Beyond litigation: the behavior of cause lawyering organizations in the LGBTQ Movement

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BEYOND LITIGATION:

The Behavior of Cause Lawyering Organizations in the LGBTQ Movement

by

David L. Trowbridge

A Dissertation

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Dedication

To Erin, my partner, for tethering me to what is important and joyful

To Deborah, my mother, for life-long support and teaching me patience
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Crossing the finish line of this marathon took a lot of coaching and support. Julie Novkov was the first person in this program that I met, the person who inspired me to stick with political science, and the one who shepherded me through weeks, months, and years’ worth of highs and lows. Advisors deal with a lot of issues from advisees but, academic or otherwise, Julie always treated those issues with a caring hand and sage advice. As advisor, counselor, therapist, editor, and mentor, Julie wore many hats. If it were not for Julie I would not be submitting this dissertation.

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ABSTRACT

Scholarship tells us that cause lawyers, including those in the LGBTQ movement, are likely to avoid non-litigation tactics in favor of court-centered strategies (Klarman 2005; Rosenberg 2008; Scheingold 1974). Other research suggests that lawyers are likely to steer the LGBTQ movement’s agenda away from both grassroots interests and its more radical agenda (Leachman 2014; Levitsky 2006). However, more recent scholarship shows an increased reliance on non-litigation tactics in the LGBTQ movement and publicly available evidence indicates cause lawyers are working on diverse sets of issues within the movement (Cummings and NeJaime 2010; Marshall 2006).

Additionally, the LGBTQ movement’s legal industry, which includes impact organizations and direct legal service providers, have experienced many successes in and out of court. These legal organizations are important to social movements for a number of reasons: they are structural resources (Epp 1998), they create opportunities (Andersen 2006), and they can influence the agenda of non-legal organizations (Levitsky 2006; Leachman 2014). Yet, for all that we know about how these organizations can affect social change, we do not know as much about their priority-setting process and tactical choices (e.g. litigation, lobbying, public education, training, etc.).

To gain a better understanding of both cause lawyers and legal organizations, I examine the agenda setting and tactical behavior of legal organizations representing the rights of LGBTQ people. Because so much of the cause lawyering literature has focused on litigation, I use the idea of “multidimensional advocacy” (Cummings and NeJaime 2010) as a starting framework. This term describes the use of an array of tactics (litigation, policy, education) in a variety of venues (courts, legislatures, agencies, media, and the public) to reach an organizational goal. By looking beyond litigation, I explore uncharted aspects of cause lawyer agenda-setting.
Ultimately, I demonstrate that the current narratives about cause lawyers and legal organization behavior, particularly those that depict “isolated lawyers,” are incomplete. First, as scholars we take for granted the significance of how perceptions of community need influences agendas. Scholars tend to focus on other elements (often material ones like resources). While those elements remain important, the evidence here suggests that those elements can take back seat to perceptions of need. A sense of need may even drive organizations to pursue an issue when they see little chance of success (legally and politically). Second, by pushing non-litigation work to the margins, we have also missed how lawyers are engaged in extra-judicial processes. Lawyers recognize a “trap” in using courts alone and have navigated a course around that trap by engaging with state and non-state actors outside of courts. While previous scholarship has noted the use of non-litigation tactics, this project goes further by demonstrating that lawyers believe public education and public policy work are central to achieving organizational goals.

The primary lessons of this study, shown through dozens of interviews, archival work, and analysis of publications, are that lawyers recognize a limit to litigation and they approach agenda setting through a difficult balance of factors. Of those factors, community need and perceived opportunity are the most significant.
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Chapter One | Introduction: A Balancing Act

From small service providers to large advocacy groups, cause lawyering organizations have been critically important to achieving legal and policy changes on behalf of social movements since the dawn of the legal realism and access-to-justice causes in the early 20th century.¹ Yet, much of what can be applied to organizational behavior from the disciplines of politics, law, and social movements is either outdated or contested, especially when it comes to how these organizations set agendas. Take for example legal organizations representing the interests of lesbian, gay, bisexual, transgender, and queer people (LGBTQ).²

“I am big fan of the work of the LGBT movement” Mara Keisling, executive director of the National Center for Transgender Equality (NCTE) told a reporter in 2013, “but I'm really cynical about the prioritization within it” (Crary 2013). Seven years earlier, a manifesto titled “Beyond Marriage” was being shared among members of the LGBTQ movement (Acey et al. 2006). It stated that the movement had become overly focused on one issue: marriage equality. Some argued that the movement was pursuing issues, like marriage, that were prioritized by groups with the most access to resources, and not issues valued by the most vulnerable members of the community (Spade and Willse 2013). This was not a sentiment shared by all, but the critique was common and is felt by some today.

The responsibility for this prioritization often revolves around the notion that “leadership by an elite of white legal professionals” has deradicalized the movement’s original agenda (Willse

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¹ Cause lawyering organizations are non-profits motivated by a political cause, are led by lawyers, largely staffed by lawyers, and identify their primary tool as litigation. For a definition of cause lawyering, see: Scheingold, Stuart A., and Austin Sarat. Something to Believe In: Politics, Professionalism, and Cause Lawyering. Stanford, Calif: Stanford Law and Politics, 2004, 5.
² LGBTQ was chosen as a more inclusive term over the more familiar LGBT because “queer” has increasingly become a popular identity within the movement. Though in the past the term has been used as a negative slur against gay and lesbian people, it has been recaptured as a term of pride for some lesbian, gay, bisexual, transgender, and gender non-conforming people.
and Spade 2005, 310) [emphasis mine]. Indeed, marriage equality was championed by legal organizations working within the LGBTQ movement as evidenced by an array of highly visible litigation victories spanning two decades and in published accounts of the fight for marriage equality (Cathcart and Gabel-Brett 2016). Research has suggested that this litigation may have shifted the movement’s agenda (Leachman 2014) and some have called out these organizations for a lack of transparency in how they set their priorities (Carpenter 2014).

Much of the cause lawyering and public interest law literature referenced earlier suggests this kind of behavior (prioritizing marriage and focusing on litigation) is to be expected. In this reading of the literature, movement lawyers and movement organizations are disconnected from the communities they serve, especially from subgroups that lack resources and representation (Bell 1976; Levitsky 2006; Strolovitch 2007). Further, we should expect legal organization behavior (defined here as agenda setting and tactical choices) to be influenced by the perceived opportunity for litigation wins (Bell 1976; Handler 1978; Rosenberg 2008). Sustaining that adherence to a litigation strategy is a belief in a “myth of rights” of courts (Rosenberg 2005, 2008; Scheingold 1974) and by the preferences of major donors and foundations that keep organizations running (Rhode 2008, 2052; Spade and Dector 2013a; Teles 2016). This interpretation of the literature

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3 For example, Willse and Spade write: “A significant force of change has been the creation of funded organizations led primarily by white lesbians and gay men with economic and educational privilege that claim to represent a broad-based movement for LGBT rights. However, the agendas of those organizations have come to focus on the rights of people with occupational, educational, gender, and race privilege and to marginalize or ignore the struggles of transgender people, queer and trans people of color, and queer and trans poor people. These organizations have fought for the rights of gay youth to join the Boy Scouts, but virtually ignored the struggles of queer and trans youth who remain over represented and abused in the juvenile justice system.” in Willse, Craig, and Dean Spade. “Freedom in a Regulatory State: Lawrence, Marriage and Biopolitics.” Widener L. Rev. 11 (2005): p.317

4 Most notably cases like Romer v. Evans (1996), Lawrence v. Texas (2003), Goodridge v. Department of Health (2003), and Obergefell v. Hodges (2015). At the same time, some of those who were reluctant to pursue marriage, both in a strategic sense and a normative sense, were lawyers within these organizations. See: Ettelbrick, Paula. “Since When Is Marriage a Path to Liberation?” in The Columbia Reader on Lesbians and Gay Men in Media, Society, and Politics, edited by Larry Gross and James D. Woods, 633–36, 1999.
suggests we should expect “isolated lawyering” practices that are disconnected from the communities that organizations serve and constrained by their own maintenance.

Herein lies the puzzle. Other scholarship in these same disciplines (cause lawyering and public interest law) suggests a different expectation. First, this literature suggests that lawyers can be more involved with the communities they serve (Coutin 2001; Gordon 2007; Lopez 1992; Marshall 2003). Second, this more “engaged lawyering” allows movements and activists to take the lead (Coutin 2001; Erskine and Marblestone 2006). It also suggests litigation can aid in radicalizing movements (Pinello 2006, 193), generate important opportunities (Andersen 2006), and mobilize movement constituents under a shared identity (Boutcher 2005; McCann 1994). Further, a cursory examination of public material from LGBTQ legal organizations demonstrates a dedication to many issue areas beyond marriage that reach marginalized subgroups. Based on this literature, one could reasonably expect the agenda setting of legal organizations to include community input and engagement with other movement organizations.

These two sides, the “isolated lawyering” reading of the literature and the “engaged lawyering” interpretation, are further complicated when one considers they both center litigation activity. This is problematic because more recent works indicate that cause lawyers are involved in extra-judicial activities, including lobbying, public education, and coordination with other movement groups (Aron 1989, 32; Cummings and NeJaime 2010; Nielsen and Albiston 2005, 1612; Zuber 2017). But even some of this research keeps non-litigation work in the periphery as an aside to litigation.

This all begs a few questions: are these LGBTQ legal organizations simply providing lip service to non-marriage issues? Are they paying cursory attention to some issues but dedicating the bulk of their work to the interests of those with most access? How are resources allocated
among issues and tactics? Are extra-judicial tactics central to cause lawyering or simply in the periphery, as the literature might suggest?

In examining the behavior of legal organizations that represent the lived experiences of LGBTQ people, this project addresses these concerns by asking: *how do cause lawyering organizations set their agendas and select tactics?* This is asked through a partial framework of “multidimensional advocacy,” (Cummings and NeJaime 2010) a term used to describe the behavior of organizations using an array of tactics (litigation, policy, education) in a variety of venues (court, legislatures, agencies, media, and the public). Each chapter investigates one tactic or influence on agenda setting to explain its importance (or lack thereof) to organizational behavior.

This project confirms much of what one might expect from social movement studies and legal mobilization scholarship (Andersen 2006; Epp 1998; McAdam 1982). However, the observations here also present import caveats to the limits these theories impose on organizational behavior. For instance, rather than agendas being heavily swayed by wealthy foundations or opportunities to win in court, the organizations I studied engage in a balancing act between different elements. At the fulcrum of that balancing act are perceptions of community need and perceived opportunities to succeed within different venues. Regarding tactics, rather than being constrained to act until opportunities are ripe as some theories might suggest, organizations in this study may work around their resource constraints and build the groundwork for creating their own opportunities. These organizations are far removed from a “myth of rights” (Scheingold 1974) and from court-centric models of behavior. These findings are important because they expand the way we typically think of cause lawyering and legal organizations
This does not mean long-standing critiques of lawyers and these organizations being “isolated” are wrong. It may very well be that the critiques from movement activists specifically spurred changes in how these organizations behaved. Indeed, in this project one will find some confirmation of critiques. However, the results of this study do suggest that at least today, much more nuance exists in agenda setting and tactical choices than previously understood by academics.

**Cause Lawyering Organizations**

As stated earlier, the literature on cause lawyering and scholarship from public interest law give us some clues of what to expect from legal organizations regarding their behavior. However, most of the cause lawyering literature focuses on individual cause lawyers or cause lawyering in general.\(^5\) “Little attention” (Komesar and Weisbrod 1978, 100) has been paid to how legal organizations operating in social movements behave. This has resulted in a “strikingly thin” (Rhode 2008, 2028) understanding of both the range of tactics these groups have (Cummings and NeJaime 2010, 1330) and what debates dominate the agenda setting process (Carpenter 2014, 120–21). This gap is also striking given their significance to social movements: they are structural resources (Epp 1998), they create opportunities (Andersen 2006), and they can influence the agenda of non-legal organizations (Leachman 2014; Levitsky 2006).

While there have been important, large-sample survey studies over the last two decades (Aron 1989; Nielsen and Albiston 2006; Rhode 2008) there has yet to be an in-depth qualitative analysis of legal organizational behavior that interrogates priority setting and strategic choices. Little has been done either on comparing the behaviors of large impact litigation groups to smaller direct service organizations. These smaller direct service providers get left out of much of the

discussion of law and social change even though they provide enormously important services to their constituents and occasionally participate in impact work. Thus, given the significance of these organizations and the lack of work dedicated to their behavior, this project focuses on how they both make decisions.

What I refer to as “legal organizations” in this study are often called public interest legal organizations (PILO) within the relevant literature. The primary difference between a PILO and a private law firm is that a PILO’s “primary goals focus on social justice or social change through law reform, rather than profit” (Nielsen and Albiston 2005, 1596). Historically, public interest law has been defined as “efforts to provide legal representation to interests that historically have been unrepresented or underrepresented in the legal process” (Aron 1989, 3). However, this definition is disputed (Chen and Cummings 2012, 3–40).

To make matters more complicated, PILOs can be divided into two different, though convergent, traditions of public interest law work. The first are those styled after legal aid organizations which are groups that provide free or cost-reduced direct legal services to indigent clients in need of assistance. Whoever walks through the door will get help, assuming they meet requirements for income, the issue comports to the organization’s mission, and there is staff availability. The second tradition is the impact organization, also known as a ‘law reform’ or ‘legal advocacy’ organization. These organizations are molded after the progressive and legal realist-inspired groups of the 1910s and 1920s such as the NAACP Legal Defense and Education Fund (LDF), the National Consumers League (NCL), and the American Civil Liberties Union (ACLU). They seek to spur policy and legal change through carefully choreographed cases.

Why then was the term “cause lawyering organization” chosen for this study? In general, this term provides tighter boundaries through which organizations in this study can be compared
to others, and it allows inclusion of both impact organizations and direct legal service providers. The category of “cause lawyering” is newer than “public interest lawyering” and the two are distinguished by the motivations of lawyers. Though there is no universally agreed upon definition, Scheingold and Sarat (2004, 5) state that cause lawyers take an affirmative political and/or moral cause behind their activity. For example, a public interest lawyer would advocate for a client with whose beliefs they did not agree, but whose purpose they felt served a broader public interest. A cause lawyer on the other hand, is defined by their commitment to a political or moral cause and thus is significantly less likely to advocate for a client whose claim they did not personally sympathize with.

Both sets of lawyers are interested in policy reform, but it is the political motivation that makes them distinct and worthy of separate treatment. Since organizations and lawyers in this study are not expected to advocate for clients working against LGBTQ rights and equality, “cause lawyering organization” was chosen. Hereafter, for the sake of brevity, they will simply be referred to as “legal organizations.”

**Isolated versus Engaged Lawyers**

With that focus on legal organizations in mind, this project resides in a foundational concern of sociolegal studies. Scholars in this area have long been concerned that lawyers and

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6 Take the example of a lawyer working for the ACLU, an organization whose purpose is to protect important civil liberties like freedom of speech. A public interest lawyer might be working for a cause, like protecting speech rights, and then might defend the speech of a neo-Nazi she vehemently disagrees with politically and morally. However, since the distinction between public interest lawyering and cause lawyering is the political motivations behind the lawyering, this person would not be categorized as a cause lawyer.

7 Scheingold and Sarat make the following argument: “What we call cause lawyering is often referred to as public interest lawyering within the legal profession and among academics. However, we prefer cause lawyering because it is an inclusive term. It conveys a determination to take sides in political and moral struggle without making distinctions between worthy and unworthy causes. Conversely, to take about public interest lawyering is to take on irresolvable disputes about what is, or is not, in the public interest. Whether the pursuit of any particular cause advances the public interest is very much in the eye of the beholder.” Scheingold, Stuart A., and Austin Sarat. *Something to Believe In: Politics, Professionalism, and Cause Lawyering*. 1 edition. Stanford, Calif: Stanford Law and Politics, 2004, pg. 5
litigation-based tactics might co-opt movements away from their original or more radical goals. In particular, some scholars worry that litigation may reduce demands of a movement into abstract legal concepts (Tushnet 1984). Further, Galanter (1974) argued that because litigation can be a game of resources, a court-based strategy may limit who – and what issues – get to be addressed. Others argue that lawyers may hijack a movement by shifting ownership of grievances from grassroots to elite professionals (Handler 1978; McCann 1986; Menkel-Meadow 1998; Meyer and Boutcher 2007).

For instance, Derrick Bell showed that NAACP LDF lawyers working on school desegregation had a “divided allegiance” between the clients they represented and the organization that they worked for, creating a potential conflict of interest and disconnect between lawyers and the black community (Bell 1976). Looking at rights and identity based groups generally, Dara Strolovitch (2007) found that, faced with limited resources and representing large and internally complex constituencies, organization agenda setting is fractured (Strolovitch 2007, 3). Aligning with theories of intersectionality (Crenshaw 1991), Strolovitch observed that “the level of activity that organizations devote to an issue depends more on the relative advantage of the subgroup affected by the issue than it does on the relative size of the affected group” (Strolovitch 2007, 83). She found that the more marginalized subgroups (those with intersecting marginalized identities) saw issues important to them receive fewer resources than issues that were prioritized by larger, more advantaged subgroups. Taken together, this literature draws a portrait of isolated lawyers: isolated from the more radical elements of the movements they serve, isolated from the most marginalized clients because of their education and stature as lawyers, and disengaged from alternative tools that could serve their goals.
On the other hand, scholars have also observed that litigation and cause lawyers can support social movement agendas (Keck 2009; Pinello 2006). Pinello suggests that litigation has in fact “radicalized” the LGBTQ movement (Pinello 2006, 193) and invited more gay and lesbian persons to become politically active (Pinello 2006). As opposed to creating factions within a movement, NeJaime (2011) and Boutcher (2005) argue that a judicial defeat could be used internally to construct organizational identity or mobilize movement-constituents. Marshall (2006) found lawyers who encouraged self-help in conducting legal research, and Erskine and Marblestone (2006) discovered cause lawyers taking instructions from activists in equal wage campaigns. Collectively, these sets of works and others demonstrate a model of “engaged lawyering.”

Finally, most of the relevant literature centers litigation when studying the effects and behavior of lawyers in social movements, at the expense of tactics like education and policy (Gordon 2006, 287). Even when noted within studies, non-litigation tactics remain in the periphery. Non-litigation work has been noted in broad surveys of legal organizations (Aron 1989, 32; Nielsen and Albiston 2005, 1612) and legislative strategies specifically have been observed in the LGBTQ movement (Andersen 2006; Stoddard 1997; Zuber 2017). Even less recognized are public education tactics such as town hall meetings, holding conferences, or developing informational material (Andersen 2006, 214–15; Meili 2006, 126–27).

However, one recent study has shed light on the multitude of cause lawyering tactics. Cummings and NeJaime (2010) found that LGBTQ movement lawyers in California were careful to pursue strategies that were mindful of both policy and litigation in pursuing marriage equality victories alongside other social movement organizations. This is part of what they call a “multidimensional approach” to lawyering, where lawyers advocate for issues across different
venues, at different levels of government, and use different tactics like education, policy work, and litigation (2010, 1242).

In sum, one side of the literature suggests we should see isolated lawyers (Carpenter 2014; Levitsky 2006). Another side suggests that we should expect organizations to be closely engaged with the communities they serve (Coutin 2001; Erskine and Marblestone 2006; McCann 1994). To adjudicate between these readings of the literature, this project looks at every aspect of cause lawyering, not just litigation.

**Literature on Social Movement Studies & Agenda Setting**

The agenda setting of cause lawyering organizations is something we know little about, in part due to the lack of transparency of these decisions (Carpenter 2014, 121). Creating some clarity, Chen and Cummings write that “ultimately, the agendas of nonprofit public interest law organizations are set through negotiation – and sometimes contestation – by various internal and external stakeholders: lawyers, funders, organizational members, community residents, influential political actors, and others” (Chen and Cummings 2012, 143). However, the study of agendas are most often focused on litigation despite research that has shown organizations moving “beyond litigation as the sole focus of social change” (Nielsen and Albiston 2005, 1612).

Social movement theories have been used before in the study of law and social movements (Andersen 2006; McCann 1994) and may be helpful here. These theories include resource mobilization (McCarthy and Zald 1977) and opportunity structures (McAdam 1982). While typically used to describe what makes movements successful, they make valuable frameworks for generating expectations of agenda setting because, as described below, they tap into elements that may encourage organizations to act. Further, because these theories are focused on political processes, they cover cause lawyering tactics like public education and policy, which have stakes
in the political realm. In other words, these theories may better help explain organizational behavior compared to litigation-centric theories.

Komesar and Weisbrod (1978) first articulated a resource-driven theory of non-profit legal organization behavior. They argued that non-profit legal organizations were captured by publicity seeking tactics and issues, unlike private firms where profit-seeking was central to priority setting. Given the funding restraints of a 501(c)(3) (the IRS code for nonprofits) and the preference foundations give to organizations who can demonstrate measurable results, legal organizations are forced into seeking issues and tactics that continue to bring in funding to the organizations (mainly big litigation cases). This allows them to “keep their doors open” so they can continue their work.

However, legal organizations are no longer financed in the same way they were in the 1970s and 1980s. Organizations like the ones in this study are not wholly reliant on a single foundation or two. Instead, they have large donor bases, major individual donors, and a multitude of foundations to rely on. That said, more recent studies of PILO behavior have concluded that funding issues may seriously affect the prioritization and tactical choices of PILOs (Albiston and Nielsen 2014; Aron 1989). Thus, any examination of priorities should include consideration of funding sources.

Charles Epp in *The Rights Revolution* (1998) claimed that a support structure (similar to the idea of mobilizing structures from social movement studies) is one of the necessary conditions for achieving a significant change in realized rights. He describes support structures as “rights advocacy organizations, willing and able lawyers, financial aid of various types, and, in some countries, governmental rights-enforcement agencies” (Epp 1998, 19). Many of the things that social movement scholars refer to as resources are included in Epp’s definition of support structures. These include elements such as legitimacy, money, facilities, and labor, as well as
networking structures (McCarthy and Zald 1977). Though these theories on resources (Epp 1998; Komesar and Weisbrod 1978; McCarthy and Zald 1977) do not extend to organizational agenda setting, one could reasonably use them to predict that organizations are going to act when they believe they have support structures in place and will be influenced, by the sources of these resources (i.e. foundations, major donors).

However, scholars like Sidney Tarrow (1994) and Doug McAdam (1982) argued that building resources is just one part of social movement success. McAdam (1982) theorized that in addition to resource mobilization and the formation of grievances, that opportunity structures need to be present for success. These structures can be summarized as “institutional and sociocultural factors” like access to a political system or the balance of power among elites “that shape social movement options – by making some strategies more appealing and/or feasible than others” (Andersen 2006, 6; McAdam 1982, 27).

Relying on this model, Andersen (2006) developed a parallel analytical framework for understanding how social movement legal groups become successful in court. Andersen argued that shifts in access to courts, the configuration of judges on the bench, framing processes, and supportive allies together amount to a legal opportunity structure (LOS). In this model, funding and labor resources are less important but still present (Andersen 2006, 8) and legal organizations lack some autonomy (apart from framing processes).

Andersen compares litigation opportunities in this model to striking a match: “when struck, it is unpredictable. It may fizzle out, especially in the rain. It is always dangerous. And it can, under the right circumstances, light a path out of the darkness” (Andersen 2006, 218). Still, organizations are beholden to moments, or windows, of opportunities to act. As such, this theory could be used to predict that organizations will be in search of opportunities to act and to achieve
wins, especially in court. Conversely, we might expect organizations not to act when they perceive a lack of favorable opportunity structures.

The political and legal opportunity models are useful in describing much of the behavior observed in this project. Yet, as later chapters will show, choices are made that these models cannot explain because the models are asking and answering questions about success rather than about agendas. First, the findings in this project show that organizations are constantly looking for ways to act on a myriad of issues. When one venue or window closes, they look for another. They are not stopped by closed windows of opportunity, just merely slowed down.

Second, observations in this project also suggest that when constrained by a lack of resources or opportunity, organizations can build their own opportunities, typically through work on education, collaboration, and policy engagement. In other words, they can shift the structures that McAdam (1982) and Andersen (2006) speak of: they can build political and legal allies, they can find more donors, and they try to change public opinion. The observations here thus give more autonomy to organizations and lawyers in how they behave, as well as account for the non-litigation work that they do.

**Analytical Approach and Definitions**

As previously described, this project uses *multidimensional advocacy* as a framework to examine cause lawyering organizational behavior. Cummings and NeJaime (2010) define this term as a social change tool that advocates for issues “across different domains (courts, legislatures, media), spanning different levels (federal, state, local), and deploying different tactics (litigation, legislative advocacy, public education)” (2010, 1242). Legal organizations that are oriented toward creating policy change are typically described in the public interest law literature as having three tools at their disposal: litigation, public policy work, and public education. This project uses these
tools as guideposts to understand agenda setting and to record how cause lawyers believe change is made.

These are useful guideposts because much of literature on cause lawyering tends to focus on just litigation yet early observations in this study showed that organizations were using a variety of tools. Thus, to understand agenda setting, observations go beyond the scope of legal case selection. Instead, this project asks: what issues are organizations working on with administrative agencies? What subjects are organizations choosing to do public education work with? How are organizations deciding what kinds of cases to take to court? Who are organizations working with and on what topics? Such an approach gives us a holistic view of the behavior of these cause lawyering organizations.

Again, theories in social movement studies can help explain much of what is observed in this study. Resource mobilization theories (McCarthy and Zald 1977) can help explain the observed importance of resources as constraints and facilitators. Theories on legal and political opportunity structures (Andersen 2006; Epp 1998; McAdam 1999) are also applicable to the observed behavior of these organizations. As later chapters will show, many lawyers talk about waiting for the “right moment” or a confluence of events, to make their decisions to pursue an issue and to pursue it in a certain way.

However, according to observations, resources are not fully determinative of agendas or tactics. They are certainly constraining depending on the size of the organization, but they do not dissuade all organizations from pursuing issues when lawyers want to pursue them. Further, while a lack of resources may mean not pursuing an issue in a resource-intensive way, the multidimensional approach widens the lens of what lawyers do and shows us that organizations may pursue other avenues such as collaborating or utilizing networks of lawyers outside the
organizations. While many lawyers discuss waiting for the right time to act, other lawyers discussed making their own time and building allies and resources.

Without using the array of tactics of guideposts, these behaviors may not have been visible. In using multidimensional advocacy as a framework, this project finds that cause lawyering organizations are more attentive to community needs than what the literature might suggest and that organizations are not giving lip service to their engagement with community members or non-litigation tactics. To the contrary, while it is beyond the scope of this project to say how well organizations are adjusting to community need, it is perceived by organizations to be a central part of their work.

Definitions

Regarding the tools of organizations and their priorities, a few terms require explanation. First, policy work consists of three parts: lobbying legislatures, drafting legislation, and working alongside or educating administrative agencies. Chapter Four describes each of these components in detail. It is important to note that policy work is often thought of as specifically legislative. However, in part due to constraints on lobbying in the tax code for non-profits, policy work is actually focused on engaging with administrative agencies at the state and federal level.

Public education as a tactic is divided into three approaches and audiences: outreach work (aimed at the target community), public persuasion (the general public), or professional education (lawyers, judges, and administrative professionals). Several activities are used in each of these approaches, though often one activity can serve multiple functions. Activities include call centers, community workshops, continuing legal education events (CLEs), media relations, press releases, publications (newsletters, pamphlets, books, etc.), and surveys.
Finally, the definition for ‘agenda’ in this project is adapted from Kingdon’s classic work on policy agenda setting (Kingdon 1984, 3). Here it is described as the list of problems or subjects to which an organization is paying serious attention and committing resources to at any given time. This attention and commitment of resources includes money, staff time, public education projects, lobbying, or litigation work dedicated to an issue area.

Case Selection

There are two layers of case selection in this study: the movement and the organizations. Regarding the movement, the project centers on legal organizations advocating for the rights and improved lived experiences of lesbian, gay, bisexual, transgender, and queer (LGBTQ) people. Examining the LGBTQ movement is a useful case study under both an extreme selection rationale and a representative sample rationale.

To the former, studying the LGBTQ movement is a somewhat extreme case because of the scope of their great success, much of which has been based in litigation. In other words, this is akin to studying legal organizations working for racial justice and equality (like the NAACP LDF) during the civil rights era. Just in the last two decades, LGBTQ legal organizations have supported and spearheaded major Supreme Court victories on sodomy de-criminalization (Lawrence v. Texas 2003) and marriage equality (Obergefell v. Hodges 2015) that have been likened to Brown v. Board of Education (1954) and Loving v. Virginia (1967). These victories have shifted the legal framework in which LGBTQ individuals and groups operate (Andersen 2006; Boutcher 2005). Thus, studying these organizations offers a chance to explore the behavior of successful organizations whose staff have a great deal of institutional memory.

The movement’s success may also be helpful in looking for the influence of extra-judicial work. One might expect to see less of non-litigation tactics in organizations and industries where
litigation has mattered a great deal because, at least ostensibly, what would be the need for these other tactics? Thus, substantial commitments to public education or policy, beyond just their mere use in the periphery, may be a significant finding.

On the other hand, studying organizations in the LGBTQ movement is helpful because they are representative of legal organizations in other social movements. The impact organizations in this study are staffed by lawyers who carefully select cases to advance policy change through courts, just as the ACLU, NAACP LDF, and CPL began doing a century ago. Indeed, some of the organizations in this study were modeled from these earlier groups in their mission and organizational hierarchy. The direct legal service providers in this study are also representative of other legal aid groups across the country in terms of size, mission, and approach.

Thus, we could reasonably expect the behavior of organizations in the LGBTQ movement to track closely with the behavior of organizations in other movements. However, as others have pointed out (Scheingold and Sarat 2004: 72-97), the practice site of a cause lawyer can make all the difference in the kind of lawyering that is done. This means we may need to be cautious when generalizing the findings of this study.

Regarding the second layer of case selection, I attempted to reach most of the small universe of active legal organizations that focus almost exclusively on LGBTQ issues. This was

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8 “Almost” because some of the organizations also advocate for the protection and rights of people with HIV/AIDS. Other organizations in the universe that are not included in the study are: the LGBT Rights Project of the ACLU, the Servicemembers Legal Defense Network (I interviewed a former lawyer, but it was for her work with a different organization), and Immigration Equality (I left them out because they focus exclusively on immigration). Two organizations were omitted from the universe because they were referral services. They are: the Colorado Legal Initiatives Project (though I did interview the founder), and the former Legal Services at the Los Angeles LGBT Center.
accomplished, with interviews at ten out of the thirteen identified organizations. Besides the necessary focus on LGBTQ issues, the primary criterion for selection was whether organizations employed multiple lawyers that actively brought cases to court. This avoids selecting referral services which do not litigate themselves but instead refer clients to networks of cooperating attorneys.

More organizations in this universe may exist than identified, but they are likely to be run by a single lawyer acting as a referral service rather than taking cases themselves. There is also a tight cohort of lawyers in this specific legal industry and given all of the interviews with those lawyers, it is unlikely that an organization meeting my criteria would escape observation.

**Table 1.1: Organizations in Study**

<table>
<thead>
<tr>
<th>Name</th>
<th>Founded / Ended</th>
<th>Interviewees (#) and Material</th>
<th>Impact or DLSP</th>
<th>Reach</th>
</tr>
</thead>
<tbody>
<tr>
<td>Free State Legal Project</td>
<td>2009</td>
<td>Yes (2)</td>
<td>DLSP/Impact</td>
<td>Maryland</td>
</tr>
<tr>
<td>GLBTQ Legal Advocates and Defenders</td>
<td>1978</td>
<td>Yes (6)</td>
<td>Impact</td>
<td>New England</td>
</tr>
<tr>
<td>Lambda Legal Defense and Education Fund</td>
<td>1973</td>
<td>Yes (10)</td>
<td>Impact</td>
<td>National</td>
</tr>
<tr>
<td>Mazzoni Center, Legal Services</td>
<td>2010</td>
<td>Yes (3)</td>
<td>DLSP</td>
<td>Philadelphia, PA</td>
</tr>
<tr>
<td>National Center for Lesbian Rights</td>
<td>1977</td>
<td>Yes (5)</td>
<td>Impact</td>
<td>National</td>
</tr>
<tr>
<td>Peter Cicchino Youth Project, Urban Justice Center</td>
<td>1996</td>
<td>Interview only (1)</td>
<td>DLSP</td>
<td>New York, NY</td>
</tr>
<tr>
<td>Sylvia Rivera Law Project</td>
<td>2002</td>
<td>Yes (1)</td>
<td>DLSP</td>
<td>New York, NY</td>
</tr>
<tr>
<td>Transgender Law Center</td>
<td>2002</td>
<td>Interviews only (2)</td>
<td>Impact</td>
<td>National</td>
</tr>
<tr>
<td>Whitman-Walker, Legal Services</td>
<td>1986</td>
<td>Interview only (1)</td>
<td>DLSP</td>
<td>Washington, D.C.</td>
</tr>
</tbody>
</table>

The organizations referenced in this project, are listed in Table 1.1 above. One noteworthy absence is the ACLU LGBT Rights Project. This project has been involved since the 1980s in coordinating with the other impact organizations in this study and their work continues to be significant. Attempts were made to reach an ACLU lawyer though at least two of my interviewees
(Kate Kendell and Geoff Kors) worked for state ACLU organizations at some point. Still, future work on this legal industry would benefit from the inclusion of lawyers and material from this organization.

The table below also includes whether the organization is an impact organization (Impact) or a direct legal service provider (DLSP). “Material” means that I gathered and analyzed documents, like newsletters or 990 forms, of these organizations. “Reach” refers to the physical scope of the organization’s work, or in other words, where the organization will ordinarily participate in litigation or policy work.

**Data Collection**

The three sources of data in this project are described below. First, I conducted interviews with current and former staff members (lawyers and non-lawyers). Second, I analyzed organizational documents (such as memos and financial reports) from three LGBTQ-related archives. Third, I examined newsletters and annual reports (sometimes accessed through archives) to corroborate interview responses and to find examples of education and policy projects.

I interviewed at least one person at ten legal organizations. Requests for new interviewees from different organizations ceased once: (a) a point of saturation was reached (i.e. interviewees started suggesting I contact the same people), (b) once I obtained interviews with people from various kinds of positions (litigation, education, policy), and/or (c) I failed to receive a response from specific lawyers after multiple attempts.

I collected interviews using a selective snowball process. Once I identified organizations, I emailed staff members, often beginning with the executive and legal directors. After I contacted these leaders and permission was given to me to use their names, I sent further solicitations to other staff members. I selected some staffers based on their time with the organization to tap into
their institutional memory. I also selected staffers based on their role in litigation, public policy, and education.

The emails I sent to prospective interviewees requested forty-five minutes to an hour for interviews, though actual interviews often went longer. Most interviews were conducted over the phone, but some were conducted in-person when travel was possible. Questions were semi-structured so that interviewees received mostly the same questions. Some questions varied based on staff position and either new or unique information. Conversations were recorded with permission using TapeACall and transcripts were made most often through a paid service (see Appendix A). In total, I conducted thirty-eight in-depth semi-structured interviews with current and former staff members.

Transcripts of interviews were then coded in Atlas.ti for analysis. For certain chapters, such as those on public education and public policy, I used extensive coding to break down specific features such as ‘comments about education’ or ‘comments about community need.’ Most codes were created before an initial analysis though additions were made based on-going observations. The purpose of coding was to limit the potential for bias based on relying on memory alone. For example, without the help of coding I might recall something being extremely significant from the interviews but come to find later that it was only uttered by one interviewee. This helps prevent overstating observations or drawing imprecise conclusions. It also helps find connections where they might not have otherwise been observed. Coding schemes are included in Appendix A.

I retrieved organizational documents such as memos, reports, emails, newsletters, and annual reports from multiple visits to three archives: the LGBT Community Center Archive in New York City, Yale University’s Manuscripts & Archives in New Haven, Connecticut, and the GLBT Historical Society Archive in San Francisco, California. Those documents were
photographed and uploaded onto a computer for tagging and analysis using the Picasa photo organizing software program. I also compiled documents (specifically newsletters and annual reports) from the internet and from a visit to two organization headquarters (NCLR headquarters in San Francisco and EAP in Philadelphia). Each newsletter and annual report was analyzed for budgetary information to trace the commitment of resources. Finally, I also used these documents to corroborate projects and stories discussed by interviewees.

**Chapter Summary**

Every chapter in this project either focuses on one tactic of cause lawyering or one potential influential element of agenda setting. The first three chapters examine how agenda setting works within each of the three primary tactics (litigation, public education, public policy). That is, how did organizations decide what issues to pursue in policy work? How did organizations decide what issue to utilize education campaigns with? How did organizations decide what cases to select? Because the literature is unclear about their importance, Chapters Two and Three also define the tactics (public education and policy) and examine why they are important to legal organizations. The following three chapters are on community need, foundations, and the marriage equality campaign. These elements were given special attention because they were constantly present in the literature or found to be significant during this project. Each tactic or element in every chapter is defined and then analyzed for its relationship to organizational behavior.

Chapter Two begins where most of the relevant literature centers: litigation and case selection. However, the chapter broadens the scope of previous literature by searching for influential elements on agenda setting present in different disciplinary works such as public interest lawyering (Nielsen and Albiston 2005; Rhode 2008) and social movements (Andersen 2006; Epp 1998). Observations confirm much of what one would expect when putting these pieces together.
For example, lawyers in these organizations generally rely on a consensus model among legal staff, without influence from boards of directors in selecting cases. Within this consensus model, individual lawyers are given broad latitude to use their own expertise and interests to guide their decisions. However, while the literature says little about missions and community need, these two elements were central motivations in case selection. Thus, while this chapter confirms much of what one might expect, it adds important nuance to a careful balancing act performed by lawyers.

The third chapter focuses on public education. Interviews with staff and evidence from organizational material reveals that public education tactics are used to overcome limits to judicial pathways for change. This observation counters the classic claim that cause lawyers are beholden to a “myth of rights,” the idea that judicial edicts can bring about desired changes in rights. Instead, lawyers view public education as serving four functions: priming a pathway to successful litigation, controlling for backlash and counter-mobilization, amplifying the power of litigation as a leveraging tool, and supporting change directly through awareness raising and training.

To fully realize the importance of public education, lawyers had to experience important losses and wins, specifically around marriage equality. The lessons of political backlash taught lawyers that they had to win in the court of public opinion, winning “hearts and minds,” just as much as they had to making winning legal arguments. Which issues organizations decided to work on was also not wholly determined by litigation. While these efforts most often come about because of an on-going case, they were also used when litigation was not an ideal method to achieve a desired goal.

Chapter Four expands on the third prong of cause lawyering tactics: policy work. This kind of work is critical to reaching the goals of organizations by providing: (a) a foundation on which to build legal casework, (b) an alternative to judicial pathways, and (c) a complementary
mechanism that works alongside public education and litigation. Policy work, which consists of bill drafting, agency work, and lobbying, is in many ways preferred to court cases because they offer longer-lasting legal bulwarks against attacks by opposing interests. Which issues are pursued using policy work is largely determined by perceptions of legal and political opportunities and lawyers’ sense of community need. Collaborations with other organizations are also integral to the implementation of policy strategies. Sometimes choices to act were constrained by resources, especially among service providers. However, lawyers described a balancing act between the needs and goals of the organizations with opportunities.

In Chapter Five, the focus of the project turns to the aspect of agenda setting most cited by interviewees: what community need is. Since much of the sociolegal and cause lawyering literature paints a picture of an “isolated lawyer,” this chapter investigates what ways, if any, organizations try to gauge the needs of the community they serve. This chapter concludes that legal organizations are more engaged in understanding community need than what would be expected from the literature. Unlike the “isolated lawyer,” these organizations are determining community need through call centers, outreach work, community surveys, and the personal experiences of staff. Thus, both impact organizations and legal providers take affirmative steps to understand community need and build it into their priority-setting processes.

Since much of the literature on social movement success and critiques of interest groups has to do with resources, Chapter Six focuses on the importance of foundations and pecuniary resources on agenda setting. Unlike what we might expect from Komesar and Weisbrod (1978) and from resource-centric theories (McCarthy and Zald 1977; Wilson 1974), the findings here are that monetary resources, while a constraining factor, are not a leading determinant of agendas. This might be unsurprising to those who note cause lawyers have different motivations than other
lawyers (Scheingold and Sarat 2004; Menkel-Meadow 1998). However, what the chapter demonstrates is that this lack of influence is in part due to the way organizations are set up. For instance, board members and development staff are removed from the day-to-day work of lawyers and boards rarely, if ever, interfere with choices by staff.

The one caveat is direct legal service providers, which sometimes must limit what they do to what they can fund. However, even in these instances, organizations are pursuing issues they have already prioritized. What foundations and funding pressure can do is limit the scope of a provider’s agenda. Moreover, both providers and impact organizations are often educating donors about important issues and may even turn down money if accepting means they must shift away from their priorities.

Chapter Seven finishes by examining organizational behavior where this Introduction began: with marriage equality. There has been criticism against pursuing marriage equality because, according to some, it served as a distraction from other issues and used up valuable resources. Given the implications for agenda setting, this chapter asks how pursuing marriage equality influenced these organizations. Did organizations benefit from pursuing this issue, as Komesar and Weisbrod’s (1978) theory might suggest? Were resources disproportionately focused on marriage to the detriment of other issues?

This chapter finds that while indeed impact organizations benefited from their marriage work with significant increases in donations, not all organizations prospered. Smaller, direct services programs did not see the kind of increase that larger organizations saw. However, with increased resources, these organizations expanded their work, both in issues and tactics. Public education work for instance, including outreach, appeared to have benefited from the marriage equality campaign. Lawyers also believed that marriage equality created a ripe opportunity,
because of its effect on public opinion, to pursue other issues such as transgender rights. Thus, while in some aspects organizations behaved as would have been expected based on resource models, a closer examination shows that contrary to critiques, organizations were deployed in a diverse agenda and were utilizing a range of tactics.

The conclusion wraps up with a case study: how the National Center for Lesbian Rights continues to pursue the end of conversion therapy in the United States. This issue illustrates the common themes throughout this project: lawyers acting when they saw need, lawyers acting with little resources or perceived opportunity, lawyers utilizing non-litigation tactics alongside lawsuits to reach their goals, and lawyers shifting existing opportunity structures. This all was revealed through a multidimensional view of cause lawyering behavior.

Rather than centering litigation, the project looked at an array of tactics and influential elements. Each tactic and element were defined and scrutinized for their relevance to agenda setting. The findings are important because they tell us that lawyers are far from captured by a myth of rights and more engaged with communities than we might have otherwise expected. This challenges the way we commonly think about cause lawyering organizations and how they relate to social change.
Chapter Two | A Mission-Driven Approach in Litigation

I ask in this chapter: how do cause lawyering organizations select cases? To answer that question, I trace and evaluate several potential influences suggested in the literature. I also consider influences, like community need and mission statements, that were prevalent in interviews. Case selection is the area of lawyering where there is the most insight from scholarship. However, while there are more recent large-N surveys of PILO behavior (Nielsen and Albiston 2005; Rhode 2008), there has not been a new theory on case selection since the 1970s (Komesar and Weisbrod 1978).

As described below, the “isolated lawyering” literature would predict case selection criteria centered on legal wins and a consensus model of decision-making between lawyers. Under this model, it would also be unlikely for community stakeholders to influence case selection (Rhode 2008, 2051). A more “engaged lawyering” model would center community need and might consider ideas from non-legal organizations. Under this model, we would be unlikely to see an influence from major donors or foundations.

What emerges from interviews and analysis of documents confirms much of what one would expect from both models. This includes a lack of interference by boards of directors and a constrained but important role for pecuniary resources. While organizational documents point to a “consensus” model of case selection among rank-and-file lawyers, details from interviews suggest a great deal of autonomy among individual lawyers. This confirms expectations from a more recent large-N study showing use of consensus decision-making among lawyers (Rhode 2008, 2053).

There are, however, important differences from the “isolated” reading of the literature. For instance, winning and waiting for opportunities to triumph in court does not have as much

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9 To be clear, “cases” are when lawyers take up a person’s claim and provides legal representation. It does not have to mean litigation. For example, it could result in a settlement with an employer or a school agreeing to change some policy.
influence as one would expect (Komesar and Weisbrod 1978, 87). While resources can be constraining, unlike what the isolated reading would suggest, development staff and boards of directors (who are primarily concerned about fundraising) stay out of the case selection process. Individual lawyers take what they can handle (in terms of workload) and refer out other cases through cooperating attorneys when they need help. How cooperating attorneys alleviate resource pressure is one of the more significant observations. The PILO and cause lawyering literature does not suggest we should expect the importance they show here.

The other pronounced distinction from previous works, particularly from the isolated lawyering reading of literature, is in community need. I find that these cause lawyering organizations are continually citing needs of community members and have developed ways to determine what those needs are (this is expanded upon in Chapter Five). Most studies, with exceptions (Hilbink 2006; Komesar and Weisbrod 1978; Menkel-Meadow 1998; Scheingold and Sarat 2004), overlook the personal motivations of lawyers and how they might influence case selection. Other scholarship presents the possibility organizations may dismiss or break with the priorities of their community (Bell 1976; Handler 1978; McCann 1986; Meyer and Boutcher 2007; Willse and Spade 2005).

That is not to say we should really expect organizations not to care about community members. After all, literature aside, one could reasonably expect movement actors to exhibit some altruistic motivation rooted in either political, moral, and/or social normative beliefs. Rather, we might expect an organization’s agenda to be disconnected from grassroots elements of the movement and from other non-legal organizations.

Putting all this together, because there is a dynamic relationship between elements (as described below), it is difficult to adjudicate their importance relative to each other. Instead, broad
categories of “most likely”, “moderately likely”, and “less likely” were used below to describe influence. This avoids individual ranking and the “likely” qualification allows for exceptions. Using these categories, I conclude that organizations in this study center three elements in a balancing act with the rest. These are community need, the mission, and to a slightly lesser degree, opportunities to win. This points us toward organizations that look closer to the literature of “engaged lawyering.”

Expectations of Behavior

As stated above, several potential influences for case selection can be derived from cause lawyering, public interest lawyering, and social movement organization scholarship. However, their relative importance to each other is difficult to discern. Based on analysis of the literature, potential influences were categorized to have a significant likelihood, moderate likelihood, or limited likelihood to influence case selection. These influences include community input, funders (mainly foundations), perceived opportunities to win in court, individual staffers, and boards of directors.

Community need might be expected to have a moderate to low influence based on the literature. While a few recent works suggests that cause lawyers are uniquely motivated by political and moral beliefs (Scheingold and Sarat 2004), community need is not often considered in the study of legal organizations. One exception is Deborah Rhode’s survey of public interest legal organizations where she found that most organizations do not make significant efforts to consider stakeholders, such as members, clients, or community groups (Rhode 2008, 2051). However, direct legal service organizations that are funded by the Legal Services Corporation (LSC) must consider community need because LSC-funded organizations are bound by rules to utilize client and community outreach to set priorities (Rhode 2008, 2051).
Resources are likely to be at least moderately influential, if not strongly influential on case selection, though that may vary depending on how resources are defined. According to Chen and Cummings (2012, 145) funders, including foundations and major donors, “can significantly shape institutional priorities.” This would seem to indicate more than just foundations reinforcing some issues the organizations are already working on, though it is not clear if it amounts to a quid pro quo.

However, a survey of public interest legal organizations reports that funders had a limited influence on case selection (Rhode 2008, 2052–53). Most organizations (55%) reported that funders only have a “limited affect” on organizational priorities while well over a quarter (39%) reported a moderate impact. Rhode’s study also specifically quotes Lambda’s legal director Jon Davidson as saying that leaders resist allowing “money to drive the agenda” (Rhode 2008, 252). On the donor side, Kosbie (2017) found in a survey that many donors that give to the National Center for Lesbian Rights (NCLR) have a low expectation that all of their preferred issues were being addressed but gave anyway.

Komesar and Weisbrod (1978) argued that, stemming from a need for resources, legal organizations would be motivated to show funders they are succeeding to encourage more giving. One way of doing that is to consider the chance of success in court, which lawyers reported as being an influential factor in case selection (Komesar and Weisbrod 1978, 87). They also reported that lawyers are highly interested in novel questions of law rather than cases that could be used to “enhance implementation and enforcement” of current laws (Komesar and Weisbrod 1978, 89). Regarding both of these potential influences, the authors believed that highly visible cases, including issues that “might prove dramatic or startling” would attract donors and were thus likely to be prioritized by organizations. (Komesar and Weisbrod 1978, 89).
Resources, though, can extend beyond the pecuniary. For example, social movement scholarship views labor and expertise (McCarthy and Zald 1977) as being important resources. Indeed, survey data shows that most organizations (95%) rely on *staff autonomy* in making case selections (Rhode 2008, 2051). According to Rhode’s survey “informed judgements by experienced staff generally drove the priority-setting process and attracted reasonable consensus in strategic decision making” (Rhode 2008, 2053).

Rhode also found that a majority of respondents believe that *boards of directors* are not overly involved (Rhode 2008, 2051). Most organizations rely on boards for fundraising, selecting new directors, and creating strategic vision. Of those organizations the Rhode surveyed, “only 13% of organizations reported high levels participation; almost two thirds (63%) reported limited involvement” (Rhode 2008, 2051). Instead, most relied on their boards for fundraising and general governance, such as hiring of personnel.

Thus, based on the literature we might expect the following model of behavior:

1. Limited to moderate influence of community input
2. Moderate influence from funders
3. Moderate influence of opportunities to win in court
4. Moderate to significant influence of individual staffers
5. Limited influence from boards of directors

**Determining Case Selection Criteria**

The challenge of addressing how organizations choose their cases is largely about data and transparency. As Carpenter (2014) points out, the public does not know much about how cause lawyering organizations make decisions because these processes take place in conference rooms and offices. There are no consistent records of what factors go into selecting every case, though some meeting minutes are available through their archives. Organizations, somewhat surprisingly, do not keep master dockets of cases they have selected. To track cases, one either needs access to an organization’s storage unit (see Andersen 2006), or one can estimate cases based on annual
reports, as done in this project. But to know why cases were selected requires some detective work, reaching out to people who were in the rooms where cases were debated, chosen, or handed off to other firms and lawyers.

