachusetts Judicial Court ruled that MCAD did not have the authority to review complaints based on sexual orientation. However, the court agreed with the reasoning developed in GLAD’s brief that discrimination based on sexual orientation was like discrimination based on sex. The opinion is worth quoting at length because it demonstrates the justices’ thinking on this issue:

As a matter of literal meaning, discrimination against homosexuals could be treated as a species of discrimination because of sex. We treat distinctions based on pregnancy as distinctions based on sex, calling them “sex-linked.” In a somewhat different sense, homosexuality is also sex-linked. A prohibition of discrimination against homosexuals might not be out of harmony with G. L. c. 151B . . . But we do not think we are free to supply our own reading of the statutory language or our own view of what the policy should be. We know that the widespread discussion of sex discrimination in recent years has focused on discrimination between men and women. The uniform interpretation of statutes prohibiting discrimination in employment because of sex has limited the statutes to discrimination between men and women. Discrimination based on sexual preference has been excluded (MacAuley v. MCAD, 1979).
By drawing an analogy to discrimination based on pregnancy, the Court seemed to be suggesting that discrimination based on sex-linked traits was a form of sex discrimination. However, the justices were not at liberty to apply this rationale in light of established precedent. Even though *MacAuley v. MCAD* was not a victory for GLAD, the notion that gay people might enjoy legal protections under existing law had still crept into the judges’ consciousness.

The final observation that can be made with respect to GLAD’s docket is that gay rights litigation often complemented rather than displaced other civil rights strategies. Even though scholars have argued that lawyers dominate social movements (Meili 2006) and dictate strategy (Levitsky 2006), several of GLAD’s earliest cases actually helped to make political mobilization possible. For example, in *Commonwealth v. T.C.* (1979), GLAD represented a man by the name of Taffy Comer who was charged with disorderly conduct after posting publicity for Gay Pride Week. “At first the policeman just told me to move on,” Comer told a reporter from *Gay Community News*, “but then he called me back and said my ‘attitude’ was bad, so he was going to arrest me,” (Michaelson 1979). Comer spent an hour and a half in jail and was ordered to return the next day for a hearing. “I didn’t know what my bail rights were and really had no idea of what I could or could not do in that situation.” After contacting the Bail Fund, Comer was put in touch with local attorney John Ward and GLAD agreed to take his case. According to GLAD’s Second Annual Report, this was a “typical situation” in which arrests for disorderly conduct were used “to harass citizens” involved in “unpopular or controversial” activities. Responding to the mere threat of litigation, the charges against Comer were eventually dropped.

In another instance where gay rights litigation made political mobilization possible, GLAD and several other attorneys represented James Anderson, a member of the Boston Lesbian and Gay Pride Committee who held the permit for the 1981 pride parade. The permit was
initially obtained in March 1981. However, on June 18, Anderson was informed by the Deputy Commissioner of Traffic and Parking that the parade route could no longer be used. In typical discriminatory fashion, the Commissioner’s notice came just two days after a demonstration was held at City Hall to protest the elimination of the city’s liaison position to the gay community. With less than eighteen hours before the start of the parade, GLAD filed suit in Superior Court of Suffolk County, claiming that the city’s action was in retaliation for the demonstration. Indeed, an affidavit submitted to the court by Anderson indicated that the Commissioner had telephoned him to say that the “demonstration was unacceptable and that the curtailment of the parade route was ‘just a scratch on the surface’ of the City’s punitive reaction to the lesbian and gay community’s behavior,” (Goldsmith 1981). When asked by Judge Paul K. Connoly why the city had waited so long to change the permit, attorney Kelan Derderian called the delay “regrettable,” but insisted that the large crowd would put an unexpected strain on the police department and disrupt business on Beacon Hill. According to newspaper coverage of the event, Judge Connoly responded that the rights of free expression took precedence over the interests of business and granted an injunction preventing the city’s action (Goldsmith 1981). At a news conference immediately following the hearing, local attorney Kathy Triantafillou commented on its significance to the gay community. “We prevented the city from behaving in an irrational way to a demonstration. Everyone in the Constitution is guaranteed the right of free expression. No one is excluded, including gay and lesbians . . . Ten years ago, this might not have happened,” (ibid.).

