
From Protest to *Perry*: How Litigation Shaped the LGBT Movement's Agenda

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This Article empirically examines how litigation shapes the substantive agenda of a social movement. Critical scholars have argued that movement lawyers, as professionals and elites, tend to substitute their own priorities for those of their clients. Yet lawyers and litigation can also influence a movement's agenda through subtle, organizational dynamics rather than through the volitional, ethical choices made by movement lawyers. This Article reexamines critiques of civil rights lawyering through a case study of the movement for lesbian, gay, bisexual, and transgender ("LGBT") rights. This case study draws on quantitative and qualitative analyses of original data from more than two decades of LGBT movement history. These analyses reveal that litigation garnered more news media coverage than other tactics and that the LGBT movement organizations that used litigation had a greater likelihood of survival than organizations that did not. These benefits made litigation the most visible

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and established of all the LGBT movement's tactics. In addition, LGBT protest organizations responded to the legal issues projected in the mainstream media to form their agendas, subtly redirecting those protest organizations away from their original priorities and toward legal goals.

This Article makes a novel contribution to existing scholarship by exposing systemic processes that may privilege movement litigation relative to protest, elevating the issues being litigated to top movement priorities. Significant implications follow for theories of law and social change. The dominance of legal issues on the LGBT movement's agenda marginalized movement demands for cultural transformation or structural change in favor of assimilationist goals, such as the right to marry, that translate well into formal legal claims. Understanding the dynamics revealed here, which allow litigation to set a social movement's agenda, will help civil rights lawyers in the LGBT movement and beyond to provide more effective representation and to achieve more far-reaching social change.

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INTRODUCTION

Legal scholars critical of the role of lawyers in social movements have long warned of the potential for litigation to transform and deradicalize a social movement’s agenda.¹ Movement lawyers, the argument goes, dominate the attorney-client relationship in their pursuit of impact litigation, substituting their own legal priorities for the more radical goals of their activist clients.² But litigation can also influence a social movement’s agenda through a subtler set of unintentional, organizational dynamics rather than through the volitional, ethical choices made by movement lawyers.³ This Article investigates how litigation and legal priorities may come to dominate a social movement’s agenda to the exclusion of more radical and transformative priorities. These dynamics are explored through a case study of the lesbian, gay, bisexual, and transgender (“LGBT”) movement from 1985 to 2008. The case study uses quantitative and qualitative analyses of original data to examine how litigation may shape the substantive focus of movement activism. This research provides new insights into the structural and systemic factors that may privilege litigation over other social movement tactics and make the issues that are litigated the focus of activism outside the courtroom. Understanding the inadvertent (and often invisible) processes revealed here will help lawyers in the LGBT movement and in other civil rights

¹ See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471-72 (1976) (noting how the ideals of lawyers may differ from the relief sought by victims of school segregation).

² See JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* 25-26 (1978); MARK TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950*, at 146 (1987); Bell, *supra* note 1, at 488; Mark Kessler, *Legal Mobilization for Social Reform: Power and the Politics of Agenda Setting*, 24 LAW & SOC’Y REV. 121, 137-38 (1990).

³ A growing body of legal scholarship recognizes that patterns of social privilege and subordination result from unintentional, organizational practices rather than overt strategic action. See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 2 (2006).

movements to provide more effective representation of marginalized communities.

The LGBT movement is a particularly rich setting for examining the factors that foster intramovement consensus around legal issues as shared, first-order priorities. This movement comprises diverse, even oppositional activist communities. Although large, national civil rights organizations constitute the LGBT movement's mainstream,⁴ a critical faction of grassroots and protest-based activists historically have taken a more confrontational approach. Radical protest groups that challenged the mainstream LGBT movement's focus on formal legal equality⁵ diffused throughout the country in the early 1990s. Touting a radical, "queer" political identity,⁶ these protest groups articulated a set of structural goals, such as combating the widespread homophobia propagated by media images and religious organizations and transforming heterosexual-dominated public spaces.⁷ Yet despite queer groups' radical rhetoric, the protest actions they organized ultimately came to focus on many of the same formal legal priorities that they critiqued.⁸ This Article aims to understand how these seemingly polarized factions within the LGBT movement have come to agree that

⁴ See *infra* Part III.C.

⁵ See Joshua Gamson, *Must Identity Movements Self-Destruct? A Queer Dilemma*, 42 SOC. PROBS. 390, 394 (1995) (describing queer politics as a "rejection of civil rights strategies 'in favor of . . . anti-assimilationist politics' and a 'willingness to interrogate areas which would not normally be seen as the terrain of sexuality . . .'"); see also URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* 183 (1995) [hereinafter *VIRTUAL EQUALITY*] ("Civil rights strategies do not challenge the moral and antisexual underpinnings of homophobia, because homophobia does not originate in our lack of full civil equality."); Rosalind Pollack Petchesky, *Sexual Rights: Inventing a Concept, Mapping an International Practice*, in *SEXUAL IDENTITIES, QUEER POLITICS* 120, 126 (Mark Blasius ed., 2001) ("The negative, exclusionary approach to rights — sometimes expressed as the right to 'privacy' or to be 'let alone' in one's choices and desires — can never in itself help us to construct an *alternative vision* or lead to fundamental structural, social, and cultural transformations.").