I relied heavily on the literature to identify potential elements early on that I could use in questions to interviewees. This gave me a list of elements to ask about, but other potential influences were added to questions over time based upon ideas from the first few interviews. Thus, some of the answers about elements below were made unprompted while others were made in direct reference to a question about that element. All interviews were then analyzed through a coding scheme listed in Appendix A. These codes categorized comments by the type of influence.

The Differences Between Types of Organizations

Case selection processes undertaken by direct legal service providers and impact organizations (as described in Chapter One) have different orientations. That is, they are set up differently to select cases based upon their purpose. Direct legal services focus on a client and their individual harm(s). Their tax status as a 501(c)(3) is contingent upon them providing “legal services to indigent persons otherwise financially incapable of obtaining” representation (Internal Revenue Service 1984). Whereas, “public interest law firms” may conduct activities that “benefit the community as a whole by providing legal representation on issues of significant public interest where such representation is not ordinarily provided by traditional private law firms” (Internal Revenue Service 1976, 1). Either type of organization can provide both kinds of representation (and some in this study do), if client fees are not collected.

This means that direct legal service providers are typically set up to provide aid to individual clients with the end goal being a client’s need. While all lawyers are bound by a code of professional responsibility that demands that clients be zealously represented (American Bar
Association 2018, Rule 1.3), lawyers for impact organizations have a secondary goal of creating policy change through the cases they select. Impact organizations seek out clients with sympathetic backgrounds and legal injuries that lawyers believe will stand a strong chance in challenging a law and setting legal precedent. These cases are often referred to as “test cases.” Thus, an important distinction between these two kinds of organizations is that impact organizations exercise much more discretion in who they choose to take as a client.

For example, Suzanne Goldberg explained to me that at Lambda “there was a deliberate aim to take cases that would have an impact beyond the individual case, and to take cases that affected some of the most pressing areas of life, lesbians, and gay men, and people with HIV” (Goldberg 2016). Rather than starting with a case and considering its worthiness, Goldberg said that lawyers began with priority issue areas, and searched for the best cases to advance those issues. Goldberg: “we would think about our priority areas and take those into consideration when vetting cases or other projects” (Goldberg 2016).

Historically, legal services providers are typically smaller in size than impact organizations. They have fewer attorneys and relatedly bring in fewer funding. As demonstrated in interviews and from the literature, there is a tension between direct legal services and larger impact organizations within the LGBTQ movement. That tension lies in the belief that a disproportionate amount of resources goes to big “impact cases” such as those regarding marriage equality or equal access to the Boy Scouts. Where more money should go, some argue, is to clients who need help today instead of impact cases that take years to develop and even longer to implement. On the other hand, other interviewees believe that impact and direct litigation are both

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10 The ABA’s Model Rules of Professional Conduct states: “As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.” Comment to Rule 1.3 on Diligence states: “A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.”
necessary parts of the movement’s ecosystem as it tries to achieve greater equality and better lived experiences for its members.

This is all to say that this chapter, like the rest of the project, deals with a broad category of organizations. There are structural differences between two types of cause lawyering organizations influence case selection. This chapter will address those differences when necessary.

The Early Processes of Impact Organizations

According to interviews and analysis of organizational documents, there was a shift in case selection processes for impact organizations.11 The shift was from a board-dominated model with a focus on precedent setting cases, to a staff-centered model that balanced numerous elements including perception of community need and opportunities to win in court. This change occurred across all the impact organizations as they accumulated more full-time staff. By the mid-1990s, the shift was complete. This section describes the early period.

First, from the 1970s to the early 1990s, boards of directors played a significant role in case selection. For example, a 1991 GLAD document titled “Board of Directors, An Introduction” showed that the board had five standing committees, one of which was a litigation committee. This committee had “decision-making authority on the acceptance of potential cases for representation by GLAD attorneys” (GLAD Staff 1991). The committee reviewed “prospective cases to determine whether each case raises issues that are in furtherance of GLAD’s goals of protecting the legal rights of lesbians and gay men and whether GLAD has the resources to pursue a case in light of the expected commitment of time and money” (GLAD Staff 1991). Note the relevance of resources as a constraint. The board committee also maintained a roster of cooperating attorneys

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11 The direct legal service organizations in this study did not emerge until the mid-1990s. Some of them did not open until the early 2000s.
who would accept GLAD cases on a non-fee basis (GLAD Staff 1991). This indicates not just an importance of the board itself, but also values placed on resources including time and money.

Arthur Leonard, a former board member of Lambda Legal, explained to me that during the 1970s and ‘80s, Lambda as an organization was largely board functioning. That is “it was a working board… It was a bunch of attorneys, they were the board of directors, and they took on cases as part of their practice and they considered it pro bono activity because they were doing it on behalf of Lambda” (Leonard 2016). The organization relied heavily on volunteer lawyers which made up their own legal committee. This committee of practicing attorneys would “sit with the staff and review the requests for representation and talk about strategy in cases” (Leonard 2016). At the time, staff consisted of “one lawyer in house” and an administrative assistant. The committee “would meet once a month with the staff and they would talk about the case requests that they thought that might have merit” and would discuss whether it would make a good test case (Leonard 2016).

Thus, another element becomes clear: the importance of winning and making precedent. Leonard continued that “in the early years” case selection was largely dependent on “what came over the doorstep and we felt we could do something with” (Leonard 2016). Lambda was getting dozens of calls each day, and the legal committee would start by weeding through calls and then look at the priorities of the organizations “on a theoretical basis” (Leonard 2016). This meant asking: “what are the issues that face our community, where do we need to make precedents?” (Leonard 2016). Lawyers wanted to “establish some kind of legal precedent or principle of law” that they could use in other cases.

In general, case selection for impact organizations in these earlier decades revolved around the board committees. These committees of volunteer lawyers prioritized cases based on the case’s
potential to set precedent, as well as where there was a reasonable chance at success, and would try to select cases they thought addressed areas of most need. As demonstrated below, these processes were not stable over time and at least some organizations moved from ad hoc selection mechanisms to more formalized ones.

**Changes in Modern Era**

As staff size grew, more of the responsibility to select cases moved down to non-board lawyers on staff. Today, lawyers report using a “consensus” model to determine case selection. This means that each lawyer advocates for a certain case and together they decide whether it should be taken. However, if a lawyer really wants to pursue a particular case, rarely are they denied. A Lambda Legal pamphlet from the mid-1990s described case selection as having four elements: precedent, effect, success, and resources.\(^\text{12}\) To the first element, the pamphlet reads:

Lambda determines if the cases would set a legal precedent in the particular state or federal district where it arises. Lambda considers cases that will either create new rights or enforce existing rights. Once the law has been clearly established in favor of lesbians and gay men in a jurisdiction, Lambda is less likely to take a case which merely applies that law, preferring to focus on unestablished principles or cases in other jurisdictions. (Lambda Legal 1993)

Regarding the “effect” element, the pamphlet states that Lambda will consider whether the issue is of overall importance to the lesbian and gay community: “In selecting those cases to which we dedicate resources, our institutional interest rests with setting precedents that benefit the larger community” (Lambda Legal 1993). Lambda also considered the likelihood of success, considering those cases with greater legal “foundations” as being capable of enduring the legal process. Finally, Lambda considered the “availability of organizational resources such as finances, staff and

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\(^{12}\) The document is undated but using the content, such as the absence of the Southern Regional office listed among the addresses, it was likely created between 1993 and 1997.
cooperating attorneys” and how it can disperse those resources across a “wide variety of issues” and throughout the country (Lambda Legal 1993).

Perhaps most insightful from the archives is a GLAD document dated November 1995. The memo appears to have been written as GLAD was reviewing its own case selection process. As part of that review process, then GLAD executive director Amelia A. Craig reached out to other legal organizations to ask about their processes. Those organizations included Lambda, NCLR, the ACLU, and the ACLU of Massachusetts (Craig 1995).

Kate Kendell, executive director at NCLR, described in this memo that: “staff attorneys generally decide what cases to take by evaluating whether cases are clearly within their mission. If they have a question, they raise it at their Legal Committee, a committee chosen by the staff attorneys that also has a board liaison who participates” (Craig 1995). In earlier years, the legal director had more input in the decision making. In the event of a dispute after review by the committee, which Kendell noted rarely happened, the legal director would make the decision with the executive director having final approval (Craig 1995). The board in these instances is informed of the final decision.

The Gay Rights Project and AIDS Rights Project at the ACLU (now the LGBT & HIV Project) followed what their legal director referred to as a “consensus model” with the legal director having the “ultimate say” (Craig 1995). Decisions were typically made with organizational goals in mind. In the Massachusetts ACLU chapter, staff attorneys made decisions with “their sense of the organization’s priorities and budget” in mind (Craig 1995). On the rare occasion of a conflict, the board might be brought in, but final decisions went to the executive and legal directors.
Another GLAD document from that same period outlined their own litigation criteria which was extensive.\textsuperscript{13} Perhaps most telling, the weight given to any criterion was “determined in the direction of the GLAD attorney or attorneys involved in the decision making process” (GLAD 1995). The first of these criteria were laws restricting the civil rights of LGB people or people living with HIV/AIDS, as well as enforcing laws that protect those populations. Second, was to maintain a diverse docket which included variations in geography, topics, and client profiles. Third was coordination with other organizations, and they noted the Roundtable (see below) specifically. Fourth were the facts of the case and how they accomplish GLAD’s mission. Next was GLAD’s financial capability and staff availability, followed by complying with their conflict of interest policy. Last was whether there was an alternative to litigation and “any other factor that may be of any relevance to a particular case” (GLAD 1995).

In sum, in the early days impact organizations relied more on boards to make decisions and the focus was on setting precedent. That period comports with earlier theories on case selection (Komesar and Weisbrod 1978). However, as impact organizations grew, other factors became more relevant to decision making. First, authority shifted to full-time legal staff and their individual judgements. Staff looked to the board for suggestions, but board involvement was slowly phased out. As this was done, staff lawyers reached a consensus model. Lawyers had to keep in mind the constraints of the budget, but they also considered a few other variables: the chance of success in creating precedent, the needs of the community, and the diversity of the docket.

Additionally, as collaboration and communication strengthened during this period, strategies were also influenced by companion legal organizations. Much of this comports with

\textsuperscript{13} The document was undated but placed next to the previous document (Amelia Craig’s 1995 memo) in the archive and contains the same header, footer, and font. It is reasonable to assume they were published together.
more recent scholarship that suggests a stronger likelihood of staff autonomy and collaboration in agenda setting (Rhode 2008). However, consideration of the diversity of the docket, which is present in the evidence here, is not a common element found in the literature. This may speak to an organization’s desire to ensure they are reaching all parts of the community they serve.

**North Star: Mission Statements**

The dockets, interviews, and organizational material clarify that today, mission statements are the primary influence on case selection. When mission statements were mentioned, they were described as a guidepost amidst uncertainty. Janson Wu, current executive director at GLAD, recalled a time when he was part of the staff and they would turn to their then executive director Lee Swislow for advice:

…at the end of the day, we are guided by our mission, and as long as we're using the resources to further our mission, that is what our compass point is. That is our North Star. […] I've learned a lot of the importance of being rigid about that from my predecessor, Lee. Whenever there was a hard decision to make, when there were competing interests, including interests from externally and from funding sources, and then all eyes in the room would turn to Lee. Lee would always say, "Well, the question I always ask myself in these moments is, 'What would further our mission?'" And she always redirected the conversation back to the mission and I try to follow that same model. (Wu 2017)

One place to observe the role of mission statements is in the transformation of statements of the three impact organizations between 1998 and 2002. During this period, one-by-one, GLAD, Lambda, and NCLR incorporated gender identity and/or transgender people into their core missions. As Chris Daley of the Transgender Law Center and Jennifer Levi of GLAD pointed out to me, the major three organizations were already doing work with transgender clients and had transgender staff members. But it was only after internal advocacy that these LGB organizations

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14 Both Jennifer Levi and Shannon Minter believe that it is difficult to separate “gay history” from “transgender history.” They argue that much of advocacy, legal and otherwise, used to advance gay rights has been aimed at, and fought for by, transgender people. In this narrative, fractures in the movement and within organizations occurred
really became LGBT organizations. Today, all three organizations have created unique transgender rights projects. In fact, NCLR’s project spun-off to become its own organization, the Transgender Law Center, founded by NCLR staff lawyer Chris Daley.

This story is less about cause and effect, and more about the constitutive nature of organizational missions, which are originally set by boards. That is, missions focus the organization’s work to given areas but because lawyers have a great deal of autonomy and are part of shaping the organization’s identity, they can push at those boundaries. Thus, lawyers at once are both constrained and free to set case agendas within the organizations. The following story about GLAD provides an example.

Transgender Inclusion at the Turn of the Century

In 1998, GLAD’s Board of Directors began considering changing their mission statement to include issues of gender-identity and defending transgender people. A Strategic Planning Committee was put together to address the issue, ultimately deciding against recommending inclusion of transgender people. At this point, GLAD was already taking transgender clients and doing work in this area. However, the identity of the organization was still focused on sexual orientation and AIDS/HIV. Some on the board felt GLAD should only take cases where a transgender person’s injury could be related to their sexuality. For example, a Strategic Planning Committee Memo asked about the connection between someone being denied a loan because they cross-dressed and assumptions about sexuality (GLAD 1998b).

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around employment discrimination, both as a strategy (whether including gender identity hurt chances of legislative victory) and as an identity.

15 It is not clear what motivated this consideration, whether it was a periodic review, suggestions from inside the organization, or an external influence. I speculate, based on my reading of the memos and interviews, that it was likely an internal push by staff.
Meeting minutes of the Strategic Planning Committee in September of 1998 show a recommendation to not include transgender, gender expression, nor gender identity. However, the recommendation also included GLAD adopt a policy statement.16 This statement read:

We acknowledge that there are shared issues with the transgender community and that GLAD may choose to provide assistance in such cases, provided that the issues arising from such cases further GLAD’s mission and have sufficient nexus with GLAD’s mission to achieve full equality and justice for all gay men, lesbians, bisexuals and people living with HIV; and further provided that GLAD’s work on such cases is consistent with the priorities of the organization and does not consume a material portion of GLAD’s resources. Our interest is to recognize the changing landscape of legal theory so that we do not limit GLAD’s effectiveness in pursuing our mission. (GLAD 1998c)

Not long after, board member Donna Turley sent a concerned email about the policy statement to the entire board. It was, “full of too many ifs and buts, and very tepid” according to Turley and constrained work on transgender issues with the caveat about consuming too many resources. Turley wrote: “there may be a transgender issue that is exactly in line with our goals and mission statement (which isn’t really revised by this policy statement), and it may take many resources. I don’t want to limit us” (Turley 1998). A week later, the policy recommendation was updated:

In order to enhance GLAD’s effectiveness in pursuing our mission, we acknowledge that there are shared issues with the transgender community and that GLAD may choose to provide assistance in cases raising issues of gender expression or identity, provided that the issues arising from such cases further GLAD’s mission and have sufficient nexus with GLAD’s mission to achieve full equality and justice for all gay men, lesbians, bisexuals and people living with HIV; and further provided that GLAD’s work on such cases is consistent with the priorities and resources of the organization. (GLAD 1998c)

Note the changes. The resource caveat was altered to be less constraining. The portion about limiting GLAD’s effectiveness was also eliminated. Finally, gender expression and identity

16 Whereas a mission statement describes an organization’s purpose for existence, a policy statement is an ad hoc recognition of a shared value by those within an organization. For strategic planning and case selection, mission statements are more significant.
were added. What remained was the concern that any case should have “sufficient nexus” to sexual orientation and people with HIV, and that GLAD “may” decide to take cases on behalf of transgender clients, not that it was their imperative.

Two years later Gary Buseck brought the issue of including transgender people into the mission statement back to the board. Once again, the issue was elevated to Strategic Planning (Yale June 86). On March 3rd, Buseck sent a message to the board regarding his position. In brief, it advocates for the inclusion of gender identity and transgender people into the mission statement at the risk of getting left behind by the movement and other organizations.

“Things are moving very fast in our relevant world concerning the significance of transgender issues to the movement” Buseck wrote. He continued: “people are seeing ever more clearly the intersection between trans and g&l activism” (Buseck 2000). He stated that since GLAD adopted the formal policy stance, it had “stepped out and really been doing pioneering work in the area” (Buseck 2000). He further argued that other legal groups have been looking to GLAD and that they have been getting enormous credit for their work. However, he also claimed that GLAD was “not getting credit in any wider circles because our policy remains essentially undisclosed except by our actions” (Buseck 2000).

A day after this email, Turley sent Buseck a message. In it, she referred to the last mission statement change attempt. Turley recalled “a tough fight and a lot of education […] I think that your e-mail continues that education, but I am not sure the change will be easy” (Turley 2000).

In the end, Buseck’s suggested mission statement change was adopted and GLAD went on to create a Transgender Rights Project within the organization, headed by Jennifer Levi.17 This

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17 It should be noted that GLAD hired Levi during a fundraising drive called the “Third Lawyer Campaign,” right during the first period when GLAD’s board was debating and ultimately ruled against a mission change. While the board did not move on changing the mission, staff may have found a way to work around the mission, by hiring
example uncovers an important limitation to the mission statement: while staff are guided by the statement, missions do not constrain staff from pushing at the margins, at least in these organizations. Levi, who was hired amid this debate, suggested to me that “the internal conversations about the importance of doing the trans-work drove the reshaping of the mission statement” (Levi 2016). Even though transgender people and gender-identity were not part of the formal mission, staff continued to work with transgender clients and related discrimination claims.

What are we to draw from this example? It reveals that mission statements are not after-thoughts, they are important to both boards and to staff. While staff are guided by this statement in their case selection, they are not permanently bound. This does not mean the mission statements were merely window-dressing though. To the contrary, bringing the missions up-to-date with staff and broader movement priorities publicized GLAD’s work to the community in a broader way, potentially bringing greater visibility of GLAD to the trans community. In addition, it opened the door for discrete projects with dedicated staffs and budgets. What we should take from this is that missions are important, but their influence is dynamic. That is, they focus case selection but given that lawyers are part of setting the mission for the organization and have autonomy to select cases, lawyers have room to push at those boundaries.

**Board of Directors**

The literature is clear that boards today are likely to have limited influence on the day-to-day operations of legal organizations, which includes case selection (Rhode 2008). Indeed, interviewee after interviewee in this study quickly pushed aside any notion that their respective boards had a role in case selection. The only influence that interviewees see is that boards help to craft the mission-statement and occasionally settle disagreements.

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specifically for the purposes of expanding transgender work. Whether this is really how it played out has not been confirmed but it is an interesting coincidence.
What do boards do then? Boards support staff in their endeavors, occasionally helping to solve disputes, push agenda items if they lag, but mostly boards are the face of the organization and chief fundraisers. They help spread word about the work of the organization, speak to community members, and try to bring in new members and funding through donations. Whenever there is a “giving drive” (fundraising event over a given period usually to achieve a specific dollar amount), it is the board that conducts this, reaching out to people and often donating themselves.

When pressed, interviewees insisted that boards do not pressure staff to move in any certain direction or tell staff that donors or fundraising could be aided by focusing on any given issue. For the most part, staff did not interact on a regular basis with their boards. Suzanne Goldberg, a former lawyer at Lambda insisted to me that her “experience was that the board always respected the domain of the staff to make decisions [and] develop strategies” (Goldberg 2016).18

Boards were rarely involved in the day-to-day activities and when they were, it was either to support staff or solve disputes. Former GLAD executive director Lee Swislow gave an example where GLAD’s board kept the staff on their own agenda:

We had been talking in our strategic planning for a couple of years about wanting to increase our work with LGBT youth and increase the visibility of that work. At some point, the board is like, "You guys are taking too long to do it," and said, "You know, we want to see a budget that supports an increase in youth work." (Swislow 2016)

At the Transgender Law Center, based on staff recommendations, the board will help set long term goals and help create strategies for the next few years (Davis 2016). At NCLR, the board was described as “visionary” in setting end goals (Sakimura 2016) and at Lambda, Wolfson described the board’s involvement: “I wouldn't even say programmatic so much, it was much more

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18 Interaction between rank-and-file staff and boards is also minimal. For the most part, boards interact with the executive director and legal director at impact organizations.
organizational. The executive director had the ultimate authority with regard to program and that authority was exercised, as it were, with regard to case selection, by the lawyers” (Wolfson 2016).

Moreover, each of the descriptions in the 1995 GLAD memo on the case selection criteria of Lambda, NCLR, and the ACLU is either without mention of boards or affirmatively states that their respective boards are not part of case selection. For example, the Massachusetts ACLU board might be called in to mediate disputes between staff over a case – which were noted as rare – and even after the board weighed in, final decisions were left to the executive and legal directors (Craig 1995).

Evan Wolfson added another rare caveat, that like the mission statement, the board of directors at Lambda would sometimes vote on general policy directions of the organization. This was particularly salient in the early 1990s, during the debate about whether to prioritize or pursue same-sex marriage. Wolfson said that it was a:

… very, very rare occasion the board would have discussions and maybe vote…[on] where it stood as a general matter on a question of policy. For example, do we favor having the freedom to marry, fighting for the freedom to marry? But not should we take the Hawaii case or should we not take the Hawaii case. That did not go to the board. (Wolfson 2016)

To summarize, as expected boards of directors are not involved with case selection, whether in day-to-day operations or steering from higher up. This goes for impact organizations and direct legal service organizations. Following board models such as the Carver Model, boards are responsible for holding staff and executives accountable, making sure that they are adhering to the vision the staff shapes, and are responsible for fundraising (Carver 2016). As discussed below, what they are involved in (fundraising), does not appear to influence case selection either.

Resources

While I address in greater detail the influence resources can have on organizations in Chapter Six, I discuss the particular influence on case selection here. Findings confirm parts of the
literature that suggest that lawyers try to avoid the influence of funders (Rhode 2008, 252). My observations also counter the literature that suggests funders, foundations in particular, may influence case selection (Komesar and Weisbrod 1978). However, how much influence funders have on case selection depends on the size of the organizations and its funding diversity. Diverse funding sources give large impact organizations greater case discretion than smaller direct service providers that often only have one or two major sources of funding. Impact organizations can even reject donations from foundations and major donors if leadership feels that the requirements of the gift do not fit with the organization’s goals.

This does not mean that a limitation of resources is not understood or considered when selecting cases. When lawyers discuss taking on a case, they may ask: will there likely be an appeal? If so, will it lead to the U.S. Supreme Court? Are you going to need to pay for witnesses and experts? How much travel will be involved? Will a large public education campaign be required? These questions can become part of a discussion and when the answers are costly, according to Jennifer Levi, it may lead to a “more searching review of whether it's the right case to take” (Levi 2016). However, answers to these questions that prove costly do not mean the end to a case. Instead, a lack of resources could mean, for instance, bringing in cooperating attorneys who are willing to work pro bono to lead the case.

Direct legal service organizations however are more likely to be dependent on funding sources and thus are more beholden to available funding. For instance, they may tailor planned projects to fit with the constraints of a new grant (Carpenter 2017). This may not be the case for direct service providers that are housed within larger institutions such as the legal services at Mazzoni Center for Health & Wellbeing and Whitman-Walker Health. The reason is that most operational funding for legal services within larger organizations comes from the parent
organization itself and thus legal service lawyers do not have to “chase grants” (Lobier 2017). Significant to the independence of both direct service providers and impact organizations is the support of cooperating attorneys. These attorneys, often donating their services pro bono or offering services to clients for a discounted fee, will either take clients that the organization cannot commit resources to or will support ongoing litigation by the organization. This allows organizations to spread their resources across a broad set of issues.

To summarize, interviews and materials demonstrate that the preferences of foundations and major donors do not affirmatively influence case selection by legal organizations in this study. This both confirms more recent scholarship (Rhode 2008, 2052–53) and counters older theories (Komesar and Weisbrod 1978). That is, there is no quid pro quo for work on an issue in exchange for support. The analysis in Chapter Six also concludes that leadership within impact organizations explicitly keep funding concerns separate from case selection. Further, leadership see it as their duty to educate donors – individuals and foundations – on the organization’s work. They do not offer to do different work that they do not already conduct. Overall, resources appear to have a moderate level of influence on case selection for direct legal services organizations, and a lesser influence on larger impact organizations.

Community Need

Relevant literature on cause lawyering and public interest lawyering does not tell us how community need might factor against other elements in case selection. Certainly, we know that cause lawyers, by the very nature of the category they are placed in (i.e. lawyering for a cause), have different motivations than other lawyers (Menkel-Meadow 1998; Scheingold and Sarat 2004). We also know social movement organizations might not always represent groups within their constituency equally well (Strolovitch 2007). This is why Chapter Five investigates the ways
in which legal organizations determine community need and how it may influence priority-setting across the three primary tactics (litigation, education, policy). I find that there is a diverse set of pathways lawyers use to understand community need. This list of pathways includes call centers, outreach events (e.g. workshops), surveys of community members, and the experiences of the lawyers themselves. Of all of these, call centers represent the most direct and frequent way that organizations determine community need.

As noted in Chapter Five, Lambda Legal executive director Kevin Cathcart echoed fellow attorneys in saying that issues reported by community members deeply influenced agenda setting. When asked how issues were prioritized Cathcart responded first: “…what are we hearing from people about? What are the problems that are popping up again and again?” (Cathcart 2016a). Much of the sense of community need comes from intentional activities to interact with people. This includes calls to the organization (see below and Chapter Five), as well as what staff hear in workshops, conferences, and in speaking to community members (Goldberg 2016).

We can see a commitment to community need in the self-critique of organizations. In a 1994 letter to members of NCLR, executive director Liz Hendrickson lamented the archetype of a LGB plaintiff at the time: an affluent white gay man. Hendrickson argued that cases and plaintiffs needed to be chosen differently: “Their selection is conscious, not accidental. We call them "super gays," people who are just like those in power except for being lesbian or gay… We need to embrace a new symbol for our community and she needs to be a lesbian of color. We need to redefine equality and restate what we want” (Hendrickson 1994). Recognizing that the community is much larger than the typical plaintiff, Hendrickson and NCLR committed to broadening their reach to other parts of the community, going so far as to create a Lesbians of Color Project aimed at drawing lesbians of color into conversations that would influence priority setting.
We also see the influence of community need when organizations forego concerns about victory or popularity. This was the case when GLAD took on *Kosilek v. O’Brien* (2015), where a transgender person in federal prison challenged the state’s refusal to provide gender affirming surgery as medical treatment. GLAD took on the case without assurances of a victory and even though “the ethics [and] educational value of that case wasn't conducive to touching people's hearts and minds when it comes to trans people” (Wu 2017). The motivation for selection was described simply as “a case that we could not refuse to do” (Cunningham 2017). In other words, without financial motivation, without a perception they would win, without an opportunity for educational advancement, and without political mobilizing implications, GLAD took the case. Such a situation fits with a case selection process that is concerned for the most marginalized and in need of services, contrary to what one might expect given the literature.

We also see a commitment to community need when comparing cases that organizations work on to the calls they receive from constituents. Call centers, where intakes (or calls) come into, are available at all the legal organizations and have a few functions. As stated earlier, call centers are, first, an important way that legal organizations try to gauge the harms their community experiences. Second, they are a means of finding cases. Constituents call these helplines with potential harms and are seeking legal advice. Third, they are a way for organizations to help educate and assist their community. Most calls to impact organizations will not be taken as cases but very often organizations will help callers in other ways such as offering advice or pointing them to a network of attorneys who would be willing to take their case.

Thus, one way to evaluate the influence of community need is to compare call center data to the cases that organizations take. Based on the availability of data, NCLR was chosen as an

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19 Chapter Five explains call centers in greater detail.
example. According to information provided by NCLR staff and newsletters, the most frequent calls by issue area from 2003 to 2015 were (in descending order of frequency): family, marriage, immigration, and employment (see Appendix B for details).

To determine what kinds of issues were being taken as cases, a proxy called “report lists” for NCLR’s docket was created using cases listed in newsletters and annual reports (see Appendix C). In these report lists, the most frequent issue areas reported between 2003 to 2015 were like the calls: family, immigration/asylum, marriage, and employment. During this period, I observed a correlation between the rise in calls and reported cases on immigration/asylum. This parallel rise happens right around the failed passage of the DREAM Act in 2010 and President Obama’s issuance of Deferred Actions for Childhood Arrivals (DACA) in 2012. For a more direct comparison, Tables 2.1 and 2.2 provide a list of the most frequent calls and most frequent cases from report lists. This close connection between calls and report lists indicates that lawyers are likely paying attention to the concerns being voiced on these call centers. For instance, family and marriage dominate calls throughout and are consistently towards the top of the report lists.

However, calls and cases from report lists are not exact matches. Issues like sports and youth issues make frequent appearances among the top five issues, but do not make a significant appearance among calls. Lawyers explain this discrepancy, saying it would be a mistake to rely on case selection alone to determine cases (Cathcart 2016a). The concern is that there may be groups and individuals that are unfamiliar with the call centers or cannot reach it for some reason.

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20 Proxies of Lambda’s, NCLR’s, and GLAD’s dockets were created using newsletters and annual reports. As interviewees reported, these documents should be reflective of actual dockets because the aim of the reports is to give donors and members an accurate representation of the organization’s work. This is an imperfect method with significant caveats but without access to private organizational documents, dockets are difficult to estimate. To see a full explanation of how these proxy dockets were created and a test of their accuracy, please see Appendix C.
Organizations would risk missing a segment of their community if they selected cases by caller demand alone, thus demonstrating again a concern for understanding community need.

Table 2.1: Comparison of NCLR’s Intake Data to NCLR’s Report Lists 2004 and 2005*

<table>
<thead>
<tr>
<th></th>
<th>2004</th>
<th>2005</th>
</tr>
</thead>
<tbody>
<tr>
<td>Calls</td>
<td>1. Family and Parenting (33%)</td>
<td>1. Family and Parenting (40%)</td>
</tr>
<tr>
<td></td>
<td>2. Marriage and Relationship (17%)</td>
<td>2. Marriage and Relationships (16%)</td>
</tr>
<tr>
<td></td>
<td>3. Employment (11%)</td>
<td>3. Employment (10%)</td>
</tr>
<tr>
<td></td>
<td>4. Immigration (4%)</td>
<td>4. Immigration (6%)</td>
</tr>
<tr>
<td></td>
<td>5. Criminal Justice (1%)</td>
<td>5. Youth (4%)</td>
</tr>
<tr>
<td>Report Lists</td>
<td>1. Marriage and Relationships (35%)</td>
<td>1. Family Law (33%)</td>
</tr>
<tr>
<td></td>
<td>2. Family Law (30%)</td>
<td>2. Marriage and Relationships (23%)</td>
</tr>
<tr>
<td></td>
<td>3. Youth (17%)</td>
<td>3. Other Civil Rights (15%)</td>
</tr>
<tr>
<td></td>
<td>4. Employment and Housing (9%)</td>
<td>4. Immigration (9%)</td>
</tr>
<tr>
<td></td>
<td>5. Immigration (4%)</td>
<td>Youth (9%)</td>
</tr>
</tbody>
</table>

*Intake data was provided by NCLR and is kept in the author’s files. Report lists for 2004-2005 were created using newsletters and annual reports from the GLBT History Museum, San Francisco, CA. See Footnote 20.

Table 2.2: Comparison of NCLR’s Intake Data to NCLR’s Report Lists 2010 and 2011

<table>
<thead>
<tr>
<th></th>
<th>2010</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Calls</td>
<td>1. Family and Parenting (40%)</td>
<td>1. Family and Parenting (40%)</td>
</tr>
<tr>
<td></td>
<td>2. Marriage and Relationships (19%)</td>
<td>2. Marriage and Relationships (19%)</td>
</tr>
<tr>
<td></td>
<td>3. Immigration (14%)</td>
<td>3. Immigration (16%)</td>
</tr>
<tr>
<td></td>
<td>4. Employment (4%)</td>
<td>4. Employment (5%)</td>
</tr>
<tr>
<td></td>
<td>5. Disability / Youth / Estates, Wills, &amp;</td>
<td>5. Criminal Justice</td>
</tr>
<tr>
<td></td>
<td>Trusts (2%)</td>
<td>Taxation (2%)</td>
</tr>
<tr>
<td>Report Lists</td>
<td>1. Immigration and Asylum (50%)</td>
<td>1. Immigration and Asylum (51%)</td>
</tr>
<tr>
<td></td>
<td>2. Family Law (17%)</td>
<td>2. Family Law (15%)</td>
</tr>
<tr>
<td></td>
<td>3. Marriage and Relationships (9%)</td>
<td>3. Marriage and Relationships (11%)</td>
</tr>
<tr>
<td></td>
<td>4. Sports</td>
<td>Youth (5%)</td>
</tr>
</tbody>
</table>

*Intake data was provided by NCLR and is kept in the author’s files. Report lists for 2010-2011 were created using newsletters and annual reports found online. See Footnote 20.

This kind of comparison could be also problematic. Relying on the number of cases or even the percentage of cases alone as an approximate for priority-setting (i.e. how much organizations are paying attention to an issue) assumes that any individual case expends as much resources as another case. However, this is not how cases work. That is, ‘case A’ might take a few weeks of a lawyer’s time, while ‘case B’ might take months or years. For example, NCLR does direct service work in asylum cases and this issue dominated case highlight figures in 2010 and 2011. However,
the amount of time spent on the asylum cases collectively may or may not match the kind of resources that are poured into impact litigation cases in other areas, for instance, those on marriage equality. Moreover, as the rest of this project shows, case selection is not the only place to view priority setting of organizations. Thus, solely using report lists to determine how organizations are responding to community need may be misleading.

But there are other ways that legal organizations show they are concerned with community need when it comes to selecting cases. Decision making was in part based on “participating in the community” which included going to conferences, participating in workshops, and doing educational events (Goldberg 2016). Some of these events, like NCLR’s Rural Pride Campaign are as much about educating community members as they are about being a “listening tour” (Gonen 2017). Organizations will also use surveys, like Lambda Legal’s 2012 survey on government misconduct (Lambda Legal 2013) to determine harms and need.

As demonstrated, it is difficult to draw a straight line of cause and effect between measures of community need and case selection. However, by relying on further evidence presented in Chapter Five, it appears community need (as assessed through filters such as call centers and workshops) may be a significant to moderate influence on what cases are selected. While this was not unexpected, this is an important finding given the lack of consideration for community need in the relevant literature.

**Lawyer Interest and Autonomy**

The autonomy of lawyers also influences case selection. “By and large” Evan Wolfson, formerly of Lambda Legal explained to me: “when it came to case selection, it was decided by the lawyers not by any level of hierarchy” (Wolfson 2016). In other words, as Chapter Six explains, board members, development staff (those who work on fundraising), and others are kept out of the
room when case selection is conducted. Among some staff (legal and non-legal) this is seen as a positive for keeping decisions isolated from funding concerns. Among others, it is viewed as isolating input from non-legal staff who work directly with community members and potential clients (i.e. community educators).

In these lawyer-only meetings, interviewees across organizations report a consensus model, which comports with the literature (Rhode 2008, 2053). However, upon further digging, individual lawyers appear to have greater autonomy. In these meetings, individual lawyers will start by advocating for cases they want to take. Then other staff will offer suggestions, but if an individual deeply wants to pursue a case, they will typically be allowed to do so. While discussion may lead a lawyer to not take a case or to farm it out to cooperating attorneys, it is at the individual lawyer’s discretion. Executive directors can intercede though they rarely do and are present at meetings to offer advice and guidance. A negative word from a director could dissuade a lawyer (thus perhaps having an equal weight as a veto) but in principle, it is up to the individual lawyer.

Debate between staff can arise on contentious issues. This was the case with Lambda Legal when they debated pursuing marriage equality in the early 1990s. Evan Wolfson had been at Lambda for two years and wrote his Harvard Law thesis on how marriage could be won (Wolfson 1983). So, when two Hawaii citizens sought to challenge the denial of a marriage license to them by the state, Wolfson jumped at the chance to join the case.

Paula Ettelbrick, legal director of Lambda at the time, recalled this moment to Nathaniel Frank as “probably the tensest moment within Lambda. Evan was chomping at the bit to do it and almost threatened mutiny” (Frank 2017, 94). At first, Wolfson’s request to join the Hawaii case was denied by both legal director Paula Ettelbrick and executive director Thomas Stoddard. It was
seen as “premature as a strategic matter” (Cole 2016, 25–26) even though Stoddard had openly supported pursuing marriage equality in public debates with Ettelbrick.

Stoddard’s purported rationale included deferring to the organization’s legal director, Ettelbrick, whose role it was to handle these issues. The influence of the LGBT Roundtable, a collection of LGBT lawyers across the country that met regularly to strategize cases, was the other influence. The consensus of the Roundtable was that it was the wrong time to pursue marriage (Frank 2017, 94). Ettelbrick’s reasons, according to research by Lillian Faderman, was that she felt Wolfson needed “to work on legal issues related to AIDS” and prioritize a case involving the Boy Scouts (Faderman 2015, 585).

But eventually Stoddard and Lambda leadership relented under Wolfson’s persistence. First, they allowed him to act non-officially in an advisory capacity, then they let him write an amicus brief, and finally they gave Wolfson approval to serve in a private capacity as co-counsel (Zeitz 2015). It is worth noting that in hiring Wolfson, given his interest in marriage, Lambda was likely open to pursuing marriage. However, this unusual experience highlights the strength of the individual lawyer in selecting cases. Even with strong resistance within the organization, one lawyer was given leeway to pursue a particular case.

Next to perceptions of community need and the mission statement, the individual expertise and interests of lawyers also appear to have significant influence on case selection. Suzanne Goldberg confirmed this individualistic model to me: “we had organization priorities and there was room for each staff lawyer to press for cases or projects that seemed of importance” (Goldberg 2016). As archival material suggests, case selection by lawyers is seen as a “consensus” model, with lawyers and leadership (the executive director and legal director) moderating discussion and stepping in on the rarest occasion. What interviews reveal is that this consensus model is less about
choosing cases as a group, but more about individual lawyers defending their case to the group. In this model, the individual lawyer has a good deal of autonomy within the bounds of the organization’s mission and goals.

**Educational value**

Though the literature on public interest lawyering does not indicate this, the educational value of a case may also be taken into consideration. Educational value is defined as the perceived effect a case will have on public attitudes. Evan Wolfson of Lambda Legal explains:

The impact value and public education value would have been elements that we would talk about. In other words, not just how will this affect the law and solve a problem or rectify an injustice, but also what kind of story will it tell, how will it help move public support and the general law and culture in addition to the specific law in support of LGBT people. (Wolfson 2016)

Cases, according to interviews, can be used to create visibility about issues and establish the humanity of individuals in the LGBTQ community (Levi 2016). This kind of non-legal goal for litigation was especially prevalent in the early 1990s when lawyers did not expect to win as much as they do today. Suzanne Goldberg of Lambda Legal recalled that: “we were thinking there were factors beyond [legal]. The question was always if we lose, how much harm would that loss do, and how much could we leverage the loss to strengthen public support?” (Goldberg 2016).

Even in the earlier years, lawyers would look at the education value of a case. Arthur Leonard explained to me that in the 1980s: “… it’s Lambda Legal Defense and Education Fund, and the education is a big part of it. It’s using the cases to educate the public, using the litigation to educate the judges and educate the defendants that you’re suing” (Leonard 2016) [italics used to denote tonal emphasis]. But at least at Lambda, education was not a primary criterion for case selection. Leonard recalled the behavior of the former National Gay Rights Advocates (NGRA), which closed in 1991, as compared to other LGB legal organizations during the 1980s:
The philosophy that Lambda followed... was that you only file a lawsuit if you think you have a decent chance of actually winning it. That is, Lambda wouldn’t use litigation solely for the purpose of public education... it wasn’t [that] we had to be convinced we were going to win, we had to be convinced we had a good case on the merits and there was a possibility of actually achieving a precedent which is what you are shooting for. The feeling... [was] that NGRA was willing to go into court on absolutely hopeless cases for purpose of making a PR splash and raising money and as they would put it, educating the public. (Leonard 2016)

Relevant scholarship does not say much about a case’s “educational value” being an important part of the process. Considering that it is mentioned less among interviewees and in archival material, this element probably has less influence over case selection than others discussed here. However, the frequency with which this came up was surprising. What it tells us is that while winning is important, a court victory is not the only goal organizations have in mind.

Collaboration and the LGBT Roundtable

In what may be a special feature of the LGBTQ legal industry, the organizations in this study have a long history of working together to coordinate, as far back as the early 1980s. In fact, in an official document outlining GLAD’s early case selection criteria, it specifically lists collaboration with other organizations as part of the process. It reads: “There is also consultation and coordination undertaken in part in an effort to maintain a cohesive national strategy and to maintain consistency on a national basis....” (GLAD 1995). Much of this coordination involves submitting joint amicus curiae briefs (or, “friend of the court” briefs) to courts.

But how would collaboration influence case selection? Would one or more organizations push others to select a case? The literature is not clear about this because it does not come up. However, it is worth pursuing, given some of the accounts below, whether working with outside attorneys and organizations encourages impact organizations to select cases that they might not have otherwise done on their own. Ultimately, I find that even though collaboration has important
influences in non-litigation work and on litigation strategies, it does not have an observable direct influence in case selection specifically.

A good example of a potentially influential collaboration is the LGBT Roundtable. Attendees include “staff attorneys and executive directors” from other legal organizations as well as law professors who have “drafted legislation or published significant works addressing civil rights for lesbians and gay men and people with HIV” (GLAD 1995). First known as the “Ad-Hoc Task Force to Eliminate Sodomy Laws,” it began in the early 1980s as legal organizations tried to steer test cases through federal court system, mirroring the NAACP LDF’s playbook during the civil rights era. The original goal was to coordinate an end to anti-sodomy laws targeted at gays and lesbians. As the meeting progressed over time, it was also credited with strengthening needed coordination among the legal organizations in other issue areas.

It is difficult to gain access to detailed accounts of these meetings because they are held in strict confidence. As one interviewee anonymously put it: “I am trying to kind of walk a fine line because you know the understanding is what happens at the Roundtable stays at the Roundtable.” This was an often-heard caveat to any conversation about the Roundtable. Even in speaking anonymously, lawyers refused to go into detail about Roundtable proceedings. We can however surmise from the works of others (Klarman 1994; Andersen 2006; Eskridge 2008; Cathcart and Gabel-Brett 2016) that either specific legal strategies (e.g. is it better to take an equal protection stance or a due process stance?) or political and legal timing (e.g. will we lose? Is the public ready?) are discussed. Interviewees were also willing to speak broadly about the direction of the Roundtable and their opinions of it.

In 1990, then Lambda legal director Paula Ettelbrick wrote about “one very important vehicle which assists us in making strategy and legal decisions. That is the Lesbian and Gay Civil
Rights Roundtable" (Ettelbrick 1990). As for the purpose of the event, an earlier Lambda newsletter wrote that lawyers met to share strategies on litigation and “the most important function of the Roundtable [was] to provide a national meeting place where lawyers confronting the important challenges to lesbian and gay rights [could] share insights and expertise" (Leonard 1988, 3).

However, this did not necessarily relate to everyday case selection. Arthur Leonard noted to me in an interview that: “none of the organizations has ceded to the Roundtable the right to make decisions. The Roundtable doesn’t pass resolutions, it doesn’t dictate policies that are binding, but it creates a place for conversation” (Leonard 2016). Sometimes organizations could be talked out of doing things and the Roundtable was critical in developing marriage equality strategies: first discouraging cases in late 1980s to early 1990s, and then later, in coordinating multistate strategies to win (Cathcart 2016; Leonard 2016). While archival documents mention the influence of the Roundtable, interviewee references were less frequent. This may point to the waning influence of the Roundtable, and a shift to more informal weekly discussions amongst legal staff that was mentioned in interviews (Minter 2017).

Just as in these early years, the Roundtable still meets twice a year but has grown immensely. Where it used to be a handful of lawyers from Lambda, GLAD, NCLR, the ACLU, as well as some law professors, today hundreds attend the LGBT Roundtable. However, a well circulated critique of the Roundtable (heard in interviews) is that it is a place where strategy is described to attendees, rather than made (Arkles, Gehi, and Redfield 2010). One interviewee emphasized a well-known critique in the movement that the meeting was “a really big deal” but
also highly exclusionary. That is, there are few “elites” who run the meetings who ultimately decide what gets discussed and considered.

This interviewee also claimed the Roundtable was led by “four competing organizations that are usually represented by four white men” and that these organizations have “already articulat[ed] that agenda. It's not like it gets invented every time.” Additionally, being extended an invitation was always a challenge: “who gets to go and who's considered doing this work is its own area of conflict and controversy and exclusions.” A different interviewee stated: “It felt very clear to me that [there] were a few people who were in control of the agenda, that they were not the direct service providers.” This same person continued that they felt:

> the direct service providers could be brought in and informed as to what the agenda was, so that there could be some collaboration on implementation of that agenda. And that maybe that the impact litigation organizations could get information from the direct service providers from what they saw as being issues but there was definitely sort of set pieces as to: ‘here is the agenda that we have.’ (Anonymous)

Such critiques are common, especially among direct service providers. The feeling is that the Roundtable represents control of the LGBTQ movement by wealthy-white-male interests that discourage having non-lawyer community members become part of strategizing. While agreeing with the problem of white-male dominance within the movement, another interviewee said that the focus on the Roundtable was “a completely false drama” and a “huge waste of time, energy.”

This person argued that it makes sense that legal groups have a lawyer-only space to strategize about the law. They noted “it would be completely bizarre if the LGBT legal groups did not meet with one another and compare notes on legal strategies and so forth. Of course, we are going to do that… that’s not the place to invite in the community. It would just be chaos.” However, this person also agreed that “we need our work to be informed by a really serious, deep

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21 I am choosing to leave all of the subsequent interview statements as anonymous to avoid personalizing the issue. There are three different people quoted here.
understanding of community needs. And I think most of it is.” This person did note some exceptions, such as the lack of success and prioritization of incarcerated LGBTQ people.

This all amounts to three points. First, the LGBT Roundtable is a historically important meeting between lawyers and legal organizations that helps set general strategies for the legal industry within the movement. However, this strategy tends to reach impact organizations and not direct legal services. Second, while the Roundtable could (and likely does) have some influence on case selection, none of the interviews suggested that it has a significant or even moderate influence. As Arthur Leonard (2016) pointed out in our conversation, organizations have not ceded that decision-making to the Roundtable or any other body.

Third, the debate about the Roundtable also reflects concerns about the diversity of the movement. The LGBTQ movement has experienced problems with racism and sexism (Vaid 1995a, 275–76) and other parts of this project point out that recognition in staffing and outreach efforts by legal organizations. As one interviewee above pointed out, many feel that the Roundtable is guided by white-led organizations and that may influence the event’s agenda. However, these critiques have much more to do with larger movement strategizing than they do with prioritization of issues for case selection within individual organizations.

Finally, the Roundtable is not the only collaboration that might indicate outside influence on case selection. For example, there is often cooperation on amici. An amicus curiae brief (amici in plural) is filed to a court by someone that is not a party in the case but who has an interest in the outcome. Both NCLR and GLAD joined an amicus brief with the National Black Justice Coalition, Human Rights Campaign, and others challenging Texas’s 2016 abortion restrictions (Amaro 2016). While reproductive health issues certainly directly relate to LGBTQ rights cases in some
areas (such as in vitro fertilization), this is an issue that would seemingly fall outside both GLAD’s and NCLR’s targeted mission.

That said, there is not much indication that collaborations with outside groups influence case selection where organizations are directly representing a party/client. Other chapters will continue to show that collaborations are important when it comes to conducting work in non-litigation areas and even in agenda setting. While it may have been reasonable to expect some influence from collaborators on case selection given the LGBT Roundtable, there is no evidence to support that connection.

**Creating their own opportunity**

One of the elements that might influence organizational behavior discussed in the Introduction is the perception of political and legal opportunities available. These elements come from theories built to understand movement success (or the lack thereof) in political and legal systems (Andersen 2006; Epp 1998; McAdam 1982). As movement scholars have explained, political opportunity constitutes, though is not limited to, having elite allies (politicians, organizations, businesses), support or growing support of the public, support of state-institutions, and a weakening of opposition forces (Tarrow 1994; McAdam 1982). Legal opportunity on the other hand, as defined by Andersen (2006), is evidenced through access to courts, configuration of sympathetic (or not) judges, the presence of allies that can share the burden of bringing a case, and cultural as well as legal framing devices that can achieve success in the court of public opinion and law.

In other words, opportunities – whether legal or political – are windows of opportunity that may open and close based on the configuration of these variables. This project does not measure the presence of such opportunities. However, we could reasonably expect cause lawyers, like other
social movement actors, to be watching out for these momentary spaces to open. When there is a perception such a space has opened, we should expect organizations to try to capitalize on them. Likewise, when they are perceived to be closed, lawyers might be expected to drop an issue from their agenda. It is important to note that this chapter and others are not asking whether organizations act when there are these opportunities present. Rather, this project can only seek to ask whether organizations act when there is a perception that such opportunities are present.

To that narrower question, there were only a few references made that would reflect such a behavior in case selection. Some suggested that the ability to win a case was a factor while others explained that a courtroom victory was not a necessary condition. One non-lawyer interviewee did suggest that leadership had expressed concern about whether it was “the right time” to tackle an issue (Dueñas 2017).

This does not mean that lawyers do not care about these openings, but it is telling that they did not recognize it as a primary factor in selecting cases. Rather, while lawyers will certainly take advantage of any opportunity, legal or political, they are also in the business of creating their own opportunity, by supporting education campaigns among the public and administrators. Two primary examples are the decades-plus long campaigns to reform sodomy laws and to achieve marriage equality (Andersen 2006; Bonauto 2016; Cathcart and Gabel-Brett 2016; Eskridge 2008).

In each of these instances, organizations used state-by-state legal strategies to create a favorable federal court environment. This meant using state constitutions to challenge laws criminalizing same-sex sexual relations and bans on same-sex marriage in state courts and in state legislatures. Once legal precedent had been created across the country, legal organizations (through careful strategizing via the LGBT Roundtable) moved into federal courts, ultimately arriving as the Supreme Court. Once there, they had advantages in both politics (more favorable
public opinion, new political allies) and the law (more favorable state laws, new legal precedent, federal judge’s ruling in their favor).