In light of GLAD’s swift response to routine harassment, its attorneys were often described as “the shock troops” of the movement for gay rights (Travers 1984). Indeed, their ability to pressure government officials on a moment’s notice made other forms of civil rights work possible. Although some scholars have argued that litigation diverts movement energies
away from grassroots activism, this is clearly not the case when lawyers are fully committed to the cause, and when they recognize litigation as only one component of a larger strategy for change. Rather than dominate the movement, GLAD facilitated confrontation both inside and outside the courtroom.

**Summary**

In tracing the development of Gay and Lesbian Advocates and Defenders, this chapter illuminates the complex relationship between objective structural opportunities and their subjective interpretation. Despite what can only be considered as a period of constricting opportunity, John Ward recognized the community’s increased willingness to fight back against the status quo. As such, his decision to establish a gay legal advocacy group was not the product of a rational cost-benefit analysis, or even a careful assessment of structural opportunities in light of available resources. To the contrary, GLAD was founded because the right man happened to be in the right place at the right time. To put the argument in John Ward’s own words: “I was very lucky to come along at the right time to do something that was important. It’s one of the joys in my life, one of the greatest joys in my life, that I was able to do that – that the opportunity was there, that the energy was there. It certainly wasn’t just mine but I was able to see it. I don’t quite know how that happens but it’s fortunate when it does.”
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This table includes cases that were settled out of court as well as final decisions on the merits. They were identified not only through a LexisNexis search, but through careful analysis of GLAD Briefs, the organization’s biannual newsletter, and meeting minutes.
Chapter 5

CONCLUSION

“I didn’t imagine same-sex marriage. Initially, I was sort of opposed to it because I felt we should destroy the institution rather than let it expand. However, I’m married so times change.”

John Ward, GLAD’s Founder

The legal landscape surrounding gay rights litigation has changed significantly since GLAD’s founding in 1978 when nearly thirty states still criminalized sodomy. In the absence of legal protections for gay people, the police selectively enforced laws against gay men; gay parents lived in constant fear of losing custody of their children; and the absence of nondiscrimination laws meant that gay people could be fired almost anywhere in the country. Compounding the legal troubles of gay people, few attorneys—even gay ones—were willing to represent gay individuals, and the ones who did were often unsympathetic or biased towards gay clients.

More than thirty-five years later, the legal terrain has been radically altered. In 2003, the United States Supreme Court ruled in *Lawrence v. Texas* that states lacked the constitutional authority to criminalize sodomy. With respect to the issue of employment, twenty states and Washington D.C. currently prohibit discrimination based on sexual orientation and gender identity (Human Rights Campaign Fund 2016). In the area of parental rights, fourteen states now allow a same-sex parent, regardless of whether they have a legally recognized relationship to the other parent, to adopt his or her partner’s child (National Center for Lesbian Rights 2015). And, of course, gay couples are free to get married in all fifty states. The legal profession has also undergone significant changes. Whereas gay people once struggled to find adequate legal representation, even the most prestigious of law firms now take gay rights cases. As Kevin Cathcart, former executive director of both GLAD and Lambda Legal, observed:
The legal community is so different today than the legal community was back then . . . Now law firms all want to be supportive of gay organizations and lawyers all want to do pro bono work, and everybody’s involved in everything. And major, major law firms are doing marriage cases and they’re doing transgender rights case. They’re doing all this stuff. But in Boston, in the 1970s and 1980s, people in big law firms were closeted. There were very few people who were not (Author’s Interview with Kevin Cathcart).

Ironically, the increased willingness to litigate gay rights has introduced a new set of problems for the gay legal movement, namely controlling the total number of cases that are filed. Indeed, one of the biggest issues facing gay legal groups today is that lawyers in private practice can set damaging precedent by virtually bringing whatever cases they want. “The ones we worry about the most are the ones where the people are sort of like little rangers who do it on their own and don’t talk to us about it,” Cathcart explained. “You can’t put the toothpaste back in the tube.”

This dissertation has endeavored to understand why systematic gay rights ligation did not emerge until well after legislative and electoral strategies appeared on the movement’s radar. More specifically, it has attempted to explain why a politically powerless group seeking rights turned to litigation much later than we might have expected. In this concluding chapter, I draw together the major strands of my analysis and consider the implications for future research.

CONCEPTUALIZING POLITICAL OPPORTUNITY

One of the main concerns driving this dissertation has been the need to reconsider how and when opportunities matter for social movements. In recent years, the concept of political opportunity has come under attack by scholars who argue that its vague definition and broad applicability allow an endless list of elements to fall under its conceptual heading. As Gamson and Meyer note, “The concept of political opportunity structure is in trouble, in danger of becoming a sponge that soaks up virtually every aspect of the social movement environment . . . It threatens to become an all-encompassing fudge factor for all the conditions and circumstances that form the context for collective action. Used to explain so much, it may ultimately explain nothing at
all,” (1996: 275). As McAdam himself has pointed out, the main problem with this research has been the tendency to conflate structural opportunities and the collective processes through which they are interpreted. “To treat them as separate not only preserves the definitional integrity of political opportunities, but also allows us to discern two profoundly interesting empirical phenomena: those cases in which clearly favorable political shifts do not yield the kinds of empowering interpretations so necessary to collective action and those in which collective action develops in the absence of any significant change in the relative power position of the challenging groups,” (McAdam 1996, 26).

Consistent with existing research, I have shown that political opportunity is an important external factor because it can open or close space for action. However, I have added to existing theory in several ways. First, I have elaborated on the various dimensions of opportunity at the state and local level; highlighted the mismatch between perceived opportunities in the social movement constituency and objective structural opportunities; and conceptualized social movement needs as providing alternative space for action. Second, I have argued that structural opportunities are filtered through participants’ subjective interpretations. Whether a structural opportunity leads to action is highly contingent on its recognition as such. Hence, changing structural opportunities tend to influence social movements in contextually specific ways. I take up each of these points in turn.

First, most scholars tend to agree with McAdam (1996) that the structural dimensions of opportunity include the relative openness or closure of the institutionalized political system; the stability or instability of political elites; the presence or absence of allies; and the state’s capacity for repression (Andersen 2005; McCann 1994; McAdam 1982). However, most of these scholars also tend to focus on the broader political context in which social movements emerge. By
comparison, I argue that the opportunities and constraints that shape social movement outcomes may be located not only in the national political system, but also in more localized structures that encourage or dissuade activists from engaging in particular practices. In the early 1970s, national gay and lesbian organizations were in their infancy, which helps to explain why activism at the federal level was both impractical and implausible. But in Boston, what local attorney Kevin Cathcart called “small geography” provided activists with easy access to state and local officials. “It made a big difference in those early days,” he explained. “It was easy to go and be mad at the Dukakis Administration because they were just up the hill a little bit but it was also easy for the political people to go and demonstrate because you could get there from Boston, Cambridge, and Jamaica Plane. You can always get to Park Street and then from Park Street you’re there, so that was critically important,” (Author’s Interview with Kevin Cathcart). In addition to immediate access, positive interactions with political elites—such as the Mayor’s executive order and the appointment of a liaison to the gay and lesbian community—reinforced legislative and electoral strategies. However, the nature of the opposition shaped mobilization outcomes as well. Surprisingly from today’s perspective, the movement grew without coordinated opposition between 1972 and 1976. Yet routine opposition from lawmakers shaped the specific strategies local activists employed in Boston. Whereas the need to document discriminatory harm was born of a tendency among lawmakers to feign ignorance of the problem, special rights discourse compelled activists to downplay the symbolic significance of reform. None of this is to say that the broader national context is irrelevant to our understanding of social movement outcomes. However, state and localized factors also shape the prevailing opportunity structure.

Second, scholars who study opportunity have narrowly construed the term to include “constraints, possibilities, and threats that originate outside the mobilizing group, but affect its
chances of mobilizing and/or realizing its collective interests” (Koopmans 1999, p. 96; emphasis added). Dating back to Doug McAdam’s *Political Process and the Development of Black Insurgency* (1982), this research has called attention to the myriad ways in which social movements shape, and are shaped by, the political environment. However, it is not always clear how opportunities influence social movements. While some have argued that the expansion of opportunities facilitates mobilization (Andersen 2005; Tarrow 1994; McAdam 1982), others have responded that repression can lead to action (Boutcher 2011; Gould 2009; Sheyn 2009; McVeigh 2009; Dyke and Soule 2002; Wright 2007). What explains these contradictory findings? In an attempt to answer this question, I have argued that opportunities may not always be located in the structural position of the state but rather in the perceived strength of the social movement constituency. Thus, increased repression following Anita Bryant’s Save Our Children campaign did not dissuade local activists from risking collective action, but instead nourished a sense of collective defiance. Capitalizing on this renewed energy in the gay community, mainstream political activists organized protests and established new organizations, whereas local attorney John Ward founded Gay and Lesbian Advocates and Defenders. By shifting our focus away from “the world outside a social protest movement,” (Meyer and Minkoff 2004, p. 1457) to its internal dynamics we can begin to understand how the *perception of expanding and constricting opportunities* shape the potential for collective action.