The well-recorded histories of these campaigns will note how there was disagreement about “when” the right time to strike was for both issues. What they also show is that the organizations themselves were responsible for creating those moments. Other chapters in this project demonstrate this happens with non-litigation tactics as well. One example is NCLR’s effort to ban conversation therapy. Having few resources, little knowledge of the problem among the public, and a lack of legal precedent on their side, NCLR lawyers worked to educate doctors, bureaucrats, and law makers to generate pathways for change (see details in Chapter Eight).

Interviewees expressed this notion of pioneering new opportunities. Suzanne Goldberg said that legal organizations would take on issues or cases that did not have a “snowball’s chance in hell” of success (Goldberg 2016). As cited earlier, Arthur Leonard recalls NGRA being “willing to go into court on absolutely hopeless cases” to raise money and to educate the public. Evan Wolfson of Lambda describes the desire to find cases that would help them develop the law in a new direction:

We would have debates… on specific case proposals, but also in general… we'd think about, "Okay, how do we implement that?" If we want to showcase sex discrimination in the law, what kinds of cases do we want to go out and look for. So, it wasn't only just what was coming into us, it was also, how can we make this point? What kinds of things do we want to try to develop? (Wolfson 2016)

Clearly, opportunities to win (in a legal sense) were not everything. Losses too can be beneficial because, as Boutcher (2005) showed after Bowers v. Hardwick (1986), losses might mobilize a constituency to a movement and to organizations. Janson Wu of GLAD explained how this worked in case selection:

Obviously, whether or not we can win the case is an important consideration, although, certainly there are times when we'll take a case even though we think we may not win, or
perhaps feel like we absolutely will lose but there's benefit in losing, such as to spur the legislature to do something and pass a law or clarify law. There's the public education value in litigation and so we'll certainly talk about the facts and details of the case and whether or not that will be a good educational vehicle (Wu 2017).

Thus, while important, perceived opportunities to win in court do not seem to be as significant a factor as expected from earlier literature (Komesar and Weisbrod 1978). However, this does not mean the perception of opportunities are not influential. Far from it, lawyers are constantly looking for opportunities. However, there are two important caveats. First, lawyers and staff together will look for ways to build their own opportunity instead of waiting for one, giving more autonomy to lawyers. Second, lawyers will plunge ahead even with a lack of perceived legal opportunity with the hope of affecting public attitudes.

**Diversity of Cases**

The literature on cause lawyering and public interest lawyering is not clear about what role diversity plays in case selection. That is, do organizations consider the breadth of subjects they have on their docket? Do they consider whether they are touching several different issues (as opposed to one or two primary areas) or whether they are taking cases from different locations? We might read the critique of lawyers being isolated from movements as an indication that we are not likely to see much consideration of diversity. However, given that the literature does not discuss this issue, we simply do not know what to expect. Why then consider diversity? In part, because early analysis of documents hint that it might be an influence. Also, because the critiques of LGBTQ organizations have said organizations are overly focused on one or two issues (e.g. marriage equality). This section seeks to test that claim when it comes to cases specifically.

To test diversity, I analyzed newsletters and annual reports to determine what issues were being covered by organizations. This means that the charts below show how organizations are
choosing to represent their work, but they are not actual dockets. In addition, interviews and organizational documents are also considered alongside this data. Case analysis was limited to Lambda Legal and NCLR because they were the only organizations with comparable data and they also represent the kind of large national-scope organizations that are critiqued.

A significant hurdle in tracing these documents is that organizations do not keep compendiums of cases by year over time, or at least, not in a format they were willing to share. This problem can be overcome if a researcher is given access to the organization’s archives as was Ellen Andersen for her 2006 work *Out of the Closet and Into the Courts*. However, this is not a feasible undertaking across multiple organizations. As described above, proxies were developed using newsletters and annual reports. A full explanation can be found in Appendix C. These are referred to as “report lists” because what this data actually shows is an aggregate of cases presented in annual reports and newsletters.

Older documents listed entire caseloads by issue areas but as time went on, and dockets became larger, organizations either compiled data into accessible tables or, simply gave short lists of cases. While I would not trust these short lists to be fully representative of actual dockets (see Appendix C for more) I expect organizations will try portray their work to members and funders as accurately as possible.22 Regarding what we might expect to see, if we use theories and critiques about the influence of foundations (Komesar and Weisbrod 1978; Mananzala and Spade 2008), we might expect issues like marriage equality and sodomy laws (issues said to be championed by wealthy white gay interests) to dominate report lists because annual reports and newsletters target funders.

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22 When asked about this, NCLR executive director Kate Kendell noted: “we usually are pretty critical about making sure whatever we put out there is accurate.”
Lambda Legal

Analysis of Lambda Legal documents reveals early prioritization of family issues (i.e. custody, adoption, and reproductive rights) and HIV/AIDS discrimination (Figure 2.1). However, HIV/AIDS was counted as one issue and includes specific categories of its own such as employment, health care, and immigration. “Family issues” was defined as involving custody, adoption, and certain reproductive rights (i.e. artificial insemination). By the late 1990s and 2000s, employment and marriage rose in prevalence. This was followed by employment, military, and “civil rights” cases. An interesting observation is that this period is when legal organizations,

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23 In Figure 2.1 (1989 – 1993) and Figure 2.2 (1998 – 2001) Lambda issue categories were removed when they did not average five percent or more over the timespans. Marriage was added to compare to theories and critiques. Issues were limited because a chart with all fifteen issues would have been too crowded to clearly interpret. The reason for the missing year is that a 2000 Lambda Annual Report was not found.

24 Unfortunately, “civil rights” cases were not given a specific definition. It is a peculiar category too because arguably any of the other categories could be said to fall under “civil rights.”
including Lambda, were working strategically to end sodomy laws across the country. Yet, they do not rise above 9% of cases from report lists in any given year. In this period, marriage accounted for only 6% of reported cases in 1992 and 1993 and none were reported in 1989 and 1990 newsletters.

**Figure 2.2: Most Frequent Cases in Lambda Legal Newsletters, 1998 – 2001**

![Graph showing the frequency of different issues in Lambda Legal Newsletters]

*Data from Lambda annual newsletters found in the LGBT Community Center Archive, New York, NY.

In Figure 2.2, which looks at documents at the turn of the 20th century, the more frequent issues remained the same from the earlier period. These include HIV/AIDS discrimination, employment, and family cases. However, there was much more parity among the top issues. The gap between HIV/AIDS and family issues closed and employment cases rose up to match them. Youth/school cases also make an appearance into the top issues. Marriage again would not have
made this list of top issues (it averaged 3% of reported cases in these years) but was included for comparison’s sake. Sodomy cases were not highlighted in these newsletters.\footnote{To reiterate, this does not mean that the organization did not pursue cases on sodomy. In fact, a Fall 1998 newsletter (as opposed to Winter 1998 one analyzed here) lists two sodomy cases.}

Figure 2.3: Most Frequent Cases in Lambda Legal Annual Reports, 2004 – 2006

By the mid-2000s (Figure 2.3), marriage rose above HIV/AIDS and matched family cases. “Community” cases held a brief position among the most highlighted cases and included work in ballot initiatives, a sodomy statute in Virginia, a non-discrimination law, and a case involving the judicial code of ethics. Transgender rights cases also appear among the top reported cases for the first time in this period.

Collectively, what these figures of reported cases show is that Lambda is far from a one-issue organization (or at least presenting itself to donors and members as such). These are only among the top categories shown and each newsletters and annual report may contain as many as
ten categories. Since some issue areas move in and out of use between publications, there are more categories total than in any one year. That total for Lambda in these publications is twenty-five issue areas.

National Center for Lesbian Rights

As Figure 2.4 shows, NCLR has long been dedicated to family-law issues. Prior to 2010, only one issue from the previous two decades surpassed family-law cases in report lists, and that was marriage in 2004.26 This was the same year that San Francisco Mayor Gavin Newsom began issuing marriage licenses, triggering litigation that both Lambda and NCLR participated in. Then, from 2010 on, immigration and asylum cases are the most reported, though these might include family cases.27 The next highest single-issue category, after family-law and immigration, is marriage another issue likely to involve family.

However, Figure 2.4 also displays a diversity to their docket. From year-to-year NCLR is reporting significant numbers of cases involving transgender rights, youth and sports, immigration, and criminal justice. In addition, the reports of marriage and family cases are both dropping sharply, resulting in greater parity with these other issue areas. What this means for NCLR is that

26 Some notes on the data: 1990-2004 are based on newsletter while 2005-2014 are based on annual reports. Sometimes the annual reports just gave percentages (2006 through 2009) instead of an example list of cases. In a couple of years, they did both. Where this happened, the aggregate was chosen to be included in the figure. Note the following missing years: 1996, 1999, 2000, 2002, 2003, 2013. Some of these years I do not have documents for and some years have no docket information. See Appendix C for more details.

27 This does not mean that suddenly NCLR began conducting more asylum and immigration cases. What it means is that NCLR newsletters and annual reports began reporting more of these cases. This could be reasonably interpreted to say that the organization was likely doing more in this area, but it should not be read as an exact representation (see Appendix C for further discussion).
while they are focused on a broad area (family-law), they are also involved in a litany of other areas including, but not limited to, marriage. In other words, marriage has not dominated NCLR’s agenda as some might predict.

**Figure 2.4: NCLR Newsletter and Annual Report Cases, 1990 – 2014**

The interviewees also made plain their commitment to diversity in other ways. Kevin Cathcart of Lambda was explicit in saying the diversity of their docket was important. Lambda moved early to diversify *where* cases where coming from. They did not want to be just a New York City firm. Over two decades, they set up four more offices covering the midwest, west coast, and the south (Cathcart 2016). Multiple NCLR staffers discussed the Rural Pride Project which has the goal of reaching out to areas without legal aid or resources for LGBTQ clients.

Thus, when we put this data together with the evidence from interviews, it is reasonable to suggest that diversity has a moderate influence on case selection from impact organizations. We
would not necessarily expect this based on the literature of legal organizations because it is not often mentioned (Komesar and Weisbrod 1978; Rhode 2008). However, one could read some of the critical legal scholarship and critiques of movement organizations in such a way as to not expect much consideration (Arkles, Gehi, and Redfield 2010; Bell 1976; Strolovitch 2007). One important caveat to all this is where direct legal service organizations fall. Since their organizational documents did not indicate caseload, a proxy docket could not be determined. We might expect diversity to matter less to these organizations because of their structural setup. Again, because direct legal services have less discretion in which cases they take, they might be more constrained in choosing their docket this way. This is a question worth pursuing in future research.

**Summarizing the Findings**

This chapter engaged with the part of a multidimensional approach that is most common in cause lawyering literature: litigation. It also confirms much of what one would expect from the literature discussed in the beginning of the chapter, though it also produced a few surprises. Table 2.3 compares what we would expect from the literature and what was observed. Most notable was the significance of community need to case selection as well as unexpected, albeit limited roles, for collaboration and diversity of cases.

It would be a mistake to say that certain factors do not influence selection at all. At some point, certain factors may rear their head, even if it is unusual or indirect. For example, none of the interviewees mentioned boards of directors as being influential and some interviewees affirmatively stated that they had no influence. Yet, boards do have influence over mission statements which are foundational to case selection. On the other hand, staff are the ones that are going to push the boards to change the mission, if it is desired.
### Table 2.3: Expected versus Observed Influence of Case Selection Elements

<table>
<thead>
<tr>
<th>Element</th>
<th>Expected Influence</th>
<th>Observed Influence</th>
</tr>
</thead>
<tbody>
<tr>
<td>mission statements</td>
<td>Significant</td>
<td>Significant</td>
</tr>
<tr>
<td>community input</td>
<td>Limited to moderate</td>
<td>Significant</td>
</tr>
<tr>
<td>funders (including foundations)</td>
<td>Moderate</td>
<td>Limited*</td>
</tr>
<tr>
<td>opportunities to win in court</td>
<td>Moderate</td>
<td>Significant to Moderate</td>
</tr>
<tr>
<td>individual staffers</td>
<td>Moderate to significant</td>
<td>Significant</td>
</tr>
<tr>
<td>boards of directors</td>
<td>Limited</td>
<td>Limited</td>
</tr>
<tr>
<td>collaboration</td>
<td>Not expected</td>
<td>Limited**</td>
</tr>
<tr>
<td>diversity</td>
<td>Not expected</td>
<td>Moderate to Limited</td>
</tr>
</tbody>
</table>

* Foundations may have at least moderate influence on provider case selection.
** Collaborations may strongly influence long-term legal strategies.

In such a dynamic relationship, where one element is both influencing and being influenced by another, it is difficult to weigh importance and to completely disaggregate one element from another. While the elements have been placed into approximate categories, there is no certainty in knowing when something that is “moderately influential” might be the deciding factor in case selection.

As a hypothetical, one could imagine a lawyer with two cases in front of them, but due to their own time constraints, they can only choose one case. Their own expertise leans toward case A and this issue is something they are getting a lot of calls about. However, case B would add a new issue to their docket diversity and there is a perception it has a better chance to win in court than case A. There is no telling which case would be selected. Informed speculation (relying on conclusions in Table 2.3) would point to case B. But it is certainly possible that a lawyer might be encouraged by colleagues to select the other. Moreover, maybe in this hypothetical the case is
picked up by a cooperating attorney. The point is that while we can group these elements together into “typical” categories, it is difficult to be more specific about their influences.

Although, even with this degree of uncertainty about the specific weight of each criteria relative to each other, it is reasonable to say that the organizations in this study typically center three criteria in a balancing act that includes all the elements discussed here. They are: community need, the mission, and to a slightly lesser degree, opportunities to win. This points us toward organizations that look closer to a model of “engaged lawyering.”
Chapter Three | Engaging Hearts & Minds through Public Education

This chapter asks: what is public education and why is it important to legal organizations? While the literature on cause lawyering and public interest lawyering centers on litigation, spending on education at these organizations has rivaled litigation. For example, from 2012 to 2015, GLAD’s Public Affairs & Education department accounted for anywhere from 25% of program service expenditures to 44%.28 In that same five-year period, Lambda’s Education & Public Affairs department spent 50% of their total services, with the rest going to litigation.

Also, consider the importance one individual lawyer has publicly placed on education in achieving victories. At a 2014 Columbia Law School Symposium, GLAD Civil Rights Project Director Mary Bonauto was asked to focus her discussion on marriage equality to litigation. Bonauto remarked that would be difficult “because ideally you [lawyers] will first create a climate of receptivity for litigation. Both the public and the courts need a problem to be defined in both head and heart terms so they can understand the litigation is responding to and resolving real problems” (Bonauto and Esseks 2015, 118). Two years later at Rutgers Law School, Bonauto reflected on the state-by-state path GLAD took, recalling: “each of the three states in which we filed litigation had an effective grassroots organization on the ground to conduct public education” (Bonauto 2016, 1496).

More recent literature buoys Bonauto’s comments and these budget figures, suggesting public education work is a common tactic of cause lawyering (Cummings and NeJaime 2010, 1315–17; Marshall 2006, 172–74). However, most of the literature, including both isolated and engaged interpretations, treat public education work as if it is in the periphery. In other words, the literature recognizes its existence, but does not pay it much attention.

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28 This is according to publicly available Annual Reports and 990 forms on the organizations’ respective websites.
Older scholarship casts doubt on the importance of public education to cause lawyering. For instance, classic law and society scholarship claims that lawyers are lured to litigation by a "myth" that courts can produce desired change (Handler 1978; Rosenberg 2008; Scheingold 1974) and are thus unlikely to move beyond the judiciary. While newer works and observations reveal that lawyers are willing to engage in extra-judicial behavior, we still know little about public education. For instance, there is no indication of how agenda setting works within this tactic, or how public education might influence the agendas of other tactics, like litigation.

Based on interviews and document analysis, this chapter makes two primary arguments. First, regarding the theme on tactics, this chapter demonstrates that public education is not just a tactic in the periphery of cause lawyering work. It is central to what they do. Lawyers recognize a "trap" in using litigation alone and have plotted a way around this trap by supporting litigation with non-litigious strategies. These strategies recognize that winning, through courts or otherwise, requires altering opportunity structures including elite allies (e.g. judges) and public support (Andersen 2006). Moreover, it shows that lawyers purposefully use litigation for its indirect effects, specifically in raising consciousness and driving mobilization of support (Cummings and NeJaime 2010; Keck 2009). My interviews with lawyers reveal four functions of public education: to prime a pathway for successful litigation, to control for backlash and counter-mobilization, to facilitate litigation as a leveraging mechanism, and to support change directly through awareness raising and competency training. This finding is important because it contributes to our understanding of the limits to the law.

Second, this chapter reveals a constitutive relationship between agendas and tactics. Lawyers and staff working on public education have a degree of autonomy to decide their own work, though much of it is tied to on-going litigation. Public education tactics (specifically
outreach) can also influence the agenda setting of organizations by relaying community need to lawyers. Finally, outreach and public persuasion work (explained below) can result in increased donations to the organization, allowing it to operate and even expand its portfolio of work. Thus, in this relationship, the work of the organization to create change also sends signals back to them about community need which in turn influences the way organizations set their agendas. This finding is important because it tells us that legal organization agendas are broader than expected, in part because of their willingness to go outside of courts.

Using interviews and organizational documents, I categorize educational tactics within three different approaches: outreach, public persuasion, and professional education. Each approach is based on separate audiences: public persuasion (to shape public opinion), outreach (to learn from and inform the target constituency), and professional education (to educate “elites” and service providers about the law and cultural competency). These approaches involve a broad repertoire of tactics including: call centers, press releases, workshops, surveys, publications, and media relations (see Table 3.1 below).

**Definitions and Typologies**

Interviewees often defined public education in a dualistic way: education of the public and education of the community. For example, Janson Wu, the executive director of GLBTQ Advocates & Defenders (GLAD), divided the work of public education into two parts. The first he calls “public persuasion. The kind of hearts and minds work that we do in changing peoples' attitudes and beliefs about LGBT people” (Wu 2017) [emphasis mine]. The second he calls “pure public education, which is educating our community about their rights and about things that are happening in the community” (Wu 2017).
Thomas Ude Jr. is the Executive Director of Legal Services at Mazzoni, a health and wellness provider in Philadelphia. Ude defined education in a similar dualistic fashion: “One, it educates people who interact with LGBTQ people [about] how to interact with them appropriately, and [second] also some of the education we do educates people who are LGBTQ about what their rights are and the rights that they have” (Ude Jr. 2016).

Public education includes an array of tactics. McCann (1994) wrote: “general public education and advocacy activities” include: “group seminars or workshops, direct lobbying efforts, letter writing campaigns, rallies, marches, informational picketing, protests, strikes, and other publicity event” (McCann 1994, 80). Based on interviews and how efforts are organized in organizational material, I also include: call centers, press releases, publications ( newsletters, pamphlets, books, etc.) community workshops, continuing legal education events (CLEs), surveys, and media relations (social media presence, taking questions from news media, and reaching out to news media).

As Table 3.1 shows, educational strategies are defined and divided as outreach, public persuasion, or professional education. **Outreach** efforts are meant to raise awareness among community members, whether it is rights consciousness, helping people recognize a legal claim, or simply increasing the visibility of the organization. This is accomplished by reaching out to local and state community organizations to collaborate on workshops, rallies, newsletters, public events, etc. It also includes social media work that is aimed at drawing in community members. **Public persuasion** efforts are broader campaigns aimed at educating the public with the goal of shifting opinions and attitudes about LGBTQ people. Relevant tactics include digital strategies, press releases, and media relations. **Professional education** has the purpose to train and inform elites (lawyers, judges, public officials), professionals (e.g. employers), and service providers (e.g.
community health organizations) about law and cultural competency. Tactics include call centers, workshops, and continuing legal education training (CLEs).

**Table 3.1: Approaches to Public Education**

<table>
<thead>
<tr>
<th>Audience</th>
<th>Example of Tactics</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Outreach</strong></td>
<td>• Collaboration with local organizations</td>
</tr>
<tr>
<td></td>
<td>• Rallies, marches, protests, and other public events</td>
</tr>
<tr>
<td></td>
<td>• Coordinating workshops</td>
</tr>
<tr>
<td></td>
<td>• Know-your-rights material</td>
</tr>
<tr>
<td></td>
<td>• Call Centers</td>
</tr>
<tr>
<td><strong>Public Persuasion</strong></td>
<td>• Social and digital media strategies</td>
</tr>
<tr>
<td></td>
<td>• Press releases</td>
</tr>
<tr>
<td></td>
<td>• Media relations</td>
</tr>
<tr>
<td><strong>Professional Education</strong></td>
<td>• Continuing Legal Education trainings</td>
</tr>
<tr>
<td></td>
<td>• Job-training seminars</td>
</tr>
<tr>
<td></td>
<td>• Speaking engagements</td>
</tr>
<tr>
<td></td>
<td>• Workshops</td>
</tr>
</tbody>
</table>

These are not fixed typologies. In some cases, groups may be working on a tactic – a postcard campaign for example – aimed at both outreach and public persuasion. In some cases, it is difficult to draw the line between what counts as litigation and what counts as education. Lee Carpenter, former legal director at Equality Advocates Pennsylvania (EAP), offered the example of a lawyer using a press conference to create awareness of an on-going case. Was this education or litigation? She suggested that these “are not really hard categories necessarily” (Carpenter 2016a). For this reason, and the methodological difficulties of trying to count activities like

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29 Equality Advocates Pennsylvania was a state-based legal service provider that dropped their legal services in 2010. Those services went to the Mazzoni Center for LGBTQ Health & Well-being, while Equality Pennsylvania is now a political advocacy organization.
workshops and forums, educational tactics are not quantified in this chapter. Instead, reliance is made on interviewee observations to tell how much education work has or has not changed.

**De-Centering Litigation**

A careful reading of cause lawyering and legal mobilization scholarship makes clear that we should not be surprised to see legal organizations engaging in public education. One can find mentions of education in sections of larger studies or in references to the “other” work that lawyers do. There is also a great deal of encouragement of activist lawyers to pursue this kind of tactic. But therein lies the problem with determining expectations of public education’s function and effect within legal organizations. Public education as a tactic has not been the focus of a cause lawyering study and thus what we do know about it is limited.

Some assessments of lawyers, particularly in the isolated lawyering area of the literature, would not suggest that education is something that cause lawyers are likely to participate in. In this literature, lawyers are positioned as captured by a “myth of rights” (Scheingold 1974). These lawyers use litigation despite its limitations and potential negative side-effects (Bell 1976; Handler 1978; Rosenberg 2008). Gerald Rosenberg described the allure of using the Supreme Court to create social change as a “flypaper” trap (Rosenberg 2008). But lawyers continue to use litigation, in part due to their legal training and professional experiences which influence them to “internalize the myth of rights” (Scheingold 1974, 151). Thus, even though scholars recognize this trap, they expect lawyers to be continually to be lured in by it.

In response to Scheingold (2004) and others, some scholars began exploring extra-judicial effects of litigation and the behavior of cause lawyers. Scholars found indirect effects of using litigation, including consciousness raising (A.-M. Marshall 2003; McCann 1994; Silbey 2005)
mobilization of support (Burstein 1991; McCann 1994; Silverstein 1996), and shaping media coverage (Leachman 2014; Tauber 2015).

The importance of those works for this chapter is that in interrogating these extra-judicial effects of litigation, researchers have found that lawyers do not hold a naïve faith in litigation as a be-all-end-all strategy. For example, in McCann's (1994) seminal study of legal mobilization, he found that cases were “carefully coordinated with publicity campaigns to dramatize the wage discrimination issue, to educate the public, and to activate potential advocates for the cause” (McCann 1994, 62).

It is from this scholarship on cause lawyering that we find references to public education. Specific education strategies cited in the scholarship often include media work and community organizing. For example, in his study of lawyering by Left-activists in Seattle, Scheingold found lawyers feeling that “the legal stuff is secondary” (Scheingold 1998, 125) and that they sometimes organized and participated in protests themselves (Scheingold 1998, 136).

Scholars found lawyers using tactics like organizing experts, offering training and educational material to other lawyers, holding “town meeting” designed to educate the public, creating informational packets for target constituencies, and engaging with the media on upcoming lawsuits (Andersen 2006, 214–15; Meili 2006, 126–27). In their comprehensive primer on public interest lawyering, Chen and Cummings (2012) suggest numerous potential direct and indirect effects of public education strategies. These include ensuring the sustainability of courtroom victories, creating pressure on elected officials, attracting new members to the organization, and generating fundraising opportunities (Chen and Cummings 2012, 270–71).

Cummings and Eagly (2001) observe that a new strategy, “law and organizing”, is in its early stages of development and includes coordinating grassroots mobilizing practices with
litigation. Among environmental justice groups, lawyers “downplayed” litigation and instead emphasized organizing tactics to “empower community residents as political actors” (Cummings and Eagly 2001, 473–74). According to some lawyers, education and outreach feels like most of their work (McCann and Silverstein 1998, 270). These findings are supported by Cummings and NeJaime (2010), who developed the idea of “multidimensional advocacy”, the framework for this project, based on LGBT movement lawyers in California.

These studies are backed up by public calls from lawyers for movement lawyers to expand their repertoire of tactics (Ashar 2008; Lopez 1992; White 1987). They argue that legal tactics should be subordinate to other social and political mobilizing strategies. A classic iteration of this is “rebellious lawyering”, a term coined by Gerald Lopez (1992). Lopez argued that lawyers should collaborate with non-lawyers, become immersed in communities, and think of the law as an educational tool.30

Another popular version is “community lawyering,” where lawyers often working for poor communities “translate information about the law into lay language, pressure opponents, defend the organization, open up spaces for community voice and action, and seek to establish new legal frameworks” (Gordon 2007). Lawyers have also been encouraged to mobilize their clients and constituency to speak about grievances to the public (White 1987). In fact, some legal education clinics have begun training lawyers to think differently about lawyering skills and practice through employing community education methods (Ashar 2008).

Within the LGBTQ movement, similar community lawyering critiques have been levied, particularly that strategizing has been too isolated to lawyer-only spaces (Arkles, Gehi, and Redfield 2010; Vaid 1995a). Instead, these lawyers argue that “the most significant, lasting, and

sustainable way to make change is through community organizing that mobilizes those persons directly impacted” (Arkles, Gehi, and Redfield 2010, 582). Urvashi Vaid, a lawyer-activist within the movement, has called the split between lawyers and political/social advocates a “false dichotomy” because “politics, lawmaking, and litigation are intimately connected” (Vaid 1995a, 132). Though education and organizing are different, these calls might lead us to believe that legal organizations are not already employed in public education tactics, or at least not dedicating significant resources to outreach work.

However, large-N surveys over the last two decades indicate we should expect to see more of this work. Nan Aron (Aron 1989, 32) found that almost two-thirds of legal organizations in her survey in the 1980s “engaged in community education or public education work.” Comparing their own 2004 survey data to a 1978 study (Handler, Ginsberg, and Snow 1978), Nielsen and Albiston (2005) observed a marked increase in attention to non-legal tactics. In 1975, 72% of surveyed legal organizations reported spending effort on “research, education and outreach” whereas in 2004 that number rose to 95% (Nielsen and Albiston 2005, 1612). Likewise, Deborah Rhode (2008) found that a fifth of the legal organizations surveyed operated hotlines or free legal clinics, helping organizations “identify major problems and build public awareness of the organization” (Rhode 2008, 263). In fact, the primary way legal organizations obtained clients was through media and community outreach.

What this review of the literature has demonstrated is that we should fully expect to see organizations doing public education work. But it leaves us with many questions. Should we expect organizations to be committing substantial resources to education? If lawyers are truly caught up by a “myth of rights,” as a more isolated lawyering reading of the literature would suggest, perhaps not. What does public education mean and what are its boundaries? We have
some idea, but it comes from a patchwork of studies with no clear definition. Finally, what is the perceived function and importance of education compared to litigation? How is it a part of legal organization behavior? Thus, there are still many details to learn about how public education works alongside litigation and what effects it is perceived to have.

**Evolving Role of Public Education**

This section supports two arguments. First, education work has long been important to organizational identities but fewer resources in the past did not allow for the kind of dedication seen today. Second, an early loss in marriage equality generated a new understanding of the interplay between legal and political processes. This lesson in turn precipitated an expanded role of public education across all the organizations. Lawyers view this expansion as helping to facilitate desired social change by supporting litigation at different stages and generating awareness of harms and rights.

Evidence from organizational material indicates a clear shift in how some of these organizations approached public education. Figure .31 exemplifies this shift. While the National Center for Lesbian Rights (NCLR) does not isolate education expenses in their financial reporting, Lambda and GLAD list spending on separate education departments. Note that the sharp change in 2004-2005 for GLAD’s spending on education, as well a shift in 2003-2004 for Lambda. These shifts, as explained below, can be tied to marriage equality litigation.

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31 Data was collected from 990 forms as well as audited financial statements and annual reports. Note that in this chart and elsewhere in the project, the years typically denote the “fiscal year” which begins in the previous calendar year. For example, the reported numbers here for 2005 are from the 2004-2005 fiscal year. It is typical accounting practice to refer to a fiscal year by the calendar year it is submitted.
Figure 3.1: Percent of Program Service Spent on Education, 1997 – 2015*

* GLAD data is from the Yale University Library, Manuscripts and Archives (New Haven, CT). Lambda data is from the LGBT Community Center Archive (New York, NY) or available online. The dotted line for GLAD between 2010 and 2012 is to note that their 2011 990 form only reported three months. This was because GLAD switched financial reporting from a calendar year to a fiscal year between 2011 and 2012.

From as far back as their respective founding periods, all three impact organizations (Lambda Legal, NCLR, and GLAD) included public education in their mission statements. A 1978 copy of GLAD’s original “statement of purpose and descriptions” reads:

The corporation was formed for the primary purpose [emphasis mine] of educating the homosexual community as well as the public at large concerning both the legal disabilities suffered by homosexuals and the remedies available for those disabilities. The corporation is empowered to its educational mission in a variety of ways: promulgation of written materials, speaking engagements, media presentations, and public interest litigation. (GLAD 1979)

Indeed, organizations early on were producing informational material, usually put together through the lawyer on staff and an administrative assistant. These were mostly “know your rights”
pamphlets, as well as newsletters for members and donors. In addition, the lawyer(s) on staff would conduct speaking engagements.\textsuperscript{32}

However, the bulk of the work was always litigation. There were no education departments or education-specific staff members at NCLR and GLAD in their first decades. Rather, the work was done by attorneys and sometimes board members, ancillary to their other roles. Pat Maher, the first Public Education Coordinator at Lambda in the early 1980s, noted in a memo that there was a “great and largely untapped fundraising potential” in educational projects such as publication, presenting at seminars for attorneys, and increased membership (Maher 1983).

In 1983, Kathy Travers was brought on as the first paid staffer at GLAD whose focus was to be education and, consequently, this was the “beginning of some serious attention to education” (Buseck 1999). Such dedicated positions are a signal that organizations are prioritizing an issue or strategy because the organizations, especially in this era, are investing resources when resources are scarce.\textsuperscript{33} The title also sends a signal to staff, community, and donors that the organization takes the position seriously.

While NCLR did not have a public education department (and still does not), it has long been an important part of their work in overcoming the limits to litigation.\textsuperscript{34} Speaking to the Bay Area Reporter in 1987, executive director and founder Roberta Achtenberg stated: “Litigation can be an extremely inefficient way to change people's attitudes” (Powers 1987). Journalist Ed Powers noted that while the organization was ready to go to court when necessary, it also “tried to educate people so that situations that lead to litigation” could be avoided (Powers 1987). Powers wrote:

\begin{itemize}
\item [\textsuperscript{32}] During the early years of these organizations there was only one or two lawyers on staff supported by a Board and pro-bono attorneys.
\item [\textsuperscript{33}] Dedicated education staffers have positions listed in annual reports or newsletters as part of an Education department or who have the words “Education” or “Outreach” in their position titles.
\item [\textsuperscript{34}] Director Kate Kendell explained: “Everyone here understands and embraces that a part of their job is not just put your head down and write a brief, but a part of your job is looking for every opportunity to elevate a conversation about what the subject of that brief is” (Kendell 2017).
\end{itemize}
“over the past year, the Project has worked to educate social workers, judges, psychologists and court personnel about gay and lesbian parenting” (Powers 1987). Then, in 1990, NCLR created the Lesbians of Color Project which had the goal of including more lesbians of color into “legal institutions” not just as recipients of services but as drivers of the agenda (NCLR Staff 1990).35

In the mid-1990s, this education work continued to grow, including work with call centers and community outreach. Education work at Lambda at that time included newspaper and television media “to change hearts and minds” as well as publications and conferences aimed at giving “lawyers the tools they need to do their work, and non-lawyers an understanding of how the law stands” (Lambda Legal 1989). Penny Perkin’s tenure from 1989 to 1994 as Lambda’s Public Education Director, saw education grow “through the need for and through my interest in it and the organization’s growth and expansion during that time” and the support of the lawyers (Perkins 2017). After Perkins departure and alongside budget increases, the position was split into two new hires and by 1998, there were four education staffers.

In that same period, around 1994, GLAD moved to recruit, train, and supervise volunteers for hotline and education efforts (Netherland 2017). In a 1996 memo to the GLAD Board describing her job, much of which included supervising volunteers and the hotline (Netherland 2017), education staffer Julie Netherland wrote:

The whole point of impact litigation is to take cases which effect the broader community. My job is to make sure that the broader community knows what Mary [Bonauto] & Ben’s [Klein] work means to them. That they know what the legal precedents effecting their lives are and how to make use of them. We in the public education program, cannot give people legal advice. But what we can give people is information. And as cliched as it sounds, information is tremendously powerful. (Netherland 1996)

35 A common theme in the archival material from GLAD, Lambda, and NCLR, was their interest in reaching communities of color, specifically in the early to mid-1990s. For example, one of GLAD’s education staffers, Craig Bailey, was focused on expanding GLAD’s network in the lesbian and gay people of color community. Another example is Lambda education staffer Mariana Romo-Carmona. Romo-Carmona was a “Chilean writer and long-time activist” who stated in a Lambda newsletter that she wanted “to help expand Lambda's horizons to include the specific concerns of the lesbian and gay people of color communities in this country” (Allen 1990).
The first significant shift in education’s role is best explained by former Lambda executive director Kevin Cathcart. He emphasized that while they “had always done some community education”, the “aha” moment was the fallout of the 1993 Hawaii marriage decision (Cathcart 2016a). In *Baehr v. Lewin* (1993) the Hawaii state supreme court supported the argument that the state constitution prohibits banning of marriage based on sexual orientation. However, this triggered a massive public campaign which culminated in voter-approved changes to the Hawaii constitution, defining marriage as between a man and a woman and essentially rolling back the perceived victory.

At this point, Lambda was a small organization, “doing a lot of the work based on a very tight and stretched budget” and was not utilizing public education to the extent it does today (Cathcart 2016a). Before the Hawaii case, Cathcart described the mindset of lawyers as going out and “winning things” and then “handing it off” to someone else to do the rest of the work. But when Hawaii citizens voted to overrule their high court by voting for a constitutional amendment banning same-sex marriage, it was “a real wake-up call” that litigation alone could not create a “victory” (Cathcart 2016a).

Thus, victory was not just a win in court, but also changes on the ground that ensured the implementation of legal victories. Cathcart acknowledged a limit to litigation and how education formed the basis for resolving this problem: “We’re not just here to rack up victories, we’re here to make changes in peoples’ lived lives and in society” (2016). He continued: “We realized that if

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36 A resolution in this case was not reached for another six years. Meanwhile, backlash ensued in the form of several state laws banning same-sex marriage and the passage of the federal Defense Against Marriage Act (1996). For more on this, see Klarman, Michael. *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage*. Oxford; New York: Oxford University Press, 2013, (p 48-74).
there is nobody to hand it off to, we needed to structure ourselves better to do more of the public education. What does this victory mean? How will it affect you” (Cathcart 2016a)?

After *Baehr*, opponents of LGBTQ rights and marriage equality exploited the gap between courtroom victories and political processes by challenging the decision in state and federal legislation. Several states passed laws, including state constitutional amendments, defining marriage as between a man and a woman. In addition, in 1996 the federal government passed the Defense of Marriage Act (DOMA), which defined marriage as between opposite sex couples for federal policy purposes (such as immigration) and pronounced that states did not have to respect out-of-state marriage licenses that did not meet this definition. As scholarship has shown, these countermobilizing forces put the LGBTQ movement on the defensive and in turn, placed marriage equality higher on the movement’s agenda (Dorf and Tarrow 2014). However, it also taught cause lawyers at Lambda an important lesson in how they needed to engage both legal and political processes to achieve their ultimate goals.

This shift in understanding education’s potential was not just happening at Lambda. By 1999, Public Education Director Andrea Hildebran wrote to GLAD’s Strategic Planning Committee that education was the “direct service arm of GLAD”, "the 'impact' of impact litigation", "the eyes and ears of the legal departments”, and "GLAD's Liaison to the Non-Legal World" (Hildebran 1999). The Hotline (GLAD’s call center), “solidif[ied] GLAD's relationship with the grassroots of our communities” (Hildebran 1999).

For Lambda, education efforts escalated again in the early 2000s. When long-time Legal Director Beatrice Dohrn left in 2000, the education department “endeavored to get good publicity for what the legal department did. It wasn’t its own thing yet” (Dohrn 2016). But by 2002, Lambda had a new Education & Public Affairs Department. It was staffed by eleven people, more than
double the total staff ten years earlier. This included people dedicated to communications, web
design and management, publication, and outreach. By committing significant resources, Lambda
signaled that education was an important strategy in overcoming limits to litigation. Legal Director
Jon Davidson recalled: “[when] we created a new department, it was partially a reflection of ‘you
can win a case and lose a battle’” (Davidson 2016).

While GLAD and Lambda interviewees point to Baehr as a turning point, the same is not
universally stated by NCLR staff. Executive Director Kendell does not “think there’s any magic
moment”. Instead, Kendell believes “it was more gradual and over time” (Kendell 2016). Shannon
Minter, the longtime legal director at NCLR, noted that “there has always been a good bit of that
[education] and always been a recognition that that’s what we need to be doing” (Minter 2016).

The reason for this second gradual shift may have been changes in technology. Kendell
points to social media and the internet, where a tweet can go “viral” with thousands of people
sharing a message or story. This work hasn’t “required developing glitzy and expensive
campaigns. It’s been more capturing the media you’re going to get and […] helping to amplify
that” (Kendell 2016). Today, Kendell explains “it’s trying to deploy a number of different
strategies” and getting the “biggest-bang” for a small expenditure of resources “to do the most
good for the most people” (Kendell 2016). She estimated that anywhere from 20% to 30% of their
budget goes to education (slightly fewer than Lambda and GLAD) adding that, with significantly
greater resources, they might have an education staff but “We just never had that luxury” (Kendell
2017).

However, Minter noted that around the year 2000, NCLR started to do education work “in
a much, much deeper and more systematic way” (Minter 2016). This is when NCLR began
working with Equality California on a range of issues and its leader Geoff Kors (who would later
join NCLR). The work with Equality California and the strategy encouraged by Kors opened Minter’s eyes to a “deeper level of coordinating… the legislation, the political education, the litigation” (Minter 2016). “It accomplished so much in such a short period of time,” Minter said, “for me, it was so transformative” because it showed what was possible when coordinating with non-litigious efforts like education and policy (Minter 2016).

A unique turning point for GLAD during this second shift in public education was the 2003 state supreme court victory in Massachusetts for marriage equality, *Goodridge v. Department of Health* (2003). Following the decision, GLAD saw a sharp increase in attention and donations to their organization. In Figure 3.2 below, you can see this jump in revenue (adjusted for inflation).

**Figure 3.2: GLAD Revenues from 1998 – 2008***

*Based on 990 tax forms mostly collected through GuideStar. Data has been adjusted for inflation.

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38 In the early 2000s, equality organizations in California were pushing for expanded partnership rights by fighting against backlash and new hurdles such as Proposition 22 which defined marriage as between a man and a woman.
Before Carissa Cunningham was hired as the Public Affairs and Education Director in 2004, GLAD had no education department. As Gary Buseck, legal director and former executive director of GLAD explained: “even though we did it, there was never really a significant staff to do it” (Buseck 2016). Thus, Cunningham explained, “when they hired me their intention was to create a department and to be more intentional and strategic about how they communicated about not just our laws but our issues as well. And to purposefully set out to create the environment into which we could win and in which our wins would be sustained” (Cunningham 2017) [emphasis mine].

Buseck concurred: “it was only with Carissa’s [Cunningham] arrival and the post Goodridge resources” that they could “professionalize public affairs and public education” (Buseck 2016). Lee Swislow, the executive director at the time, explained: “It [Goodridge] was huge… it allowed us to increase our resources, both in number of attorneys that we had, as well as to increase our public education department, which then both supported our marriage efforts but also gave us additional capacity” (Swislow 2016). The new department was created in part to sustain the Goodridge victory, a lesson learned from Baehr. Republicans in the state legislature were pushing back to reverse the decision in Goodridge, including through a state constitutional amendment, and GLAD had filed another marriage case in Connecticut. GLAD needed to hold their ground.

Another important influence in the shift toward great public education work was the critiques coming from within the LGBTQ movement itself. Lawyer-only spaces such as the LGBT Roundtable were criticized as negating the voices of the community and for focusing only on law-reform strategies (Arkles, Gehi, and Redfield 2010; Spade 2015; Vaid 1995a, 134). The movement was deemed by some to be dominated by lawyers focused on legal agendas, rather than on
community needs. Instead, activists sought integrated approaches that centered community engagement around grassroots efforts, law reform, and administrative work. Based on literature (Carpenter 2014, 2016b) and interviews, these critiques have been heard by movement lawyers.

A significant new stage in the role of public education that impacts this vision of law and community engagement occurred in 2017 when Lambda ended their Education and Public Affairs department. Such a cut would seem to cut across a main implication of this article: that lawyers view public education as integral to legal strategies for change. However, the development works (mostly) to reinforce this argument.

After the departure of long-time executive director Kevin Cathcart and the welcoming of chief executive officer Rachel Tiven, the decision was made to divide education staff and functions between the Communications and the Law & Policy departments. Law & Policy Director Jennifer Pizer explained that “if anything, it’s a greater recognition of the importance of communication and education’s role” by bringing the education folks closer to the policy work (Pizer 2017). Lambda’s Proyecto Igualdad director Francesco Dueñas also noted that previously “there was too much of a silo between the community education and the legal department” and that cases were not “as in concert as they could be” (Dueñas 2017). Now, education work is becoming more integrated.

One alternative explanation for this shift is concern over resources. A few interviewees expressed concern that there might be a loss of interest (and thus donations) in the work of these organizations following the marriage equality victory in Obergefell v. Hodges (2015). Thus, this department change might be an effort to stream-line and consolidate processes ahead of tougher times. Pizer noted that because of this integration, face-to-face engagement efforts may succumb to broader media campaigns:
We can't do enough of it [grassroots work] for it to make sense when there are other things that we could do that could reach more people. Not necessarily with the same quality of engagement that you get if you're meeting face to face in a room, but at least for now, we're shifting to some other things. (Pizer 2017)

While the integration of public education with litigation and policy strategies would seem to line up with the goals of law-reform critics, the movement away from direct community engagement (as Pizer suggested) would seem to be a rejection of these critiques. However, Pizer pointed out that like other past changes in Lambda, that this was more of an experiment and “not static.”

**Education Work Alongside Litigation**

“Public education, community education, policy work” Kendell explained, “reinforces the litigation and really creates an endless loop of self-reinforcing culture change” (Kendell 2016).

Kendell continued:

I think we all know that winning a case at the Supreme Court might be important and certainly help usher in a change in culture, but if there’s not a sort of companion effort to move hearts and minds and to create a climate where our people embrace whatever the Supreme Court did or make it real… there [is] a tremendous possibility that you will backslide … the only way to respond to the backlash is to shore up whatever victory through a multipronged effort … (Kendell 2016)

As this belief and Figure 3.3 illustrate, public education sustains victories through two processes: *priming* and *controlling*. These categories were developed through analysis of interviewees responses and organizational material.

Through priming, public persuasion and outreach tactics are aimed at shifting public and elite opinion before a case. In other words, organizations prime (or prepare) the legal environment by altering the conditions around it. This may alter the pressure under which stakeholders are making decisions, including judges. Additionally, as interviewees and the literature suggest, judges
do not exist in a vacuum and thus may change their own minds based on new information, separate from public pressure.

For example, Evan Wolfson (Lambda attorney and founder of Freedom to Marry) believed that organizations needed to “create a climate”, through public education and organizing, in which courts would have the “courage to do the right thing” (Wolfson 2016). Davidson of Lambda also believed that judges were “members of the public too” and they are “more likely to get judges to do the right thing if they had a sense that the public wasn’t that far behind them” (Davidson 2016).

**Figure 3.3: Education Influence Pathways as Perceived by Interviewees**

![Diagram showing education influence pathways]

The goal of **controlling** is to mitigate the strength of backlash and ensure the successful realization (implementation) of a court victory (Cathcart 2016a; Kendell 2016). Lawyers are acutely aware that legal change is not the same as change on the ground, that street-level bureaucrats and even elites, like former Alabama Chief Judge Roy Moore, can resist Supreme Court decisions. Controlling unfolds in a few ways.

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39 Following the *Obergefell v. Hodges* (2015) decision, Alabama Chief Justice Moore refused to recognize the U.S. Supreme Court’s finding that states could not deny same-sex couples marriage licenses.
First is making sure that the community knows their rights and knows whom to contact if they are violated which helps legal organizations watch for resistance to implementation. Second, staff discuss outreach and public persuasion work as if it changes attitudes against resisting compliance. Third, while a loss is not desired or sought, public education is seen as a hedge against a loss. Even after a failure in court, changing public attitudes is quite significant for long-term success. Fourth, as Kendell points out, there is a goal to “inoculate” the public by changing attitudes so that litigation is not necessary. Kendell explained: “what we want to do is inoculate the larger population so that whatever gave rise to the lawsuit isn't repeated because they recognize, ‘Oh, that's not the way gay people, queer people should be treated’ even if there's no law” (Kendell 2017).

The perceived importance of priming and controlling is evidenced from the commitment to it. In the 2015-2016 fiscal year, Lambda’s “community educators” gave over 200 workshops and presentations at “community centers, schools, businesses, events and conferences” which were estimated to reach over 6,000 people (Lambda Legal 2016). In 2013, NCLR dedicated between five to seven training sessions to just LGBQ elder law issues with community members, advocates, and attorneys (NCLR 2014). This just scratches the surface. Covering the multitude of issue areas, both impact and direct legal service providers conduct hundreds of workshops, presentations, panels, speaking engagements, trainings, etc. for community members every year.

Amplifying the Power of Litigation

Michael McCann has written about how movements can use litigation as a “club” or leverage to pressure the state or private parties to bargain and make changes (McCann and Silverstein 1998, 207–11). Beverly Tillery, a former Deputy Director of Education & Public
Affairs of Lambda Legal, provides an example of how education is used to *amplify* the threat of the litigation.\(^{40}\)

Tillery began by noting specifically that employment cases are a good example of the limits of a court case because even a victory in court does not mean a winning action that will impact many employers (Tillery 2017). At the same time, Tillery, who is not a lawyer, noted that litigation can be disempowering to community members because conversations about strategy are often insulated between lawyers. In other words, non-lawyers and people outside the case often cannot get involved in legal strategies. However, in public education, the public is part of the strategy.

In 2004, Lambda Legal filed suit against Foot Locker for the mistreatment and firing of a young gay black man.\(^{41}\) Tillery recalled using education while litigation commenced. The first goal was to elevate pressure on the company to make sure that they were taking the case seriously. The second was to educate the community about the issues involved. Lambda ran a massive postcard campaign (Lambda Legal 2008a) that Tillery explains got people talking about issues related to the case including the roles that allies play in supporting fellow workers.\(^{42}\) Moreover, Tillery credits the media and outreach campaign in getting Foot Locker to eventually settle the case (Tillery 2017).

Another example comes from Lambda’s 2004 Annual Report. It provides a flowchart (too large to reproduce here) explaining the evolution – from a phone call to the Help desk (call center), to the $600,000 settlement – of an HIV employment discrimination case against Cirque du Soleil

\(^{40}\) Because of a recorder malfunction on my phone, I took detailed, verbatim notes while Tillery spoke. That said, because I do not have the backing of the recording, I do not feel it is appropriate to use quotation marks indicating a direct quote.

\(^{41}\) *Dunbar v. Foot Locker, Inc*, South Carolina District Court, Case No. 3:04-cv-02519 (2004).

\(^{42}\) Tillery’s recollection is backed up by a Fall 2008 IMPACT newsletter from Lambda that states: “Assisted by a massive postcard campaign from Lambda Legal members, we obtained a settlement from Foot Locker where Dunbar received a cash payment and the company committed to training all of its employees around sexual orientation harassment and discrimination.”
(Lambda Legal 2004). This chart showed that after Lambda filed a complaint with the EEOC, it deployed “a media campaign to raise awareness of Cusick’s [plaintiff’s] firing and state protests at Cirque performance with local groups.” Implicit in its inclusion, public education was used to bring pressure from the public onto Cirque du Soleil.

In addition to supporting the leveraging power of litigation, education can augment policy and legislative work. GLAD’s decade-long Director of Public Affairs Carissa Cunningham described GLAD’s push to pass legislation in Massachusetts that would require MassHealth to cover treatment and surgery for lipodystrophy, a condition brought about by the interaction of HIV and the toxicity of medication to treat it.\(^43\) Most of the work, according to Cunningham, had to be education “because it was taking an obscure condition… that most people were not familiar with, defining it as a problem, getting people to understand it, getting people to care about it, and people including legislature to care about it, and getting people to do something about it” (Cunningham 2017). Here, staff believed that the education work was doing consciousness raising absent litigation. And, even though it was coupled with advising and lobbying, education is credited with doing the heavy-lifting.