Finally, despite disagreements over what counts as opportunity, scholars have generally agreed that “increased opportunity implies more space and fewer constraints,” (Gamson and Meyer 1996, 277). Consistent with these findings, I have argued that increased access to gay and gay friendly politicians, Massachusetts’ liberal political reputation, and the absence of organized opposition facilitated legislative and electoral strategies in Boston. However, my examination of
Gay and Lesbian Advocates and Defenders further indicates that the needs of the social movement constituency also played a crucial role in creating space for action. Thus it became clear after speaking with local attorneys that the Lesbian Lawyers Potluck and GLAD both filled the unmet legal needs of the gay community. Whereas the former provided social and emotional support to (often closeted) lesbian attorneys working in a heterosexual profession, the latter orchestrated gay legal claims in a way that was not only central to the development of the law, but to the accurate and informed representation of an underserved population. In addition to harnessing the gay community’s renewed energy in the wake of a concerted backlash, John Ward knew that police abuses would continue in the absence of a concerted legal response.

In sum, my account reiterates one of the central findings of political process theory: that opportunities can open or close space for action. Where I differ from existing research is on the emphasis I place on perception. Thus I argue that the impact of political opportunity is contingent and that expanding and constricting opportunities affect movements in contextually specific ways. Moreover, my research indicates that activists tend to interpret political space by exaggerating opportunity and minimizing constraint. Indeed, when national, state, and local structures point activists in conflicting directions, the imperatives of collective action lead them to counteract constraints and facilitate action by overestimating the degree of opportunity. While this “systematic optimistic bias” (Gamson and Meyer 1996) helps to facilitate action in the face of potentially overwhelming obstacles to change, it can also lead to politically unwise decisions. This may be especially true as social movements professionalize and the policy stakes intensify. Thus systematic optimistic bias may be more crucial for nurturing “the movement building process,” than facilitating the subsequent struggle over “formal changes in official policy” and “policy development and implementation,” (McCann 1994: 11).
THE MYTH OF RIGHTS (AND LAWYER DOMINANCE)

This research also engages with a longstanding debate about the role of courts in movements for social change. Indeed, great disagreement exists about the impact of litigation on social reform efforts. Among those who study the direct effects of litigation, many have argued that the power of courts to achieve social change is limited and that “flypaper courts” impede social reform by “deflecting claims from substantive political battles, where success is possible, to harmless legal ones where it is not,” (Rosenberg 2008: pp). Thus Gerald Rosenberg and others (Klarman 2013; D’Emilio 2007) have argued that activists should abandon the courts and refocus their energies on the political arena instead. Alternatively, those who study the indirect effects of litigation argue that court victories can lend legitimacy to a cause, mobilize constituents, attract media attention, and increase a social movement’s bargaining power (Scheingold 2004; McCann 1994; Galanter 1983). However, even these scholars have warned that “lawyers are generally poor grassroots activists” (Pierceson 2010: 162) and that rights-based litigation should supplement rather than replace political mobilization.

In addressing this debate, I have sought to build on—and yet transcend—the legal mobilization framework. Although this framework recognizes that “law is embedded in the social life of distinctive cultural groups” (Merry 1998: 575), and that dominant legal conventions “constitute just one highly variable dimension in the complex mix of interdependent factors that structure our understandings and actions” (McCann 1994: 9), legal mobilization scholars have generally, though not exclusively, prioritized winning. In other words, they have focused their attention on how favorable decisions impact social movements without due consideration of the effects of legal loss. While one might expect that losing in court can debilitate movements, the research developed here indicates somewhat counterintuitively that the benefits of winning can
also accrue to the losers. Thus I show how gay rights activists capitalized on *Doe v. Commonwealth's Attorney* (1976), *Gaylord v. Tacoma School District* (1977), and other negative decisions to mobilize outraged supporters and facilitate legislative and electoral strategies. This approach, while rooted in the legal mobilization framework, situates court-based tactics within the broader range of strategies pursued by activists and suggests that even a legal loss can nurture political mobilization. In sum, decisive legal victories are not required to effectively mobilize legal resources such as publicity, increased awareness and consciousness-raising.

Although this research offers a more nuanced account of the effects of legal losses, negative decisions were but one of the myriad factors reinforcing the turn to legislative and electoral strategies. Indeed, activists’ attempts to reframe legal losses were buttressed by dominant understandings and experiences of law in the gay community. Indeed, one of the biggest obstacles to litigation was judicial attitudes toward homosexuality. In case after case, judges who were supposed to be neutral in their decision-making evidenced significant bias toward gay litigants. Thus my examination of cases involving the custody and visitation rights of gay parents revealed the belief among judges that a child’s relationship with a gay parent might be harmful to the child; that gay people were prone to molest children; that gay parents were more likely to engage in sexual acts in front of their children; and that being raised by a gay parent increased the likelihood of becoming gay. The lesson derived from these experiences in court was that, despite the growing influence of the gay and lesbian rights movement, judges remained openly hostile toward gay litigants. Widespread recognition of this fact led to quiet forms of resistance such as settling child custody disputes out of court or signing relationship contracts. However, in cases involving sex-related charges, the desire to remain anonymous and
avoid public embarrassment caused countless gay men to lump their grievances, and even plead guilty to trumped-up charges, just to avoid the publicity of a trial.

The general picture that emerges from my analysis is that, despite intolerant political majorities, activists looked favorably upon the elected branches of government precisely because of these negative encounters with the law. This was especially true in the early 1970s when local activists gained access to mainstream political institutions in the absence of coordinated opposition. By the late 1970s and early 1980s, however, the rise of the Christian Right and their allies in the Reagan administration constricted opportunity, particularly at the national level. Although these developments forced activists to reconsider the need for litigation, of equal if not greater importance was the emergence of gay activist attorneys who were both willing and able to counteract increased repression in court. Of course this is not to say that political backlash generated a spontaneous legal movement. As one attorney observed, “the first generation of lawyers out of law school post-Stonewall helped lay the basic building blocks of the LGBT legal structure,” (Author’s Interview with Gary Buseck). Indeed, students from each of the surrounding law schools agitated for changes in admissions policies that diversified access to the bar and altered the curriculum to include gay legal issues. Less constrained by professional norms and expectations, law school students were generally freer to undertake politically defiant action. So too was local attorney John Ward who secured a considerable degree of autonomy from the dominant legal community by going into private practice. Thus the first people to openly advocate gay rights in court were economically and socially independent of the mainstream legal community.

Since the rise of legal advocacy in the late 1970s, gay legal organizations have been criticized for imposing their agenda on the rest of the movement (Levitsky 2006) and alienating
participants through their reliance on technical expertise and professional knowledge (D’Emilio 2007). However, none of the attorneys I spoke to for this project viewed litigation as the primary or sole tactic of advocacy. To the contrary, they understood litigation as a complementary to the range of strategies pursued by other activists. As John Ward once told Gay Community News, “I think that while litigation is not always the answer, it’s a good way to demonstrate seriousness of purpose to people . . . I think some governmental practices are so bad that they’re ripe for litigation. Later, you reach a point where government gets more sophisticated in its forms of discrimination and litigation becomes counterproductive and only serves to tie up a lot of your resources. At this point, however, it’s my opinion that it’s acutely necessary,” (Stein 1978). In the context of the 1970s, actual and even threatened litigation was often sufficient to deter discriminatory practices. Thus when the Boston Public Library refused to allow the Gay Speakers Bureau to use its facilities for a public forum, GLAD sent them a copy of the complaint it proposed to file in federal district court. Faced with the onerous prospect of going to court, the library “capitulated and voluntarily gave the Bureau what it wanted,” (Stein 1978). Similarly, the prospect of litigation routinely prompted police commissioners to issue orders prohibiting entrapment and deterred police officers from selectively enforcing the law against gay men. Thus litigation proved to be a particularly useful tool for “compelling concessions” from political elites without necessarily dominating the movement (McCann 1994: chapter 5).