Cunningham explained how it worked: “we had an in-house story teller. She was somebody with a journalism background who basically worked as a reporter and she wrote stories. She sat down people who were affected by our work and wrote about them” (Cunningham 2017). This story-teller was Manager for Public Education” Laura Kiritsy. Kiritsy “did amazing work finding people with lipodystrophy …. built a rapport with them, interviewed them, told their stories, and

\(^{43}\) According to a Boston Globe story on a GLAD client, lipodystrophy is “an atypical distribution of fat brought on by an interaction between HIV and the toxicity of medications introduced in the 1990s to treat the virus. The disorder causes fat to gather around the neck, in what is called a “horse collar,” and on the upper back, in a “buffalo hump” (Fox 2014).
we put together a storybook that was sent to all the legislatures with photos of people with this condition” (Cunningham 2017).

Ultimately, one of the people in that storybook, John Wallace, gave GLAD permission to pitch his experience to the Boston Globe and the Globe “did a beautiful story on him and on lipodystrophy in which they took photographs of him and it was on the front cover of their health section” (Cunningham 2017). The effect of this was perceived as critical to legislative success. Cunningham: “this photo was circulated around the State house and people were shocked. [They] said we can't allow people to live like this when this condition is so easily treatable and for such a low cost” (Cunningham 2017).

It is important to reemphasize that GLAD, an impact legal organization, led by and staffed largely by lawyers, was employing an entirely non-litigious strategy to pursue a goal. While that strategy included communication with elected officials and staff, it largely relied on public education tactics. These tactics included media relations, publications, and outreach aimed to shaping public opinion with the hopes of influencing elected officials. This illustrates that legal organizations not only recognize the limits to litigation but are willing to employ exclusively non-litigious tactics to overcome those limits.

Creating Awareness

Further demonstrating this point, legal organizations will use public education approaches, specifically outreach and professional education, to facilitate change absent (though not always) litigation, legislation, or major events. There are two purposes of this work. First, organizations have the goal of informing their target constituency of legal developments. This means that community members will be better equipped to recognize a legal harm and report that harm to a lawyer. Second, organizations want to ensure that people able to facilitate change (e.g. employers, providers, government administrators) are familiar with LGBTQ identities and issues. This means
helping people unfamiliar with LGBTQ issues to become “competent” in the obstacles LGBTQ people face as well as what it means to be in the LGBTQ community. The hope is that people in these positions will become allies that are better informed when implementing policies and making decisions that impact LGBTQ people.

NCLR’s Cathy Sakimura explains that NCLR lawyers “spend a considerable amount of time doing webinars, and training at conferences, and CLEs [continuing legal education]” to make sure that attorneys understand relevant legal precedent and laws (Sakimura 2016). Trainings are also used to educate services providers, businesses, administrators, and community members. There are, broadly, three types of trainings. One is specifically for lawyers and judges. Another is aimed at employers, schools, and direct service providers. And the final type is often referred to as “know your rights” workshops aimed at community members.

The first, formal legal training and education, often takes the form of CLEs. Each state court system in the United States sets a certain number of hours of professional development training lawyers must complete, whether in legal theory or practice, over the course of a certain number of years (this varies). For example, Mazzoni lawyer R. Barrett Marshall helped create and lead a two-day CLE track at the Philadelphia Transgender Health Conference, the largest health conference of its kind in the world (R. B. Marshall 2016).

A second type of training is cultural competency which could be aimed at lawyers and judges as well as employers, schools, direct service providers, and other kinds of administrators. The purpose is to acquaint people, often for the first time, to LGBTQ identities and the types of discrimination, harassment, and legal problems LGBTQ people often face. The organizations in this study are often asked to assist legal aid organizations (providing services to low-income clients) or schools looking to create safe environments for LGBTQ students. In 2014, Lambda
conducted twenty-two training sessions for service providers in the Texas Child Protective Services Department to “increase their competency in respecting the needs and rights of LGBTQ youth” (Lambda Legal 2014, 43).

The third type of training is “know your rights” workshops. Workshops and trainings can range from local events to large scale national forums. For example, as of 2017 the Sylvia Rivera Law Project offered five different kinds of training including police interaction, healthcare, immigration, rights of prisoners, and identity documents. The police interaction workshops educate community members on how to “protect your rights when a police officer stops you” while the “name change and ID training” helps service providers in New York City (i.e. medical, welfare, shelters) assist transgender clients with identity documents, which are important to accessing services (Sylvia Rivera Law Project 2017). In 2016, Lambda hosted a “national training academy” in Huntsville, Alabama titled “HIV is Not a Crime II” (Lambda Legal 2017b). The panels and workshops were aimed at educating advocates with HIV and allies on how to repeal laws that criminalize people living with HIV.

Lambda also runs Proyecto Igualdad, a program that commits education resources to two different audiences. First, Director Francesco Dueñas explained, are LGBTQ Latina/os living with HIV. The goal is to expand the understanding of “know-your-rights” information because of language accessibility issues for predominantly Spanish-speaking Latina/os. The work includes translating Lambda documents and creating unique material for Spanish-speakers.

The second audience is the broader Latina/o community with the goal of increasing support for LGBTQ rights. Dueñas described working with the Hispanic National Bar Association (HNBA) to do CLE programming. Not long after implementation, Dueñas experienced a flood of reactions including HNBA members coming out (Dueñas 2017). This precipitated the election of
the first LGBTQ HNBA president and a LGBT committee which became a formal section of the HNBA. According to Dueñas, this was a critical achievement. These HNBA attorneys sit on local community organizations across the U.S., resulting in more community leaders knowledgeable in LGBTQ issues.

**Educational Tactics and Agenda Setting**

Public education is also a mechanism to inform organizations about the needs and priorities of their constituency. This in turn will influence what issues they take on. Outreach strategies are the best suited to fulfill this purpose. These efforts have a feedback effect on the organizations, primarily through call centers and community outreach events (workshops, conferences, etc.). As the organizations reach out to their community, they are also hearing back from them.

**Call Centers**

Chapter Five will discuss call centers in more detail, but it is worth emphasizing that the most frequent answer to the question: “how do you determine community need?” was data from call centers. Call centers, where people with legal harms or legal questions can request advise, have historically fallen under education work at impact organizations. However, today call desks centers typically have their own staff though the mechanism is deeply rooted in outreach and education.

These call centers collect, aggregate, and analyze the data from callers. Those are then turned into reports which are presented to legal staff at least monthly or even weekly. Thus, these intake call center lines serve as a proxy for community need (with important exceptions). As Chapter Five describes, they influence the agenda setting of the organization since interviewees include community need as a factor in selecting issues.

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44 Lawyers believe there are problems with relying solely on intakes to determine need (see Chapter Five).
Community Outreach

An important way public education work informs legal and organizational priorities is through outreach efforts. While ostensibly used to educate the community about their legal rights, they are also seen as ways to learn from the community. Kendell explains:

There will be situations where someone will come up after a community forum and suggest a piece of work… we very much see this role of public education as a two-way street. It’s never us just telling people what we know. It’s us saying, “Here’s what we’re up to, what do you think about it and what else do you care about?” (Kendell 2017)

Outreach can impact legal priorities and the work of the organization simply by informing more people about the existence of the organization and getting them to reach out. Lee Carpenter stated:

I think the understanding [is that] without education and outreach as part of your function, you can’t do direct legal services because you don’t have any relationship with your target population. Because these entire enterprise rests on having a direct line of communication with a population that needs your services you can’t do that unless you’ve done outreach…. the idea is “how am I going to get clients if nobody knows I’m here.” (Carpenter 2016a)

Suzanne Sobel, former executive director of EAP, recalled doing over eighty speaking events in one year. She traveled to churches, synagogues, and universities. “Anyone who would ask, we would go” Sobel said, “we went all over the place and it was all of us. I was doing TV and radio and newspapers and all kinds of things” (Sobel 2016). Patrick Paschall, executive director of Free State Legal (a direct service provider in Maryland) explained the importance of outreach. “It brings everything” Paschall noted, “doing outreach work and ensuring that the community and the public know about the work that we’re doing drives clients to come to seek legal help from us” (Paschall and McMahon DePalma 2016).

Julie Gonen, the Public Policy Director at NCLR, gave an example from their Rural Pride Campaign. The campaign is a series of outreach summits for LGBTQ individuals in rural areas where LGBTQ folks are often without resources and spaces to talk about and learn about issues
that concern them. Lawyers share important federal policies and resources that folks in these areas should be aware of. At the same time, as Gonen explains, “It wasn’t just “Hey let’s come in and tell you a bunch of things”” (Gonen 2017). Rather, according to Gonen, “It was supposed to be kind of a listening tour. You know we all know what it’s like being LGBT out here and we sometimes heard things that we didn’t necessarily expect” (Gonen 2017).

The outreach efforts at Lambda also impact their case selection. Beverly Tillery gave an example of when Lambda wanted to “put a stake in the ground” for criminal justice issues. 45 The education department in turn conducted a national survey which brought in not only new and compelling data but formed the basis of “good storytelling” which the department publicized. As a result, when Tillery left, Lambda was taking a case of a transgender woman incarcerated in a male prison in Texas who had suffered extensive harassment, threats, was physically assaulted, and placed in solitary confinement. Tillery opined that she did not know if that case would have been possible if the education work had not been done first because it educated the organization about need.

**Autonomy of Staff**

To what degree can those who work on education influence their own agenda? At both impact organizations and legal providers, when education tactics were deployed was largely contingent on litigation. However, other concerns might influence when, and in what forms education work is conducted.

For direct service programs, limits to resources can inspire educational work. For example, EAP lawyers frequently helped transgender people with identity document changes. To free up

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45 This is not an exact quotation due to a recorder malfunction. See more detail at footnote 40.
resources (staff time), EAP started offering how-to documents so that individuals who could do it on their own could do so, freeing up time to help those who could not. Carpenter explained:

we knew that [for] anybody who has limited English proficiency, limited literacy skills, bad prior interactions with any kind of legal institution, [they’re] not going to be equipped necessarily to jump through these bureaucratic hoops by themselves […] The idea was that we would help those people do it and pay more attention and time to the people who really just weren’t equipped to do it alone. (Carpenter 2016a)

Among the two organizations that have public education departments, there has always been strong coordination between the legal and public education staff. There are no separate agendas. Perkins, Education Director at Lambda in the early 1990s, described the coordination as “totally intimate” (Perkins 2017) and chiefly by the litigation. Wolfson explained: “the public education was an instrument of fulfilling [the legal] agenda […] maximizing our chances of winning a case, maximizing our chances of holding that victory, and making it part of the lived experiences” (Wolfson 2016).

However, autonomy has grown. Wolfson explains again: “the execution of the public education department, the kinds of programs they might have come up with, or the ideas they were kicking around in their team about let’s do this, let’s do that, those might be constrained by the lawyers, but they weren’t totally run by the lawyers” (Wolfson 2016). Janson Wu, executive director of GLAD, notes: “at times, we’ll do independent public persuasion projects that may not be necessarily related to litigation” however, these were “much rarer” (Wu 2017). Work not tied to litigation may be tied to a policy goal or know-your-rights work. Wu says that part of GLAD’s mission is to educate the community and, in that regard, the “public affairs and education department will on their own kind of dictate a lot of the priorities in term of the outreach that they do and the communities that they want to reach” (Wu 2017).
When it comes to setting *organizational* priorities, education staff are also included. Today, the legal staff as well as the education staff at Lambda are part of an annual management meeting in which program priorities are set for the upcoming year (Davidson 2016). At GLAD, the public affairs and education director was also part of the “management team” that would make strategic decisions and set program priorities (Cunningham 2017).

*Summarizing the Feedback Process*

Interviewees’ explanations of education work and its impact on case selection and organizational priorities can be thought of as two causal pathways. The first is that organizations do work in communities to spread knowledge about legal developments; in turn they hear about what needs are not being met, and that information can drive changes in the organization. Another pathway is when organization work in new areas. Through call centers or public forums, they hear back from constituents, including people who were not familiar with the organization, and those concerns are heard by lawyers who might then might make new choices about case selection.

*Development and Maintenance*

Public education is also important to the financial and membership side of organizational maintenance, a process Wilson (1974, 30) described as “securing essential contributions of effort and resources from members, managing an effective system of communications, and helping formulate purposes”. Education efforts can drive donations to the organization among its members and donors, allowing organizations to continue and even expand their work. The data and observations from call centers, outreach efforts, and surveys are often used to bring resources (donations, grants) to the organization.

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46 This does not include case selection. Case selection is decided only by lawyers in the organization. No education, administrative, development, or board input is made in individual case selection. Programing decisions, which can guide the lawyers in what cases they select, are influenced by education staff, legal staff, and boards.
Call centers have also been used to leverage greater resources for the organizations. Amara Chaudhry-Kravitz, former legal director of EAP and director of legal services at Mazzoni echoes these points: “You're telling your individual story hoping that they care. That's why again, my legal department reports had to look the way they did. The foundations really want to hear about data intake, trends and the private donors probably want to hear sympathetic stories” (Chaudhry-Kravitz 2016). Stefan Johnson of Lambda and Ming Wong of NCLR, both the call center directors at their respective organizations, spoke specifically about how the call center data is used to educate funders about the continuing needs of the community and to writing grant application.

Call centers help the organization keep their doors open (financially speaking) and fund work beyond what the donors want to necessarily see. In this maintenance-style behavior, the organization is educating donors about what is important – what they are hearing about – not just about highly visible issues.

The publication of Annual Reports and newsletters is not only a way to communicate with members but also to encourage their continual financial support. Kevin Cathcart explains: “Part of this actually also serves the development purpose which is you got to tell people what you’re doing so they give you money, so you get to keep doing it and hopefully do more. We've grown steadily throughout the years and telling the story is an important part of that” (Cathcart 2016a).

Outreach strategies, by building visibility and name-recognition, not just among community members but also the public, can create opportunity for new membership and donations. Indeed, the big three impact organizations (GLAD, LLDEF, and NCLR) saw spikes in revenues in the years following Goodridge v. Dept. of Health (2003) and increased visibility of marriage equality in the media. Even though only one of those organizations actually brought that
case (GLAD), the visibility of their own efforts to achieve marriage equality through outreach and public persuasion may have benefited their resource development.

And the information from education, specifically outreach, can be vital to securing funding from foundations. Lee Carpenter explained how legal providers would use education when applying for grants: “… that talk about not doing direct legal services for the first six months of the project, that talk about only doing education and outreach. Because the idea is “how am I going to get clients if nobody knows I’m here” (Carpenter 2016a).

**Discussion and Conclusion**

In the process of trying to understand what public education is and how it relates to agenda setting, this chapter revealed an entirely different story about organizational behavior. This was a story of how lawyer-led organizations have come to recognize and manage the limits of judicial pathways for social and legal change. Education helps lawyers reach their goals through four functions: priming a pathway to successful litigation, controlling for backlash and counter-mobilization, amplifying the power litigation has a leveraging tool, and supporting change directly through awareness raising and training.

Further, educational tactics have an important stake in agenda setting. Educational staffers have a degree of autonomy on their own, influenced by not just what it is happening with litigation, but how they are perceiving need. That perception of need often comes from the very educational tactics organizations pursue. Thus, there is a feedback effect when organizations conduct educational work for the community, hear information about what the community needs, and then relay that back to other staff.

The incorporation of educational efforts into the tactical repertoire of legal organizations began in the 1980s when most efforts focused on engaging the media around on-going cases, creating publications, and participating in public forums. This was done primarily by lawyers, part-
time staff, and administrative assistants. Given the scarce resources available at the time, organizations were limited in what they could dedicate to these tactics.

Wins and losses in marriage equality were important sparks to shifting the role of, and energy behind, public education. The first shift occurred in the backlash to *Baehr* (1993) when counter-mobilizing forces used political processes to overcome a judicial win (Klarman 1994, 2013; Rosenberg 2008). Due in part to this loss, lawyers in these organizations recognized the gap between judicial rulings and realized rights. Capitalizing on this defeat as legal organizations have before (Boutcher 2005; NeJaime 2011), lawyers sought to expand public education work to overcome the trap of judicial rulings being blocked by political counter-mobilization and resistance to implementation.

But to do more education work, organizations needed more resources. An answer to that need was a second shift that developed because of technological changes and marriage equality. During the early to mid-2000s, the internet and new digital platforms created a way to reach the public and community members. Meanwhile, victories and collaborations around marriage equality in the mid-2000s (especially *Goodridge v. Dept. of Health*) demonstrated what was possible by coordinating policy, education, and litigation efforts (see Cummings and NeJaime 2010). Marriage brought visibility and excitement and with that, monetary resources that expanded public education work. In addition, critical lawyers during this era advocated for organizations to elevate the voice of community members in their decision-making processes (Arkles, Gehi, and Redfield 2010; Spade 2015; Vaid 1995a). While interviewees did not cite this as specifically influential to public education tactics, community members’ voices were heard by organizations and it is hard to imagine that they did not play some role in the development of outreach work.
Just as lawyers in other movements (McCann 1994; McCann and Silverstein 1998), the lawyers and staff in this study had goals beyond the courtroom. Interviewees repeated without prompting the “hearts and minds” goal of education. According to interviews, changing attitudes and opinions of LGBTQ people and the harms they are under is a necessary condition to achieve not only victory in court, but also to see those victories realized on the ground. This comports with what some legal scholars have said about culture shifts being necessary to make legal changes possible (Guinier and Torres 2014).

Lawyers spoke as if education could prime a pathway to success in court by shaping the “court of public opinion”. In turn, these public campaigns could reach judges and shift their understanding of an issue or apply pressure to them. Staff also believe that education mitigates backlash from street-level bureaucrats or organized interests. Even in a loss, a victory can be claimed from changing public opinion. Thus, as evidenced in the history, education work has helped redefine how to achieve “victory.”

Persuasion and outreach also aid in the maintenance of organizations. Outreach to communities, media relations, and donor education keep resources and clients coming to the organization. Call center data can be used to educate the community, major donors, grantees, and foundations. In turn, the expression of community need found in this data can drive resources: volunteers, donations, grants, and fellowships to the organization. Education keeps community members, both organizational members and the constituency, apprised of the organization’s work. It reaches people previously unaware of the organization and thus may lead to new clients.

Finally, outreach work helps organizations set priorities and education staffers have a degree of autonomy over their own work. Call centers keep the organization apprised of what concerns there are from constituents who know the organization. Outreach efforts (such as
workshops, forums, and collaborations) update cause lawyering organizations on needs from their broader target constituency. In turn, organizational staff set new priorities or devise/alter strategies to best meet the needs of the community within other strategic concerns (i.e. legal opportunity; available resources; staff expertise).
Chapter Four | A Collaborative Effort in Policy

In continuing with the framework of multidimensional advocacy, this chapter investigates what policy work means in advancing organizational goals, how policy work complements litigation, and how organizations decide what issues to prioritize for policy work. Policy work is defined as work with legislatures or administrative agencies, at the state or federal level, and it often involves work in lobbying, monitoring federal agencies, drafting legislation, and policy analysis (Aron 1989, 88–90; Chen and Cummings 2012, 259–60).

Surveys show that some legal organizations dedicate quite a bit of attention to policy (Aron 1989, 32). Additionally, research into marriage equality efforts in California show that policy work can be used strategically alongside litigation and public education (Cummings and NeJaime 2010). According to Aron (1989, 32), from 1983 to 1984 three-quarters of PILOs in one study engaged in non-litigious activities, including legislative work. Nearly four-fifths of those organizations lobbied Congress and/or state legislatures. Further, the LGBTQ movement has a history of pursuing legislative strategies (Andersen 2006; Stoddard 1997; Zuber 2017). Yet, as the Introduction explained, there is literature that suggests we should not often expect to see the integration of policy work because lawyers (according to these arguments) tend to be isolated to litigation, given their training and belief in the power of courts to create change (Komesar and Weisbrod 1978; Rosenberg 2005; Scheingold 1974).

Unfortunately, there is no way of measuring policy work in the budgets of these organizations. Organizations also do not keep complete lists of policy projects in annual reviews or newsletters, though they do contain highlights. Thus, we cannot quantify the amount of policy work being done.
However, interviews in this study confirm the integral nature of policy work to legal strategies. Interviews also go further, describing the nuances of what policy work entails. This often includes policy is often state-focused (as opposed to federal) and in collaboration with state and local groups. These collaborations are noteworthy considering what we would expect from literature that indicates lawyers are isolated from communities and shape the direction of movements (Bell 1976; Handler 1978; Levitsky 2006; Leachman 2014).

Interviews reveal that agenda setting in policy work is not just about what is happening with litigation. That is, policy work is not solely dependent on what cases organizations are bringing at any moment or intending to bring in the near future. Neither are policy agendas mostly about what can be funded or what donors encourage, as one might expect (Komesar and Weisbrod 1978), though this can be a constraining factor. The policy agendas of these organizations and how policy work is conducted are heavily influenced by perceptions of opportunity and community need.

Finally, we can distinguish between internal organizational dynamics driving policy work (i.e. strategic beliefs, resources) versus the recognition of external opportunities or dangers that provoke policy intervention. Internally, by showing that lawyers are fully invested strategically in using policy work alongside and without litigation, this chapter serves as another strike against the “myth of rights.” What is surprising is not that organizations participate in public policy, but that they feel it can be preferable to litigation.

The external influence on policy work, namely the perception of opportunities to win (achieve a policy goal) confirms much of what we would expect given literature on opportunity structures and movement success (Andersen 2006; McAdam 1982). However, according to Zuber (2017, 14–16), much of opportunity structure scholarship focuses on the federal level and national
politics, at the expense of missing opportunity windows at the state and local level. Zuber (2017) found that lesbian and gay rights organizations pursued opportunities at the local level when federal policy windows closed. This chapter extends that finding. That is, legal organizations (both impact and direct legal services) are actively involved in policy work at the state and local level, having a hand in bill writing, drafting ordinances, and in the administrative interpretation of law. Thus, this chapter shows organizations finding opportunities in different venues for policy work. Certainly, organizations will dedicate more when and where they see greater opportunity, but lack of opportunity in one space, for instance at the federal level, does not foreclose work on a policy issue.

A History of Policy Work

Public policy work by cause lawyers entails anything from lobbying, monitoring federal agencies, drafting legislation, and policy analysis (Aron 1989, 88–90; Chen and Cummings 2012, 259–60). Policy work aims to amend, clarify, or enforce policy through methods that do not involve litigation. While some lawyering scholarship exclusively focuses on courts, more recent work has observed the use of policy work by cause lawyers to achieve movement and organizational goals.

However, most of the scholarship on law and social movements is in that first camp and focuses “much more on litigation than on legislation in relation to movements” (Gordon 2006). A look at some of the field’s canonical works (McCann 1994; Rosenberg 2008; Scheingold 1974) and a reading of literature reviews (McCann 2006) will confirm this. Additionally, as this project has already explained, some have argued that we are unlikely to see lawyers engage in non-litigation work (Komesar and Weisbrod 1978; Rosenberg 2005).
Much of the work in the second camp, the ones that have observed policy work, show elements of community engagement wrapped up in policy approaches. For example, Ziv (2001) examined lawyers working on behalf of clients with disabilities, concluding that legislative-lawyering opened up the cause lawyers to multiple roles: “partly a community organizer, a legal analyst, a drafter, a lobbyist, and a statesperson” (Ziv 2001, 237). Erskine and Marblestone (2006) documented the work of cause lawyers advocating for living wage ordinances (LWOs). They found that lawyers took a back seat to non-lawyer activists and assisted in campaigns where “legislation, not litigation, was the primary legal tool” (Erskine and Marblestone 2006, 257). Part of the strategy was the belief that “even if LWOs are challenged in court after their initial enactment, litigation is a reaction to and a defense of the ordinance as opposed to a proactive effort to create new rights or enforce existing rules” (Erskine and Marblestone 2006, 237). On the other hand, Gordon (2006) found that legislative victories for the United Farm Workers were just as vulnerable to subversion as judicial victories.

Policy work has also been popular among cause lawyers in the LGBTQ movement. Activists and movement leaders were disheartened by early court losses in Boutilier v. INS (1967), Doe v. Commonwealth’s Attorney (1975), and Bowers v. Hardwick (1986) (Andersen 2006; Stein 2010; Zuber 2017). While many considered the Constitution a refuge for gay and lesbian rights, these losses spurred a reconsideration of judicial tactics. State sodomy laws were being overturned legislatively as early as 1961 and through the 1990s. Beginning in the early 1970s, cities like New York, Washington D.C., Minneapolis, and Portland were creating anti-discrimination ordinances for housing and employment. While federal courts seemed to close one opportunity, lawyers on behalf of LGBTQ rights were using state and local policy to advance their causes (Andersen 2006; Zuber 2017).
Former Lambda Legal executive director Thomas Stoddard argued that, compared to litigation (the primary tactic of his former organization), “legislative reform makes real change… more probable, since it is much more likely than other forms of lawmaking to engage the attention of the public” (Stoddard 1997, 982). Indeed, in studying the work of LGBTQ organizations (legal and non-legal) in the struggle for marriage equality in California, Cummings and NeJaime (2010, 1312) found that “LGBT movement lawyers prioritized a nonlitigation strategy over litigation, and conceptualized litigation as a tactic that succeeds only when it works in conjunction with other techniques – specifically, legislative advocacy and public education.”

The aim of this chapter is to contribute to this more recent scholarship by exploring the policy work of LGBTQ legal advocates and asking how they conceptualize policy work’s role in achieving organizational goals and how these efforts happen alongside litigation.

**Defining Policy Work**

Based on this literature, policy work can be divided into three main components: lobbying, drafting legislation, and administrative agency work. All three components are present in the work expressed by interviewees and in the publications of organizations. Below, each of these areas is briefly described. Further explanations follow with examples from interviews and newsletter analysis.

*Lobbying*

Lobbying activity constitutes supporting or opposing the passage of “legislation” (Kindell and Reilly 1997). Lobbying happens when actors try to support or oppose policy by directly contacting legislators (direct lobbying), or by encouraging people outside the organization to contact legislators (grassroots lobbying). As non-profits filing as 501(c)(3)s, the legal organizations in this study are prohibited by the Internal Revenue Service (IRS) from engaging in
“lobbying activity” that would constitute a “substantial part” of their activities. This vague phrasing has been interpreted by lawyers in this study to mean anywhere from ten to fifteen percent of total expenditures (Carpenter 2016a; Cathcart 2016a). While other nonprofits often create separate lobbying arms to do this work, the organizations in this study have not. That said, lawyers do engage in lobbying, including the recent push to pass the Employment Nondiscrimination Act through the U.S. Congress.

**Drafting Legislation**

Many lawyers working for social movements, whether working for organizations or independently collaborating, will often draft language for bills and amendments to existing laws and local ordinances. These are then handed off to lawmakers, at the federal, state, and local level. This work is a natural extension of litigation in many cases. Aron (1989, 95) points out, a victory in court could be in danger of legislative backlash (see Hawaii after a marriage victory) but a loss in court could encourage legislatures to address problems. Legislation, as described below, also offers an alternative path when a judicial pathway is closed or unwelcoming. Finally, legislation can provide the tools necessary for lawyers to succeed in court when making arguments about the interpretation of the law.

**Administrative Agency Work**

While the IRS limits lobbying activities, these regulations do not include “an attempt to influence administrative rulemaking or other actions … and local actions by special bodies such as zoning or school boards” (Kindell and Reilly 1997). Thus, it very common for cause lawyers to be monitoring the activities of federal and state administrative agencies to track “where policy decisions are made” and to stay “in close communication with lawyers and citizen groups concerned about agency policies” (Aron 1989, 95). Lawyers will commonly use the public
comment period in the rule-making process to submit opinions and generate pressure on agencies (Chen and Cummings 2012, 260). Agencies may also solicit advice from lawyers representing certain interests and groups as they create rules.

**A Tactic to Fill in the Gaps**

Ultimately, the legal organizations in this study understand, as Mary Bonauto explained during a community forum, that “litigation is one tool, and it must be wielded alongside legislative lawyering and public education” (Bonauto 2016, 137). Interviewee Patrick Paschall of Free State Legal put it: “we require both an emphasis on direct legal services and an emphasis on impact litigation on the litigation side and these can’t be done effectively without policy advocates also pushing in the legislatures and in the regulatory policy spheres” (Paschall and McMahon DePalma 2016).

Interviewees were careful to note the 501(C)(3) status of their organizations and the limits to lobbying. A glance at the financial statements of these organizations reveals little about policy work though they do record expenditures on lobbying. Those reported expenditures are often slim, a few thousand dollars here and there contained within budgets that are well over a million dollars. However, interviewees reported a growth in policy work, not lobbying specifically, during their time at their organizations (Buseck 2016; Kendell 2016; Park 2016b; Pizer 2017).

**Growth of Policy Work**

Growth in policy work was sometimes out of necessity, whether in changes to community need or based on failures in other venues. Take for example Equality Advocates Pennsylvania (EAP). Andrew Park, founder and former executive director of EAP recalls that the organization began with little involvement in the state capital but over time, community leaders sought them out for help as legal experts (Park 2016b). For instance, EAP worked with the Philadelphia City
Council around domestic partnership, coordinating and participating in grassroots lobbying and mobilization efforts.

EAP continued to move away from litigation over time, specifically in direct legal services, as more lawyers became available to LGBTQ clients and as other organizations began taking on LGBTQ cases (Park 2016b; Sobel 2016). Park: “Lots of lawyers were advertising in the papers. The other groups were taking LGBT cases. More people, not poor people, but services for LGBT people became the same as services for everybody else… The legal industry knew how to handle these cases” (Park 2016b). Thus, as need shifted, EAP’s work began to shift as well and the organization hired an executive director, Stacey Sobel, with a background in lobbying.

However, this adjustment, ostensibly based on community need, could be recast as an organizational survival strategy. With less need for certain services, one could argue what the organization did was adjust their work to keep the organization open. However, the two theories are not mutually exclusive. Both desires to adjust to need and to keep the organization open could be based in a desire to work toward broader goals.

Part of the growth of policy work is, according to interviewees, due to the increased presence of laws compared to thirty years ago. This means more opportunity to interact with administrators and rulemaking. While this also might mean more opportunity to litigate, Kevin Cathcart noted: “…the policy work has grown a lot in recent years. In part because it’s opportunistic… there is work that we can do now around enforcement or regulations of things, that twenty years ago the agencies weren’t there to work with us” (Cathcart 2016a).

Others would place the marker of growth even earlier. Scholars have noted developments around local city ordinances and state laws in the 1980s (Andersen 2006; Zuber 2017). Jennifer Pizer of Lambda pointed a finger at the work of Thomas Stoddard in New York City during the
1980s (Pizer 2017). Not only was Stoddard coming to Lambda as an experienced legislative lawyer from the New York Civil Liberties Union, but Lambda was expanding its work in HIV/AIDS because of the significant need for anti-discrimination protections in employment, housing, and health care (Pizer 2017). According to Pizer, growth continued to occur in the 1990s, resulting in state level work that had “just enormous impact” on policy and lives (Pizer 2017). Part of that growth was from “internal advocacy” within the organization (Lambda). Some staff persuaded leadership that there was much greater opportunity to advance policy due to receptive state legislatures, especially on the west coast.

Why Policy Work

The impetus behind much of the policy work is simple: lawyers do not believe every goal is best reached through litigation. Often, perhaps surprisingly, the use of policy is an effort to avoid litigation. As Kate Kendell put it, “if you get the federal government to make statements that govern all private schools that get federal funding or public schools which get federal funding, you don’t have to litigate in every single state” (Kendell 2016). A Lambda Legal Annual Report put it slightly different way:

Courts sometimes can’t or won’t take on the discrimination that too often tarnishes our lives. So, Lambda Legal works directly with lawmakers, policymakers and businesses to win fairness for LGBT people and for those with HIV or AIDS. We draft legislation, fight back when the right-wing attacks civil rights laws, and persuade corporations and organizations to treat their employees and clients equally. (Lambda Legal Staff 2002, 2)

Within multi-state litigation strategies, there could also be enormous costs. Pizer explained that “we could be litigating, sometimes for a decade, to address a problem. And we might win… we do have a very good track record… but that’s a decade of intensive work… that’s an enormous effort that has uncertainty built into it” (Pizer 2017).

However, both Pizer and Gary Buseck of GLAD pointed out that policy work can also drain resources. Buseck noted: “litigation can get a victory quicker than policy work (it could take
years) and it’s harder to raise funds off of years of work with no victory… to invest six or seven years and significant resources in a bill that you know that is going to take six or seven years and because it is kind of controversial you have a good sense that the legislature doesn’t really want it” (Buseck 2016).

Both Pizer and Buseck separately agreed that the two strategies were costly and had drawbacks. This illustrates the nuanced, strategic thinking of cause lawyers that moves beyond litigation. Both see costs to each tactic and have observed that in some environments, one can be better than the other. According to interviews, impact litigation has proven difficult and unsuccessful in certain areas. Buseck noted for example that “there is clearly the realization that there are things we want to do in the youth area that are different and that if you are going to deal with foster care and juvenile justice you may have to work on policy rather than litigation” (Buseck 2016).

At least one legal organization in this study did not identify using the kinds of policy work that impact organizations utilize. Lee Strock, executive director of the Peter Cicchino Youth Project (PCYP), part of the Urban Justice Center in New York City, described an organization focused on litigation and direct legal services. By the latter, Strock meant that lawyers act as advocates on behalf of clients, often homeless LGBTQ youth, in matters involving safe shelter access, health care access, and assistance with immigration documents. Strock commented: “I would say that 90 to 95% of our work is the direct provision of legal services so that’s [policy] not really the focus of what we do. We don’t have a lobbyist. We don’t have a communications person. We’re not in the position that some place like Lambda Legal is to do big impact litigation or policy work” (Strock 2016).
Part of the reason may be resources (see below) and the other is about perception of need. Some direct legal service providers (as explained elsewhere in this work), argue that they are fulfilling a need by doing direct services that is not met by large impact litigation cases. They are taking on people who need help today, not three to seven years after a case has reached the Supreme Court. This is not to say that these lawyers do not believe there is a need for impact litigation. A few stated quite clearly that there needs to be a balance between both strategies. They agreed that both are part of achieving change in the same ecosystem and their particular role as service providers is one part of that balanced approach.

Returning to the PCYP, while Strock does not identify the organization as participating in traditionally-recognized policy work, like lobbying, the organization does policy work as defined in this project. The difference is that PCYP is more focused on a client service orientation of policy work. For example, they might intervene on behalf of a client with an administrative agency. They also interact with agencies in training, as they did with the Administration for Children’s Services on LGBTQ non-discrimination policies (Strock 2016). Given what we know about direct legal services and their focus on individual clients, this is an unsurprising finding. It is also similar to the work of other providers in this study such as the Mazzoni Center’s legal services.

Work with Agencies

Much, if not most, of the policy work of these legal organizations is agency based. Whether it is dealing with the Social Security Administration, Housing and Urban and Development, state health departments, or local school boards, lawyers for these organizations are actively engaged with those responsible for developing rules and implementing policy.

Perhaps the clearest illustration of agency work stated during interviews was NCLR’s advocacy with the federal department of Housing and Urban Development (Gonen 2017; Kendall
Between 2010 and 2012, NCLR worked with HUD to develop its Equal Access Rule. This rule expanded the definition of housing discrimination to include discrimination based on sexual orientation and gender identity. NCLR participated in roundtables and conferences with HUD staff and was the lead drafter on public comments (Rupert 2011).

Then Policy Director Maya Rupert and NCLR staffers encouraged amendments to the rule that would ensure protections based on gender identity for homeless shelters (Kendell 2016; Rupert 2012). According to Kendell, they worked on educating senior staff and provided them with specific examples of why the proposed amendments were necessary. This included training senior HUD staff on domestic violence in the LGBTQ community and issues affecting transgender people in shelters (NCLR Staff 2011).

As Kendell described it, this work was a “little bit below the radar because it’s not particularly sexy” but it represents “enormously important” work that “improves the lives of hundreds of thousands of particularly poor people” (Kendell 2016). It also represents much of the kind of work that NCLR and other legal organizations engage in. Not long after its creation, HUD enforced this rule against Bank of America. Bank of America was accused of denying a Fair Housing Administration-insured mortgage loan to an eligible Florida lesbian couple because they were not married. HUD won a settlement which included a fine and an agreement from Bank of America to re-train its employees on the Equal Access Rule (Rupert 2013).

**Educating Lawmakers**

Much policy work does not revolve around promoting specific bills but rather, educating lawmakers and agency staff at different levels about the harms LGBTQ people are under. Organizational newsletters are peppered with examples. In 2011, NCLR reported that they were

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47 To my knowledge, NCLR was not part of bringing this suit.
invited to host a brown bag lunch presentation for the Department of Justice. The purpose was to educate “key staff” about the prevalence of violence against transgender women and girls (Rupert 2011). In the same year, NCLR partnered with the National Women’s Law Center and the Law Students for Reproductive Justice to “educate policy makers” about reproductive rights issues and the LGBTQ community (NCLR Staff 2011).

Part of the education process is also providing testimony to legislators. Lawyers are often called to provide expert testimony before state and federal committees. For example, in 2015, GLAD had to defend against backlash in Maine following on-going litigation in Doe v. Clenchy. In this case, GLAD challenged a school’s refusal to allow a transgender girl to use the bathroom that conformed to her gender identity. While this case was being appealed, LD 1046 was introduced into the state legislature. This bill would have allowed public accommodations facilities designed around a specific biological sex to be restricted to the related gender (VoteSmart 2011). GLAD Transgender Rights Project lawyer Jennifer Levi provided expert testimony during the legislative hearings on the bill (Levi 2012), though it is unlikely this all that GLAD did. The bill was ultimately defeated in a Republican controlled legislature. GLAD then continued to litigate the case through 2014 when they finally succeeded in Maine’s Supreme Court.

Bill and Policy Drafting

Legal organizations in collaboration with other groups might develop bill language and then lobby legislatures (state or federal) to introduce it. More commonly, they will sponsor legislation written by legislative staff that had the organization’s input. For example, Geoff Kors of NCLR recalls working on California Assembly Bill 1266, a bill on transgender student access to facilities and programs. This bill was signed into law by Governor Brown in 2013. Kors notes:

We're talking sports programs and we're talking bathrooms and locker rooms, and everything that goes with it. We knew that would also likely result in litigation, as well as
a possible ballot measure. You're crafting a bill in a way that is going to withstand legal challenge. Also, doing it in a way that allows education to the public about what the harm is and what the reality of this legislation will mean if it passes so you can build support for the bill and get it passed and signed. (Kors 2016)

Here we can see the multitude of factors at play in what these organizations are doing. Bills might be drafted in collaboration with other non-legal organizations, in conjunction with legislative staff, and with consideration of the political environment.

Another example is when the Philadelphia City Council sought to create a non-discrimination law. According to Barrett Marshall of Mazzoni Legal Services, “they were sending us drafts of the bill” and in meetings “literally sending texts back and forth” with Mazzoni Legal Service’s director (Marshall 2016). David Rosenbloom, the director at the time, “was pointing out places where the language was too narrow or too broad or where they might get themselves into trouble or where they needed to be careful of federal law” (Marshall 2016). While it is unclear exactly how often organizations, impact or legal providers, are participating in this kind of work, it is not uncommon.

Collaborating and State Focused

Based on interviews and analysis of newsletters, working in collaboration with other organizations is not just common in policy work, it is integral to the tools of policy work discussed above. From research to bill drafting, the lawyers in these organizations are in constant communication with other organizations. For example, Pizer reports that a “collaborative team” worked together on a nondiscrimination bill in Pennsylvania. This team consisted of a lawyer from the ACLU, a lawyer from the Human Rights Campaign, and a lawyer from the National Center for Transgender Equality (Pizer 2017).

Organizations are not just working with other lawyers; they are often working closely with state and local movement groups. Legal organizations feel this is important because state groups
have the expertise and knowledge about on-the-ground situations. Pizer notes that when she returned to Lambda after a year at the Williams Institute of UCLA, she came back “in order to set up a policy program that was more formalized and specifically dedicated to helping the states” (Pizer 2017). Working with local groups also helps create legitimacy around the lawyer’s involvement. As Cathcart put it: “it’s important politically to have people on the ground who are part of the local or state legal communities because it sends a certain message that is not just ‘oh yea, Lambda Legal came from New York to do this’” (Cathcart 2016a).

In California, NCLR worked closely with the policy-focused Equality California to work on legislation banning conversion therapy (SB 1172 which became law in 2012). Kors, who worked for both organizations on this issue, recalls: “Equality California reached out to NCLR to work on the bill. NCLR had one of the first LGBT youth programs in the country among the legal groups. There was a partnership on that bill going forward that was really close throughout that process” (Kors 2016). But the work did not stop there. According to Kors, organizations in other states began reaching out, including New Jersey, wanting to push through changes in their own states. This ultimately inspired the creation of a distinct project within NCLR, #BornPerfect, which seeks to end conversion therapy practices across the United States.

**Multi-dimensional advocacy**

Putting this all together, we begin to see that lawyers’ behavior in tactical choices is a balancing act. There were iterations of statements like “we need statutes and litigation to enforce laws” (Pizer 2017) and “we need policy advocacy pushing while impact litigation is on-going” (Paschall and McMahon DePalma 2016). Lawyers believe that policy, education, and litigation feed off each other and offer opportunities when one tactic hits a closed window. Litigation can be used to “fill in the gaps” in the places where policy does not help (Sakimura 2016). Clear statutes
“remove doubt” about the interpretation of law and “effective litigation” enforces those laws (Pizer 2017). Public education can then be used to combat stereotypes in order shift support for legislation (see Chapter Three) or to educate lawmakers and agency actors (Gonen 2017).

How Policy Agendas are Decided

The literature, as explained in previous chapters, suggests that agendas of legal organizations may be guided by resources and opportunity. Indeed, when it comes to policy work, these variables tend to exercise influence. However, there are a few other factors that appear to wield just as much influence: collaboration and understanding community need. Resources are restrictive but not determinative of issue prioritization. In other words, some resources are often a necessary condition to commit to work in an area, but it is not sufficient.

The first guidepost in determining what policy projects are chosen and what issues are pursued, are the programmatic guidelines of the organization. This was the first thing that Jennifer Pizer, the Law & Policy Director of Lambda Legal mentioned:

There are broad programmatic guidelines that our Board sets, and they set the programmatic guidelines in close coordination with our CEO. And those are formulated by senior members of the organization working with the CEO who leads the effort, but with very significant input about what we see coming up, where we think we can advance, what we think the community is most going to need. (Pizer 2017)

Staff and Pecuniary Resources

“In an ideal world” Patrick Paschall of Free State Legal commented, “we’d have an army of lobbyists explain the real issues that LGBTQ people experience so that legislators understand that we’re not talking about academic issues here” (Paschall and McMahon DePalma 2016). Instead, organizations are sometimes restricted in what policy work they can do based on their organizational capacity. But that does not mean that organizations will always cease to pursue a given issue without staff experts. Based on their own agenda, legal organizations will determine
where resources go, including the expertise of people they hire. Thus, resources (pecuniary and skilled labor) may be constrictive but not necessarily determinative of policy agendas.

According to Julie Gonen (Policy Director of NCLR), what policy issues are worked on is based more on “capacity than anything else” (Gonen 2017). NCLR is staffed in way that they can work on “a pretty wide portfolio of issues” but “at the end of the day there's just only so many we can [do]” (Gonen 2017). Gonen explained that the idea of “capacity” means the number of staff, time, and “to some extent” the individual expertise of staff (Gonen 2017), a definition resembling resource mobilization theory (McCarthy and Zald 1977).

Thus, staff expertise can guide agendas. For example, when NCLR hired Gonen as their policy director, she was the former director of federal policy and advocacy at the Center for Reproductive Rights (NCLR Staff 2015). It makes sense then that NCLR has become involved in working on reproductive rights issues. There is an important counter to this. If an organization hires a person with a specific background (e.g. reproductive rights; marriage), that may indicate a choice by the organization to pursue that issue and thus the individual staffer has less autonomy than if the staffer chose an issue to work on themselves. However, since every staffer is going to come in with a multitude of experiences, expertise, and interests, it is difficult to show that specific intention of organizations in their hiring.

Regarding pecuniary resources, Suzanne Sobel of the former Equality Advocates Pennsylvania, acknowledged that “money did effect some of it [the agenda]” (Sobel 2016). According to Sobel:

Getting grants for legal work, getting grants for fellowships were just easier. It was easier to fund the legal work. Some people only wanted to give to legal… then there were other people who just really desperately wanted to have a junior HRC [Human Rights Campaign] and only cared about the legislation and being flashy. (Sobel 2016)
The added challenge, in looking for pecuniary resources for policy work, is finding grants that allow organizations to do work they want to do. Sobel: “part of what happens with a nonprofit, depending on your percentage of grant [and] individual donation dollars, is your grant money has to be spent on whatever it is you asked for … that has a big impact on what work you do” (Sobel 2016). Another anonymous long-time lawyer within the movement noted, when asked about how organizations decide between litigation and policy:

I think part of what makes this hard for the legal organizations is frankly we are used to doing and winning, telling people we won and say ‘fund us and help us keep winning.’ Then you look at organizations like HRC [Human Rights Campaign] perhaps, where not necessarily their fault, but you could say ‘what have you accomplished?’ Particular with HRC work on the federal level… who could accomplish anything in Congress?

The point is that “you could work on policy” but while “it is true litigation can take a while”, nowadays organizations can end up “with a lot of wins” with litigation as opposed to investing “significant resources” in legislation that is unlikely to succeed.

Additionally, as was the case with some direct service providers, resources are often hard to come by. For organizations like PCYP, a lack of resources may be part of the reason why they do not participate in as much policy work. On the other hand, other direct legal service providers also have fewer resources than impact organizations but are involved with lobbying, bill drafting, educating legislators, and coalition building around policies.

In sum, a lack of pecuniary resources can influence policy agendas within these legal organizations, especially direct service providers. Only the direct service providers mentioned issues with grants. This makes sense given the reliance these organizations have on grant funding as opposed to larger organizations that are sustained by greater member donations. Yet, resources are not solely determinative of agendas. Organizations, after all, will determine where resources go including what kind of people they hire (i.e. expertise in policy), based on their own agenda. Thus, we might view resources as constraining but not determinative of policy agendas.
Balancing Opportunities and Need

Legal organizations report considering community need in setting the agenda for policy work. However, there are some differences between the processes of determining policy priorities between types of organizations. For the direct service providers, policy work springs from what they see from their clients. Barrett Marshall of Mazzoni remarked: “our largest policy projects at this point all started out as individual cases. Someone had a problem and needed help… I think there is a kind of purity there that is really meaningful and that matters” (R. B. Marshall 2016). Amy Nelson of Whitman-Walker’s legal services also stated that their policy works comes straight out of direct client experience (Nelson 2016).

But for the large impact organizations, the amount of work and what kind of policy is being pushed is often a matter of balancing that need with opportunities. Gonen explained:

…when you have limited resources, spending those resources to try to drive co-sponsors on a bill that's going nowhere is not the best use of time. So that's when we mostly focused on agency policy because that's where we had receptivity. So, knowing when is a good time, I mean it's sort of a confluence of trying to be aware of the needs in the community and then matching that up with a receptive ear in an agency. (Gonen 2017)

Everyone who spoke about the policy agenda spoke about increasing work around receptive agencies and new executive (presidential or gubernatorial) administrations. Lambda and NCLR worked in California for years to pass bills with a receptive legislature, but it was not until Gray Davis became governor and began signing bills, that Lambda increased their state level policy work in California (Pizer 2017). Thus, at some point, organizations will contribute more to policy issues when there is a perception of an opportunity to win.

For example, nearly all executive directors and policy directors cited increased work with the Obama administration. One of the reasons that NCLR opened up an office in D.C. was that they felt they “were not taking full advantage of all the opportunities [they] had with this
administration, and particularly when it came to administrative agencies like Health and Human Services or Housing and Urban Development” (Kendell 2016). However, this also means that there is a perceived lack of receptivity from the current Trump administration. Gonen: “there was I think more room to drive the agenda ourselves whereas now, most of those opportunities are shut down and we’re more in a defensive posture” (Gonen 2017).

Sometimes, what issues get prioritized is serendipity and about finding those moment of opportunity. Pizer explained:

That's why all these coalition meetings and emails and just watching things move is really important because you find those moments where you realize that you find an important person, it may not be somebody super high up in an agency but somebody who is committed and knows how to get things done and you can match that up with a need... it's not a science, I think by any means. You just sort of watch for opportunities and sometimes it takes a while for anything to come to fruition. (Pizer 2017)

On the other hand, it is not all just waiting around for the next opportunity. As evidenced through the lobbying, education work, and collaborations, staffers working in the policy arena are constantly trying to carve out new paths for their goals. Gonen explained NCLR’s deeper move into the policy arena as: “we didn’t necessarily want to just wait until there was a confluence where we had to file a lawsuit… sometimes it’s better to be proactive and try to influence policy upfront” (Gonen 2017). Thus, organizations are looking to both take advantage of and structure opportunities themselves.

Collaboration

The policy agendas of legal organizations in this study are potentially influenced by the organizations they work with. There are limits to the influence of this work. Collaborating with other groups will probably not lead legal organizations to work on an issue that they are not already inclined to work on. However, the comments below suggest that collaborations can move issues forward into action. This is important because the literature says legal organizations working with
local groups may give direction but are not likely to take direction themselves from these same groups (Levitsky 2006).

In this study, lawyers instead imply that the relationship between legal organizations and non-legal groups is not unidirectional. Organizations like Lambda, NCLR, and GLAD do indeed provide strategies and advice for smaller, state and local organizations. However, lawyers also spoke as if there is often a give-and-take. Kors of NCLR explained: “To some degree some of that prioritizing happens with other groups. There is a weekly call on LGBT issues happening in the states with the national groups and the Equality Federation and others” (Kors 2016).

When it comes to state-specific work and what kinds of organizations may influence NCLR’s policy agenda, Kors notes: “Sometimes litigation groups, sometimes the more established political groups. But often it really is from the grassroots up. Often the strategy is from the political and legal groups, but I think the issues often get pushed up through the grassroots” (Kors 2016). This indicates that collaborating organizations are contributing to a general conception of community need to these legal organizations, thus potentially influencing their agenda setting process.

Litigation

How closely the policy work is done in coordination with litigation varies from organization to organization. When asked how policy agendas were set, Kate Kendell commented that the policy work focuses on the programmatic issues of the organization (family, youth, elder people, sports, asylum seekers, etc.) but also “what can we pursue that avoids having to litigate, because litigation is always a blunt instrument and it’s not very nuanced” (Kendell 2016). This statement is especially important, given the literature that indicates lawyers will likely favor litigation over other tactics.
Among the impact organizations, there is some separation between policy-centric lawyers and litigation-centric lawyers. When asked who sets the policy agenda, the litigation team or the policy team, Pizer of Lambda responded: “It’d be the policy team” (Pizer) and Gonen from NCLR commented that the policy team “work[s] pretty autonomously” (Gonen 2017). However, all of the lawyers, including Gonen and Pizer, were careful to note that there is overlap.

There is not always a clear line between lawyers working on policy and those working on litigation. Moreover, often times these teams need to interact to ensure cohesive strategies. Minter, NCLR’s Legal Director, commented that there is an “unbelievable” amount of communication between himself and the policy team, “dozens of email chains, two-to-three conference calls a week” (Minter 2016). Gonen agreed, noting she often works with Minter, asking: “hey what do you think?” about endorsing legislation or signing onto letters (Gonen 2017). Pizer gave an example:

if we’re dealing with, say, a proposal about transgender rights. I’m going to want to make sure that what we’re doing, what we’re recommending to state groups, is in harmony with what our Transgender Rights Project lawyers think is a good idea. Sometimes they do a bunch of policy work, but sometimes their time is consumed with litigation, and they don’t have capacity. (Pizer 2017)

While there is collaboration between the litigation arms and policy arms of the impact organizations, there is also a degree of autonomy. Policy decisions are often made independently of litigation, and sometimes done to avoid it. However, legal teams are consulted to ensure consistency and to seek advice. With direct legal service organizations, their litigation teams and the policy teams are the same. With often two or three lawyers, there are not the resources to create distinct teams. As Marshall (from Mazzoni) and Nelson (from Whitman Walker) were quoted as saying earlier, much of their policy work is determined from their case work. This does not mean
that policy choices are only influenced by on-going litigation, but rather that the harms lawyers see in these cases encourage them to find alternative policy routes.

Without data, it is difficult to say exactly how often litigation is affected by policy or vice versa, though both certainly occur. To explain this “synergy between litigation work” and “the public policy strategy” Jennifer Pizer of Lambda told the story of a 2003 same-sex adoption case. The narrative demonstrates that lawyers think about what tools are most likely to maximize their potential for victory when balancing litigation and policy work. What victory means is not just a legal win, but what the human impact is as well.

For two decades, California family courts issued second parent adoptions to lesbian couples without much political or legal pushback. Then in 2001, a biological parent filed to have her spouse’s parental rights removed, rights which were granted in two second parent adoptions. Part of the legal grounds for removal, the plaintiff argued, was that there was no legal basis for second parent adoptions in California. The San Diego appellate court agreed with the plaintiff which, according to Pizer, put “tens of thousands” of second parent adoptions by same-sex couples across California at legal risk.

Immediately there was a legislative response. Assemblywomen Carole Migden and Sheila Kuehl, both openly lesbian members of the California state legislature, brought forth a legislative proposal to make it explicit that same-sex couples could adopt without severing the rights of the initial parent, in essence making second parent adoption legal. According to Pizer, “there was very

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48 The case was Sharon S. v. Superior Court, 73 P.3d 554 (Cal. 2003)
49 According to a NCLR report: “A second parent adoption (also called a co-parent adoption) is a legal procedure that allows a same-sex parent, regardless of whether they have a legally recognized relationship to the other parent, to adopt her or his partner's biological or adoptive child without terminating the first parent’s legal status as a parent.” The report, “Adopt by LGBT Parents,” is available online at: http://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf
good reason to think it would probably pass” (Pizer 2017). However, Pizer along with lawyers at NCLR thought the legislation should wait.

The reason was that lawyers at both organizations were concerned about letting a dangerous court precedent stand. While legislation would certainly mean an immediate remedy for couples going forward, those thousands of previous adoptions would still be at risk “because we had this court of appeals decision casting serious doubt on their judgements” (Pizer 2017). Further, other states had similar laws to California’s and their courts, up to that point, had been reading them in the same way California had (Pizer 2017). Thus, letting the ruling stand would also endanger a huge number of adoptions across the country if courts followed this case as precedent.

Lawyers at both organizations were able to persuade the two legislators to step back so that they could appeal to the Supreme Court of California first, to try their hand at a judicial victory. Indeed, in 2003 they won that victory. Pizer reflected upon this experience:

We want to think about what’s best for these people that are in the litigation, what’s best for the community here in California, and what’s best for the community more broadly, and what are the options? And what’s the order in which we pursue things? Having the legislative option as a plan B was incredibly important, and then doing things in a particular order to maximize the potential for protecting more people was also really important. (Pizer 2017)

**Discussion and Conclusion**

This chapter has described the nature of policy work, what role it plays in reaching the goals of legal organization, and how policy agendas are determined. Three key lessons regarding these subjects emerge from interviewees with organizational staff.

First, policy work is a significant part of a multidimensional strategy to reach programmatic goals that cannot be reached by litigation alone. In fact, policy may be chosen at times because lawyers are trying to avoid litigation. The nature of policy work (bill drafting, agency work,
lobbying) presents many opportunities to support the goals of these legal organizations by providing: (a) a foundation on which to build legal casework, (b) an alternative to judicial pathways, or (c) a complementary mechanism that works alongside public education and litigation.

Second, in deciding what issues are pursued through policy work, there is a balancing act being played between opportunities (which could come in the form of a receptive agency or an eager state organization) and need. Resources may constrain some of the work that organizations do, but when these two factors dovetail, it appears that they guide the policy agenda.

Third, collaborating with grassroots organizations, political groups, and other non-legal organizations is an important part of policy work. Interviewees explained that they were constantly interacting with other groups in deciding what to do and when. Less substantiated but still worth noting is that collaborating with these groups may influence agenda setting of policy work because these groups may be informing lawyers and staff about community need and opportunities.

Thus, agenda setting of issues in policy work is a balancing act. Gonen of NCLR commented: “One of the things that’s sort of nice about NCLR is that we don’t have a rigid plan that says ‘in X time period we will work on these issues and only these issues and so you must adhere strictly to this plan’” (Gonen 2017). None of the organizations, as far as interviewees expressed to me, expressed such a rigid plan. Instead, what goes into deciding what policy issues are pursued is determined by a confluence of factors including collaboration with organizations (often state level), perceived opportunities, and a sense of community need. These choices are at times constrained by resources, especially among service providers. But most of the input cited by interviewees was about balancing the needs and goals of the organizations with opportunities presented by receptive audiences and willing partners.
Chapter Five | Art, not a Science: Determining Community Need

This chapter is the first to step outside the multidimensional framework and it focuses on an element that continually came up in previous chapters. I heard interviewees discuss it in choices to litigate, in choices to pursue educational strategies, and in choices to select policy work. That element is community need. My goal for this chapter is to dig into this element and into the degree to which the perception of community need is part of agenda setting in cause lawyering organizations. Because there is not a clear way to trace community need alone through decision-making, I instead consider the commitment of resources and thought that go into determining what need is. If organizations were not concerned about community need or were simply providing lip service to its importance, we would not expect to see staff actively trying to determine community need and relaying that information to the rest of the organization.

On the surface, this might seem like a strange question to ask. What is the purpose of a non-profit organizations working within a social movement, if not to serve their community? Chen and Cummings (2012, 143) suggest the target community of an organization is one of many factors that goes into negotiating, or contesting, a nonprofit legal organization’s agenda. But this begs the question, what part of the community is the organization serving?

As earlier chapters expanded upon, the isolated lawyering reading of literature tells us that organizations do not always prioritize items that are deemed important to subgroups within their constituency (Bell 1976; Strolovitch 2007). This is an often heard criticism within the LGBTQ movement in regards to legal and non-legal groups (Arkles, Gehi, and Redfield 2010; Carpenter 2014; Rubenstein 1997; Vaid 1995a; Willse and Spade 2005). Carpenter (2014) argues that this criticism is partly due to a lack of transparency and understanding of how organization set their priorities. To address this, Carpenter calls for direct legal service organizations to share their call
center data on community need with larger impact organizations and that these organizations should use that to set priorities.

Yet, with the critiques in hand, we do not really understand the all the ways in which organizations attempt to, if they do it all, understand the needs of their community. My observations in this study show that there are deliberate strategies for determining community need that require investment from the organizations. The findings of this chapter are significant because they demonstrate that cause lawyering organizations are more interested in and engaged with community needs than what the literature would suggest.

Both impact organizations and legal providers take specific steps to understand the needs of the community they serve and recognize this task as a part of their agenda setting process. These steps include aspects of public education work discussed in Chapter Three. Thus, the findings here augment those in Chapter Three that indicate education is both a tactic to create change and also a means of setting agendas: first, organizations educate communities so they can recognize a harm and make a claim; second, organizations hear from community members via their educational tactics and set agendas accordingly.

The four steps or processes that help determine community need are: (1) call centers, (2) outreach work (including community events and workshops), (3) community surveys, and (4) personal experiences of staff as part of the community. While interviewees spoke most often about call centers, an understanding of community need is developed by every staff person in an often organic process.\footnote{I do not consider “organic” as contradicting “deliberate”. As described below, staffers are aware and make plain that certain mechanisms are in place in part to learn from the community but how that information is relayed back does not always take the form of formal memos or reports which is why I call that process “organic.”} As Lambda Executive Director Cathcart explained, “it’s an art, not a science” (Cathcart 2016a).
Call Centers

Among all the answers I received from lawyers and other staff to “how do you determine community need?”, intake data (or communications made to organizations through “call centers”) was the most frequent and often the first answer (see Table 5.1). However, staff and leadership are also aware of problems that exist by solely relying on intakes (Buseck 2016; Carpenter 2016a; Cathcart 2016a), which I discuss further below.

Call centers manage all the communications coming into the organization from people with questions about legal advice. “Intakes” are phone calls, letters, and emails to organizations that could include lawyers looking for technical advice on a case, a lawyer or person looking for information, a person looking for legal advice, or a person looking for representation. For the most part, intakes are the latter: calls from constituents looking for legal advice, information, and representation. Each of the organizations has a call center (sometimes referred to as a “HelpLine” or “Help Desk”) staffed by either trained volunteers, law clerks, attorneys themselves, or all of the above. Both impact organizations and legal providers receive hundreds of calls each year and interviewees have stated, to vary degrees, that these intakes influence decision making in case selection and other approaches.

Intakes are tracked using computer software – whose sophistication has grown over time – which can turn out reports for analysis. This tracking is not perfect. Every answer from interviewees regarding intakes had the same warning: not every call is recorded and when a call is recorded, the issues or demographic information might not be entered. This could be due simply to software malfunction or staffers/volunteers forgetting to record certain information. There is

51 Interviewees also pointed out that intakes involve a lot of non-related calls such as “where are the best places to hang out in Boston?”
52 At NCLR, there was a period between 2010 and 2014 where their database was slow and sometimes malfunctioned.
also the challenge of how to record calls, specifically into issue categories. Some call center staffers are trained to select all the issues relevant to a call (Wong 2016) while other are trained to select one relevant legal issue at stake (R. B. Marshall 2016; Johnson 2016). This led to some methodological challenges in measuring call center data (see Appendix B).

**Table 5.1: Example of Answers Related to Effect of Intake Data**

<table>
<thead>
<tr>
<th>Name, position</th>
<th>Organization</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gary Buseck, Legal Director</td>
<td>Gay and Lesbian Advocates and Defenders</td>
<td>&quot;I would say one of things that has been great for GLAD and impact litigation, has been our hotline and GLAD Answers. It gives us a sense of what is going on the ground. A decent percent of impact cases came through the hotline. Our docket, for half of our history, has been built by the community and what opponents did to them.&quot;</td>
</tr>
<tr>
<td>Kevin Cathcart, Executive Director</td>
<td>Lambda Legal Defense and Education Fund</td>
<td>In response to how cases and projects are chosen: &quot;There’s a couple of things … One of them is what are we hearing from people about. What are the problems that are popping up again and again, and we have that computerized database for the intake? We can, as best as possible identify trends. It's different in different parts of the country. There's enormous differences between say the state of family law in the Mid-Atlantic states and the state of family law in the Deep South.&quot;</td>
</tr>
<tr>
<td>R. Barrett Marshall, Supervising Attorney</td>
<td>Legal Services and Public Policy, Mazzoni Center</td>
<td>&quot;[...] Because we were first and foremost a direct services office, our policy and our initiatives often spring out of those direct services, they spring from cases that we are dealing with in the office. I think it makes us unique in that we are really responding to the needs of the community very, very directly even with our policy initiatives. Our sort of largest policy projects, at this point, all started out as individual cases.”</td>
</tr>
<tr>
<td>Cathy Sakimura, Supervising Attorney, Family Law Director</td>
<td>National Center for Lesbian Rights</td>
<td>In response to whether intake data influences decision making: “Yes, absolutely, yea that does happen. We have generally had our attorney who oversees the helpline, does reports to the legal team on a regular basis about trends that he sees. New types of issues that are arising or something that seems particularly salient which certainly could impact our case choice decisions as well as we may decide to write a publication to do a training a particular topic if there are a lot of questions that are something that people can resolve on their own.</td>
</tr>
</tbody>
</table>

Reports will break down calls by these issue types, as well as demographics such as race, gender identity, religion, income, and geographically. By using intake data, organizations "can at
least come to the conclusion that there are a lot of people with [a] problem" (Carpenter 2014). At impact organizations, there are intake coordinators (always lawyers) charged with sharing this data with the rest of the staff and their respective board of directors. For instance, at NCLR the board is notified twice a year of what intakes are showing and staff hear about trends in weekly meetings which often solicit ideas and comments from staffers (Wong 2016).

This is not just a recent trend. Since at least the late 1980s and early 1990s, intake information has been used to determine priorities of the community. In the early 1990s, Lambda Legal’s newsletter “Lambda Update” contained an “Intake Corner” describing the calls from the community (Lambda Legal 1990). GLAD revamped their intake procedures in the 1994, feeling that the call center was “more than a way to screen cases; it was a public education tool” (GLAD 1994). This report also states that “even though we only take a fraction of the cases that we hear about, GLAD has a lot to offer people in the way of expertise, referrals and materials” (GLAD 1994).

Intake data is also useful for legal providers and they run their centers in much the same way as impact organizations. However, the data is not often used to determine what cases the provider will pursue because they will take most cases provided that certain criteria, including income level, are met.53 Intakes might be helpful in determining what services they offer or what legislative projects they might pursue.54

For example, Equality Advocates Pennsylvania started a youth based project that was “based on the number of people who call us with school bullying problems and with harassment or discriminatory treatment in schools” (Carpenter 2016a). Here, the organization first had to recognize that this problem fell within the scope of their work and that the organization had

53 See Chapter Two for selection criteria details.
54 This could potentially influence hires, though that would also require the resources to do so.
sufficient expertise and resources to do something about it. Thus, the claims of harm from the community, as communicated through the call center, influenced the agenda of the provider.

*Using Intakes to Communicate Need to Donors and Allies*

Foundations offering grants and fellowship positions, the media, and collaborating or sympathetic organizations are also looking for ways they can tell their readers, donors, or staff, ‘here is where the most need is.’ Intake data, as explained below, offers a simple empirical way to answer these questions. Service providers and impact organizations will provide call data to donors and allies in order to communicate need and harms.

Calls have also been used to leverage greater resources for legal providers. As resource mobilization theory suggests, resources for an organization include labor, not just capital (McCarthy and Zald 1977). Organizations will use descriptions of community need as represented by intake data to acquire more resources, either in grants that provide money or in fellowships that provide lawyers, to do the work represented in that data. For grant giving organizations and foundations who want to see hard data and prefer quantitative measurements to determine success of an investment, intake data is not only an accepted norm but a preferred one for donors.

Stacey Sobel, former Executive Director of Equality Advocates Pennsylvania (EAP) and former legal director of Service Members Legal Defense Network (SLDN), noted that EAP used their intake database to talk about the issues they were receiving when writing grants. Sobel: "because we had a database we could track what were the most common calls for assistance. We could say the number one calls for assistance is family related issues" (Sobel 2016). As Chapter Three discusses, call center information is used to educate funders about the continuing needs of the community, especially among transgender people, as concerns have elevated that many major funders following *Obergefell v. Hodes* (2015) have felt less a need to give to LGBTQ
organizations. Ming Wong of NCLR also stated that the data is used to write grants to show what issues are being brought up and from where in the country (Wong 2016).

Johnson of Lambda noted too that data is shared with organizations that are looking for information. The Gill Foundation, which is a major LGBTQ cause funder, was worried that many allies and LGBTQ people after *Obergefell* felt that the "battle" has been won. So when the Foundation wanted to publish material arguing that the struggle for full equality is far from over, they contacted Lambda for data and examples to make that point (Johnson 2016). Legislators, whether state or federal, will also call for information. Johnson recalled when the Employment Non Discrimination Act (ENDA) was being deliberated in Congress, staff from elected members would call to get examples and data on how discrimination was affecting LGBTQ people (Johnson 2016).

*Concerns of Intake Only Based Assessments*

There is near universal awareness about the pitfalls of relying *solely* on intake data to determine community need. Former Executive Director of Lambda Legal Kevin Cathcart believes that focusing too much on calls could limit the broad range of issues that an organization focuses on. What Cathcart means is that the subgroups within the LGBTQ community that are familiar with Lambda are calling Lambda. Other subgroups, perhaps those with less financial resources or fewer means of communicating with Lambda, may have needs that are not reflected in the callers that are familiar with Lambda. Gary Buseck of GLAD provides such an example below.

Instead, Cathcart believes that Lambda needs to continue working on a broad range of issues so that people come to the organization with different concerns. He warned that "if we get a reputation of only doing one thing, then that can become a self-fulfilling prophecy... It's a sort of a feedback loop, it can be very dangerous" (Cathcart 2016a). The danger Cathcart refers to is not
hearing the full gamut of community needs from groups in the community that are not familiar with Lambda or who otherwise decide not to reach out.

Leonore Carpenter, someone who has argued for combining and sharing direct service intake data with impact organizations, agreed. Carpenter:

There is sort of a problem you have to build into this method of issue prioritization, the self-fulfilling prophecy problem. If you decide you are going to have an employment law project, and then you start to tell everyone you have an employment law project... you have then created a situation in which people are going to call you with employment law problems. And then you are going to look at your statistics and feel very satisfied with yourself, that you have so many people calling you about these employment law problems, see you were right all along. So there is sort of that in-build problem of self-fulfilling prophecies. (Carpenter 2016a)

Others have mirrored these sentiments (Buseck 2016; Davis 2016; Spade 2016). Legal Director Gary Buseck of GLAD states that at the “two ends of life, elder and youth, there is a lot of things that keep them from being able to just tell us what is going on” (Buseck 2016). Here, there is a dual complication related to call centers. One, those that have recognized a harm are afraid to speak up and call. For example, a person in elderly care facility will be reluctant to complain about the people currently in charge of their care for fear of reprisal.

In this sense, lawyers interact in the naming, blaming, and claiming process of legal disputes (Felstiner, Abel, and Sarat 1981). Scholars have identified three stages in the cycle of injury to dispute: the injured party recognizes a harm (naming), they decide another party is responsible for that harm (blaming), and finally they ask the responsible party to make reparations for the injury (claiming). Here, lawyers are recognizing that they may be missing community members who are caught between the blaming and claiming stages.

The other problem is that some may recognize a harm, have assigned responsibility, but do not realize they have a potential legal claim. This again inserts these organizations in the naming-blaming-claiming process. Younger people especially may not realize that they have a potential
legal claim and may not be familiar with the resources to help them. Also, as in the first example, young injured parties might be reluctant to draw attention to themselves if their claims are against schools or parents because of a fear of reprisal.

Thus, organizations are cognizant of the limits to using intake data. Masen Davis answered the question of assessing community needs this way:

"I don't know that anybody's perfect at this but there are a few ways that happened at TLC. One was the intake data. Looking at where the trends were and who was contacting us and what were they contacting us for? We had to be a little careful about that though… sometimes it would be disproportionately white or you'd get a disproportionately number of trans people from one region or another because something was going on." (Davis 2016)

This is often why intakes are weighed against what is heard “on the street” (Cathcart 2016a) and why occasionally organizations will “do surveys to get more detail about what people are needing” (Davis 2016).

These concerns are not new. A 1994 GLAD Annual Report describes an intention to serve “communities we don’t serve now (communities of color, outside Mass., youth, Spanish speakers, deaf, etc..)” (GLAD 1994). This could mean that the author(s) felt that the call center was not accessible to these groups (i.e. did not have Spanish speaking staff or equipment for the deaf) or it could mean that these groups were not aware of GLAD’s services. It could also mean both. Later, GLAD – and other organizations – would address some of these issues by hiring Spanish speakers at their call center and by utilizing technology for the deaf. The significance is that staffers were conscious of the problem that call centers were not hearing from many people in their community and sought to correct that issue. This adds a degree of nuance to the critique that strategies made by lawyers are made in isolation from community members. This may be, but lawyers in this study show concern in how they determine community need and report that perceived need has significance in what they work on.
Finally, there is a difference between how many of these calls turn into cases between the impact organizations and the legal providers. In a given year at Lambda, fewer than ten of these calls might turn into an impact litigation case. While there are no available figures on how many calls to legal providers become cases, given their selection process (see Chapter Two), they are going to accept more of their calls as cases compared to impact organizations. However, while calls to an impact organization might not result in an impact case, they might result in the organization helping in some other way: writing a letter, connecting the client with a provider, or connecting the client with a lawyer. For example, a 2007 Lambda Annual Report explained how their Help Desk assists callers without getting involved in litigation. It states:

While we can only get involved in litigation for a small fraction of callers, we also do a significant amount of non-litigation advocacy for callers. In 2007, we offered assistance in a number of ways, including: writing an advocacy letter for a gender non-conforming lesbian kicked out of a day shelter in Georgia; helping a gay man resolve a probate dispute after his partner died; advising a transgender state employee who was considering transitioning on the job; and providing research and advice to a lawyer who contacted us regarding an HIV employment discrimination case he was handling. (Lambda Legal 2007)

In other words, lawyers can use call centers to buoy the claim of injuries by either taking the case themselves, or more likely with impact organizations, by helping injured parties find the resources needed to continue their dispute. Either way, these centers are used to both hear about, and respond to, community need. There was also no indication that different kinds of organizations, impact or legal providers, treated these calls in distinct ways.

Public Education: Outreach through Community Events and Workshops

Suzanne Goldberg, a staff attorney for Lambda Legal in the 1990s, noted to me that while intakes were always important, they “did not drive the decision-making. It was about participating in the community, going to conferences, where you can get a feel for what issues were pressing” (Goldberg 2016).
Goldberg’s point, which is shared by other interviewees, is that the sense of community-need often comes from interacting with potential clients in workshops or events, as well as meeting with service providers and legal staff at other organizations. When it comes to setting the agenda in public policy work, NCLR’s Geoff Kors notes that “most of it in my experience is really working in partnership with the state groups” (Kors 2016).

Outreach work, part of public education strategies, can be defined as efforts to reach out to provide information and services for people who might not otherwise have access or knowledge about an organization’s work.55 The goal with outreach work is multifaceted. One, interviews lead me to believe that it can be used to raise familiarity with an organization and their work by building name-recognition. Two, it can be used to educate community members about their rights, encouraging them not only to recognize harms but also to instill the ability to recognize that there may be a legal claim and remedy for that harm. Among the more common tools of outreach by legal organizations are engaging with local and state community organizations on workshops, rallies, and public events.

By meeting with people in the community who are interested in the organization’s work and by reaching out to local organizations who provide services (housing, medical, legal) to LGBTQ people, legal organizations are exposed to the array of issues concerning their target constituency. Moreover, this allows legal organizations to address parts of the community they do not hear from. For example, in 1984 Lambda Legal brought activists and citizens together for a community discussion in New York City. A Lambda newsletter writes of the event:

The group agreed that Lambda is not well known in the Asian, Hispanic, and Afro-American lesbian and gay communities. Those with legal needs who are aware of Lambda are often more likely to approach [other organizations] either because they feel these organizations will be more accessible and receptive to their needs too because they fear coming out in a publicized case. (Harris 1984)

55 Chapter Three goes into greater detail about outreach work as a part of public education strategies.
In 1988, NCLR created a position for a staff attorney to focus on lesbians of color. This person was charged with, in addition to litigation, “outreach to minority communities; presenting workshops to minority community organizations; and litigation involving lesbians of color” (NCLR Staff 1989). Undoubtedly, in targeting this constituency, NCLR sought to know more about it. As another sign of their intent to include minority voices in decision-making, since the mid-1990s, half of NCLR’s board has been women-of-color (Kendell 2016).

Outreach can result in a feedback effect: as organization begin to target certain groups, those community members grow to know that those organizations exist, or at least believe organizations are willing to listen to them. In turn, this could result in more contact to the organization, thus increasing the perception of need on the empirical side (intake data). This is what happened when NCLR targeted lower income workers, specifically people of color, in 1992 (NCLR Staff 1993a).

Outreach choices might also be made because organizations are trying to reach communities that do not hear much from lawyers often, as is the case with NCLR’s Rural Pride Campaign. Julie Gonen, Public Policy Director at NCLR, described the intention of going to a space, like rural areas, where LGBTQ folks do not have as much access to resources and legal education. Here, NCLR could both provide community members with information and use it as a “listening tour” to hear about what issues mattered to them (Gonen 2017).

GLAD executive director Janson Wu notes that this work helps to guide organizational priorities, explaining: “the kind of information you get from the community is particularly critical” (Wu 2017). This information often comes from, according to Wu, GLAD’s public engagement within the Public Affairs and Education department. Wu notes that this department has at “least one key position which is our community engagement manager whose job is to be out there in the
community and to be engaging with the LGBT community… I’d say that is one important way that we get that feedback from the community” (Wu 2017).

As Chapter Three explained, both impact organizations and direct providers stage or participate in hundreds of conferences, workshops, and trainings across the country. These might include discussing navigating police interaction for LGBTQ youth of color, name change how-to workshops, or dealing with health insurance and Medicaid obstacles. In addition to educating community members, these events also offer opportunities to hear from people.

Some legal providers may have a more unique experience in this area than impact organizations. Legal providers housed within larger entities, like Mazzoni Legal Services, Peter Cicchino Youth Project (part of Urban Justice Center), and the Legal Services at Whitman-Walker, often see issues related to the missions of their parent organizations. In other words, they may not need to go out into the community as often as impact organizations because the most in-need of assistance (legal or otherwise) are visiting the same building where they work. For example, both Mazzoni and Walter-Whitman specialize in health and wellness of LGBTQ people by providing medical services. As a result, much of what legal services deals with, and their sense of community need, relates to navigating and overcoming obstacles in obtaining insurance and Medicaid.

Another sign of commitment to community need is the presence of full-time “community educators” or “community engagement” staffers. These positions began popping up in the early 1990s but gained a greater presence in the mid-2000s. While GLAD’s original education director was given the title “Education/Outreach Director” from 1991-1992, it was not until 2005 that they added a specific “Outreach Director” to their Public Affairs & Education staff. In 2013, GLAD also added the position of “Community Engagement Coordinator” which still exists today. While

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56 Chapter Three explains more about how and when these kinds of educational positions began to form.
57 This information is available within NCLR, Lambda, and GLAD annual reviews from these respective years.
NCLR has maintained the belief that education work – which includes outreach – is part and parcel of everyone’s job (Kendell 2016), they currently have a “Development and Outreach Director” and from 2008 to 2009, they had a “Proyecto Poderoso Community Worker” whose responsibility was reaching out to Latino Communities. Even with the limited resources of a legal provider, Equality Advocates Pennsylvania had a Policy & Outreach Coordinator from 2007 to 2008.

Lambda Legal began employing community outreach-specific roles in the early 2000s with an “Outreach Associate” in 2000 and then their first “Outreach Director” in 2004. In that same year, Lambda added a specific “Community Organizer for New Jersey” and four years later in 2008, added a “Supervising Community Educator.” Today at Lambda, part of the community educator job description is to bring back what they are hearing from the community (Dueñas 2017). This comes in the form of bi-weekly meetings between lawyers and educators. The problem has been, according to community educator Francisco Dueñas, is that they “didn't have a very good formalized procedure or process” to further communicate what they were seeing (Dueñas 2017). It was more “organic and really just in dialog with each other” (Dueñas 2017).

These illustrations of where and how organizations are conducting outreach to their community should be read in the context of critiques within the legal industry. Some argue that legal organizations are not getting into the community enough. For example, Dean Spade is founder of the Sylvia Rivera Law Project (SRLP) which provides legal services to low-income gender non-conforming and transgender individuals in New York City. When the Project was just beginning, Spade located hundreds of organizations in the New York area that service low-income people and started visiting them. He recalls:

Soup kitchens, needle exchanges. I went to those organizations, wrote to them, called them about where they see trans people. What were they seeing? Were people getting help?... As soon as I open the door, they were calling me. They have trans people because trans
people are poor. If I had just sat in my office and opened the door and not reached out to those organizations, I wouldn’t have gotten those cases. (Spade 2016)

In other words, here was a community that either did not know that legal services existed in the city for them or were unwilling to go to such services. By doing the outreach work directly to these people, Spade and SRLP have tapped into a community that other legal organizations in the area might not have been hearing from.

Other interviewees have under anonymity lamented the disconnect between lawyers and some of the clients they serve. For example, one impact organization lawyer does not think that legal providers or impact organizations are doing right by LGBTQ people in prisons. Though organizations like NCLR and GLAD have litigated in this area, such as in Kosilek v. O’Brien (2015) and Adams v. Federal Bureau of Prisons (2014), there has not been much success in systematic reforms and favorable precedent for LGBTQ prisoners. There are significant needs for this group, including protecting them from violence, getting them into the proper gendered facilities, and finding them access to quality healthcare. This anonymous advocate stated candidly:

We suck, we’re not good advocates for prisoners. We’ve have failed, completely failed. […] I do think the reason for that is because […] it is probably the most marginalized groups of people in our whole society and there is just too much distance between the advocates and the people effected.

Thus, on the one hand, there is plenty of evidence to illustrate a long-running investment in outreach work within these cause lawyering organizations for the purpose of measuring community need. However, these efforts, as some interviewees described, may not be enough to make the agendas of legal organizations responsive to the needs of marginalized community members.58 As a consequence, outreach work may not be having the effects lawyers want them to have, which is to help produce better services and outcomes for client.

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58 By “most in need” I am using an intersectional approach to defining need. That is, that certain LGBTQ people are vulnerable on multiple levels: age, gender-identity, income-level, race, and ability. This phrasing should not be
Community Surveys

Surveys are another formal method of both sharing and gauging community need. Though it is unclear when their use began, they have been sparingly used by organizations over the last decade and a half. Surveys are most likely to be sponsored by impact organizations as opposed to legal providers, which is likely due to their cost. While surveys are put together with advice and input of organizations, they are often done with the help of paid consulting agencies who may administer and analyze the data. According to interviews and the text of survey reports, this method is explicitly used to determine the needs of the community. Almost as explicitly, this data is used to set organizational priorities and find cases to litigate.

During the early years of the Transgender Law Center (TLC), originally a project of NCLR, legal director Shannon Minter would ask TLC founder Chris Daley: “what kind of calls do you get on a regular basis? What are the issues people are facing?” (Daley 2016). When they felt that was not enough, NCLR and TLC designed and issued a survey of transgender persons to augment the data from intakes. Daley states that “we really did try to use that to guide what we were doing. At the same time, though a lot of our work was opportunity and not always coming from pleasant circumstances” (Daley 2016). 59

Titled: “Trans Realities: A Legal Needs Assessment Of San Francisco’s Transgender Communities”, the survey and subsequent report was conducted to “identify and quantify gender identity-related legal problems” (Minter and Daley 2003, 3). 60 The report notes that:

59 Daley is referring to the 2002 murder of seventeen-year-old Gwen Araujo of Newark California. Araujo was murdered by four men after they discovered she was transgender. Two of the men were convicted of second-degree murder but not of hate crimes. Read more: https://en.wikipedia.org/wiki/Murder_of_Gwen_Araujo

60 The report, which can be found at http://www.nclrights.org/wp-content/uploads/2013/07/transrealities0803.pdf, states that it was a survey of 150 self-identified transgender people in San Francisco. Survey participants were “either seeking transgender related social services or a part of a transgender community group” (2003:44).
NCLR and TLC see the report as a tool in further understanding the existing legal need and potential priorities of the transgender civil rights movement. Community organizations are most effective when they are responding to actual, instead of perceived, community need [emphasis mine]. This report is one step in identifying those needs and priorities. However, further research and discussion are strongly encouraged to test the findings of this report and to insure [sic] that any excluded voices are heard and incorporated. (Minter and Daley 2003, 5)

It continues: “The intent of this report is to foster a better understanding of the legal needs experienced by transgender people specifically because of legal or societal barriers to the expression of their gender identity” (Minter and Daley 2003, 6). Drawing a line directly to the agenda of the organization, participants were asked to identify their top three areas of concern. The report states that “the goal in doing so was to begin to gather data on community priorities in order to make better resource allocation decisions” (Minter and Daley 2003, 25) [emphasis mine]. But Daley states that figuring out community-need really involves a combination of things:

both really going to the community and trying to figure out what folks’ needs are. And that’s another place where the clinics and the help lines and email, doing advice and council, just really came in handy because we always had a sense of at least people who were reaching out to us. What were their set of needs? That, plus the more formal information gathering through the surveys and the opportunities really drove the work that we did. (Daley 2016)

Masen Davis, who followed Chris Daley as executive director at TLC, also utilized surveys. In 2009 TLC issued a survey, the “State of Trans California”, which had 650 respondents from around the state. The survey asked questions about education, housing, health care, and employment (TLC Staff 2009). Davis stated that “we definitely used that to inform our planning and our work. Then the National Center for Transgender Equality did a national survey right around the same time and we also have used some of those to see …what priorities were” (Davis 2016).
In 2012, Lambda Legal conducted a national survey on government misconduct (police, courts, prisons, and school security) titled “Protected and Served?”. One goal of the survey was to “assess the current issues and legal needs of LGBT people and people living with HIV regarding police accountability and government misconduct—in order to help shape Lambda Legal’s future agenda for litigation, education and policy work and support other research, advocacy, litigation and policy efforts” (Lambda Legal 2013, 5). Based on that information, Lambda “narrowed the list of possible government misconduct issues to those based on the needs expressed and connection to Lambda Legal’s mission and scope of work” (Lambda Legal 2013, 5).

Other audiences of survey results include the public, professionals, and lawmakers. For example, a 2010 Lambda Survey of discrimination against LGBT people and people with HIV entitled “When Health Care Isn’t Caring” was used in workshops such as one conducted by the Institute of Medicine and National Resource Council in 2012 (Alper, Feit, and Sanders 2013). The workshop was aimed at supporting LGBTQ patients in the collection of data in electronic health records. Lambda’s presentation (conducted by then Deputy Education Director Beverly Tillery) focused on the findings of that survey.

Again, interviews and documents show that survey methods, while used infrequently, are a formal method of determining community need. They may even be used to set priorities and find cases. Thus, they serve as another indication that organizations are trying to understand community need and incorporate it into their work.

Part of the Community

Another important way that the organizations in this study perceive community need is from the lived experiences of the staff and board that support the organizations. It needs to be

61 A PDF of the PowerPoint presentation can be found here:
http://www.nationalacademies.org/hmd/~media/50244D33AA27468B99EA3071C91DC0B8.ashx
noted that legal organizations are largely run by members of the LGBTQ community. As such, experiencing discrimination oneself and having second-hand knowledge of the experiences of friends, family, or co-workers is likely to shape the way one sees community-need. This might be a common theme among many legal organizations trying to advance civil rights and civil liberties for certain groups (such as women or people of color) but it is not necessarily the case for all (groups advocating for the environment, animal rights, or low-income people).  

While it is not clear how community need influences agendas, it is relevant to a major source of tension with the LGBTQ movement. This concern has been, and continues to be, that the staff at large LGBTQ rights organizations (not exclusively legal organizations) are dominated by white men. Since 64% of licensed lawyers are male as of 2017 (down from 70% in the early 2000s) and 67% are white (down from nearly 80% in early 2000s) (American Bar Association 2017), this phenomenon is likely to be experienced in many different legal organizations.

One of the mostly commonly cited examples of how a lack of diversity influences agendas is the prioritization of marriage (Acey et al. 2006; Spade 2015; Vaid 1995a). As Chapter Seven will expand upon, pursuing marriage equality has been critiqued as part of an assimilationist agenda (Ettelbrick 1999; Polikoff 1993a) that greatly benefits older, white, affluent men.  

Marriage, according to this critique, marriage runs counter to the goal of affirming gay identity and culture (Ettelbrick 1999, 637) because it is a “privileging institution” that benefits people along multiple lines of religion, sexuality, gender, race, class, age, citizenship, and more (Bornstein 2014, 62

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62 For example, in the latter grouping, legal-aid lawyers are going to be more financial secure then the clients they serve.
63 Part of this assertion is rooted in the idea that white-gay men in the 1980s began to seek relationship recognition in the face of death and discrimination from HIV/AIDS. This narrative has been challenged by some (Chauncey 2005) who point out that lesbian couples also long desired some form of relationship recognition as they sought to legally protect their families (including children).
25). As Kenyon Farrow has argued, marriage may also draw attention away from issues important to communities of color. Farrow:

the vast majority of issues that my community—The Black Community, of all orientations and genders—are not taken nearly this seriously when it comes to crucial life and death issues that we face daily like inadequate housing and health care, HIV/AIDS, police brutality, and the wholesale lockdown of an entire generation in America’s grotesquely large prison system. (Farrow 2007)

Academic works echo this problem of an apparent focus on marriage equality. Activists of color and self-identified radical leftists in Chicago saw same-sex marriage litigation “as an example of a top-down strategy, conceived of and implemented by attorneys with little attention to the needs and desires of the greater GLBT community” (Levitsky 2006, 156). Gwendolyn Leachman argues that same-sex marriage litigation is a “key example” of the way litigation and its extralegal benefits can “refocus the priorities of protest-based activists away from their original goals and toward formal legal objectives” (Leachman 2014, 1672).

To explain why organizational agendas are the way that they are, Dean Spade of SRLP points toward staffing issues. Spade writes:

Nonprofits serving primarily poor and disproportionately non-white populations are frequently governed almost entirely by white people with college and graduate degrees. Staffing follows this pattern as well, with most nonprofits requiring formal education as a prerequisite to working in administrative or management-level positions. The nature of the infrastructure in many social justice nonprofits often leads to concentrating decision-making power in the hands of people with race, education, and class privilege rather than in the hands of those facing the oppression. Consequently, the priorities and implementation methods of such organizations frequently do not reflect the perspective or approach that would be taken by the people most directly affected by oppression. (Spade 2009, 301)

A review of board minutes and interviews reveal that not only has this concern been long recognized by organizations (Feit 1991), but they have also been addressed in actions. NCLR’s board has maintained a majority women of color because, in part according to executive director
Kate Kendell, the organization knew it would be keeping a “racial justice and intersectional approach” (Kendell 2016). Former executive director Lee Swislow of GLAD recalls that an early task the GLAD board gave her was to “develop a diversity plan” (Swislow 2016). This plans was to include “diversifying the board, diversifying staff, [and] diversifying plaintiffs” in part because when she began, the board was “overwhelmingly white” (Swislow 2016). It was important to the board to have diversity across sexual orientation, gender identity, age, HIV status, and employment. Swislow expanded, noting that it was also important to not just have one or two members fulfill a demographic need, because you could lose those members at any time and because the organization wanted a diverse group talking about the organization “for credibility in the community” (Swislow 2016). Current executive director of GLAD Janson Wu described diversity’s importance:

…Diversity is important because our community is diverse and we want people to see themselves in the faces of the people that work at GLAD, first and foremost. We want people to trust GLAD and the people who work here as well, too. And seeing diversity helps create that trust. Organizations that are more diverse do better work (Wu 2017)

Among the legal organizations, staff diversity along gender has been commonplace. Among full-time staff at GLAD, roughly half or more have been women over the last two decades.64 Leadership roles among these legal organizations have often been filled by women: Kate Kendell is longtime executive director at NCLR and Kevin Cathcart’s long tenure at Lambda is flanked by Paula Ettelbrick and incoming CEO Rachel Tiven. This is also true among direct legal service providers: all the executive directors of Equality Advocates Pennsylvania, besides founder Andrew Park, were women; Amy Nelson has led Whitman-Walker’s legal services; and

64 I drew this conclusion with some trepidation as I used commonly used male and female first names to estimate this. I decided not to turn these into raw numbers for graphing purposes as I believed that would lead to inaccuracies, albeit on the margins.
Amara Chaudhry-Kravtiz led Mazzoni legal services for a short period (it is currently being led by Thomas Ude Jr.).

**Conclusion**

As a proxy for measuring commitment to community need in organizational agenda setting, this chapter identified how community need was being determined by staff. Assessing community need is a careful balancing of staff experience, community relationship, and formal assessments such as surveys and intakes. Kevin Cathcart succinctly summarizes the mentality of most interviews by stating: “program priorities [are] based in part about what people are calling us about. It’s also based in part what we hear from people on the streets… It’s an art, not a science” (Cathcart 2016a). That said, organizations determine community need through four mechanisms:

(1) call centers: intake calls were the most commonly cited answer to “how does your organization determine community need?” and “how do your organization set priorities?” These call centers hear from thousands of members of the community each year which are compiled into data sets and shared with staff, board members, and funders.

(2) outreach work: another commonly cited means of understanding community need was going to forums, holding workshops, and speaking to members of the community.

(3) community surveys: surveys were more likely to be conducted by impact organizations which is likely connected to cost. These are another formal way, like intakes, to assess community need.

(4) personal experiences of staff as part of the community: in these organizations, it is impossible to ignore that one way staff understand community need is from being a part of the community themselves. These lawyers and staff do not live in a vacuum and thus are likely to hear and see issues firsthand that will inform their understanding of need.
These findings are important because they tell us that cause lawyering organizations are more engaged in understanding community need than what would be expected from critical scholarship and social movement and interest group literature. More specifically, both impact organizations and legal providers take affirmative, proactive steps to understand community need and recognize it as a visible part of their priority-setting processes. Interestingly, public education tactics which are used to educate community members, are a significant part of hearing from them. While this literature does not say community need is unimportant, this factor is typically given little attention in the agenda-setting work.

These findings also tell us that there is information that both impact and legal providers could share with each other. As Carpenter (2014, 2016b) has already argued for, organizations could share call center data in the hope of expanding the kinds of calls being tracked. What observations here also show is that surveys could be shared across organizations and could even be conducted with legal providers. Outreach events such as workshops and community forums could be used to cull together ‘listening reports’ that discuss what was heard from community members.
Chapter Six | Keeping the Doors Open

This chapter covers an element consistently present in the literature: the influence of resources and particularly, foundations. I ask: *to what extent do foundations influence legal organizations’ priority setting and tactical decisions?* In doing so, this chapter also tracks the different ways that organizations are funded. I find that sources of funding are quite diverse and foundations have slightly different effects between impact organizations and direct legal service providers. Regardless of those effects, organizations set agendas independently from foundations because of concerted efforts to do so and because funding acts more as a constraint than a pull.

The reason I gave foundations their own chapter here is because they are prevalent in both lawyering and organizational behavior literature. Building from the work of James Q. Wilson (1974), Steven Teles argues that based on the need for resources, “organizations can be drawn into an organizational-maintenance trap” in which foundations shape core organizational tasks and behavior (Teles 2016, 455). In other words, because organizations need resources to survive, they can become beholden to the preferences of their sources of funding. Such a trap is recognizable in scholarship on legal organizations which suggests that “funders can significantly shape institutional priorities” (Chen and Cummings 2012, 145) and hamper their ability to bring about change (Albiston and Nielsen 2014). These theories are echoed as concerns by activists and lawyers in the LGBTQ community. They argue that organizations have been captured by large-money donors and foundations (Spade 2015; Spade and Dector 2013a).65

However, my observations suggest that organizations are less captured by foundation and major donor interests than one might expect. Instead, organizations, particularly impact

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65 This critique is laid broadly at non-profit organizations, not legal organizations specifically.
organizations, take concrete steps to isolate decisions from funding and even work to educate donors about needs of which donors are not aware. The reason for this may have to do with the capacity to raise money from many sources (i.e. development staff) and that impact litigation may be preferred by foundations that give grants. Also, given their larger reach (national and regional) they have large donor bases.

Alternatively, interviews with direct legal service providers suggest that they are constrained by the desires of foundations. It is not the case that these providers are captured by foundations who mold provider agendas to their whim. Rather, a lack of support from foundations is more of a constraint on what issues and tactics they can work on from their own agendas.

These findings do not directly answer whether organizations are closer to the ‘engaged lawyer’ or ‘isolated lawyer’ readings of the literature. However, the findings do speak to whether lawyers are more beholden to financial interests than the communities they serve. Both types of organizations are not passive recipients that allow donors to call the shots. Directors and staff were mindful to not let funding influence their work, insulating lawyers from funding concerns (Dohrn 2016). In fact, directors and staff sought to educate donors, often as to why they should contribute to general operating funds.

In addition, having diverse funding sources can keep one foundation or donor from leveraging control over an organizations’ behavior. Thus, the findings here are not what one would expect given the literature on foundation influence over interest groups (Teles 2016). Rather, the behavior here confirms more recent scholarship that indicates a constraining aspect of resources that is experienced more by direct legal service providers than impact organizations (Rhode 2008).

Captured versus Indirect or Constrained Explanations
Given the economic demands of a law practice and the fact that many groups do not generate enough money to match their budgets, how do legal organizations stay open (Albiston and Nielsen 2014, 62)? As Rhode (2008, 2056) notes, organizations with membership bases experience “bone crushing pressure” to pay for their budgets. One answer to this question is the work of foundations which have long supported public interest law and the growth of legal organizations (Albiston and Nielsen 2014; Aron 1989, 50–62).

Some of what scholars have observed about public interest legal organizations suggests that foundations and major donors can have a significant influence over priority setting processes of cause lawyering organizations. However, these same studies may also indicate that foundation influence is less about the capture of organization agendas, but rather, about indirect constraints on their operations.

Foundations are among the most common sources of funding for legal organizations according to surveys from the 1977 to 2008 (Aron 1989; Handler, Ginsberg, and Snow 1978; Rhode 2008). Some scholars of public interest law contend that major funders, including foundations, “can significantly shape institutional priorities” (Chen and Cummings 2012, 145). In the most recent survey of public interest legal organizations, nearly 40% reported being “moderately” influenced by funders in their priorities (Rhode 2008, 2052). Some point out that it is “the unequal power between donor and recipient,” in which recipient organizations rely on foundation money to keep their doors open, that “forces organizations to adopt donor-determined projects” (Weissman 2002, 810–11).

Foundations often want to contribute donations or grants to specific projects or issues and are unwilling to fund operating expenses (Rhode 2008, 2056) which would give more autonomy to the organization to decide what to do with the funding. In a survey of organizations, Rhode
found executives frustrated by foundations who desired “newer, hotter issues” rather than the current civil rights agendas of organizations. Some LGBTQ activists and movement leaders have observed funding moving away from issues of poverty and issues important to people of color, immigrants, disabled people, and other marginalized groups (Spade and Dector 2013c, 2013b). Part of the cause for this diversion, they believe, is that leaders in foundations and non-profit boards are white college-educated professionals.

In return for this funding, foundations will often ask for reports showing measurable outcomes in which the funders can assess the effectiveness and success of organizational activities (Komesar and Weisbrod 1978, 96–97; Rhode 2008, 2056–57). As Rhode (2008, 2056–57) found, this can result in groups shifting priorities or “stretching the truth” in their reporting to meet these outcomes. This also might give a reason for organizations to support call centers and track calls, to show funders with numbers what the community need is and that need changes.

Foundations can also capture an organization’s agenda by conditioning the “receipt of funding” on the organization’s “willingness to alter its approaches, thus undermining that organization’s autonomy” (Chen and Cummings 2012, 137). Some have even found that foundations can constrain lawyers from participating in political activism or controversial issues (Shdaimah 2009, 75). This might be because, according to Dean Spade, foundations and philanthropy of LGBTQ issues “fetishize” legal policy change, rather than movement building and supporting direct services on the ground (Spade and Dector 2013b). That is, policy change, as a clearly measurable and visible outcome, is strongly incentivized by foundations at the expense of other tactics.

However, this same literature points to the possibility that the influence of foundations may be less about capture and more about indirect influences. That is, organizations may be acting in
ways that they believe will catch the attention of major donors and foundations but are not altering the general priorities. Further, this reading of the literature suggests there may be differences in how impact organizations and direct legal service providers respond to funding sources.

Though Rhode’s survey indicated a potentially strong influence of foundation dollars, it also showed that more than 80% of organizations had at least some individual contributions and, for a majority of organizations, individual donors accounted for at least 40% of support (Rhode 2008, 2054). Indeed, research shows increased diversity in organizational funding, including money from court-awarded attorneys’ fees, governments, as well as corporate grants and in-kind contributions, though these sources only amount to a small part of budgets (Aron 1989, 54–59). Others have also shown that funding over time has “shifted away from foundation support toward government grants” (Albiston and Nielsen 2014). This indicates that some organizations may be less reliant on foundations than others and thus, perhaps be less likely to be pressured into changing their behaviors to fit foundation wishes.

In order to address a foundation’s need for measurable outcomes, some have suggested that organizations are likely to alter their agenda or tactics in ways that would attract “positive reaction from third parties such as the press or the media” (Komesar and Weisbrod 1978, 96). By seeking out cases specifically in “new areas of social change since such cases might prove more dramatic and startling” organizations would hope to win the approval of foundations (Komesar and Weisbrod 1978, 89). The effect is that organizations might turn away from implementation and enforcement of law, which may be in the best interest of legal clients, and instead turn their attention to highly visible cases (Komesar and Weisbrod 1978, 89). However, even if this were shown to be accurate, such an influence would not be the same as foundation capture. In fact, it might not even mean organizations change their agendas to any significant degree but rather, they
may find one or two highly visible cases to bring in foundation money. Further, more recent scholarship has shown that low visibility tactics have been favored by some LGBTQ legal organizations (Gash 2015) which casts some doubt on this theory.