Beyond wielding law as a malleable strategic weapon, gay activist attorneys tapped into a set of enduring legal principles to advance gay rights. While it would be easy to portray gay rights litigators as misguided individuals who were led astray by the ideals of law, my analysis provides a useful counterpoint to this overly simplistic criticism. For starters, gay activist attorneys approached law as only one tool for resisting domination, rather than a panacea for
every problem facing the gay community. Thus they consciously relied on educational activities to facilitate changes in dominant attitudes toward homosexuality. Moreover, gay activist attorneys expressed what Mari Matsuda (1987) has called “double consciousness.” As she describes it, “people on the bottom” generally see law in two ways at once. As outsiders, they express deep criticism of the law as an unprincipled source of power and privilege; but as insiders they “hope to transform standard constitutionalism into something their own that no mainstream attorney can exploit,” (388). This ambiguity was evident in the way that gay activist attorneys understood and talked about law. On one hand, they criticized judicial decisions as unprincipled, biased and downright prejudiced. As such, it cannot be said that they operated under the mystifying spell of law. On the other hand, they tailored the universal language of rights to meet the distinctive legal challenges facing gay people. Fusing antidiscrimination discourse with feminist critiques of dominant sex and gender roles, gay activist attorneys created new legal meanings out of familiar legal conventions. Put simply, they recognized law’s limitations while providing gay litigants with the opportunity to be heard meaningfully in court.

Finally, with respect to the legal mobilization framework, this research pushes past the initial focus on social movement participants to illustrate how rights-based advocacy transforms the attitudes, beliefs and understandings of dominant legal actors. While most existing studies focus on how rights claims transform the political aspirations and commitments of activists themselves (Polletta 2000; McCann), GLAD utilized litigation as a tool for educating multiple constituencies. At the most basic level, GLAD sought to inform gay men and lesbians about their rights in order to prevent government officials from singling them out for harassment. Second, they aimed to educate the public at large about the rights of gay citizens, believing that litigation and education would contribute “to understanding, tolerance and harmony in communities where
people of diverse lifestyles must live and work together.” (GLAD’s Second Annual Report 1979-198). Finally, GLAD sought to educate members of the dominant legal community, many of whom held irrational and outmoded attitudes toward homosexuality. Given the educational value of legal advocacy, even a legal loss in cases like *MacAuley v MCAD* (1978) had value in educating judges about how their decisions would impact gay people on-the-ground.

In the end, scholars have good reason to be skeptical about the role of courts in movements for social change. This is because some lawyers do prefer litigation-intensive approaches over a multidimensional advocacy framework, and because the conditions under which lawyers and activists effectively work together are not always present. Moreover, courts do not have the capacity to produce significant social change on their own. That being said, law is an instrument of power that when wielded effectively by activists can subvert dominant legal conventions; complement rights-based strategies taking place outside the courtroom; and propel us down the long road to social justice.
APPENDIX

Data Collection of Published Gay Rights Decisions

In April, 2014, I conducted a Lexis-Nexis search for all gay rights cases decided at the state and federal level between January 1, 1969 and December 31, 1986. The search string contained the key words “homosexual,” “gay,” “lesbian,” “bisexual,” “transgender,” “transsexual,” “transvestite,” “HIV,” “sexual orientation,” or “sexual preference.” To help narrow the results to relevant cases, the search itself was limited to case summaries rather than the entire text of an opinion. Overall, the search yielded a total of 817 cases. Following Pinello (2003), cases that lacked the potential to advance gay rights beyond the immediate interests of the litigants were excluded from the sample. These were most likely to include prosecutions for homicide where the defendant was an alleged victim of a “homosexual advance.” The second type of case most likely to be excluded involved defamation suits. Taken together, these cases typically fail to treat gay men and lesbians as equals under the law. For example, if falsely identifying someone as gay is considered slanderous but falsely identifying them as straight is not, the legal rule that emerges fails to treat heterosexuals and homosexuals the same. Overall, 56 percent of the Lexis-Nexis citations were excluded from the sample pursuant to this decision rule. The remaining 359 cases were coded 1 if decided in favor of gay rights and 0 if against. In addition, I coded whether a decision was issued by a state court (1 if yes and 0 if not), a federal court (1 if yes and 0 if not), and the issue area. The list of issues was finalized only after coding all of the cases. This allowed me to capture the full range of issues being litigated while ensuring that the categories are exhaustive.
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