Rhode’s survey also found that a majority of reporting organizations believed that funders had a limited influence (Rhode 2008, 2052–53). Limited though, still implies some influence. As such, Rhode found that public interest lawyers tried to fit their priorities into foundations’ "pigeon holes" (i.e. narrow issues areas or measurable outcome) for grants but they were not always successful. These constraints varied across different organizations; groups that were more well-funded report less pressure to change their priorities (Rhode 2008, 2052). Among impact organizations for instance, Kosbie (2017) found individual donors gave regardless of whether they perceive an organization as advancing their own personal priorities.

The organizations most likely to feel these constraints were funded by the Legal Services Corporation (LSC) which is government funding that comes with a series of restrictions of its use (see below).66 LSC-funded organizations are most often legal service providers and, according to Rhode’s study, are likely to be pressured to alter their work based on funding (Rhode 2008, 2052–53). Organizations in other studies reported too that “funding restrictions hamper their ability to negotiate favorable settlements, bring about systemic change, and represent vulnerable client communities” (Albiston and Nielsen 2014) and legal providers have had to debate how they should triage in case selection in the face of resource constraints (Tremblay 1990, 1999; Dunlap 1999).

Thus, while some of the literature suggests that we are likely to see capture by foundations or major donors, this chapter leans toward the expectations of the literature that suggests a

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66 Government sources of funding, which may carry stricter guidelines than private funders (see below), are in the same position as foundations to offer and withhold support. Legal organizations do not have to take LSC funding or foundation funding. The only difference is that the LSC will fund any organization that meets its requirements, while foundations have a finite number of grants.
constraining influence. Observations indicate that organizations are unlikely to be captured by donor sources. However, it confirms a distinction between impact and direct legal service providers. This distinction lies in the reliance on foundations by legal providers. Whereas impact organizations have more diverse donor bases making it difficult for any single donor or grantee to wield influence, smaller organizations that rely on fewer donors have a harder time funding the work they want to prioritize. While these organizations do not pursue issues that are not on their agenda, they may be limited to issues for which they could find funding.

**Sources of Revenue**

Where does funding for the legal organizations in this study come from? How much influence does different funding sources wield upon the organizations? Data related to these questions was collected, where available, from annual reports. In some years, an organization’s data on funding sources may not have been available. The second important piece of evidence on sources of revenue, like the rest of this project, came from interviews with staff at these legal organizations.

As visualized in Figures 6.1 – 6.4 below, most funding for the impact organizations currently comes from individual giving rather than foundations whereas funding from the direct service provider (Sylvia Rivera Law Project) came from foundations. This corresponds with expectations from the literature and from interviews with staff. However, an interesting finding is how much of resources are from donated services. These are free, or reduced charge services from lawyers helping with cases alongside the organization’s attorneys. Often, these are attorneys

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67 Data was collected from annual reports. I have only listed the top three sources of revenue listed in annual reports for these organizations. These years were chosen based on the availability of documents. I was unable to find, for instance, NCLR’s Annual Report for 2013. Each organization organized their revenue differently. For example, “Donated Services” was counted separately by NCLR and Lambda but most GLAD annual reports do not list these. Since donated services is common and is included in a more recent report by GLAD, ‘donated services’ was likely subsumed under other categories like “Corporate Giving” which was included with Foundations. Not all years were available for each organization thus, in some of the graphs, years are missing.
working bro bono from large private law firms (see section on Pro Bono/Cooperating Attorneys below).

**Figure 6.1: Percent of Total Revenue by Source for Lambda Legal, 2006 – 2015**

![Graph showing percent of total revenue by source for Lambda Legal, 2006–2015.]

*Data from annual reports available on-line at Lambda’s websites. See details in footnote 67.*
Figure 6.2: Percent of Total Revenue by Source for NCLR, 2005 – 2015*

* Data from annual reports available on-line at Lambda’s websites. See details in footnote 69.

Figure 6.3: Percent of Total Revenue by Source for GLAD, 1979 – 2001*

* Data from annual reports available on-line at Lambda’s websites. See details in footnote 69.
Another finding is that foundation funding is diverse. For example, Table 6.1 shows a sample of foundation donors to NCLR between 2003 and 2005. In that period alone, there were eighteen different foundations and grantees that gave to NCLR. The implications get to a claim made by Suzanne Goldberg, former attorney for Lambda Legal who told me: “one reason that funding did not drive case election is that we were not heavily funded by any single source” (Goldberg 2016). Thus, we might expect limited influence from foundations because organizations have many sources of funding, not just from different types of sources (individual, donated services, etc.) but also from different foundations. If organizations do not agree with the demands or requests from one source, they do not risk shuttering their operations by refusing.

Where does this foundation money go? Again, one narrative from the literature suggests that foundations may have a tight control over organizational agendas and thus we might expect

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68 This period was chosen based on the availability of documents that contained such lists. They were found in “Federal Supplemental Information” sections at the end of 990 forms.
to see foundations giving to certain issues or activities in an effort to influence the organization’s work. Admittedly, it is difficult to trace exactly where money is going but there are hints within financial documents.

Table 6.1: All Foundations and Grantees to NCLR, 2003 – 2005*

<table>
<thead>
<tr>
<th>Foundations and Grantees</th>
<th>Number of Grants</th>
</tr>
</thead>
<tbody>
<tr>
<td>Boston Foundation</td>
<td>1</td>
</tr>
<tr>
<td>California Endowment for the Arts</td>
<td>1</td>
</tr>
<tr>
<td>California State Bar</td>
<td>1</td>
</tr>
<tr>
<td>Columbia Foundation</td>
<td>1</td>
</tr>
<tr>
<td>Dallas Women’s Foundation</td>
<td>1</td>
</tr>
<tr>
<td>Echoing Green Foundation</td>
<td>1</td>
</tr>
<tr>
<td>Evelyn &amp; Walter Haas, Jr. Fund</td>
<td>4</td>
</tr>
<tr>
<td>Ford Foundation</td>
<td>2</td>
</tr>
<tr>
<td>Gill Foundation</td>
<td>1</td>
</tr>
<tr>
<td>Horizons Foundation</td>
<td>2</td>
</tr>
<tr>
<td>Initiative for Public Interest Law at Yale, INC.</td>
<td>1</td>
</tr>
<tr>
<td>Legal Services for Children, INC</td>
<td>1</td>
</tr>
<tr>
<td>Open Society Institute</td>
<td>2</td>
</tr>
<tr>
<td>Rainbow Endowment</td>
<td>1</td>
</tr>
<tr>
<td>San Francisco Foundation</td>
<td>2</td>
</tr>
<tr>
<td>Small Change Foundation</td>
<td>1</td>
</tr>
<tr>
<td>Unitarian Universalist Funding Program</td>
<td>1</td>
</tr>
<tr>
<td>Vanlobelsels Remberock Foundation</td>
<td>1</td>
</tr>
</tbody>
</table>

*Data from 990 forms found through GuideStar.

First, in analyzing the IRS 990 forms, annual reports, and audited financial statements, the majority of year-to-year net assets that the three major impact organizations held were unrestricted dollars. That is, the organization were not bound to use those financial assets in any given way, contrary to what we might expect. In most years, these unrestricted assets exceeded and sometimes doubled temporarily restricted donations.

Temporarily restricted net assets are contributions that are limited by donor-imposed stipulations. Those stipulations could be time-based or based on specific activities. That is, either the funding has to be used with a specific period of time or funding has to go toward a specific
issue or project (e.g. Lambda’s Fair Courts Project). When those stipulations end or are fulfilled, those restricted assets are then reported as net assets in that year. Thus, the figures in Tables 6.2 and 6.3 represent the total assets over eight years that were released due to their fulfillment of specific purposes or timing restrictions.\(^6^9\) Table 6.2 shows the total of NCLR’s temporarily restricted net assets from 2005 until 2012. Table 6.3 shows Lambda’s temporary net assets by issue and release date.\(^7^0\) The data from these years and these organizations were used because they were the only available forms that listed the specific issues with restrictions.\(^7^1\)

**Table 6.2: Total NCLR Temporarily Restrict Net Assets, 2005 – 2012**

<table>
<thead>
<tr>
<th>Purpose / Restriction</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Time Restriction</td>
<td>$ 4,948,002</td>
</tr>
<tr>
<td>Communications</td>
<td>$ 239,583</td>
</tr>
<tr>
<td>Marriage/Family Law</td>
<td>$ 236,042</td>
</tr>
<tr>
<td>Flexible Leadership (leadership opportunities)</td>
<td>$ 154,585</td>
</tr>
<tr>
<td>Transgender Law Center</td>
<td>$ 143,595</td>
</tr>
<tr>
<td>Youth Project/Program</td>
<td>$ 87,667</td>
</tr>
<tr>
<td>Strategic Planning</td>
<td>$ 80,000</td>
</tr>
<tr>
<td>Scholarships</td>
<td>$ 70,833</td>
</tr>
<tr>
<td>Out of Home Youth (Foster Care related)</td>
<td>$ 55,000</td>
</tr>
<tr>
<td>Safe Home Project (Homeless Shelter related)</td>
<td>$ 47,500</td>
</tr>
<tr>
<td>Homophobia in Sports</td>
<td>$ 43,750</td>
</tr>
<tr>
<td>Immigration and Asylum</td>
<td>$ 40,833</td>
</tr>
<tr>
<td>Reproductive Justice</td>
<td>$ 33,333</td>
</tr>
<tr>
<td>Transgender Health</td>
<td>$ 26,250</td>
</tr>
<tr>
<td>Donor Giving</td>
<td>$ 20,000</td>
</tr>
<tr>
<td>Equity Project</td>
<td>$ 16,667</td>
</tr>
<tr>
<td>Foster Youth Program</td>
<td>$ 14,378</td>
</tr>
<tr>
<td>Law Fellowship</td>
<td>$ 10,000</td>
</tr>
<tr>
<td>LLEGO (Latinx outreach related)</td>
<td>$ 3,000</td>
</tr>
<tr>
<td>Legal</td>
<td>$ 2,500</td>
</tr>
</tbody>
</table>

*Data from audited financial statements for each year between 2005 and 2012. The statements were made available through GuideStar.

\(^{69}\) I am using the language from Lambda Legal’s and NCLR’s audited financial statements. \(^{70}\) Totals were used for the sake of visibility. Data is limited to these years because they were the only documents with this information that could be found. The source for this data came from Audited Financial Statements found on-line with the respective organization’s website or through GuideStar. \(^{71}\) Audited financial statements across years and organizations do not all contain the same information. For instance, GLAD’s financial statements (2012 – 2017) only list for temporarily restricted net assets either “purpose” (with no specifics) or “time.”
Table 6.3: Lambda Temporarily Restrict Net Assets, 2013 – 2016

<table>
<thead>
<tr>
<th>Purpose / Restriction</th>
<th>2013</th>
<th>2014</th>
<th>2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marriage</td>
<td>$219,838</td>
<td>$340,492</td>
<td>$136,340</td>
</tr>
<tr>
<td>Youth in Out of Home Care</td>
<td>$156,075</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Midwest Regional Office or Regional Offices</td>
<td>$153,104</td>
<td>$143,414</td>
<td>$346,229</td>
</tr>
<tr>
<td>Fair Courts</td>
<td>$126,340</td>
<td>$224,040</td>
<td>$250,415</td>
</tr>
<tr>
<td>transgender rights</td>
<td>$78,500</td>
<td>$50,650</td>
<td></td>
</tr>
<tr>
<td>Marketing</td>
<td></td>
<td></td>
<td>$205,920</td>
</tr>
<tr>
<td>Youth</td>
<td></td>
<td></td>
<td>$5,300</td>
</tr>
<tr>
<td>Other</td>
<td>$115,674</td>
<td>$73,569</td>
<td>$95,050</td>
</tr>
<tr>
<td>Time restrictions lifted</td>
<td>$2,221,504</td>
<td>$1,925,534</td>
<td>$2,541,578</td>
</tr>
</tbody>
</table>

*Data from audited financial statements for each year between 2013 and 2016. The statements were made available through Lambda’s website.

As the tables show, marriage received the most money of any restricted subject area though time restrictions, not bound to single issues, far outpaced marriage specific-grants over these years in both organizations. Additionally, one can see that foundations were giving specifically to a multitude of issue areas such as foster care, homophobia in sports, and immigration. While these figures do indicate that marriage was a favored issue among foundations, they also show that organizations were hardly restricted to marriage and were in fact encouraged to work on other issues. Perhaps most significantly, given that most assets are unrestricted and most restricted assets are only limited by time, organizations are much less constrained by foundations than one would expect.

What then about individual giving, considering it is the largest source of funding overall for impact organizations, according to Figures 6.1 to 6.3? What kind of behavior does individual giving, where most resources come from, incentivize? A larger proportion of funding from individual donors could encourage publicity seeking behavior (e.g. choosing controversial issues) if leaders believe that high visibility tactics and issues will bring more attention and name-recognition to the organization. However, one might also suggest the opposite, that when leaders...
look at the sum of individual giving, any one issue or tactical preference is diluted. Therefore, an eclectic group of donor preferences results in no single issue getting all the attention.

The interviews from this study suggest a narrative closer to the latter alternative. Organizational leadership in this study display a belief that their donors may originally give for one reason or issue, but they stay because they believe in the mission of the organization. And there is indeed some early evidence suggesting donors are continuing to donate at high levels after *Obergefell v. Hodges* (2015).72

Interviewees repeated that donors were “loyal” (Wu 2017; Minter 2016) and likely to stay given the identity of organizations which presumably attracted donors to them (Kendell 2016). “We attract a certain type of donor and foundation” Kendell explained, “we are relentlessly progressive. We are unapologetically intersectional” (Kendell 2016). These suggestions are supported by findings about donor opinions of NCLR (Kosbie 2017).

In 2014, Jeffrey Kosbie conducted a survey of donors to NCLR. Among the many interesting findings, Kosbie discovered that donors gave to NCLR regardless of whether they perceived NCLR as advancing their own personal priorities and identify NCLR not just as an LGBT organization, but a broader social justice one. Confirming these points, a plurality of donors in Kosbie’s study ranked a “willingness to pursue broad, transformative goals” as the most important reason to give to NCLR while “responsiveness to preferences and wishes of donors” was ranked the least important (Kosbie 2017, 88).

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72 Executive Director of GLAD Janson Wu explained that their December 2016 fundraising – usually their biggest month – was the highest grossing in GLAD’s history. This is a year and a half after the *Obergefell v. Hodges* marriage equality decision.
As Table 6.4 illustrates below, interviewees in this project were adamant in rejecting the notion that donors, foundations, and individuals influence their priorities and they were confident in donor commitment to the organizations, no matter what they worked on.

**Table 6.4: Statements on Foundation/Donor Influence**

<table>
<thead>
<tr>
<th>Name/Position</th>
<th>Organization</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chris Daley, founder and former executive director</td>
<td>Transgender Law Center</td>
<td><em>I did not see funders directing our work. Actually, I can’t think of a single instance in which we did something in a particular way because a funder asked us to or in some way implied we needed to.</em></td>
</tr>
<tr>
<td>Kate Kendell, executive director</td>
<td>National Center for Lesbian Rights</td>
<td><em>I have never in my 20 years as executive director, done something that I felt like the organization shouldn’t do in order to get donor money nor have I chosen not to do something because a donor made their gift contingent on us not doing something.</em></td>
</tr>
<tr>
<td>Lee Swislow, former executive director</td>
<td>GLBTQ Advocates and Defenders</td>
<td><em>We didn’t follow the money. If a foundation wanted to fund a program that we could have done but just, it wasn’t anything we were planning to do and it wasn’t something that we really valued, we wouldn’t do it just to get the funds.</em></td>
</tr>
<tr>
<td>Evan Wolfson, former lawyer</td>
<td>Lambda Legal Defense and Education Fund</td>
<td><em>it’s not like everybody [referring to lawyers] was in a sealed vacuum but, absolutely, the question of how will this affect our funding, or could we raise money off of this, was never something discussed as an element of case selection.</em></td>
</tr>
</tbody>
</table>

Based on observations with interviewees and archival data, no connection was found between individual giving and priority-setting with one exception. That exception was marriage equality and observations suggest that major donations to support marriage equality were vital to amplifying the breadth of the campaign in terms of time and other resources. Documents do not break down resource allocation by issue but based on interviews, it seems likely that at least from *Goodridge* (2003) to *Obergefell* (2015), that marriage was receiving more attention from staff, more media and education work, and financial resources.
However, as lawyers for these organizations will point out, they were already doing work on marriage and had no plans to stop. Thus, while the pecuniary support led to greater investment of resources into marriage cases and campaigns (and thus, by one definition, increased its prioritization), it was not a quid-pro-quo of bringing in a new issue or funneling less money to an area because of marriage. Instead, it shows a reasonable responsiveness to donors.

Types of giving should also be considered when assessing the influence of giving on priorities. Most individual donations are made through fundraising campaigns (mailings and emails), donor drives and dinners, and memberships. These kinds of donations are unrestricted, that is, there is no limitation to what the organization can spend it on (unless the campaign, like a drive to hire a third lawyer as GLAD did in 1997, was geared toward something specific). As an interviewee explained it, “those are actually the most powerful ways to give to organizations because that really allows us the flexibility to be responsive, to be flexible, to be nimble, and to respond to the needs of the community at the moment” (Anonymous).

However, major donors (donors giving thousands if not millions of dollars) and foundations, will ask that money go toward specific projects or issues. Though most giving is not limited to certain issues, restrictions can become problematic when what organizations need are general operating funds. These funds help to pay for salaries and rent, things that are “unsexy” to donors and foundations but necessary to keep the doors open. One impact organization lawyer anonymously described the situation this way:

 Foundations do tend to more likely to want to give restricted gifts. This is not a secret, in the funding world. They want to give to a project. They're less likely to give to general operating. So, for us, our goal is always to try to find a project that we're already working on that they are interested in funding, or something that we want to work on but we haven't been able to get off the ground yet, and to try to avoid as much as possible trying

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73 This interviewee asked that all discussion of foundations and fundraising be anonymous.
to fit our work into the strategic goals of a foundation when that stuff doesn't exist. That's really not serving anyone well so, sometimes that means saying no to money.

Therefore, organization leaders see it as their job to educate donors. Often the executive director will sit down with major donors and foundation staff and explain what the organization does and what it wants to work on. It is their job to explain the importance and life-altering work that needs to be done across the board (Cathcart 2016a). Kate Kendell of NCLR expands on this:

If a donor wants to make a really significant gift and talks to me about restricting it to just one particular project or issue, I will usually try to talk them out of that and explain that look, if we win protections for transgender women in detention facilities or conditions of confinement or we win employment protection for transgender individuals, that’s going to help a transgender kid who wants to play the girl soccer team as a girl because she identifies as a girl (Kendell 2017)

In other words, the executive director tries to connect the dots between what they are working on and what a major donor or foundation wants to see. In this regard, the arrow of influence is less in the direction of donors toward legal organizations, but organizations towards donors. Executive directors will encourage major donors and foundations to give generally, but if they want to donate to specific issues or projects, directors will explain the particular needs of the organization and what their goals are. If these needs and goals continue not to match up with what the donor wants, organization leadership is willing to walk away from the donations and even recommend other organizations who are better suited for it. This is not behavior that literature would indicate though it is unclear whether this is distinctive behavior to these organizations alone.

This does not mean that major donors or foundations will not try to influence organizations, which interviewees did either allude to or directly imply. But when that happens, the executive director bears the burden, and isolates those concerns from staff. Beatrice Dohrn, formerly of Lambda Legal, stated of case selection: “there was no pressure brought to bear on us… the legal department was really kept pristine from those [funding] concerns” (Dohrn 2016). Dohrn credited the executive director, Kevin Cathcart, of making clear that the legal department should make its
decisions “cleanly.” Dohrn: “He wanted us to make clean decisions about what the legal department thought was the thing to pursue…” (Dohrn 2016). If a major donor wanted to give money in order to influence their agenda, according to Dohrn, “forget about it” (Dohrn 2016).

Mason Davis noted that sometimes donors, though not often, would request that TLC focus on a particular issue or partner with a particular organization in order to receive funding. When I asked whether they would accept or reject those kinds of donations, Davis responded: “it really varied on whether or not it made sense for us strategically” (Davis 2016). He went on to explain that if what foundations or donors offer is in sync with larger organization goals and issues, and if it provides an entry point for future work with that foundation, the organization might take an approach or tactic they would not have led with. Such tactics might include, as Jennifer Levi of GLAD suggested, greater coordination among organizations. Levi explained: “the most recent influence [from foundations] has been an appropriate push for coordination among organizations that are doing related work. That's where I felt the foundation influence most significantly” (Levi 2016).

**Pro-Bono/Cooperating Attorneys**

What makes legal organizations in this study unique from other interest groups and non-profits is that it is common practice for legal organizations to receive assistance and services from specialists, greatly expanding their capacity to work on different issues and utilize different tactics. Legal culture not only permits but encourages volunteerism among its cohort. Firms often require their lawyers to dedicate a certain number of hours, *pro bono*, to clients who otherwise could not afford an attorney.

All the legal organizations in this study have lists of pro bono attorneys that they can tap into and have been vetted to some degree. Sometimes organizations will even train these attorneys
and these attorneys will charge a reduced fee for service clients calling into the organizations. A second category related to pro bono work are “cooperating attorneys.” These are more likely to be seen with impact organizations. Cooperating attorneys, also usually working without a fee, will partner or cooperate with an organization on an on-going case. It might be to serve as lead representation, for advice on legislation, or to provide technical expertise on a legal matter. As Wasby (1995, 265–68) observed with the NAACP Legal Defense Fund, cooperating attorneys can play a significant role in legal organization work.

This network of pro bono and cooperating attorneys gives legal organizations a distinct advantage, compared to other interest groups, because they allow organizations to dedicate resources to one area, knowing that they can rely on outside attorneys to fulfill another area. Pro bono attorneys help to take, sometimes for free and sometimes at reduced fees, many of the call center issues that organizations cannot handle (GLAD 2017; Lambda Legal 2017a; NCLR 2017). These centers receive thousands of call each year, and pro bono attorneys are integral to finding those callers representation and aide.

What this means for case-selection and priority-setting, is that lawyers are freed up to take on cases that they would never be able to do on their own. Kevin Cathcart, executive director of Lambda Legal, noted about cooperating attorneys that: “We would not be able to do anywhere near the amount of work that we do… we have two dozen lawyers. That makes the same size as a medium sized law firm in a small city” (Cathcart 2016). Cooperating attorneys also expand the reach of the organization, enabling them to prioritize cases across the country. Cathcart explains again: “We need people in Iowa because we can't fly to Iowa every time there's a hearing or a motion or a something” (Cathcart 2016).
As legal organizations grow, so too does their dedication to training these attorneys, as the investment pays dividends. For example, GLAD recently helped train over eighty attorneys from the Ropes and Gray law firm in Boston. Then GLAD partnered with the Massachusetts Transgender Political Coalition (MTPC) to connect those attorneys with transgender people who needed help with changing identity documents (Wu 2017). Note that this kind of activity is not impact litigation, but rather, more of a direct services tactic conducted by a larger impact organization. This kind of event is not isolated. NCLR uses a network of pro bono attorneys to help LGBTQ people with immigration issues and Free State Justice, a Maryland-based organization, helps connect attorneys with LGBTQ clients who need help with wills.

**Figure 6.5: Legal Services Provided with Each Expansion of GLAD’s Legal Staff**

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* Reprinted with permission from the Gay & Lesbian Advocates & Defenders Records (MS 1961). Manuscripts and Archives, Yale University Library
Cooperating attorneys working with legal organizations will put in thousands, if not millions, of dollars’ worth of hours. GLAD documents note that in 1996 “volunteer cooperating attorneys and legal interns collectively contributed 3,980 hours on GLAD impact litigation cases. The value of these services is in excess of $462,000” (GLAD 1998a). When GLAD launched its Third Lawyer Campaign, a fundraising effort to hire a third full-time lawyer in 1998, it showed that cooperating attorney labor made up anywhere from an estimated (using market rates) quarter to half of the organization’s workload (see Figure 6.5 above).

The implications of this important resource are that pecuniary constraints, that is, a shrinking of outside funding to the organization, does not immediately eliminate or deter work in any given areas because part of the legal organization functionality is relying on these attorneys. This unique aspect of legal culture gives legal organizations freedom from the constraints of funding that other interest groups and social movements organizations might not otherwise have. This is not to say these other kinds of organizations do not have volunteers. What is unique about cooperating attorneys is the level of specialization and the comparable cost to hire these lawyers in the private market.

This is not a supplementary benefit, or bonus of being a legal organization either. It is integral to their work. Laura McMahon DePalma of Free State Legal noted: “It's needed. We have so many cases… There is high need and we don't have the resources. Like any other nonprofit we don't have the resources to provide immediate remediation to every person who walks through our door” (Paschall and McMahon DePalma 2016).

These networks also enable legal organizations to focus on a broad set of goals, instead of pouring resources into one or two issues and cases. Kevin Cathcart of Lambda explains:

We could have 24 people who did nothing but custody cases, or nothing but employment cases, or nothing but HIV. Nothing but transgender. We don't have the luxury because we
have to be a broad-based organization serving a lot of people, because there isn't anybody else to take up the slack if we're not broad-based. The way that we can be bigger than we are is by leveraging resources from [firms]. (Cathcart 2016)

Cathcart frames the advantage another way. If Lambda, like in its formative years, were only three lawyers, larger opponents could simply “paper them to death” (Cathcart 2016). That is, opponents could file so many motions and forms that the organization would never be able to keep up. However, upon seeing a partnership with a firm, opponents will “cut the bullshit” (Cathcart 2016). Having these cooperating attorneys as partners in a suit also keeps organizations from spreading their resources so thin, that they cannot be effective in their legal challenges.

**Direct Legal Services and Resources**

It is important to note that larger impact organizations and direct legal services providers do not operate with the same funding constraints and allowances. Further, they have different relationships with funders. While there is not enough evidence to make strong assessments of these relationships and their effect on providers specifically, there is enough from interviews and the literature to explain what these relationships might mean.

Some legal providers rely more on government and foundation money, and when they do, “this has a big impact on what work you do” (Park 2016b). According to one interviewee with direct legal service experience, for organizations that rely heavily on foundations, “the foundations operate as overlords. If you can match your activities to match the foundations, you get to do them. If not, not” (Anonymous). Another former direct legal service lawyer gave the following example of constraint anonymously:

Let's say you knew you really needed to fund a new project about legal advice regarding housing for clients. But the cool new thing to do is to fund medical-legal partnerships for veterans. What you would really like is a drop-in clinic for indigent who were having landlord/tenant problems, but you know is a grant for medical-legal partnership opportunity with veterans. What do you do? You propose a project, that gives housing advice to veterans in a medical-legal setting but could only be used for veterans. Let's
assume need is infinite and can never be met: there are probably 10,000 people in need and I bet we can find several hundred that are veterans. You get a lawyer who is expert in housing, but to make the funder happy you are only going to provide services in particular context that the funder wants. Happens all the time” (Anonymous).

Again, the implication, just as it is with impact organizations, is not that foundations will choose for organizations what they will do, but since organizational maintenance is more closely tied to foundation funding, they can only do the work that they both want and that a foundation will support. This is different from the experience of impact organizations where foundations are not the primary resource, funding sources are fairly diverse, and organizations can rely on relationships with cooperating attorneys.

Government funding too can come with restraints. One of the more popular forms of funding for legal service providers is the Legal Services Corporation (LSC). Receiving LSC money however comes with restrictions such as giving up the ability to use class-action lawsuits, forgoing collection of attorneys’ fees, and inability to represent undocumented people.74 For these

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74 The Legal Services Corporation Act (42 U.S.C. 2996) prohibits: political activities, including voter assistance or voter registration; lobbying government offices, agencies or legislative bodies, except for limited situations; criminal cases, except for cases in Indian tribal courts; habeas corpus actions challenging criminal convictions against officers of the court or law enforcement officers; organizing activities, including training for-or encouraging of-political or labor activities; proceedings or litigation to procure non-therapeutic abortions or compel the provision of abortion services over religious or moral objections; proceedings involving desegregation of public schools, military service or assisted suicide. The 1996 Appropriations Act (Pub. L. 104-134) prohibits: Lobbying government offices, agencies or legislative bodies with any funding, except for limited situations; representing people who are not U.S. citizens with limited exceptions such as lawful permanent residents, H2A agricultural workers, H2B forestry workers, and victims of battering, extreme cruelty, sexual assault or trafficking; class actions; soliciting clients in-person; abortion-related litigation of any kind; representing prisoners; representing people who are being evicted from public housing because they face criminal charges of selling or distributing illegal drugs; most activities involving welfare reform;
reasons, none of the organizations in this study accept LSC funding. However, since many of the legal providers double as broad-based advocates, they can receive government grants for a host of reasons including helping people to navigate health care markets to aiding immigrants in their application process.

Some of the direct service programs in this study also relied on funds from state Interest on Lawyer Trust Accounts (IOLTA). These accounts are methods of raising money for organizations and lawyers that provide legal services to low-income, indigent clients. The ability to only take indigent clients is a significant limitation (Carpenter 2017). Money is earned through deposited client funds that earn interest in lawyer trust accounts. Every state has an IOLTA program and they can distribute millions of dollars each year to direct legal service programs. Providers are asked to demonstrate the need for a project and to “calculate outcomes based upon success in identified priority areas” (Carpenter 2014, 133). It is not clear how or if these accounts influence agendas of service providers, though interviewees never brought up restrictions.

Three of the interviewed legal service providers were also housed within larger advocacy organizations: Peter Cicchino Youth Project within the Urban Justice Center, legal services at Mazzoni Center for LGBTQ Health & Wellbeing, and legal services at Whitman-Walker Health Center. This adds another lay of complexity in tracing the effects of funding. According to an interview, Whitman-Walker Health’s legal services (WWH) funding recently followed a 45% (grants), 20% (fundraising), and 35% (general operating from Whitman-Walker) split (Lobier

redistricting activities; influencing the time or manner of census-taking. The Consolidated Appropriations Act (Pub. L. 111-117) removed the restrictions on the ability of LSC grantees to claim, collect or retain attorneys' fees. See: https://www.lsc.gov/about-statutory-restrictions-lsc-funded-programs
Erin Lobier, part of WWH’s Law & Policy team, says that the organization shies away from “chasing the grant money” (Lobier 2017).

Unlike some of the other services at WWH, the Law & Policy program is more entrepreneurial in fundraising, often through dinners and drives, with the goal of expanding existing work that matches the organization’s mission and identity. For example, WWH never fundraised around marriage equality and instead was focused on drawing support for transgender health services and identity document changes. Thus, legal services programs housed within larger organizations may be insulated from foundation or major donor preferences due to their support from the broader organization. Comparatively, stand-alone legal providers might be more vulnerable to influence from foundations and major donors because they typically see fewer individual donations and do not have the support of a broader entity.

Overall, it is still difficult to exactly determine the influence foundation and major donors have on the agendas of legal providers. While a few of the interviewees expressed that foundations were powerful in shaping organizational actions, no one said that foundations or major donors could alter the priorities of an organization or force the organization to utilize a tactic it would not normally use.

Conclusion

The two different types of organizations pursue slightly different approaches. Impact organizations have the capacity to raise more money (i.e. they have development staff) and their kind of work (e.g. impact litigation; major education campaigns) is preferred by foundations. Also, given their larger reach (national and regional) they have bigger donor bases than direct legal service providers. Providers are more limited in where they raise money. Unfortunately, the available data on providers is much more limited, specifically with where money is coming from.
Based on what evidence is available (including interviews), it is reasonable to conclude that much, if not most, is coming from foundations.

To what degree do foundations influence legal organization priority-setting and tactics? Again, regarding direct legal services, information is limited but available figures and interviews suggest that the need to keep the doors open does not significantly influence the priority-setting process in either type of organization. However, direct legal service work may be significantly influenced in other ways that resemble more of a constraint on the work they would like to do.

Other reasons that organizations might not be strongly influenced by foundations is that they are staffed by cause lawyers who have different motivations than other lawyers (Scheingold and Sarat 2004; Menkel-Meadow 1998) and thus are not particularly swayed by pecuniary pressures. But it also might be because the funding streams of impact organizations in particular and the cultural legal commitment to pro-bono attorneying, shields organizations from pressure by any single donor. A third alternative is that organizations may be consciously pursuing fundraising strategies that would not require them to align their priorities with donors, though this was not indicated in interviews.75

Overall, I found that the five most important findings regarding financial pressure on agenda-setting are:

(1) Impact organization leadership explicitly keeps funding concerns separate from case selection. Lawyers make decisions in a silo from funders but are not unaware that litigation is costly.

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75 Two examples are when organizations use fundraising dinners and mail funding drives.
(2) Individual donors, not foundations, make up the majority of current giving to impact organizations. Other research shows that these donors support them because of their identity, regardless of their specific agenda (Kosbie 2017).

(3) Executive directors see it as their duty to educate donors – individuals and foundations – on the work that they do, not to offer work they would not normally pursue.

(4) Pro bono and cooperating attorneys allow both impact organizations and direct legal service providers to spread their resources across a broad set of issues.

(5) Direct legal service providers are more likely to be constrained by a lack of funding than impact organizations. There was no indication that foundations forced changes in an organization’s agenda, or anything resembling a quid pro quo. However, available evidence suggests the interests of grant makers and donors may constraint parts of providers’ agendas. This may result in organizations trying to re-define current work to meet the requirements for grants.
Chapter Seven | While Marriage Was Won

Marriage equality casts a long shadow in this project. It was present in every chapter, and affected every tactic and influential element including litigation, public education, public policy, community need, resources and foundations. As one interviewee put it, marriage was “like the boa constrictor swallowing a rat and all that you can see is the bulge but don’t realize that there are all kinds of other things going on around it” (Buseck 2016). This project indicates that the marriage equality campaign – defined here as the concerted effort through litigation, policy, and public education to achieve marriage equality – influenced a change in behavior in LGBTQ legal organizations. For instance, Chapter Three discussed how marriage cases influenced changes to public education strategies. Then, Chapter Six cited executive directors and staff who claimed that marriage equality litigation, especially in the mid-2000s, was bringing significant resources into impact organizations. Evidence also shows, as discussed in Chapter Four, that marriage equality brought together coalitions of groups, including impact organizations, to work on marriage litigation and policy.

Given that the goal of this project is to understand the behavior of cause lawyering organizations (their agenda setting and tactical choices), I believe it is important to ask what effects the marriage equality campaign had on these organizations. Based on literature across disciplines, we might expect organizations to become more formalized and to see greater financial resources after seeing success (Albiston 2011; Gamson 1975; McCann 1994; Staggenborg 1988). We might also expect litigation to divert energy away from other strategies (Albiston 2011, 64). In addition, the critical scholarship on the LGBTQ movement states that marriage may have been a distraction from other issues, drawing attention and resources from critical topics important to marginalized community members.
By looking at marriage, we may also gain insight into what happens when movement organizations see a sudden influx of attention and resources. Where do those resources go? How does it affect personnel? Do one or two issues overshadow others within organizations? Might organizations change tactics? We should be cautious in generalizing to other movements’ legal industries because marriage equality was certainly a unique issue in the attention it received and the series of federal cases that cascaded over a three-year period (2013 – 2015). Instead, if we take this as an ‘extreme case,’ we are better able to see shifts than we might with less influential events.

The chapter begins with two sections that review the relevant literature and contextualize the marriage debate within the LGBTQ movement. Both situate what we might expect when movements succeed. The latter section also advances our understanding of how marriage was a debated priority within the movement.

Then the chapter moves into two general overviews of how marriage, according to interviews and financial documents, may have influenced impact organizations and direct legal service providers. I conclude that these organizations had very different experiences. Interviewees from impact organizations report substantial effects on resources, both pecuniary and staff. Direct service providers however, say they felt little in the wake of the movement. In other words, they did not see the kinds of resource benefits or attention that interviewees from impact organizations observed.

The next three sections take us into specific effects of marriage. The first addresses the narrative that marriage was a diversion from other issues. Specifically, I explore whether marriage drew attention and resources away from issues in these organizations. This is a difficult question to answer definitively but available evidence from interviews and documents suggest that, if anything, marriage created greater visibility around other issues and brought in resources that were
reallocated to those other issues. This dovetails into the next section, which suggests, based on the memories of interviewees, that marriage opened opportunities for success in these other issue areas. With a broader donor base, greater visibility of their work, and shifting public attitudes (which they credit marriage with), impact organizations felt they had a greater capacity to succeed in other issues areas.

The next section speaks to tactics discussed in earlier parts of this project. What it shows is that marriage equality, according to interviews, fostered the growth of multidimensional advocacy, specifically in education, which Chapter Three discusses. Marriage also inspired new ways of thinking about “framing” around issues and generated networks of organizations with which to collaborate. Interviewees, specifically with those in impact organizations, really credit marriage equality with not just a growth in organizational capacity, but in lessons on how to create change. Finally, the last section documents widely stated concerns about the effect of the marriage equality victory in the Supreme Court. These concerns are eye-opening in their own right, but their presence further supports the argument that marriage equality was important to movement organizations, especially in resource building.

**When Movement Organizations Succeed**

There is no specific scholarship regarding what happens after cause lawyering organizations achieve success, let alone what happens in the midst of success. Scholarship in social movement studies and legal mobilization suggest that organizations professionalize, de-radicalize, and choose institutional pathways to change as they become more successful. Other sociolegal works that focus on litigation suggest that a litigation campaign could attract new membership and resources to an organization.
The literature from social movement studies specifically indicates that social movement organizations and their tactics become more bureaucratized and professionalized (Gamson 1975; Lang and Lang 1961; Staggenborg 1988). Organizations move away from protest tactics and toward engagement with state and formal institutions. Because of this professionalization, some have argued that movement organizations can become more oligarchical and conservative (Piven and Cloward 1979; Zald and Ash 1966). Though, when it comes to the organizations in this study, they are already professionalized in the sense that they engage with the state (through courts) and primarily use a non-protest tactic (litigation).

Still, these theories could be used to suggest that as LGBTQ legal organizations grew, they were more likely to move away from the movement’s more radical goals, as some have demonstrated (Leachman 2014), and instead became overly focused on “achievable goals” through litigation. Marriage could be a part of that conservative shift that the theory suggests (see critical LGBTQ scholarship below) and we would expect to see that resonate in other parts of the movement’s agenda, as well as expect fewer work outside litigation.

From works on legal mobilization, scholars worry that when lawyers translate the movement’s demands into litigable injuries, they may reduce those demands into abstract legal concepts (Tushnet 1984). Others have argued that both lawyers and legal organizations could hijack a movement by shifting ownership of grievances from grassroots to elite professionals (Handler 1978; McCann 1986; Menkel-Meadow 1998; Levitsky 2006; Meyer and Boutcher 2007). Subsequently, the agenda organizations might change (Levitsky 2006; Leachman 2014), resulting in the diverting of resources away from other issues important to movement members (McCann and Silverstein 1998), perhaps specifically non-legal issues such as AIDS/HIV fundraising for LGBTQ organizations (Leachman 2014, 1744). Just as with social movement studies, these works
indicate that legal organizations are vulnerable to setting agendas in ways that do not comport with grassroots interests. This is exactly the criticism that some have raised regarding marriage, as discussed below.

The other side of the legal mobilization and cause lawyering literature is how law and litigation can be important tools on the path to achieving social change. For instance, litigation might help generate both financial resources for organizations (Boutcher 2005) and increased membership (Boutcher 2005; McCann 1994), regardless of whether the cases are won or lost (NeJaime 2011). Litigation might also be used as a “club” (McCann 1998) to pressure adversaries into compromise, thus increasing the organization’s bargaining power (McCann 1994; see examples in Epp 2010). The attention that litigation brings (Leachman 2014) to the public at-large can also benefit organizations within a movement. Externally, litigation might mobilize elite allies outside of the organizations (Mather 1998). Internally, the language of legal rights can foster a sense of collective identity and give activists, both old and new, goals around which to organize (McCann 1994). From this, we might expect the marriage campaign to have brought in new members as well as resources, and to have influenced the mobilization of allies to other organizational causes.

Again, studies on movement organizations and legal mobilization provide general hints at what to expect but it is a tenuous connection because these works ask significantly different questions. In general, social movement studies indicate that over the life cycle of a movement, there is greater professionalization of organizations and their agendas become less radical. Sociolegal scholarship shows that litigation campaigns may deradicalize movement agendas and potentially divert resources away from issues important to movement members. Thus, we might expect to see organizations with limited agendas and an inordinate amount of resources flowing to
marriage during the campaign. However, that expectation is based on a very broad interpretation of the related literature.

**Narratives on Marriage**

It is important to contextualize the issue of marriage equality within the LGBTQ movement. Doing so advances our understanding that marriage was an agenda item, like others, that had to be fought for within the movement and within organizations. Contextualizing the issues this way also raises at least one question that this study can address which is: was marriage equality a diversion from other issues within legal organizations?

Marriage received a great deal of support within the movement, from the grassroots to movement elites, but also had skeptics that were concerned about its prioritization. The debate can be categorized into four overlapping narratives: (1) marriage was a conservative and assimilationist agenda item, (2) seeking marriage equality was a diversion from important, sometimes life and death, issues for LGBTQ people, (3) a large portion of the community demanded and needed marriage equality, and (4) marriage equality was prioritized when it was put on the defense by opposing groups.

*An Assimilationist Agenda Issue*

One long running criticism is that marriage was an assimilationist, patriarchal agenda item (Ettelbrick 1999; Polikoff 1993b; Vaid 1995b). In other words, it ran counter to the goal of affirming gay identity and culture (Ettelbrick 1999, 637) which could hurt the most vulnerable of the LGBTQ movement. This is because marriage is, Kate Bornstein argues, a “privileging institution” that “privilege[s] people along lines of not only religion, sexuality and gender, but also

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76 From the early beginnings of gay-liberation, lesbian feminism, and the break from the conforming-tactics of homophile organizations during the 1960’s and 1970’s, the destruction of oppressive sexist and racist systems have been important to LGBTQ activists. Such systems are said to include the social norms of sexuality, the criminal justice system, foreign wars, and institutions like marriage.
along the oppressive vectors of race, class, age, looks, ability, citizenship, families status, and language” (Bornstein 2014, 25).

For example, activists of color and self-identified radical leftists in Chicago saw same-sex marriage litigation “as an example of a top-down strategy, conceived of and implemented by attorneys with little attention to the needs and desires of the greater GLBT community (Levitsky 2006, 156). Scholar Gwendolyn Leachman argues that same-sex marriage litigation is a “key example” of the way litigation and its extralegal benefits can “refocus the priorities of protest-based activists away from their original goals and toward formal legal objectives” (Leachman 2014, 1672). In some ways, this comports with expectations from social movement literature that indicates organizations will move away from more radical goals.

A Diversion

Marriage has also been criticized because the focus on it was “wasting resources that would be better deployed to save some lives” (Bornstein 2014, 24) and could be better used for “real change” (Spade and Willse 2014, 32). One activist argued that: “in the early 1990s, ACT UP New York’s budget was more than $1 million a year, but it now fights AIDS with a budget of less than $20,000. Meanwhile, the HRC [Human Rights Campaign]. having thrown its full weight behind the marriage push, operates with a budget of more than $45 million” (Staley 2013).

Even Lambda legal director Jon Davidson acknowledged this criticism, noting that: “It doesn't help you so much if you can get married and then get fired because of that” (Crary 2013). Along the same lines Hannah Le, writing for the LGBTQ publication The Advocate, notes that 40% of homeless Americans identity as LGBTQ. She asks: “couldn’t we all acknowledge that there’s more to social justice for the lgbt community than just marriage equality” (Le 2013).

Activists’ concerns are echoed in scholarship. Litigating same-sex marriage and defending it against conservative opponents may have, according to Klarman, “distracted from other items
on the gay rights agenda” (Klarman 2013, xiv) as well as “diverted scarce resources from other objectives such as fighting AIDS and securing anti-discrimination laws and hate crimes protection” (Klarman 2013, 177). Klarman also wonders whether the federal Employment Nondiscrimination Act would have been enacted, given most Americans supported it in 2004, if it were not for the marriage case of Goodridge (2003) (Klarman 2013, 179).

_Grassroots Demand_

A third narrative is that the push for marriage equality was a result of a great demand from the gay and lesbian community. Marriage equality was by many accounts, seen favorably by constituents. Lawyers in this study remember that it was in high demand in early calls to organizations. However, it was also not an issue that was always at forefront of the LGBT agenda, as at least one survey shows (Egan and Sherrill, 2005).

As Lee Swislow of GLAD describes it, marriage was constantly on the minds of the people contacting their organization. She explained:

Mary Bonauto tells the story of her first week at GLAD in the 1990s. Someone called and wanted to file a marriage case. The community desire for marriage was clear for many, many years before the movement thought it was time to actually file that litigation and it was through people saying, ‘this is what I want.’ (Swislow 2016)

Yale historian George Chauncey describes in his history of same-sex marriage two causes for the demand of marriage equality. First, was the AIDS epidemic, which was also cited by interviewees (Leonard 2016). Chauncey writes that there was a “shattering realization that gay partners had no legal standing” that protected medical visitation and inheritance of property (Chauncey 2005, 102). This concern led to one of the earliest successful domestic partnership cases, _Braschi v. Stahl_ (1989), where a New York court ruled that Braschi and his partner were

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77 I have not been able to confirm this story with Mary Bonauto.
“spouses” for the purposes of renters’ succession rights after their landlord had evicted Braschi following the death of his partner.

A second catalyst of marriage onto the movement’s agenda was what Chauncey called the lesbian “baby boom” but really includes concerns of all same-sex parents. There was a fear, realized in the experiences of parents, that a lesbian or gay parent might lose custody in divorce or custody disputes from their former opposite-sex spouse. LGBTQ parents also feared that the death of the biological parent would put the custody of children in limbo.

Together, these concerns generate a narrative that indicates marriage is less of a distraction and simply one significant issue among a broad swath of concerns within the community. The fact that marriage received so much attention, particularly from legal organizations, is not surprising. Similarly, in an interview with a journalist, former Lambda attorney Evan Wolfson was asked: “But why marriage and not immigration, or adoption? There are many areas where gay people are excluded from participation. Why do you personally focus on marriage?” (Shankbone 2007). Wolfson responded: “These are not either/ors. It’s not like you have to pick one thing.”

Reactive Motives

The final narrative is that marriage equality was thrust upon the legal organizations by the acts of opposing forces. For example, David Cole chronicled how Lambda Legal executive director Thomas Stoddard, a supporter of same-sex marriage, originally denied Evan Wolfson’s request to take a marriage case in Hawaii (Baehr v. Lewin 1993) because it was considered strategically risky (Cole 2016, 26). It was not until that case became increasingly visible, and with further requests from Wolfson, that Stoddard allowed him to help “behind the scenes” and then later on, become co-counsel.

After the initial legal win in Hawaii, political backlash ensued, forcing organizations to defend against anti-marriage amendments in several states. Further, anti-gay activists successfully
used marriage as a wedge-issue in elections, such as the 2004 presidential race (Klarman 2005). Thus, marriage equality was used by opposing forces to enact other setbacks to the LGBTQ movement (Dorf and Tarrow 2014). As two Lambda leaders described it in the book *Love Unites Us*: “whether we liked it or not, the fight for marriage was on” (Cathcart and Gabel-Brett 2016, 10).

Finally, this chapter cannot and does not speak to the normative assertions in this literature. It does not wade into the debate about whether marriage should or should not have been prioritized. What this chapter does demonstrate is that lawyers, specifically those in impact organizations, saw the fight for marriage equality as building a greater capacity to do other work and succeed. Further, direct legal service lawyers were more concerned that their organizations (and by extension their work) did not see the kind of pecuniary resources that was flowing into impact organizations during this struggle. The literature above helps to contextualize these findings, as the observations speak to both narratives about marriage equality prioritization within the movement.

**Impact Organizations and Resources During the Marriage Equality Campaign**

Through the late 1990s and early 2000s, the three major impact organizations grew exponentially (GLAD, Lambda, NCLR). Analysis of newsletters and annual reports show that they grew in the number of staff and the amount of money raised. The question is, how responsible was marriage equality for this growth? According to most of the interviewees, marriage had a profound influence on their organizations, including their resources. However, other data shown below shows that foundations and grantees were giving to a multitude of issues during the most active period of marriage cases (2000s to 2010s). The implication is that either marriage cannot be fully

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78 Interviewees at both types of organizations were aware of this debate in the literature and with the concerns about impact work versus direct service work. However, it is not clear how the knowledge of these critiques may have influenced their priorities or tactics.
credited with the increase in resources or the opposite, that organizations were successful in diverting foundation money to other issues areas which is the belief supported by interviewees below.

Kate Kendell, executive director of NCLR was clear about her thoughts regarding the effects of marriage:

There is absolutely no doubt that the attention on marriage… brought in a greater abundance of resources that we were then able to deploy not just to win marriage, but to use in foster care, to transgender young people and transgender adults being safer, to custody issues, to winning adoption… [it] benefited our work across the spectrum…” (Kendell 2016).

NCLR Family Law director Cathy Sakimura agrees and notes that marriage also brought people into the movement. Sakimura stated: “I do think it has overall increased our resources and the attention on our work. It brought more people into our movement and some of those people were only interested in that particular campaign” (Sakimura 2016).

Chris Daley, who worked at NCLR before co-founding the Transgender Law Center, was specific about the influence on staff and funders. Chris noted:

Before marriage equality in California I think NCLR had nine or ten staff members. At the end of 2008 or whenever they were at twenty-five. They're up at forty now I think… the high-profile nature of marriage equality brought in funders who otherwise were not doing this funding, allowed organizations by and large to grow and to become more sophisticated about raising funds so that they could sustain themselves better. These are folks who were not going to come in if there wasn't some big pressing need (Daley 2016)

“What can I say?” Lee Swislow, former executive director of GLBTQ Advocates & Defenders (GLAD) said to me, “I mean, for GLAD, as the organization that won the first marriage case in the country, it was huge. I mean, GLAD probably tripled in size because of the visibility and support that it got through our leadership in terms of marriage litigation…” (Swislow 2016). GLAD is not without agency here. Undoubtedly, they could point to work in development and grant requests, but it is telling how much they credit marriage with this growth.
Gary Buseck, current legal director and former executive director of GLAD concurs. In addition, Buseck also explained the effect *Goodridge* (2003) had on GLAD: “I became executive director in 1997 and I was there until just after the *Goodridge* decision until 2004. I think when I left the budget for the 2004 calendar year was set at something like 1.6 million dollars and within a year GLAD’s budget was at least a million dollars more than that” (Buseck 2016). He went on: “… *Goodridge* allowed a very significant amount of growth at GLAD and I don't know I would assume that phenomenon happened elsewhere but at the same time we had at GLAD, ballparking it, something like a million dollars of additional income in the subsequent post *Goodridge* year” (Buseck 2016).

However, there was a limit to the effects of marriage. Buseck recalled: “Yet we won the Connecticut marriage case in 2008 and I think it is fair to say that it had zero effect … I mean the community did not respond to winning marriage in Connecticut the way it responded to winning marriage in Massachusetts” (Buseck 2016).

Shannon Minter, legal director at NCLR who has been there for nearly a quarter century, stated that:

There is no question, it poured money into the movement, new money, new funding, new energy, new members, new people engaged. And yea, that enabled us and other groups to work with marriage of course but to do a whole other stuff that we wouldn’t have been able to do otherwise. It just made all the organizations – it gave us more money, more resources and staff and visibility. There was so much momentum. I think all the victories and visibility around LGBT issues around marriage has helped us win so many other things: discrimination protections, protections for transgender students… (Minter 2016)

We also might be able to track the influence of marriage on organizations through giving by major donors and foundations. There is one major obstacle to this. Development directors and executive directors spend their time educating donors (see Chapter Six), trying to convince them to donate to general funds and give unrestricted donations. As the previous chapter discussed, most
organizational assets are unrestricted, either because they came from individual donations or, unrestricted grants or major gifts (donations over a thousand dollars). Thus, we cannot track where most donated money is going.

However, as Chapter Six also explains, temporarily restricted assets are contributions to organizations that have stipulations, typically by time, by issue, or by activity. We can view some of these grants in available audited financial statements. As illustrated earlier in Chapter Six (Table 6.2 and 6.3), marriage is indeed the most funded single issue. However, both NCLR’s and Lambda’s temporarily restricted assets were mostly based on time, not on an issue. There were also many contributions restricted to issues beyond marriage, such as transgender rights, latinx outreach, homeless shelters, and immigration. In fact, funding restricted to marriage is outweighed in total donations to these other issues.

For example, Lambda announced in 2008 that with support from Tides Foundation, Lambda’s Home-Care Youth Project was creating two new initiatives. These were created to “build the capacity, awareness and skills of social workers and other child welfare professionals serving LGBTQ youth living in out-of-home foster care, juvenile justice and homeless systems of care” (Lambda Legal 2008a).

We might also look at the effects of a significant bequest. During the marriage litigation period an $11 million-dollar bequest was given to Lambda Legal to be paid out over eight years (Lambda Legal 2008b). The bequest came from Ric Weiland, one of Microsoft’s first employees, and it was the largest bequest ever received by Lambda (Lambda Legal 2008b). There is no indication if Weiland intended this funding to be used in a particular way or if Lambda sought to do so. A Seattle Times article noted at the time “For Lambda Legal, where Weiland was the top individual supporter for years, the bequest will expand its efforts nationwide to get same-sex
marriages legalized, fight workplace discrimination and secure the rights of gay parents” (Heim 2008) though that information is not attributed to anyone at Lambda.

In a press release announcing the bequest, executive director Kevin Cathcart remarked: “Lambda Legal will use the approximately $1.4 million it will receive each year over the next 8 years to implement the "Weiland Initiative" to strengthen and expand its legal and educational work, winning more battles for the LGBT community and people with HIV, and moving our community closer to equality. This year, it will equal approximately one-tenth of Lambda Legal's overall budget” (Lambda Legal 2008b). We also know though Weiland gave heavily to work on AIDS over the course of several years (Stiffler 2017).

The data from temporarily restricted assets and examples from the Weiland bequest and Tides partnership show that, while a great deal of money came in from major donors and foundations based on marriage, resources were also being given specifically to non-marriage projects. Some projects and issues rivaled marriage in restricted donations such as contributions to NCLR’s Transgender Law Project and Lambda’s Fair Courts Project.

In sum, impact lawyers strongly believe that their organizations saw increases in resources due to marriage equality visibility and there is some evidence to support this. We see evidence of this in restricted donations made specifically to marriage equality. However, lawyers will also argue below that resources coming in from marriage were redirected toward other issues in the form of unrestricted grants and general donations. Since these unrestricted individual donations constitute most of the contributions, it is difficult to verify that claim of lawyers.

Another potential indicator of marriage equality’s effects on organizations is the increase in staff sizes. The change most relatable to marriage was for GLAD. As we can see in Figure 7.1, following GLAD’s successful Goodridge (2003) decision, staff size increased from sixteen in 2003
to twenty in 2004 and then twenty-five in 2005. This does not mean that marriage was solely responsible for staff increases but it does support GLAD lawyers who recall this being a period of growth, which interviewees do attribute to marriage.

**Figure 7.1: GLAD Staff, 1984 – 2015***

*GLAD data is from Yale University Library, Manuscripts and Archives (New Haven, CT).

According to Figure 7.2 (below), the biggest change for Lambda in this period was from 2002 to 2003, when there was a 16% increase in staff. 2003 was the year Lambda successfully ended anti-sodomy laws in *Lawrence v. Texas* (2003) and the early 2000s were a period of tremendous growth for Lambda Legal. Overall, from 1999 to 2007, staff size approximately doubled. Lambda was involved in many marriage cases during this period, such as in California in 2005 (*In re Marriage Cases*), New Jersey in 2006 (*Lewis v. Harris*), and Iowa in 2007 (*Varnum v. Brien*). Between 2013 and 2014, Lambda also had cases escalate to the federal court level. However, it is difficult to tie the change in staff size to marriage equality specifically, given the steady nature of growth and the range of marriage cases over this period.
NCLR experienced a significant growth in staff too, illustrated in Figure 7.3, from seventeen staffers in 2004 to thirty in 2005. This trend held relatively constant up to 2015. The year 2003 and 2004 were around the time NCLR was working on marriage cases in California alongside private firms and organizations including Equality California and Lambda Legal (Woo v. California and In Re Marriage Cases). These were highly visible cases and such an increase in staff might be related to marriage but again, there could be many other factors contributing to this growth. For example, this was also the period in which NCLR was growing its Transgender Law Project which eventually became its own organization. In 2002, NCLR also participated in the televised case of Michael Kantaras, a father in Florida who had lost custody of his children because he was transgender.

Just as with foundation contributions, it is difficult to say whether staff growth was a result of marriage equality litigation. In the year or two after some of these victories, there are some staff
increases however, there are also staff decreases in the years after victories. Certainly, staff sizes were growing in general around major marriage cases, but they were also growing around other highly visible issues. Additionally, most of these changes were in non-lawyers. Given the literature, this is not surprising. Social movement scholars have noted that as organizations grow, they become more professionalized and bureaucratic (Staggenborg 1988). Indeed, most of these staffers were in development, finance, or office management.

**Figure 7.3: NCLR Staff 1990 – 2015**

![Graph showing NCLR staff from 1990 to 2015 with data from newsletters, Annual Reports, and the Internet Archive Wayback Machine.](image)


**What About Direct Legal Services?**

There is a sense in interviews that the focus on marriage equality has not been a rising tide that has lifted all ships. This stems largely from the direct legal service providers. These provider lawyers usually have some of the following beliefs in common: (a) their organization has not seen the money that impact organizations have gained from marriage, (b) they have seen a mis-
allocation in funding toward marriage within the movement, and that sometimes (c) marriage visibility has caused their organization to divert resources away from other priorities.

One such example came from a legal service provider who asked to be quoted anonymously on this topic. The interviewee stated:

[There is a] wild mis-allocation to fund same sex marriage when trans women of color are being murdered at astounding rates. To someone who does direct legal services or any kind of services in an LGBTQ community experiencing poverty and homelessness, that’s just unconscionable. The legacies of racism and classism that inform those resource allocations build walls and it’s hard to overcome them.

This same interviewee also wondered where the resources of the Empire State Pride Agenda (a policy organization) went following their closing in New York in 2015. While noting that the Agenda had achieved several non-marriage victories, including a prohibition of discrimination against transgender people, the provider argued that “their infrastructure, their funding was so heavily built around marriage that that seems to be more the reason why they had shut down.” The interviewee then asked: “Are those donors flocking to organizations like?” and answered: “I don't know that that's the case. That might be the case in a place like [omitted] where they were able to have other projects going on and other work going on that was buoyed by the interests and resources generated by marriage. I'm not entirely sure. I think the impact on my organization has been next to nil.” 79

Board members and spokespersons for the Empire State Pride Agenda (ESPA) said the decision came after unanimous votes and that the reason was that the organization felt it had met its policy objectives, including same-sex marriage equality, local state and state non-discrimination laws, hate crimes legislation, and most recently an executive order to extend anti-discrimination protections to transgender people (McKinley 2015).

79 Names omitted to ensure anonymity.
But within the LGBTQ community, the closure was met with shock and frustration, considering how many issues remain unresolved in New York State such as conversion therapy (Lavers 2015; O’Donnell 2015). ESPA’s closure also came at the heels of other organizations folding not long after marriage equality victories, including Love Makes a Family (disbanded after Connecticut won marriage equality in 2009), Equality Maryland (in August of 2015 due to budget shortfalls), and Freedom to Marry in 2015. Thus, it bears repeating the question: where did these resources go? Interviewees will point out that they did not go to legal services, for the most part. One exception might be Equality Maryland which in 2016 merged with the Free State Legal Project, one of the legal organizations in this study which provides direct legal services (Wells 2016).

It was hard to say for R. Barrett Marshall, a Mazzoni Center legal services attorney, whether more resources came to her organization as a result of marriage equality (R. B. Marshall 2016). But even the notion of uncertainty is a distinct difference from what impact organization lawyers believe. Marshall did note that for a while, some attention was diverted away from other issues during the marriage campaign though it was necessary. Marshall explained:

As soon as marriage equality happened… I was getting phone calls for people who needed to be divorced but they haven’t been able to because their marriage wasn’t recognized in Pennsylvania until then. It shifts the burden of our work and the burden of our focus because now I have all of these divorce cases that I am doing where before that was taken up with different issues. We do feel like it is important until divorces become as automatic for same gender couples as they would for opposite gender couples. We do think it is really important that we support people and show up for that process so that our courts are really understanding that our rights are really no different. We probably won’t do divorces forever but for now it is actually a really important part of the services we offer. To make sure that these new changed laws are available to the people they are meant to protect. (R. B. Marshall 2016)

Amy Nelson, director of patient legal services at Whitman-Walker Health, felt while “to some extent it [marriage] pulled away some volunteer resources because people wanted to do
marriage” that overall, their organization was not greatly influenced by the marriage equality work. One reason for that is that their legal services center did not do a lot of marriage work. Nelson stated:

marriage was something we’re happy to sign on to amici, but it was not our highest priority. It’s sort of cliché, I think of marriage benefiting more financially stable clients and that’s not our client base. I would say there was some competition there. On the other hand, a marriage win then could open the door to other public benefits victories for our clients. So, it’s not to say it’s not helpful to us, it was never one of our top priorities. (Nelson 2016)

Another reason marriage might not have been felt by the organization was that the donor base remained the same throughout the years of marriage litigation. Nelson explained that their “donor base is primarily law firms who have a presence in D.C. … those law firms tend to see us, not necessarily as the gay advocacy group, but as the low-income service provider who is focused on LGBT issues. The point is that some people see us as part of their budget” (Nelson 2016).

So why did direct legal service programs not observe an increase in resources like those in impact organizations? As Nelson’s statement implies, part of the reason that direct legal services may not have seen resource-boosts from marriage work was because some organizations were not doing much of it (though not nothing). After all, pursuing marriage equality was not the role of service providers in states where there were no marriage waves and reversals, and thus fewer clients in need of legal assistance regarding marriage.

Lee Carpenter, former legal director of Equality Advocates Pennsylvania, summarized the problem simply: “I think that there have been dramatic increases in the amount of money that has flowed into the LGBT rights movement, [but] it hasn’t trickled down to direct legal service organizations. Because direct legal service organizations don’t do marriage equality [impact] litigation” (Carpenter 2016a). Carpenter continued: “My sense is that direct service budgets have
remained flat. In fact, after the recession in 2008, Equality Advocates couldn’t even sustain its legal department, and had to give its legal department to the Mazzoni Center” (Carpenter 2016a).

Some of the budgets for direct legal services programs were available for analysis. In Figure 7.4, the revenues for Equality Advocates Pennsylvania (EAP), the Sylvia Rivera Law Project (SRLP), and Free State Legal Project (FSLP) are compared. These figures do not indicate that marriage equality influenced an increase in resources with these organizations, and it is doubtful considering interviews, that it did have a substantial revenue influence. EAP actually saw their revenues drop and as Carpenter explained above, their legal services were transferred to the Mazzoni Center for Health and Wellbeing in 2010. SRLP focuses their issues on direct services, specifically to transgender people, queer people of color, and the New York City LGBTQ homeless population. FSLP was involved in a same-sex marriage case but that was not until 2015, the same year that the Maryland state legislature passed a marriage equality bill. Further, these organizations’ budgets are dwarfed by the revenues of impact organizations which are roughly five times larger.

Part of what one might expect to hear from interviewees given the literature was a shift in the agendas and work of legal organizations. As far as direct legal service programs, that dynamic does not seem to have occurred according to interviews. Additionally, staff figures for these programs remained relatively stable during the 2000s and budgets do not reflect the bounce that impact organizations saw over the same period. Further evidence is difficult to come by without the kind of detailed financial data that is available for the impact organizations but not for the direct legal service providers. Part of the reason this data is not available is that some providers are housed within larger organizations and those reports do not break down their budgets and
funding by department. Other providers have not made audited financial statements with this information available, at least up until the writing of this project.

**Figure 7.4: Revenue of Direct Legal Service Organizations, 1997 – 2014***

*These are in nominal values (not adjusted for inflation). Data was obtained from IRS 990 forms found on GuideStar.

**Diversion or Aid?**

One behavior we might expect to see given the literature, especially from the more critical LGBTQ scholarship, is organizations diverting their resources away from other issues areas and toward marriage equality. This is a difficult assertion to confirm or reject. How would one know? How do the directors believe they know? In this chapter, the expertise and experience of directors and lawyers who were there is relied on, though this is an admittedly imperfect measurement.

Each interviewee held a nuanced view about the impact of marriage equality and almost all, even those critical of its effect on other work and resources, felt that it was a welcomed victory. That said, just as there were strong feelings and observations that marriage was largely a distraction from the work on homelessness, health care, and violence, there was also strong beliefs that the distraction narrative is misleading. Overall, interviews indicate that if anything, marriage brought
more attention to other issues on organizational agendas because the issue generated awareness and understanding of LGBTQ people.

Speaking directly about resources, Chris Daley, who worked at NCLR and then co-founded and led the Transgender Law Center (TLC) put it this way:

I think the other thing that for me, in my experience, was a complete mess, was the idea that marriage was sucking up all the money. Almost none of our work [TLC] focused on marriage equality. Every year our budget grew. We were able to find new donors every single year. Foundations and so forth. At the time, [...] California marriage equality was a central issue. I don't remember hearing this so much when I was at TLC, but within a couple years after leaving people would say, "Oh you know there's four rich gay men who are driving the whole agenda." I was like, "What are you talking about?" We started this whole organization doing all this work: at that point not having gotten any money from any of those four folks. They since have become donors to TLC I believe...Again, they weren't giving us $150,000, $300,000 like they were for marriage but we also weren't that size. We really weren't ready for those funds. Again, from the very limited experience that I had with this issue, that [marriage diverting resources] just wasn't my lived experience. (Daley 2016)

Cathy Sakimura of NCLR can see both sides but is not convinced by the diversion narrative. Sakimura believes that backlash to marriage may have drained some of the resources from legal groups because they were forced to combat anti-marriage amendments but overall, marriage raised the capabilities of organizations:

I think there is a little bit of backlash and attention, I think particularly in terms of public and media attention, [that was] really sucked into that campaign and that can have some negative impact in the work that you are doing in other areas. I think that the resources as a whole are making the basket bigger [...] I’ve never really felt that this narrative that you know marriage has sucked resources away from other works [...] really made sense because what I have seen through this time [is] that there are actually more resources and yes marriage might be getting more of what’s there but as a whole there is still more. That isn’t to say there is no backlash or no negative impact but you know I think it’s some of both (Sakimura 2016).

Stacey Sobel, formed executive director of Equality Advocates Pennsylvania (EAP) told me that post-Goodridge, the organization was forced to defend against a backlash from a proposed marriage-ban amendment in Pennsylvania. In doing so, she believed EAP was able to gain
resources, rather than drain them fighting the backlash as literature suggests (Klarman 2005). Sobel stated: “We were able to raise more money because we had a constitutional amendment pending. That was in the newspapers that had greater national or state-side readership and people were more engaged and more likely to give.” Sobel went on: “In some ways you could say that the backlash helped us raise money” (Sobel 2016).

Jennifer Levi, who heads the Transgender Rights Project at GLAD put it in the simplest terms: “To me really, I know there's a critique that suggests it's a zero-sum game that more for marriage means less for everything else, but I just don’t see it” (Levi 2016).

One of the concerns related to this issue is the diversion of attention away from other significant issues, both within organizations and among the general public. Speaking more generally about the LGBTQ movement, R. Barrett Marshall’s observation has been that marriage equality came to dominate media attention on LGBTQ issues, pushing out the kind of work that Marshall and the Mazzoni Center concentrate on daily. Marshall stated:

I do think though, with regard to media attention and community support, things like that, marriage really took the attention away from much more basic needs that the community was dealing with. Whether it is healthcare or incarceration or any number of things I do think that it distracted us from really the most vulnerable members of the community and what they were coping with” (R. B. Marshall 2016).

Gary Buseck of GLAD agrees with the media narrative. Buseck explained: “So there is a part of me that thinks that marriage became like the boa constrictor swallowing a rat and all that you can see is the bulge but don’t realize that there are all kinds of other things going on around it. The bulge is now passing through the system…” (Buseck 2016). Buseck continued: “But it certainly got the most attention from the world. We were still doing a lot of other things in the background but people didn’t pay that much attention to it. So, I don’t in one sense think that our legal agenda has changed but something took the spotlight for a period of time.”
This separation, between what the media attention is on and what organizations are working on, is a very important distinction and can be frustrating to those in legal organizations. Kevin Cathcart from Lambda summarized the comparison this way:

I think there is some confusion sometimes in the world about thinking that what the media covers the most is what the organizations do. Absolutely, there's no debate that certain things garner far more attention in the mainstream world. Marriage is the best example of that right. Try and get the mainstream world to focus a great deal on police misconduct, this past year there's been certainly obviously a lot of attention on police misconduct on a broader scale. Not LGBT specifically but much more race specific. (Cathcart 2016a)

Cathcart continued: “You know what? How many young people are forced out of schools in New York City or live on the streets in New York City. There are enormous scandals out there. They don't garner the kind of attention inside or outside the community... It's harder to get traction for some of the stories. That's why we have our own website” (Cathcart 2016a).

Cathcart’s point is significant and repeated by other interviewees. That is, even while these organizations were working on marriage, they were also heavily invested in other issues and it was part of the organization’s job to make the public aware of these issues. At the same time, the added attention to marriage in the media and public (per these interviews) was bringing in a great deal of resources to some of these organizations.

Thus, there might be a tension here: being vocal about all the different and significant work your organization is doing, but also encouraging any media narratives that bring positive attention to the organization. As demonstrated, this tension frustrated some folks, particularly some working in direct legal services – though not all – who saw the issues affecting their clients being ignored.

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80 This also potentially complicates communication strategies with the media. Organizations want to have more attention from the media but the focus on marriage may undercut their community outreach to subgroups that prioritize other issues.
However, another narrative appeared in interviews: that marriage created visibility and opportunity for other issues. The reason why, interviewees stated, is that it was an issue that resonated with a large population, within and outside the LGBTQ community. As such, it was able to change “hearts and minds” about LGBTQ people in general, and this had a ripple effect to other issue areas. Kate Kendell of NCLR:

It brought in additional resources that in our experience benefited our work across the spectrum, and marriage specifically because it’s so personal and so culturally laden with significance around how people relate to each other, having that be the portal by which people begin to understand the lives of lesbian gay bisexual and transgender people was huge in moving people to a greater place of acceptance and support (Kendell 2016).

In a separate interview, Kendell repeated this idea, illustrating how exactly she saw this playing out among the public:

Every piece of our work is related to every other piece. In some ways it is that classic metaphor, "Rising tide lifts all boats." If someone just attended their cousin's same sex wedding last month and was very moved by it, and this is such a common experience… is just completely transformed by it… and just comes back feeling like, ‘I am so honored that I was a part of that experience and now I get it. I get it.’…Then a month later they read a bill to ban conversion therapy based on sexual orientation and gender identity [that] has been introduced in their legislature and their reaction is going to be very positively impacted by the fact that they just attended their cousin's wedding. Every single bit of information that ameliorates homophobia and ameliorates the framing of us as sick or depraved, which still is how many, many people grow up thinking about LGBT people, is going to be helpful to every other thing that we do (Kendell 2017).

Note the importance that Kendell puts on how marriage influenced changes in public attitudes. Like Wolfson (2016) and others, Kendell sees marriage as a symbol through which the general public began to accept LGBTQ people. Minter of NCLR also claimed that marriage was a mobilizing symbol, comparing it to the frustrations of the civil rights movement to rally affected populations to the cause:

I think what people don’t necessarily realize is that, in the ordinary course of things, most people in a marginalized group are not politically engaged at all. That was true in the civil rights movement [where there] was only a fraction of the African American community engaged with the civil rights movement… there were African American people [who] were
afraid and [said]: ‘stop doing that, you’re just going to cause trouble. What are you doing? Don’t do that.’ It is the same with the LGBT community – the vast majority of LGBT people are not in any way politically engaged. They are not giving money, doing any sort of advocacy themselves, not physically engaged, just living their lives. And a lot of them are living it in very adverse circumstances: poverty and incarceration. So, the fact that because of – I don’t know whether a confluence of circumstances made marriage get so much attention – it got more people politically involved than is ordinarily going to be the case, and it created an influx of money and resources. (Minter 2016)

Thus, according to Minter, marriage also got the LGBTQ population more engaged. This meant more interest, more engagement, and more donations for organizations. Chris Daley, wondered whether any other issue could have done what Kendell, Minter, and others describe:

Again, for me the role that marriage had in growing the power and influence of the LGBT rights movement is hard to overstate. Was there a period of time where money could've been allocated differently? Folks could've absolutely identified other priorities. Could there have been a priority that both had as significant of social change and as much a change in the sophistication and sway of organizations? I don't know. (Daley 2016)

Though there were many significant leaders in the push for marriage equality (like Mary Bonauto), Evan Wolfson is perhaps the person most closely associated with it for his tenacious work on the issue from law school through leading Lambda Legal’s marriage project and then founding Freedom to Mary.81 During an interview for this project he was asked whether he always thought marriage had the potential to create wins for other issues or if it was something that became evident “down the home stretch?” Wolfson replied:

Oh, I always believed it… marriage is a vocabulary of love, commitment, connection, values, empathy, understanding that would be an engine of transformation that would help non-gay people better understand who gay people are and would advance us on all fronts. Only by fighting for marriage would we be able to win marriage, but also by fighting for the freedom to marry, we would be making it easier to win the other things (Wolfson 2016).

In sum, interviewees hold two somewhat competing thoughts on the diversion narrative. First is that marriage distracted from other issues in the public eye. This is just as much a source

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81 Mary Bonauto of GLAD worked for years, successfully, to achieve marriage equality in Maine, Vermont, New Hampshire, Massachusetts, Connecticut, and Rhode Island and represented the plaintiffs in Obergefell v. Hodges (2015). I was unable to interview Bonauto but her contribution should not be omitted.
of frustration for impact lawyers as it is for direct legal service lawyers. However, the second thought is that marriage also brought greater attention to other issues because it invited more people to become engaged with LGBTQ people and rights. Putting these two together, impact lawyers believe that marriage was a net positive for other agenda items. This is because they believe that marriage shifted opinions about LGBTQ people and humanized the LGBTQ community in ways that the movement had not been able to beforehand. In turn, this brought interest to the legal organizations working on marriage which worked hard to promote other important issues to this new audience. Again, this is difficult to confirm. There is no available data that would settle this. Thus, this project relies upon the experience and observations of interviewees.

**Marriage and Opportunities**

Together, the previous evidence of changes to staff, resources, and allies relate to an important concept in this project: the creation of opportunities. In other words, did marriage equality create opportunities for legal organizations to expand their work? The interviewees in this project, as evidenced above and in this section, believe it did. Scholarship has suggested that litigation could encourage development of important aspects to opportunity such as pecuniary resources and allies (Boutcher 2005; Mather 1998; McCann 1994; NeJaime 2011) while other works discussed above were concerned about organizations narrowing their work, rather than expanding it.

Regarding resources again, interviewees saw marriage expanding opportunities in other areas. Lee Swislow of GLAD noted that the resources that were gained as a result of marriage equality in 2004 went to work on more than marriage: “It allowed us to increase our resources, both in number of attorneys that we had, as well as to increase our public education department,
which then both supported our marriage efforts but also gave us additional capacity in just overall
additional capacity for all of the issues we were addressing” (Swislow 2016). Minter of NCLR
noted too that overall: “It just made all the organizations – it gave us more money, more resources
and staff and visibility. There was so much momentum” (Minter 2016).

Interviewees believe that marriage brought in more members, increasing the capabilities of
the organizations. Cathy Sakimura of NCLR recalled:

“You know, that many of those folks were drawn into our work through […] marriage and
the marriage campaigns, awareness campaigns, but then realized there was a lot of other
work they were interested in. And we’ve always taken that kind of approach, that we try
to educate all of our supporters about all of our work, and the important work we are doing
and serving, much less talked about issues and people in the LGBT community” (Sakimura
2016).

Kendell explains this in terms of donors: “The ubiquity of marriage and the American
experience definitely [worked] to our benefit on every other issue. Once donors got engaged on
one issue, then they were able to see a range of other issues and say, ‘Whoa, I didn't know that was
going on. Well, I care about that. I'm involved.’” Kendell continued: I feel like it created an
opportunity for donors to interact with the movement that would not have otherwise existed… We
saw a drop-off of some donors after we won marriage and now people are coming back because
of the threat that we face. I think to the extent there was a drop-off, I think it's temporary and I
think it's not significant” (Kendell 2017).

Shannon Minter agreed with the idea that the visibility of marriage brought political
opportunity: “I was there, I know what it was before there was so much visibility around marriage.
It definitely brought in more money, [you] know more power, it gave the movement more political
clout. We used every little last bit of it, political clout we had, to try to win victories --- gains and
advances on other issues” (Minter 2016).
Even among direct legal services groups whose work focuses more on homelessness and health care than marriage, there was a sense of a moment of opportunity. Lee Strock, executive director of the Peter Cicchino Youth Project told me: “I think that it is incumbent on me and people in my position to try as hard as we can to capture the interest and momentum of the people who are supporting marriage movements. I think it is certainly an opportunity” (Strock 2016).

*Marriage Equality and the Transgender Rights Agenda*

To understand better how marriage may have elevated opportunities for other issues, it might be helpful to look at the case of transgender rights within the impact organizations. To be clear, the increase in work and awareness on the rights of transgender people cannot not be laid solely at the feet of marriage equality. Much of the work was the result of tireless activism at the grassroots level from organizations supporting LGBTQ rights and communities of color.82

Nonetheless, interviewees believe that marriage equality had a role in elevating the visibility of transgender rights issues in the public sphere by generating more awareness and understanding of LGBTQ people. Jennifer Levi who leads the Transgender Rights Project at GLAD explained: “there's just so much education that has been done around the marriage work that really has humanized the other work that we've focused on as well” (Levi 2016). Levi continued: “I absolutely think that the recent shift in focus nationally and locally on the transgender-related work has come about because of the broader interest in the LGBTQ work” (Levi 2016). In turn, this means that legal organizations, like GLAD, have an opportunity internally to commit more work to issues important to transgender people.

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82 The elevated awareness of unequal rights and treatment sustained by transgender people was likely influenced by a confluence of events: (a) an awakening within the transgender, gender non-conforming community (Currah, Juang, and Minter 2006); (b) an increase in grassroots activism alongside organizations fighting for rights of queer people of color (Broadus 2016; Spade 2016); and (c) greater visibility in popular media of transgender characters and actors.
Shannon Minter – who along with Levi, Kylar Broadus, and Jamison Green formed the Transgender Law & Policy Institute – agrees with Levi. Minter stated: “I think all the victories and visibility around LGBT issues [and] around marriage has helped us win so many other things: discrimination protections, protections for transgender students …” (Minter 2016). Evan Wolfson also has observed that effect. He stated:

I think there's definitely no question that the marriage campaign … shifted attitudes and changed law that we created… creating the space and to some degree the momentum and receptivity for the transgendered moment and evolution that we're seeing now. Obviously, marriage didn't finish everything, but I think it absolutely has advanced almost everything we're fighting for. (Wolfson 2016)

Lee Swislow of GLAD also agrees that marriage equality visibility contributed to increased work internally on transgender issues specifically and can point to specifics. Swislow:

“As I said, it was because of our success in marriage that people wanted to support the organization, which then allowed us to expand our work, our transgender work, and to start our transgender rights project.” Swislow went on: “For transgender work, maybe we raised $70,000 of designated money for transgender work and the program cost were $200,000 but we had this unrestricted money that was coming in [from marriage] that we could use to help fund the transgender work. I think it was very helpful.” (Swislow 2016)

The Development of Tactics via Marriage

Finally, one of the most significant influences of marriage equality discussed in interviews was how much legal organizations learned about tactics and strategy, even early on. These were mostly lessons in the importance of education work, framing of issues, and collaboration. These tactical lessons, specifically in collaboration and education, also feed into creating opportunities and are part of an expansion of multidimensional advocacy. The literature is unclear about whether to expect this type of development, though one could see it as a growing professionalization of the organizations (Staggenborg 1988)

As Chapter Five extensively documents, the “wake up call” for lawyers that they needed to move beyond litigation was the political backlash that resulted from Baehr v. Lewin (1993).
Before that case, Kevin Cathcart noted, Lambda was a small organization that mostly focused on legal work with an over-stretched budget and staff (Cathcart 2016a). Impact organizations realized that they “could do more and needed to do more” which led to the growth of public education as a significant tool of impact work.

This education work in turn led to strategies around framing. The status quo of organizations in the 1990s was to speak of marriage equality specifically in terms of equal protection or civil rights. But interviewees mentioned that they learned there was a more effective way to win over public opinion. As Wolfson (2016) is quoted saying above, organizations learned to use words and ideas about “family” and “love” instead, or what legal mobilization scholar Ellen Andersen would call cultural rather than legal frames (Andersen 2006).

Masen Davis found the lessons from marriage equality had utility in educating people about transgender people. Davis explained: “The nice thing about the trans movement in some ways is we've been able to learn from other parts of the LGB movement including the marriage movement” (Davis 2016). Davis continued:

…one thing we knew was important to figure out from marriage was how do we talk about that in a way that gets people with us. The same question exists in the trans movement, whether you're talking about access to trans related healthcare or access to gender specific activities at schools. We need to be really thoughtful on how we approach these issues and how we talk to people about these issues. Actually, investing in that for the movement seemed like a good thing to do. I will say that in a lot of the discussion I see around trans people in the media, in the high-profile cases and litigation, are reflective of some of those lessons learned (Davis 2016).

Many of these lessons were not just being learned from observation, but instead, were part of trainings and conferences that legal organizations shared with other movement organizations. Lee Strock of the Peter Cicchino Youth Project shared one particular experience, recalling:

I went to a meeting/retreat for development directors for LGBT organizations where there was this fantastic non-profit consultant named Joan Gary and she was doing a training. Basically, it was all about how we're at this pivot moment in the LGBTQ movement and a
lot of organizations are going by the way side and those of us who recognize the vast amount of work to be done, we need to learn what we can. I think people like Evan Wolfson and Mark Solomon talk very well about how, "This is how we did this. Please, everyone else who are in social justice movements learn from what we did well and what we did less well (Strock 2016).

As this example also suggests, interviews held that the marriage equality campaign created a large network of organizations that worked together at the national, state, and local level. This is not to say that groups had not collaborated before. As Shannon Minter points out: “we always had the meetings, [and] a certain amount of conferring” (Minter 2016). As Chapter Two discussed, the LGBT Roundtable was a place for lawyers to coordinate legal strategies, and organizations have long worked hand-in-hand with non-legal organizations on particular projects. However, Minter adds: “It really became much more intense after marriage. After the marriage battle really heated up. And you know frankly, it has dropped off a bit too [since Obergefell]” (Minter 2016).

According to Geoff Kors of NCLR, the marriage equality efforts built a close network of collaboration between not only the public interest groups, but between state and local organizations, some with LGBTQ identities and others without. Kors stated: “Those campaign efforts really were coalition efforts. The importance of getting everyone to the table and getting folks knowing each other. I actually think, one, [marriage] does bring more resources into the entire movement. Two, [it] builds the relationships that you need to do the work moving forward on whatever the issue is” (Kors 2016).

Kors believes that these existing collaborations, which stem from marriage work, will make future work better: “Where it's easier is there are very strong relationships, both within the LGBT movement and outside the movement that are working together. It's easier, because the public has a much greater understanding of LGBT and particularly LGB people than it did previously. The organizations have developed much larger email lists, social media presence, and donor networks”
Jennifer Levi added that these new networks influenced some programmatic decisions on the part of organizations: “I think the marriage work created more national administrative structures and more national coordinated funding sources that probably did change the program, that did influence the programmatic decisions” (Levi 2016).

After Marriage

A significant concern shared across different organizations is that with marriage equality achieved, that the influx of donors, foundations, and public interest will recede from legal organizations. This raises the question of whether marriage equality created a lasting influence on organizations: will they be able to retain resources, networks, members, and continue to grow in the ways that interviewees claim they did during the marriage equality campaign? The common fear among interviewees is the general public and even people within the LGBTQ movement will feel “the work is done”, that marriage equality has been achieved and there is nothing else to do. Shannon Minter of NCLR stated that:

I think we are going to see and we are already seeing a dropping off of interest and funding. It is getting harder and harder… to do the things we want to do on these important issues, especially around advocating for incarcerated people and poor people. And the issues facing transgender people, it’s tough. It’s tough to figure out how to keep the people within who can afford to donate money to our organization, how to keep them engaged. (Minter 2016)

Geoff Kors, the policy director at NCLR agrees: “Where it's harder is that there was a lot of funding that came into marriage only, not all of which will continue to come into the movement. There is an increasing belief on the part of most Americans that there already are non-discrimination protections, that things have been addressed. Even though that's not true in so many areas” (Kors 2016). Speaking about direct legal services Barrett Marshall from Mazzoni legal services stated:

Is there marriage money going towards other things? Absolutely. Without a doubt because there was such an incredible volume of cash donated to the marriage fight we couldn't have
possibly used it all for marriage. I think that is great but the thing I do worry about is that people think that this is over. We are not getting marriage money anymore. We have to be able to present the very real needs of our community members as they are continuing to arise or we are not going to be able to replicate that funding stream and we are not going to be able to keep doing the work in those more vulnerable sectors of the community (R. B. Marshall 2016).

Signaling the commonality between what impact and direct legal services organizations are seeing, Gary Buseck of GLAD noted: “I think it [marriage] did allow all of us to do other non-marriage related work and the challenge now is to see if that can be sustained with enthusiasm for that other work… the community isn’t jazzed up about youth or elders or trans or HIV the way it was jazzed about marriage” (Buseck 2016). This potential drop-off, according to Lee Carpenter, may simply be the nature of high visibility impact litigation work. Carpenter added: “But my fear is all of this money is going to go away […] I don’t think the movement is at all well positioned to pivot away from big, single issue impact litigation. I don’t think that people think enough about direct legal services or understand what it does and I’m really concerned about that” (Carpenter 2016a).

While these fears are shared views across different organizations, another less stated view is that organizations will generally be okay. Chris Daley, explains: “Now there [are] a lot of questions about whether some of the biggest funders and other folks are now pulling back on LGBT funding because marriage has been won. That may well be true, but I think there are other funders coming into the field all the time who weren't doing this funding” (Daley 2016). Kevin Cathcart echoed Daley’s thoughts: “Not all the donors have ever stayed. Not all the donors in 1987 were donors in 1988. Not all the donors in 1994 were donors in 1995. Not all the donors now are going to be donors. There are people who are very single-minded about marriage. They provided whatever resources they provided. If they go away, you know what, I can't make people be donors. Nobody can.” He continued: “I do believe the majority of people will stay, and I think that when
more people were engaged in the marriage, it also enabled us to do more of all kinds of work” (Cathcart 2016a).

As stated above, Shannon Minter is concerned about funding, but he is also hopeful: “I will say that our core donors are very loyal, and I think really committed to a progressive agenda. But we got extra funding because of our visibility around marriage, and [we are now] trying to figure out a way to keep doing what we are doing at the same level and not have our funding drop off” (Minter 2016). Thomas Ude, director of the Mazzoni Center Legal Services believes that generally, marriage equality donors have been convinced of the importance of funding work on other issues: “I know some people who, for example with transgender rights or with LGBTQ youth, they do feel just as strongly and possibly more strongly than they did about marriage equality, so they're continued at levels or maybe even increased the level they were going for” (Ude 2016).

It remains to be seen whether marriage equality will continue to be perceived by lawyers as generating change within legal groups, particularly impact organizations. If the effects are lasting, we should expect to see organizations employing the lessons of multidimensional advocacy in other issue areas and for organizations to continue to raise significant sums of pecuniary resources. But moreover, these fears tell us that there is a perception that marriage equality brought something to organizations, whether resources or attention, otherwise they would not fear what is coming after the success of marriage equality.

Conclusion

What happened to LGBTQ cause lawyering organizations while marriage was being won? The literature does not provide a great deal of guidance on what to expect. The most helpful works suggest that after success we might expect organizations to become more formalized (Albiston 2011; Gamson 1975; McCann 1994; Staggenborg 1988) and thus perhaps more conservative (Piven and Cloward 1979; Zald and Ash 1966) as they try to win favor of the state and general
public. But the legal organizations in this study, by their very nature, were already formalized as lawyers engaging in the judicial system. (i.e. clear bureaucratic hierarchies, boards of directors, interactions with state institutions over protest tactics).

Before diving into the findings, it is important to note that it is very difficult to definitively draw a causal link between marriage equality and some of the claims that staff make. For instance, most of the impact lawyers, and even some direct legal service providers, believe that marriage equality brought greater resources to their legal organization. We can see supportive evidence in financial reporting and staffing figures, but it is likely that a multitude of events were interacting to make those developments happen. However, while we are dealing with staff perceptions, many are perceptions from people with long institutional memories and good vantage points upon which to see marriage equality’s influence.

There were four baskets of findings in this chapter. In the first, impact organizations report that they saw a significant increase in resources, particularly pecuniary. Where did most of it go? Restricted assets show that marriage was favored by foundations among individual issues but just barely. Many other issues received grants from foundations as well. Additionally, most money coming in was unrestricted and not coming in specifically for marriage. This comports with interviews who say that marriage brought in many donations but that those donations were diverted to other areas. However, it is hard to confirm that those resources came in because of marriage because unrestricted donations do not list causes. Staff grew too, but they did so around a lot of other events.

All this generation of resources, interviewees report, created “additional capacity” (Swislow 2016) to expand their work in other areas. Further, in the eyes of many lawyers, marriage shifting public attitudes toward LGBTQ people. Thus, the second basket of findings in this chapter
is that marriage may have created opportunities to win in other issues areas by expanding organizational agendas, allocating new resources, and shifting the political landscape in the favor of LGBTQ right.

As Chapter Three discusses, marriage may have also influenced the development of tactics. In this third basket, interviewees report that during intensifying work around marriage equality from the early 2000s to 2015, impact organizations came to embrace multidimensional advocacy. The development of education work, new framing strategies, and greater collaboration happened during this period. These developments, at least so far, appear to have life after marriage.

In the last basket, the experiences of impact organizations and direct legal service providers differed. Rather than alter their agendas or increase their resources, marriage equality was mostly non-influential in the work of direct legal service providers. Their concerns about marriage equality, even among those who supported the pursuance of the issue through courts, saw its prioritization in the media as problematic for their own work because it drew attention away from certain issues. Providers saw an imbalance and an unfortunate prioritization within the whole movement, with larger organizations receiving significant resources, at least ostensibly, because of marriage equality while direct legal services did not see as much, if any of those resources.

Put simply, in the shadow of marriage, different organizations had different experiences. But despite the concerns that resources could be have used “better”, interviewees and data indicate that the marriage equality campaign and its subsequent victory happened during a period of significant growth and change within the LGBTQ legal industry. Some of this growth, at least, is likely related to the visibility and resources generated by marriage equality.
Chapter Eight | Conclusion: Understanding the Changemakers

According to Gerald Rosenberg, many cause lawyers “misunderstand both the limits of courts and the lessons of history” (Rosenberg 2005, 815). Their vision is clouded “with a naïve and romantic belief in the triumph of rights over politics” (Rosenberg 2005, 815). In other words, lawyers resemble the “isolated lawyer” from the literature rather than a more “engaged lawyer” tapping into different venues and methods of change. But it is likely that most if not all interviewees in this study would take issue with this conclusion. Shannon Minter, the legal director of the National Center for Lesbians Rights (NCLR) who has been involved in a litany of issues and countless cases, remarked to me:

I have read these critiques were lawyers think the law exists in isolation and I don’t know what lawyers they are talking to because the LGBT legal groups, in my experience, in no way, shape, or form think that. We are keenly aware that the [public relations] and public education, media, is at least half the battle in these cases. [We’re] very intentional about it. (Minter 2016)

Minter’s claim is that cause lawyers are involved in work beyond litigation because they have to be in order to reach movement goals. One does not have to imagine Rosenberg’s response to this. In a discussion of his work during a Drake Law School Symposium he remarked:

One of the responses I often hear from progressive lawyers is… ‘Well, of course we are more sophisticated. This is part of a multi-tiered strategy.’ And I say, ‘Oh. Well, that's interesting. What have you been doing on the rest of the strategy? What part of your budget goes to this?’ And they respond: ‘We are really not doing much now, but we are depending on other people.’ So, I do not believe it. I want to see the numbers and the expenditures. I think this is a line we get from lawyers who realize that there is at least some literature that suggests that courts cannot solve all their problems, and they give lip service to it. I think this is an empirical question worthy of investigation. (Rosenberg 2005, 818)

In this project I provide such an investigation by asking two questions about cause lawyering organizations: (1) how do they set their agendas, and (2) how do they select their
tactics? Findings show that lawyers and legal organizations are giving *much* more than lip service to a multi-tiered strategy. Acting more like the “engaged lawyers”, these legal organizations are committed to multiple strategies due to their recognition of the limits to courts and belief in the need to engage “hearts and minds.”

Why study social movement legal organizations? The answer is that they are important, and we do not know much about them. Legal organizations (especially the ones here) have been tremendously successful in court and may influence social movement agendas (Levitsky 2006; Leachman 2014). Despite that, there is a “strikingly thin” (Rhode 2008, 2028) amount of literature and knowledge about the behavior of cause lawyering organizations. Additionally, studying one movement with multiple organizations (with different types) gave the project a diverse sample.

What we can gather from large-N studies of public interest legal organizations and scholarship on individual cause lawyers are two different baskets of expectations. In one reading of the literature, we might have expected an “isolated” style of lawyering. According to this interpretation of the scholarship, we should expect organizations to be focused internally on legal considerations and the chance at courtroom victories, perhaps also influenced by foundations that keep them open. In a different reading of the literature, we might expect a more “engaged” style of lawyering. This approach would lead us to expect active community engagement and the consideration of community need in agenda setting.

As the Introduction pointed out, most scholarship in this area tends to focus on litigation alone and typically examines two processes separately: agenda setting and tactical choices. In considering these limits to the literature and early findings, I used *multidimensional*
advocacy (Cummings and NeJaime 2010; Goldberg 2017) as a starting framework to go beyond litigation. Cummings and NeJaime (2010) define multidimensional advocacy as engagement across different venues, spanning different levels of government, and deploying different tactics (2010, 1242). Chapters Two, Three, and Four focus specifically on one aspect of this style of advocacy. Chapters Five, Six, and Seven are additional elements that sprung from the literature or from the research itself. Each of these also goes beyond litigation itself, whether it is a discussion of call centers or fundraising work.

Each tactic of a multidimensional approach (litigation, policy, education) may come with its own set of constraints and opportunities. Thus, looking at the how and why of what organizations are doing with each tactic guides us toward a more holistic idea of how organizations set their agendas. One lesson of this project is that tactical choices and agenda setting are not all about what is going to win in court. Organizational behaviors (agendas and tactics) are influenced primarily by what the needs among community members are perceived to be and whether those needs can be answered by any of these approaches. Resources and opportunity both matter in whether an issue is pursued, but to what degree they matter might change based on the tactic being used.

Contemporary theories about social movement organization behaviors have some explanatory power. Resource mobilization theories (McCarthy and Zald 1977) account for important factors in agenda setting and tactical choices such as pecuniary or monetary resources and the need for allies outside of the organization. However, in this study, a lack of resources does not appear to dissuade organizations from pursuing certain issues and the availability of different tactical approaches gives organizations the chance to leverage what resources they do have in different venues.
Opportunity structures (Andersen 2006; Epp 1998; McAdam 1982) are also significant in the processes observed here. Lawyers often speak of a confluence of events (political, legal, and otherwise) that create a moment to act. This involves finding a sympathetic ally in government, a strong network of organizations, and/or shifting public attitudes. However, lawyers recall taking on issues when there did not appear to be significant opportunity (legal or political) and there were times when lawyers expected to lose. According to interviews, organizations created their own opportunities by using a range of tactics which laid the ground work for when the moment was right. In this regard, lawyers sounded as if they were building their own opportunities, rather than waiting for the “right time.” Moreover, it tells us that a perceived lack of opportunity does not necessarily mean that an organization will not, or cannot, pursue an issue.

Each chapter tells one of two stories: one about the multidimensional strategies of these organizations and the other about internal and exogenous factors in agenda setting. Together, they illustrate a careful balancing act, where choices are often made based on perceptions of need and whether the organization can find or build opportunities across different venues.

**Multidimensional Advocacy**

The first story is of how lawyer-led organizations have come to recognize and manage the limits of judicial pathways for social and legal change. Until recently, much of the scholarship on cause lawyering has centered on litigation while non-litigation work has sat in the periphery. Early theorizing of public interest lawyer behavior suggested that organizations were more likely to “utilize tools that reflect their legal training” rather than lobbying and educations tactics which, they felt, fell outside the skills and expertise of lawyers (Komesar and Weisbrod 1978, 89). By centering all three aspects of cause lawyering work (litigation, policy, and education) rather than litigation alone, the project aspired to gain new leverage over cause lawyer behavior.
Through interviews and material analysis, I observed a strong commitment to a multidimensional strategy which demonstrates that lawyers are not caught up in a “myth of rights” (Klarman 2005; Rosenberg 2008; Scheingold 1974) and are not as limited by their legal training as others have come to expect. Tactics are often viewed by lawyers and staff interdependently, with the aim of leveraging one venue (example: public opinion) against another (example: courts or judges). I divided my findings on tactics into seven parts:

1. The work and setbacks around marriage equality taught lawyers the importance of multidimensional advocacy (Chapter Seven). While the organizations have long employed public education and policy work (Andersen 2006; Zuber 2017), both wins and losses in marriage equality showed lawyers what non-litigation tools could bring to the table. Lawyers displayed a degree of flexibility and growth that they are not often credited for.

2. Perceived opportunity and community need heavily determine what tactics are chosen and when they are deployed (Chapters Two, Three, and Four). Increased receptivity by new agency staff, perhaps after an election, might encourage lawyers to limit lawsuits and work with agencies to draft new rules. A closing in opportunity from legislatures or executive branches might encourage lawyers to open litigation and push a public education campaign to shift public opinion. Perception of opportunities within different venues (courts, legislatures, agencies, public opinion) where every situation brings unique contexts, is often determinative in influencing decisions to litigate or not.

3. Policy work (bill drafting, agency and professional advocacy, and lobbying) is used by lawyers on its own or in conjunction with on-going litigation. Policy work also has inherent educational qualities, especially when it comes to running workshops and training public officials in certain areas. Because of the institutional limitations in place on lobbying, much
of policy work focuses on working with agency officials. Strategies are often shaped by collaborations with other organizations (legal and non-legal) and state groups. Perceptions of opportunity and on-going litigation often determine what issues are pursued through policy work.

4. Public education (outreach, public persuasion, educating professionals) is utilized to some degree with every case (Minter 2016). More significantly, the dedication of resources to this tactic is beyond the scope of what the literature would suggest. Whether it is the dedicated education departments, the hiring of community organizers, or education campaigns themselves, there is plenty of evidence to demonstrate that these lawyer-led organizations are engaged beyond courts. Jennifer Levi, the director of GLAD’s Transgender Rights Project stated of education: “It's so important because it's not like the law is some objective thing that just moves because you brought a legal case that has the right framing of the argument. Law reflects society and cultural beliefs and ideas. I think that the education campaigns are really important to create a climate that supports shift in legal rules” (Levi 2016).

5. Education work is used to reach organizational goals in three ways. First, in the view of lawyers, it can prime or prepare a pathway to successful litigation by creating a supportive political environment heading into litigation. Second, lawyers discussed how public education can help to control for backlash by shifting public support toward the goals of litigation. Third, lawyers believe that education work can be used to generate public pressure on opposing parties to bring those parties to negotiate.

6. While all the cause-lawyering organization in this project used non-litigation work, there were differences between impact organizations and direct service providers. Lambda,
GLAD, and NCLR were more likely to be involved in federal rule making or large public persuasion campaigns because they have national infrastructure and resources. Smaller organizations like Mazzoni’s legal services also employ non-litigation techniques, but they are often focused on working with city councils, schools, and local and state businesses. As Mazzoni’s Barrett Marshall pointed out, “when it comes to policy and education I think there's something to be said for us being able to write a letter” to an agency or organization rather than litigate because “litigation can work against you or threats of litigation or doing this lawyer posture thing can work against you” (Marshall 2016).

7. While interviewees hinted that lawyers once had a stronger faith in courts (Cathcart 2016a), no interviewee expressed the idea that litigation is a be-all-end-all tool. Stefan Johnson, an attorney with Lambda noted: “Litigation is not going to solve all the problems. Court cases can go all your way, but if people are not with you, nothing will happen” (Johnson 2016).

**Agenda setting**

The second story is about how cause lawyering organizations set their agendas. One early theory suggests that impact organizations are motivated by resources and they select cases that would increase the visibility of the organization and its work (Komesar and Weisbrod 1978). A more recent large-N survey found varied approaches among public interest legal organizations (both impact and direct services) though two-thirds followed an “informal” approach to setting priorities which includes less regular staff meetings and fewer planning documents (Rhode 2008, 2050). Only a quarter of groups in that survey (28%) reached out for input from other stakeholders including members, clients, and similar organizations (Rhode 2008, 2050–51).

However, by looking at organizations through a multidimensional approach, and in asking about the ways organizations engages with communities, this study finds evidence for an agenda
setting process that is about negotiation between perceptions of opportunity and community need. Rather than following an informal process, staff meet regularly, set out strategic plans, and have developed ways to hear from allies and community members. In sum, organizations in this study preform a careful balancing act in their agenda setting process among community need, staff expertise, and opportunities, all of which can be constrained by available resources.

This is significant given our lack of knowledge about cause lawyering organizational behavior (Rhode 2008, 2028) and what we do know about criticisms of lawyer-led movements and the behavior of interest groups representing marginalized communities. Pulling that literature together, it would be reasonable to expect these organizations to pay less attention to community voices and allies. In the interest group literature, Strolovich’s study (2007) tells us that organizations have a tendency to commit more resources to issues important to larger subgroups, rather than small subgroups. Literature on cause lawyering within the LGBTQ movement finds that lawyers tend to be focused on their own agenda and can ‘capture’ a movements’ agenda by moving it away from its more radical parts (Leachman 2014; Levitsky 2006). As described in Chapter One and Chapter Five, lawyers have been accused of creating lawyer-only spaces that marginalize the voices of community members (Arkles, Gehi, and Redfield 2010) and the (unintentional) secretive nature of case selection and agenda setting has sowed distrust of the larger impact organizations (Arkles, Gehi, and Redfield 2010; Carpenter 2014). Lastly, an early theory of public interest legal organization behavior based on survey data suggested that public interest lawyers were “far more interested in ‘novel questions of law and legal precedent’” and “chance[s] of success” than other issues such as “altruistic motives”, “ability of client to pay” and “expected duration of litigation” (Komesar and Weisbrod 1978, 87).84

84 The question asked respondents to indicate which factors are “one of the three most important” among six factors.
Contrary to what one might assume from this literature, the research in this study suggests that organizational agenda setting resembles theories like the garbage can model or the “confluence of streams” (Cohen, March, and Olsen 1972; Kingdon 1984). These theories suggest that several factors need to interact with an element of chance for an issue to climb up an agenda. Likewise, organizations in this study balance perceived opportunities (which are subject to chance) with a sense of need from the community they serve. Since individual lawyers have autonomy, individual expertise and interests also play a role. Available resources (whether pecuniary or otherwise) also might constrain what can be done and when. In the end, the agenda setting process is a lot like the tactical process: it is motivated by need but determination involves negotiation between different elements including resources, lawyer autonomy, and opportunity.

**Opportunity Windows as a Do-It-Yourself Project**

One illustration of how both tactical choices and agenda setting can be better understood through a multidimensional framework is NCLR’s pursuit of ending conversion therapy. It hits on nearly every theme: multiple venues, foreclosed opportunities in one space but finding opportunities in another, working past resource constraints, collaborating with other organizations, constructing a network of allies, using litigation, public education and, policy, and relying on a political environment shaped by marriage equality.

As these lawyers recalled, barely anyone was working on this issue in the late 1980s and early 1990s. Neither was there a perceived landscape of political or legal opportunity. Yet, NCLR pursued this issue with vigor, utilizing both litigation and non-litigation tactics. This is not the kind of behavior we might expect given existing theories. The pursuit to end conversion therapy involved navigating a perceived lack of opportunity with varied strategies until a “window” of opportunity was available. The story shows cause lawyering organizations will pursue an issue in
any way they can if their perception of need demands it. Further, it shows organizations will utilize multiple tactics to pursue their goals which includes collaborating with other organizations and employing non-litigious tactics.

In 2014, NCLR launched its #BornPerfect Campaign, a project created to use policy, education, and litigation tactics to end the abusive practice of conversion therapy in the United States, especially practices targeted at LGBTQ youth. Conversion therapy, also referred to as ex-gay therapy or sexual orientation change efforts, is the practice of trying to change a person’s sexual orientation using a variety of psychology and/or spiritual techniques. There is no scientific evidence that such therapy works. The American Psychiatric Association opposes this practice (Commission on Psychotherapy by Psychiatrists 2000), and several American and International medical professional associations consider it abusive (Daniel and Butkus 2015; Sullivan 2015). Youth are especially at risk of being caught in these practices because they typically do not have access to legal resources to defend themselves.

The strategies of NCLR to combat this practice showcase the multidimensional framework described in this project. It also illustrates an agenda setting process that emphasizes community need and staff expertise over resources and even perceived legal or political opportunity. In this example, opportunity is less waiting for a “window” to open and much more about building the window.

85 NCLR’s website on the practice reads: “According to a 2009 report of the American Psychological Association, the techniques therapists have used to try to change sexual orientation and gender identity include inducing nausea, vomiting, or paralysis while showing the patient homoerotic images; providing electric shocks; having the individual snap an elastic band around the wrist when aroused by same-sex erotic images or thoughts; using shame to create aversion to same-sex attractions; orgasmic reconditioning; and satiation therapy. Other techniques include trying to make patients’ behavior more stereotypically feminine or masculine, teaching heterosexual dating skills, using hypnosis to try to redirect desires and arousal, and other techniques—all based on the scientifically discredited premise that being LGBT is a defect or disorder” (NCLR Staff 2014).
Getting on the Agenda

Tucked into the third page of NCLR’s fall 1993 newsletter, a headline reads: “New Project Targets Psychiatric Abuse of Gay Youth” (NCLR Staff 1993b). The first page brought other important news: the legal director had secured two new legal fellowships to fund attorneys, one of which would lead the “Youth Project” though its official title was the “Institutionalized Lesbian and Gay Youth Project” (NCLR Staff 1993b). The project was funded by a fellowship from the National Association for Public Interest Law, known today as the Equal Justice Works (EJW) Foundation.

The new director of this project was Shannon Minter, who first arrived at NCLR as a law clerk while attending Cornell. Minter’s task, according to an NCLR newsletter, was to:

compile a comprehensive national roster of facilities that try to “reorient” gay youth. Using community outreach and the media, Shannon plans to expose the abuse in this treatment, bring lawsuits, to stop it, produce a litigation manual to aid other attorneys, develop model state regulations to protect youth from forced treatment, and organize lobbying for legislation to prohibit this type of abuse. (NCLR Staff 1993b)

But Minter’s introduction to this issue came before this appointment. In his last months working as a law clerk, NCLR received a call about a lesbian teenager who had escaped from a psychiatric facility in West Jordan, Utah named Rivendell Psychiatric Center (Minter 1994; Ocamb 2012). Lyn Duff, a 15-year-old from San Diego, was confined for six months before escaping to San Francisco (Ocamb 2012). According to Minter, he was contacted by a journalist named Bruce Mirkin. Mirkin was contacted by Duff and Mirkin in turn reached out to Minter, asking: "What could we do? Can you do something to help her?" (Minter 2017). Minter, was shocked, recalling: “Oh my gosh’ I was just a student” (Minter 2017).

86 According to an NCLR newsletter Lyn was tricked into going into the facility. Her mother had found a diary of Lyn’s in which she discovered a poem Lyn wrote to another girl. Duff’s treatment included “isolation rooms, powerful psychiatric drugs, behavior therapy that linked ‘sex’ with ‘the pits of hell’, and punishment that included scrubbing floors with a toothbrush” (NCLR Staff 1993b).
Minter reached out to an ACLU attorney working in Utah named Kate Kendell who would later become executive director of NCLR. Kendell recalls:

Minter called me and said, ‘Look, would you be willing to go with me as representative of the ACLU to the psychiatric facility called Rivendell in the middle of nowhere at Utah, and to meet with this young woman who was been institutionalized because she’s a lesbian.’ A minor institutionalized by her parents. I remember thinking and saying to Shannon, ‘Wait, what, you mean people do that?’ And Shannon said, ‘Oh yeah, it’s a serious problem.’ (Kendell 2017)

Minter and the NCLR legal director also immediately reached out to a lawyer with the Legal Services for Children. Together they worked to get Duff out of the facility. How did they get Lynn out? Was it through a case or public pressure? “Nope, it was a letter” said Kendell, “It was communication with the facility” (Kendell 2017). Speaking about the tools available to them, Kendell explained:

This is where you as a lawyer, even though you know you might not have an actual claim to make, to just say ‘this is inappropriate.’ This is not a legitimate psychological, psychiatric basis for holding someone regardless of the fact that she’s a minor and regardless of her parent’s position. Her institutionalization is not justified and we will pursue all remedies available to us to get her out. I know we sent a letter, I think Shannon [Minter] may have even communicated with the director of the facility, who said, ‘Okay, got it. Yeah, you're right,’ and released her. (Kendell 2017)

As Kendell pointed out, up to this point it was unclear to many of them and others in the LGBTQ community, just how pervasive this practice was. Duff’s experience sent Minter on a mission to find more young people trapped at this facility and in others (Ocamb 2012). Subsequently, Minter was offered the Equal Justice Fellowship to return to NCLR and continue this work.

Thus, what catalyzed conversion therapy onto NCLR’s agenda was primarily a recognition of a series of harms that were being perpetrated on LGBTQ youth. Foundation money or major

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87 NCLR and the Legal Services for Children, through a Superior Court ruling, were able to help Lyn start a new life with a lesbian couple in San Francisco who became Duff’s legal guardian. Read about Duff’s ordeal in her own words: Duff, Lyn. “I Was a Teenage Test Case.” California Lawyer 16, no. 5 (May 2001): 46.

88 It was the first LGBT-specific fellowship the foundation had awarded (Minter 2017).
donor interests did not push this issue, though the funding from EJW was significant in NCLR being able to afford to bring Minter on. However, NCLR and Minter sought out this funding and sought to work on this issue. And Minter would continue to work on this issue, keeping it on NCLR’s agenda.

**Building Their Own Opportunities**

Visible paths to success at this point were nil. The most succinct description of the legal environment was provided by Minter in this exchange:

Author: “[Was] there support from public officials, support from other political organizations?”  
Minter: “No.”  
Author: “Any possibility of there being bills passed?”  
Minter: “God no.”

Kendell remarked that “legal opportunities were a little limited” because “you can't sue someone for engaging in a practice that is not illegal” (Kendell 2017). She explained:

What's your claim? You could make claims. You could do a 14th amendment claim, lack of equal protection. You could make some constitutional claims, but you wouldn't ultimately be successful because the answer the person brings is, ‘Well, I'm not doing anything wrong. Show me where anybody says this is not something I should be able to do.’ (Kendell 2017)

The lack of legal opportunities was tied up in the foreclose of political opportunities. Both Minter and Kendell explained that at that time, and into the later 1990s, it was still accepted within the public that sexual orientation can and should be changed. That was a major challenge in the social and political sphere. The other challenge was that “the LGBT community did not see this as a problem and did not believe it was widespread” (Kendell 2017). “We recognized that we were in a climate” Kendell noted, “where not only was there not political support for banning or ending conversion therapy, but there was also a lot of ignorance in the community about the existence of conversion therapy” (Kendell 2017).
In a conversation with Karen Ocamb of the Bilerico Project (an online LGBTQ news and opinion blog), Minter laid out some of the challenges both legally and politically:

“Trying to litigate this issue is really hard because the young people are so damaged. They are usually not in any kind of position to bring a lawsuit. There’s a very short statute of limitations, it’s usually only one year, if you’re lucky, two or three years. And they’re often not in touch with us until after that. Some of them would be homeless and just call me occasionally but I had no way of really tracking them down enough to bring a lawsuit. They were just too transient.

And we had a problem until recently: we couldn’t get the mainstream mental health organizations to take strong positions on these practices. They were just going through their own internal process. Looking at this issue, there were still plenty of practitioners who were defending it” (Ocamb 2012)

As a result, the first task of Minter and the Youth Project was to use advocacy work and education to (a) alert the LGBTQ community to the threat of this practice and (b) convince the professional associations and doctors to reject it. Minter noted that his biggest problem for years “was trying to get anyone to pay attention or care or even believe it was happening” (Minter 2017). He would even talk to people who worked at homeless shelters for LGBTQ youth and they would tell him “No, I don’t think this happens” (Minter 2017).

Slowly but surely, Minter and collaborators were able to turn the spotlight on this practice. They built a survivors’ network, a toll-free hotline for youth to call, and conducted education efforts. For example, funded through a grant from the Ben and Jerry’s Foundation, the Youth Project published a newsletter called “24:7: Notes from the Inside” which was a bi-monthly publication “by and for young people in psychiatric facilities and other group care settings” (Minter 1994).

They also continually reached out to associations, talking to doctors, talking to public officials. But most of this work, as Kendell put it, was “behind the scenes” (Kendell 2017). Minter for example met with federal Department of Health and Human Services representatives to draft
guidelines for general health care and mental health care providers who work with lesbian and gay youth (Minter 1995). Finally, in 1997 the American Psychological Association adopted a policy that discouraged these practices among its members and the next year, the American Psychiatric Association followed suit. Soon, other organized medical and mental professionals fell in line.

Alongside these advocacy efforts, NCLR took on more individual cases like Duff’s. Kendell recalls they “weren't pursuing specific funding” for this work (Kendell 2017). Instead, they utilized general operating funding. They became involved in cases when they got calls (Kendell 2017). While this seems like direct legal service work, Minter did not see it as such. These cases were important individually and in making a broader influence in the legal system. When I noted to Minter: “This [the Duff case] does not sound like an impact litigation case”, Minter replied:

Not really, no… Well, I mean, yes and no. I'm very dubious about this distinction between impact litigation and direct services. I think it's often misleading. Sometimes people mean by impact litigation, appellate litigation that actually changes a legal rule or standard. It clearly wasn't that, but I also think trial court cases can have impact in other ways... That case has become the template for us for dealing with other subsequent situations, where over the years we've been able to help private attorneys in other similar cases take a similar approach. It kind of did provide a template or a blueprint for that. That's another kind of broader impact. (Minter 2017)

In sum, Minter and Kendell recognized a problem. There were not the necessary kinds of allies, laws, legal precedent, and other resources to make immediate change. There were no open windows of opportunity. They had to lay the groundwork. So, they began with taking individual legal cases that they could but focused most of their energy into advocacy: building networks of allies among policy makers and professionals as well as increasing awareness in the LGBTQ community. The multidimensional nature of their tactics was bound up in their agenda setting. They (Kendell and Minter) believed in this cause but were not willing to let foreclosed opportunities in the typical lawyer-friendly venues stop them. Thus, consciously or not, they did
the work necessary to create those opportunities.

**Turning Point in California**

Through the 1990s and early 2000s NCLR continued to use education and professional advocacy tactics to build support and allies among professional agencies. Meanwhile, the marriage equality campaign opened doors in terms of resources (pecuniary) and public attention to LGBTQ issues (see Chapter Seven). Public attitude, in eyes of these interviewees, shifted positively toward LGBTQ people and expanding rights.

It was then, in the mid-2000s, that NCLR “recognized we’re at that moment…to actually try to end this” (Kendell 2017). In 2010, Kendell and others met for breakfast and began talking about what ideas they had. Some at the gathering pitched the idea of doing a legislative ban in California. They argued that they thought they could get the professional associations on board. Kendell recalls that this was “in the middle of the marriage conversation” and that they calculated that the “visibility, the acceptance, the understanding of sexual orientation variance and spectrum” was on their side and California would be the be place to start (Kendell 2017).

Around that time, Geoff Kors came to NCLR from Equality California (Equality CA). Equality CA (a policy advocacy organization) was working with legislators on a bill to end conversion therapy with NCLR’s involvement. Together they “helped draft, co-sponsor, and push California’s Senate Bill 1172” through the California state legislature (Kendell 2012). The bill banned state-licensed therapists from practicing conversion therapy on minors (Kendell 2012).

In that piece of legislation, NCLR and others “made a compromise” (Kendell 2017). Kendell pointed out that the bill did not go as far as they would have liked (a complete ban on the practice regardless of age). Kors explained that part of the bill drafting process involved anticipating responses to the bill if it were to become law. Kors recalled first that “a lot of the work
was drafting it in a way that would withstand a First Amendment challenge” (Kors 2016). Indeed, there was litigation brought by providers who practiced conversion therapy, which NCLR won.

Second, Kors noted that the law was also drafted in a way “that would avoid the mental health community opposing it and actually supporting it” (Kors 2016). He pointed out that restrictions on professional groups are often met with skepticism from those groups. Further, lawyers felt they would need these professional groups in potential future litigation, to write amici in support of the law. Thus, a lot of work went into coalition building with mental health groups over drafting the legislation. In 2012, Governor Jerry Brown of California signed that bill into law, making California the first state to ban conversion therapy.

Creating #BornPerfect

Then, things began to snowball. Kendell: “Once we got a ban in California, and of course they challenged, and we defended it and we won. That was the moment where we thought, ‘We could do this in other states’” (Kendell 2017). This was the moment that NCLR had been building to. “We didn’t know the opportunity for a project [referring to #BornPerfect] would emerge” Kendell noted, but they were “very opportunistic, so you do what you can, and then boom, all of a sudden something opens up and you’re like “Okay, now let’s launch a project” (Kendell 2017).

They conceived of a project with three prongs. First, advance legislative bans on conversion therapy for minors across the states. Second, use litigation to sue practitioners under either consumer fraud or constitutional theories. Third, engage in public education targeted specifically at parents. On this point Kendell noted:

We wanted to change the google search results. When you as a parent, five years ago, six years ago, entered conversion therapy, you would get pages of people who practice conversion therapy and you’d get NARTH [National Association for Research & Therapy of Homosexuality] ... We wanted the first four pages of search results to be article after
article about how dangerous and failed conversion therapy was and [what] long-term damage it did. (Kendell 2017)\textsuperscript{89}

So far, whether due to these strategies or not, there has been tremendous success in ending conversion therapy practices. Immediately following California’s legislative ban, New Jersey also banned the practice on minors (2013). Since then, similar bans have been erected in Washington D.C (2014), Oregon (2014), Illinois (2015), Vermont (2016), Nevada (2017), New Mexico (2017), Rhode Island (2017), and Connecticut (2017). Thirty-four local ordinances banning the practice have also been created since 2015, the same year that the White House and the U.S. Surgeon General issued statements opposing conversion therapy (NCLR Staff 2017).

Summary

This story hits on all the major themes of this study. First, the lawyers here could have chosen to try their hand at a federal or state case to challenge the legality of conversion therapy. They could have used the hallmark of impact organizations, the “test” case, to move policy. Instead, they deployed a multidimensional strategy by conducting legislative work, by collaborating and negotiating with non-legal organizations (professional and social movement groups), and by protecting their legislative wins through litigation. They used, and continue to use, public education efforts to change the hearts and minds of the public as well as professionals.

These lawyers seized a moment of opportunity, one that they helped to build. First, through their advocacy and collaboration with professional organizations, they helped draft a bill that would win support in the legislature and would survive a judicial challenge. Second, their work and success around marriage opened doors for them. When asked if the two issues (conversion therapy and marriage) were connected, Kendell responded without hesitation: “they’re totally

\textsuperscript{89} The National Association for Research & Therapy of Homosexuality (NARTH) is a non-profit organization that advocates conversion therapy practices.
related” (Kendell 2017). These lawyers observed the social and political landscape changing with public opinion and political support for LGBTQ rights around marriage. Combined with the network of allies they had created, they chose that moment to push legislation. Once they saw they could win after California, they launched a broader campaign in other states. Today, they continue to pursue a strategy of legislation and voter initiatives in states across the country. They also pursue litigation but largely in a defensive role, protecting their legislative achievements (as was the case in California and New Jersey).

**Alternative explanations**

There are of course different ways that one might interpret the observations in this study. First is to recast the narrative as a resource mobilization story. The autonomy of lawyers and staff to make decisions could be reformulated as a need for expertise and interest. Without the proper staffing and expertise, legal organizations may be less likely to work on a given issue. As Chapter Four pointed out, allies and collaborators are also important to the work that these organizations do, whether it is coordinating strategies or setting an agenda. One could also point to the need for grants and fellowships to fund staff. Additionally, marriage equality did appear to precipitate an expanded portfolio of issues and tactics because of increased pecuniary resources coming into the organizations, presumably, because of the visibility or marriage (see Chapter Seven).

However, there is a risk of looking at everything as a resource and then to say: it is all about resources. Resources are undoubtedly important, but there is nuance (according to interviews) in the degree to which those resources shape agendas and tactics. Based on observations, I argue that resources are a necessary condition but not *sufficient* in selecting issues to work on. Staff independence (agency), opportunity, sense of community need, collaborations, and other elements
are more significant in setting the direction of agendas. If resources were so controlling, one might not expect the pursuit of conversion therapy, as illustrated above.

A second alternative is to note that the interviews in this project are one-sided. That is, they come explicitly from lawyers in the movement and not from non-lawyers (though there are a few here) or from people outside of these organizations. In her study of advocacy organizations, Strolovitch suggests that leaders and staff, while well intentioned and using reasonable strategies, do not represent the interests of community members that are the most marginalized as well as they do constituents who are more privileged (Strolovitch 2007, 123–27, 206–7).

This is just to say, the lawyers in this study may be wrong about how well they are listening to the community. Or, alternatively, they are doing a lot of listening but not taking actions that reflect what they are hearing. Indeed, there were a few interviewees that were critical about the agenda setting of the larger impact organizations.90 There have also been published criticisms of the agenda setting and tactics of legal organizations (Arkles, Gehi, and Redfield 2010; Carpenter 2014; Spade 2015; Vaid 1995a).

An important addendum to this critique is that not as much attention was paid in this project to direct legal services as there was to impact organizations. By not including more input from service providers, the project risks conflating important differences between the organizations and how those might influence conclusions about tactical choices and agenda setting. For example, direct legal service providers have significantly fewer resources and a few interviewees noted how this might affect the influence of major funders since there is a greater reliance on them (Park 2016b, 2016a).

90 While not all chose to make comments anonymous, I decided not to pit these lawyers against each other.
Indeed, this project could improve from more interviews with providers and perhaps a separate chapter on these distinctions. Access and time constraints did not allow for as many interviews with direct legal service members. Many requests were sent but these are often lawyers who dedicate every part of their waking day to the job with little pay. That they do not always have the time to respond to requests for interviews from academics is beyond reasonable.

*Future Work*

These alternatives raise significant questions for future studies: How generalizable is this study to other cause lawyering organizations? To what degree are other legal organizations employing non-litigation tactics? How distinct are the behaviors between direct legal services and impact litigation lawyers? Are any agenda setting or tactical differences based on resource discrepancies or are they more about the uniqueness of the positions? Would, as Carpenter (2014) suggests, data from direct legal service providers significantly change the agenda or case selection process of impact organizations?

In particular, future work should be done on the distinction between direct legal service providers and impact organizations. This distinction largely lies in the process of case selection: do lawyers select cases based on their ability to change policy or do they take cases based on serving the individual clients? Lawyers for service providers will say that they are doing the work that no one else does by aiding the people who need immediate intervention and assistance.

This distinction can be a source of tension within the movement. Some lawyers, including interviewees, feel that while impact litigation has an important role to play in the larger movement ecosystem, that it receives significantly more resources, attention, and enthusiasm than direct

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91 NCLR is an impact organization that does provide direct legal services (including many asylum cases and parenting cases) so not every impact organization is similarly situated.
services. It also leads to service providing lawyers feeling that large impact groups do not understand the current dire needs of the people impact lawyers purport to serve.

When prompted with this critique, the response of some impact litigators was to (a) acknowledge the differences and/or (b) to reject the dichotomy between these types of litigation. A few lawyers spoke about the idea that impact litigation is the more effective tool, because it effects a significantly larger group of people than direct services does. And in that sense, one anonymous lawyer felt:

I know that sometimes people pit or suggest that there is some inherent conflict between doing direct services and impact work, and I just never got that with the work that we do. Nor do we experience any tension there at all. The goals of impact litigation are exactly the same goals when we are directly representing people. It’s hearing from all these people who have immediate problems and who are engaged in the legal system, at the initial level, like at trial court, that tells us what we need to be doing in these impact cases. I have not seen that tension… They seem like they seamlessly go hand and hand, and one informs the other.

Future work might address how community need is affected differently by impact litigation and direct legal services.

Final Thoughts

As Scheingold (2004) argued, the power of courts is limited. In fact, he argued that the real power of litigation is vested in its potential for activating rights consciousness and mobilizing political forces around the symbolism of the law. However, he also cautioned that the “legal training and professional experiences [of lawyers] predispose them to think about litigation more conventionally, to internalize the myth of rights” (Scheingold 1974, 151). To be fair to Scheingold, this belief did evolve over time (Scheingold and Sarat 2004) though others have evoked similar concerns (Rosenberg 2005; Komesar and Weisbrod 1978).

The legal organizations and lawyers in this study do not appear to be operating under such a myth today. Instead, these legal organizations behave like social movement organizations
utilizing a repertoire of protest (Tarrow 1994). Litigation remains the chief tactic of these organizations, receiving the most resources. However, the policy and public education work are considered integral to reaching their ultimate goals.

One lesson of this project is not to judge a cause lawyering organization by its docket. Much has been said about the focus of marriage equality (in interviews, scholarship, and within the movement) but for the cause lawyering organizations in this study, the bulk of their work has been on other issues (see Chapter Two). Additionally, cause lawyering organizations are employed in many kinds of activities and not just the highly-visible litigation showcased in the media. Organizations invest significant time, money, and expertise into collaborations, publications, forums, educational events, lobbying, media-strategies, etc.

Interviews with lawyers suggest they are influenced by the needs of the community they are a part of and serve. Their work is balanced by opportunities (legal and political) and constrained by resources, but the mission and need are guiding forces. This does not mean critics of lawyer-led operations and of legal reform efforts within the LGBTQ movement are wrong. It could be that movement critics and actors have been successful in shifting the ways that these organizations work. However, it suggests that Carpenter (2014) might be right, that there is a lack of transparency by legal organizations in how they make decisions which makes others wary of cause lawyering strategies.

Another lesson is that these cause lawyers are in the business of educating. It could be making arguments before judges, on-air interviews with media personalities, board rooms with potential donors, or local auditoriums with community members. As one memo pointed out: “information is powerful” (Netherland 1996) and this project shows that lawyers are strategic and effective disseminators of information.
These organizations may still be far from the dream of advocates of community and rebellious lawyering (Gordon 2007; Lopez 1992; Vaid 1995a). However, organizations increasingly recognize the significant overlap in the legal and political spheres and may still come to embrace more elements of community outreach through their public education and policy efforts. Their work continues to reflect the thoughts of Thomas Stoddard, a former executive director of Lambda Legal who wrote:

The world yearns for change and for changemakers. But those of us who try to make change ought to think more systematically about what we do and why. For the world deserves effective change, not just new rules. (Stoddard 1997, 991)
Appendix A | Interviews and Coding Schemes

Interviews were recorded using an iPhone application named TapeACall. All interviewees were asked for permission to record the call before an interview and were also asked to sign Internal Review Board (IRB) paperwork giving their consent for its use. Further, at the beginning of each interview, interviewees were asked again if recording was permitted and given notice that they could request anonymity with any statement during or after the interview.

Audio transcripts were then sent through one of two paid services. Most interviews went through Rev.com although some went through Transcribefiles.net. While both websites claim to keep all recordings and transcriptions confidential, signed non-disclosure agreements were obtained. Transcripts were then run through Atlas.ti, a program used for qualitative research and data analysis.

Once in Atlas.ti, the first few interviews went through an initial coding scheme (Table A.A.1). Based on an analysis of comments grouped together using those codes, new interview questions and codes were produced. Those new codes were then applied once all interviews were finished for chapters Two, Three, Four, and Eight. All relevant schemes are presented below.
Table A.A.1: Initial Coding Scheme

<table>
<thead>
<tr>
<th>Code</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agenda Differences</td>
<td>Comment related to differences between agenda setting of organizations or types of organizations (impact versus direct legal services).</td>
</tr>
<tr>
<td>Agenda Setting</td>
<td>Comments related to agenda setting whether case selection or broader organizational goals.</td>
</tr>
<tr>
<td>Amici</td>
<td>Comments referring to submitting or working on an amicus brief.</td>
</tr>
<tr>
<td>Board of directors</td>
<td>Comments related to the relationship with or work of boards.</td>
</tr>
<tr>
<td>Case selection</td>
<td>Comments related to selecting cases for legal representation.</td>
</tr>
<tr>
<td>Collaboration</td>
<td>Comments related to working with another organization.</td>
</tr>
<tr>
<td>Criticism</td>
<td>Comments that reflected on critiques within the movement or any comment that critiqued aspects of organizations.</td>
</tr>
<tr>
<td>Donor restrictions</td>
<td>Comments related to the influence of donors in restricting activities.</td>
</tr>
<tr>
<td>FLC</td>
<td>Comments related to a highly visible and focused litigation campaign.</td>
</tr>
<tr>
<td>Foundations</td>
<td>Comments related to the influence of foundations specifically.</td>
</tr>
<tr>
<td>History</td>
<td>Comments regarding the history of the organization or the legal industry.</td>
</tr>
<tr>
<td>Intake</td>
<td>Comments regarding call centers.</td>
</tr>
<tr>
<td>Marriage</td>
<td>Comments regarding marriage equality.</td>
</tr>
<tr>
<td>Mission</td>
<td>Comments regarding mission statements.</td>
</tr>
<tr>
<td>Of color</td>
<td>Comments regarding people of color, either in staffing or in serving people of color within the LGBTQ community.</td>
</tr>
<tr>
<td>Private attorneys</td>
<td>Comments regarding private attorneys working with or for organizations.</td>
</tr>
<tr>
<td>Public education</td>
<td>Comments regarding public education tactics.</td>
</tr>
<tr>
<td>Resources</td>
<td>Comments regarding resources, particularly pecuniary.</td>
</tr>
<tr>
<td>Round Table</td>
<td>Comments about the LGBT/Sodomy Roundtable.</td>
</tr>
<tr>
<td>Staff</td>
<td>Comments regarding staffing.</td>
</tr>
<tr>
<td>Tactic3</td>
<td>Comments related to discussing the three primary tactics (litigation, education, policy) together or in comparison.</td>
</tr>
<tr>
<td>Code</td>
<td>Description</td>
</tr>
<tr>
<td>------</td>
<td>-------------</td>
</tr>
<tr>
<td>ED</td>
<td>When interviewees discuss education element of selection.</td>
</tr>
<tr>
<td>RES</td>
<td>When interviewees discuss resources constraints on selection. This includes staffing, money, and ability to get outside (pro bono) assistance.</td>
</tr>
<tr>
<td>WIN</td>
<td>When interviewees discuss likelihood of victory in cases.</td>
</tr>
<tr>
<td>LAW</td>
<td>When interviewees discuss likelihood of advancing law/precedent.</td>
</tr>
<tr>
<td>EXP</td>
<td>When interviewees discuss staffing expertise on issue.</td>
</tr>
<tr>
<td>MIS</td>
<td>When interviewees discuss mission as determinative of cases.</td>
</tr>
<tr>
<td>BRD</td>
<td>When interviewees discuss Board influence on case selection.</td>
</tr>
<tr>
<td>HOT</td>
<td>When interviewees discuss call center data as determinative of cases.</td>
</tr>
<tr>
<td>CLI</td>
<td>When interviewees discuss case selection being client-driven.</td>
</tr>
<tr>
<td>OUT</td>
<td>When interviewees discussed need or gaps in services.</td>
</tr>
<tr>
<td>DIF</td>
<td>When interviewees discussed perceived differences between organizational case selection.</td>
</tr>
</tbody>
</table>
Table A.A.3: Coding Scheme for Chapter Three

<table>
<thead>
<tr>
<th>Code</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>PRC</td>
<td>The process of how decisions were made and priorities were set.</td>
</tr>
<tr>
<td>PRC-H</td>
<td>Who was in charge and who reported to whom.</td>
</tr>
<tr>
<td>Job-L</td>
<td>How education is related to litigation (or not).</td>
</tr>
<tr>
<td>Job-D</td>
<td>The work in general, or what interviewees did in their day-to-day. How interviewees view the significance of the work. Parts of the job that don't have a separate code.</td>
</tr>
<tr>
<td>Job-M</td>
<td>How education is related to media specifically (as opposed to visibility in general which is a different code). References to social media, speaking with journalists, or television.</td>
</tr>
<tr>
<td>Job-O</td>
<td>How education is related to outreach. Outreach means getting in touch with the target constituency, either educating them in some way or learning from them for priority-setting.</td>
</tr>
<tr>
<td>Job-V</td>
<td>How education is related to visibility. Visibility descriptions mean when interviewees speak broadly about raising awareness and visibility of LGBTQ issues. This could be to do the public or to donors.</td>
</tr>
<tr>
<td>Job-I</td>
<td>Intake data: how it is used by lawyers and the education department. Education staffers have largely been in charge of the call centers.</td>
</tr>
<tr>
<td>Job-W</td>
<td>Workshops which includes: instructing constituency of their right AND training or CLE credit hours for lawyers and judges.</td>
</tr>
<tr>
<td>Job-P</td>
<td>Publications: pamphlets, books, &quot;tool-kits&quot;, &quot;know your rights&quot;, etc.</td>
</tr>
<tr>
<td>NEED</td>
<td>How interviewees described how the organization or the public education dept. determined what community need or priorities were.</td>
</tr>
<tr>
<td>FUN</td>
<td>How education was funded, how funding impacted the work, or how education was used to influence funding. Mentions of donors and budget revenue.</td>
</tr>
<tr>
<td>RES</td>
<td>Resources (money, staff, time) needed to operate education services and how resources for education may have shifted over time.</td>
</tr>
<tr>
<td>HIS</td>
<td>Descriptions and memories of education services. Narratives about what organization was like when they started. What interviewees pointed to as important moments or shifts.</td>
</tr>
</tbody>
</table>
### Table A.A.4: Coding Scheme for Chapter Four (Policy Work)

<table>
<thead>
<tr>
<th>Code</th>
<th>Descriptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>AGE</td>
<td>Comments related to agenda setting in public policy work.</td>
</tr>
<tr>
<td>COLL</td>
<td>Descriptions of collaborations with other organizations.</td>
</tr>
<tr>
<td>EDU</td>
<td>Comments regarding public education work alongside policy.</td>
</tr>
<tr>
<td>EXA</td>
<td>Examples of policy work.</td>
</tr>
<tr>
<td>HIS</td>
<td>Descriptions of the history of policy work with the organization.</td>
</tr>
<tr>
<td>LIT</td>
<td>Comments regarding litigation work alongside policy.</td>
</tr>
<tr>
<td>OPP</td>
<td>Comments about opportunities to act.</td>
</tr>
<tr>
<td>RES</td>
<td>Comments about resources, mostly pecuniary.</td>
</tr>
</tbody>
</table>

### Table A.A.5: Coding Scheme for Chapter Eight (Conversion Therapy Story)

<table>
<thead>
<tr>
<th>Code</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Collaboration</td>
<td>Descriptions of collaborations regarding conversion therapy work</td>
</tr>
<tr>
<td>Education</td>
<td>Examples of education work in conversion therapy</td>
</tr>
<tr>
<td>Feedback</td>
<td>Comments about how other external events, like marriage, influenced work on conversion therapy</td>
</tr>
<tr>
<td>History</td>
<td>Historical background on work</td>
</tr>
<tr>
<td>Litigation</td>
<td>Comments regarding litigation around conversion therapy</td>
</tr>
<tr>
<td>Policy</td>
<td>Comments regarding policy work and advocacy around conversion therapy</td>
</tr>
<tr>
<td>Resources</td>
<td>Comments regarding influence of resources on work</td>
</tr>
</tbody>
</table>
Appendix B | Organizing Call Center Data

Call center data breaks down calls into issue types, demographics, by state, and in Lambda's case, by regional office. This information was generously provided by three different organizations: Lambda Legal Defense and Education Fund, Mazzoni Legal Services, and the National Center for Lesbian Rights. NCLR provided the most years’ worth of data from 2003-2015, Mazzoni Legal Services provided for the years 2010-2014, and Lambda provided for 2013-2015. However, because of time constraints, Mazzoni’s data did not make into this project.

Call data was complemented with more limited information provided in annual reports. Annual reports from different organizations often give a rough estimate in the breakdown of issues they are hearing about. While this permits an analysis beyond the years of raw data provided, there are limitations. Since annual reports and newsletters, when they do list calls, often provide aggregate figures and not raw numbers, not every year is equally reliable or comparable.

Comparing intake data across these organizations requires caveats. First, organizations conduct their intakes in different ways. Some intake staffers, like at NCLR, are trained to select all the issues relevant to a call (Wong 2016). For example, let us assume an 18-year-old transgender identifying student calls into NCLR. That student is attending college where dorms are divided by gender and the student wishes to live in the dormitory of the gender they identify with. However, the school refuses to allow them to do so and instead insists that the student live in the dorm that matches the marker on the student's birth certificate. In this case, the student's gender and the gender marker on their birth certificate do not match. The intake staff member on call could select the categories of youth, school, housing discrimination, and transgender. However, all those categories might be selected for that same call. We cannot be sure that this is handled consistently from caller to caller either.
Other organizations, like Mazzoni Legal Services and Lambda Legal, are trained not to select every relevant issue per se, but the one and maybe sometimes two relevant legal issues at stake (R. B. Marshall 2016; Johnson 2016). In R. Barrett Marshall's experience at Mazzoni, while every caller's problem is effected by an intersection of issues, most boil down to one particular legal problem (R. B. Marshall 2016).

In addition, every person I spoke to regarding intakes gave the same warning: not every call is recorded and when a call is recorded, the issues or demographic information might not be entered. This is more of a problem for some organizations than others. In the case of NCLR, there was a period between 2010 and 2014 where their database was slow and sometimes malfunctioned. While staffers tried extremely hard to make sure every call was logged, there may have been a dozen or so calls a year that went unlogged (Wong 2016). Given that NCLR receives around a thousand calls every year, these omissions should not significantly affect the proportion of calls. However, NCLR's Help Line coordinator Ming Wong suggested that there might have been a slight bias toward logging family law calls in quickly since those calls need to be run for conflict checks.92

Quoting raw numbers from Lambda or Mazzoni is not as much of a problem. Neither conversation with intake coordinators at those organizations indicated there were significant numbers of calls unlogged. Still, as explained below, most of the call data is examined in terms of percentages (i.e. a single category/demographic as a percent of all issue categories/demographics selected). This was done so data could be compared across years and it is easier to understand changes based on percentages than raw numbers.

92 A conflict check, done out of an abundance of caution (NCLR has a disclaimer that the Help Line is not for technical legal advice), is something attorney's need to do to ensure there is no conflict of interest between helping two parties. This happens more often with family law cases, especially in divorce or custody, where partner A calls for legal advice or representation and then separately, so does partner B to the same lawyer or firm.
**Analyzing Data**

NCLR's data was tricky to analyze. In all, there were sixty-four different categories in the years between 2003 and 2015. Analysis began by removing broad demographic categories: Sexual Orientation, Transgender, Gender Identity and Sex/Sex Stereotyping and National Origin and General Information Request, Age, and Race, HIV/AIDS. This was done for two reasons. First, though they are relevant as to why there was a harm, the demographic categories are not themselves the legal issue or injury. Second, these categories will almost always be selected along with a particular legal issues or injury and thus eliminating them may reduce the amount of double-counting. For example, an intake staff person could have selected "Transgender" in addition to a "name and gender identification" issue.

Similar categories were then grouped together to gain a better idea of how often broad issues were being heard. Many of these categories grouped together naturally. For example, “child custody/visitation (different sex)” could logically be combined with “child custody/visitation (same sex)” and “child custody/visitation (Trans parent).” This was done until there were six umbrella categories: Criminal Justice System; Employment; Family and Parenting; Health Care; Housing; Immigration; Marriage and Relationship Issues; Other; and Youth and School. “Other” consists of the categories that did not fit neatly into these umbrella categories and/or did not receive a significant percentage of calls compared to the umbrella categories. This includes: Domestic Violence, First Amendment/Civil Rights, Hate Crime, Military, Name and Gender Identification, Other, Other Civil Rights, Public Benefits, Religion, Sex Offense, Sports, and Taxation.

Lambda Legal's Help Desk reports were slightly easier to interpret. Their reports break down "sub categories" between three larger categories: sexual orientation, transgender, and HIV
related calls. I combined the calls marked sexual orientation and transgender to create fourteen categories which were then compared.
Appendix C | Report Lists as Proxy Dockets

Unfortunately, the legal organizations in this study do not keep detailed archives that list cases from year to year. One might be able to determine dockets through gaining access to confidential and archived paperwork, but such detailed information is not normally accessible to researchers and would take a great deal of time to organize. Such an effort had been done (see Andersen 2006) but it would be difficult when looking at multiple organizations.

This project works around the problem of access and time constraints by identifying cases as advertised in annual reports and newsletters, sometimes in the forms of lists and other times as aggregate figures. While imperfect, a comparison of this data from organizational material, called “report lists” in this study, against more in-depth analysis of private documents (Andersen 2006) shows that this proxy measure is not far off. In addition, these report lists are used primarily to explain case diversity, and not year-to-year caseloads. This appendix breaks down how proxy dockets or “report lists” were determined and expands on the limitations of using them.

Compiling report lists

Report lists are defined as the lists of cases or aggregated figures in annual reports or newsletters that are included to give readers an indication of the organization’s ongoing legal work. In compiling the report lists there were three difficult hurdles: (1) lack of annual reports, (2) inconsistent use of lists versus aggregate figures, and (3) changes to subject areas over time and differences between organizations. Each problem will be addressed below. As noted in Chapter Two, a case is whenever a lawyer in the organization becomes the legal representative or assists in the representation of a client in a legal dispute or adjudicatory process (such as representing someone filing for asylum). Unfortunately, because cases can go on for years, there are not always ways to tell how many cases are new and which have been on-going.
First, annual reports are preferable to newsletters because reports cover the entire year and newsletters typically cover a season (i.e. spring, winter, summer, fall). Yet, annual reports were harder to find in archives and on-line. Since there may be two to three newsletters each year, I selected the Spring/Summer editions unless it was not available and then I chose what was the latest in the year to be consistent.

Second, one of the first hurdles in compiling and comparing data is that from year-to-year there were often reporting style differences. Some years a newsletter or report would provide a simple list of cases whereas in other years they might give aggregate statistics. Some years have no docket data at all. In addition, issue categories inevitably change, with new issues appearing, some issues disappearing, and other issues (like marriage) are bounced under different umbrella categories. Some of these differences have to do with organizational development. Earlier newsletters and reports are more likely to be reflective of their actual caseload since all the organizations were handling fewer cases and presented most if not all of what they were working on. Over time, complete dockets turned into lists of examples of cases with the aim of giving members and donors a reasonable representation of what the organization was doing.

To address this, when there were lists of cases, the total number of cases were tallied and turned into percentages. This made data comparable to years with aggregate figures that were in percentages. The one exception made to recording and reporting cases as they were categorized was marriage because of its special role in the literature and this project. Thus, while reports and newsletters categorized marriage under “Family” issues, marriage was separated in this study from family categories into a “relationship” category so it could be tracked.

Third, annual reports and newsletters from year-to-year and from organization-to-organization do not use consistent, systematic tracking of cases, let alone cases by issue-area.
Many issues intersect, making hard categories across time tenuous. For example, an employment case involving a transgender person might be under “employment” but not “transgender rights” or, a “ballot initiative” case could also be a “marriage” case (example: GLAD 2002 AR). To address this, issues were put into like-categories that are referred to here as “umbrella categories” to make visualization and analysis easier. As an example, there were many categories for custody and adoption in NCLR’s dockets. These were grouped together under the umbrella category “family issues” in Figure A.C.1 below.

<table>
<thead>
<tr>
<th>NCLR Family Law Category</th>
</tr>
</thead>
<tbody>
<tr>
<td>Child Support</td>
</tr>
<tr>
<td>Donor Insemination</td>
</tr>
<tr>
<td>Foster Care Placement and Adoption</td>
</tr>
<tr>
<td>Gay Adoption</td>
</tr>
<tr>
<td>Lesbian Co-Parenting</td>
</tr>
<tr>
<td>Lesbian and Gay Custody</td>
</tr>
<tr>
<td>Non-biological Parents</td>
</tr>
<tr>
<td>Parenting (and Families after 2004)</td>
</tr>
<tr>
<td>Second-parent Adoptions</td>
</tr>
<tr>
<td>Visitation and Custody</td>
</tr>
</tbody>
</table>

Thus, it is important to note the report lists are not exact reflections of case dockets. They are representations of dockets. Report lists are relied upon based on the assumption that organizations will want to portray to their best ability, realistic reflections of their actual work. According to Kate Kendell, NCLR for instance, tries to be “pretty critical” about making sure reports are as reflective of actual caseloads as possible. A reasonable counter is that organizations might be inclined to include only cases they are interesting or provocative. However, report lists are not the “highlighted” stories in a newsletter or annual report. They are the number of cases represented in individual tables or charts or lists of named cases by issue.

Testing the proxy
To test the strength of using annual reports and newsletters, raw data provided by Dr. Ellen Andersen from the University of Vermont was utilized. Dr. Andersen conducted an in-depth study of Lambda Legal for her book Out of the Closet and Into the Courts (2006). During that study, she was given access to Lambda Legal’s private archives. With this source of information, she created the only known publicly available docket of Lambda spanning over twenty years. Since the data was presented in decade-increments, I requested and received one specific year (2001) of that data from Dr. Andersen and compared it to data from Lambda’s 2001 Winter newsletter. While not perfect, these samples match up well. For example, in Table A.C.2 below, my data from a 2001 newsletter suggests far more employment cases on the docket for that year.

<table>
<thead>
<tr>
<th></th>
<th>Andersen</th>
<th>Trowbridge</th>
</tr>
</thead>
<tbody>
<tr>
<td>AIDS</td>
<td>20%</td>
<td>22%</td>
</tr>
<tr>
<td>Criminal</td>
<td>12%</td>
<td>15%</td>
</tr>
<tr>
<td>Employment</td>
<td>6%</td>
<td>20%</td>
</tr>
<tr>
<td>Family</td>
<td>22%</td>
<td>20%</td>
</tr>
<tr>
<td>First Am.</td>
<td>4%</td>
<td>7%</td>
</tr>
<tr>
<td>Housing</td>
<td>2%</td>
<td>2%</td>
</tr>
<tr>
<td>Immigration</td>
<td>4%</td>
<td>4%</td>
</tr>
<tr>
<td>Legislation</td>
<td>4%</td>
<td>0%</td>
</tr>
<tr>
<td>Non-gay</td>
<td>4%</td>
<td></td>
</tr>
<tr>
<td>Non-gay ADA</td>
<td>6%</td>
<td></td>
</tr>
<tr>
<td>Other sexual orientation</td>
<td>2%</td>
<td></td>
</tr>
<tr>
<td>Youth</td>
<td>12%</td>
<td>9%</td>
</tr>
<tr>
<td>Elder</td>
<td></td>
<td>2%</td>
</tr>
</tbody>
</table>

At best, this makes using newsletters and annual report data a fair, albeit imperfect, proxy. At worst, this information conveys how organizations want to illustrate to their members and donors about what they are doing, if not their actual docket. In this project, report lists are used to evaluate case diversity and general shifts on issues based on long-term trends. That is, because of
the limitations of report lists, one should not take a given year alone as representative of an organization’s docket but instead, look at the consistent rise and fall of issues across time.

*Specific Caveats Regarding Chapter Two Figures and Tables*

As noted in Chapter Two, the figures of Lambda’s proxy dockets were pared down from larger pools of issue areas present in reports and newsletters. In Figure 2.1 (1989 – 1993) and Figure 2.2 (1998 – 2001) issue categories were removed from the chart when they did not average five percent or more over the given timeframes. Marriage was added because of its importance to theories and critiques, as discussed above. This limitation on issues was done for visualization and analysis purposes. A chart with fifteen subjects would have been overly crowded and thus difficult to clearly interpret.

Regarding NCLR’s material, only annual reports that listed a docket could be found starting in 2005. This means that the bulk of the report lists relies on newsletters prior to 2005. Additionally, only aggregate data was available for 2006 to 2009 annual reports. What this means is that instead of lists of cases, the reports provided tables of what the percentages of cases were in each issue area. In those years (except 2006), marriage and relationship issues were subsumed under "Family Law" which is why that category appears to disappear during those years. Annual reports for 2006 and 2007 contained both aggregate figures and a list of cases. Aggregate figures were chosen because they may be more reliable given that some cases may be confidential and left out of the lists of cases (particularly family or immigration cases).
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