⁶ *Queer* activism is distinguished from mainstream, LGBT activism in that it intentionally avoids defining sexuality in categorical terms like "lesbian" and "gay," which queers argue assumes an artificially rigid construction of sexuality and a universal experience of sexual identity. See Darren Rosenblum, *Queer Legal Victories*, in *QUEER MOBILIZATIONS* 38, 39-40 (Scott Barclay, Mary Bernstein & Anna-Maria Marshall eds., 2009) (describing how queer activists reclaimed a term originally used to "deride strange behavior or social outcasts" as a political identity for the purpose of "avoiding essentialist implications of 'lesbian and gay' and subverting normative presumptions of sexuality").

⁷ Lauren Berlant & Elizabeth Freeman, *Queer Nationality*, 19 BOUNDARY 2 149, 160, 166 (1992) (describing how queer activists reclaimed heterosexual-dominated spaces like suburban shopping malls and focused on "public language and media").

⁸ See *infra* Part III.C.

legal issues are important, action-worthy items — the priorities of a common LGBT movement agenda.

Marriage equality is a key example of an LGBT legal objective that queer protest groups have pursued, despite the issue's apparent dissonance with a radical critique of civil rights⁹ and with calls for structural social transformation.¹⁰ One early same-sex marriage demonstration illustrates how LGBT impact litigation, and the publicity it received, may have put this issue on the protest agenda. In 1990, an emerging national conversation about same-sex marriage began to intensify in the mainstream media.¹¹ News coverage gravitated toward same-sex marriage as activists prepared for marriage equality litigation in Hawaii¹² and Washington, D.C.,¹³ and LGBT litigators rallied¹⁴ against the injustices created by unequal marriage

⁹ See Darren L. Hutchinson, 'Gay Rights' for 'Gay Whites?': Race, Sexual Identity, and Equal Protection Discourse, 85 CORNELL L. REV. 1358, 1371 (2000) (arguing that marriage equality is a goal that privileges formal legal rights).

¹⁰ Legal scholars have critiqued marriage equality as an assimilationist goal. See Elizabeth B. Cooper, *Who Needs Marriage?: Equality and the Role of the State*, 8 J.L. & FAM. STUD. 325, 329 (2006); Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 240 (2006).

¹¹ See Eloise Salholz et al., *The Future of Gay America*, NEWSWEEK, Mar. 20, 1990, at 20.

¹² In March of 1990, gay couples in Honolulu began preparing for litigation by asking state authorities whether their request for a marriage license would be rejected. Robert W. Peterson, *Gay Marriage Query Becomes a Sticky Issue for Hawaii ACLU Chapter*, ADVOCATE, Sept. 25, 1990, at 560 (copy on file with author). That same month, *Newsweek* magazine published an article highlighting marriage equality as a gay movement goal. See Salholz et al., *supra* note 11, at 20. The media continued to focus on the Hawaii litigation throughout the year. See PATRICIA CAIN, RAINBOW RIGHTS 259 (2000) ("On November 26, 1990, the following news item from Honolulu was reported in several newspapers across the country: '25 gay couples are expected to file for marriage licenses to protest state ban on same-sex marriages. . . . A related item appeared a month later: '3 gay couples . . . applied for marriage licenses to challenge '81 ban[s] on same-sex marriages.'").

¹³ Patrice Gaines-Carter, *Legal Snag Keeps Gays from Tying the Knot: Couple Denied Marriage License Sues D.C.*, WASH. POST, Dec. 6, 1990, at C5.

¹⁴ One attorney for the National Center for Lesbian Rights ("NCLR"), representing a non-biological lesbian mother denied visitation rights, argued that, "If there were marriage (for homosexuals), we would not be before the court. . . . We're excluded from the possibility of being married. Only one parent has the possibility of being related to the child (because legal adoption is denied the other homosexual partner, since there is no marriage)." Kathleen Hentrix, *A Case of 2 'Moms' Tests Definition of Parenthood*, L.A. TIMES, Aug. 15, 1990, at E1. NCLR Newsletters similarly framed the case of a lesbian woman who was denied custody of her disabled lover as "a nightmare that could not happen to a married couple." *A Bittersweet Victory: Sharon Kowalski Comes Home*, NCLR NEWSLETTER, (NCLR, S.F., Cal.), Spring 1992, at 1 (copy of primary source on file with author); see also Douglas Nejaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102

laws in other areas (e.g., insurance, employment, and child custody).¹⁵ Protest groups seized on the public debate. San Francisco's chapter of Queer Nation, one of the major protest groups to emerge in cities across the United States in the late 1980s, staged its first "marry-in" at City Hall in September of 1990.¹⁶ Protestors donning "[s]igns, placards, and post-modern wedding drag" alighted on the steps of the government building en masse for a mock wedding ceremony. Though this demonstration was emblematic of the group's confrontational and irreverent tactical approach,¹⁷ the marriage focus clearly contradicted many members' political values.¹⁸ Queer Nation fliers advertising for the event acknowledged the problem, referring to marriage as "an institution which we all agree oppresses us."¹⁹ Yet members were strongly encouraged to attend the protest nonetheless.²⁰

What compelled Queer Nation to demand the right to same-sex marriage, especially given the issue's divisive effect on Queer Nation's membership and its clash with the group's radical politics? I argue that impact litigation and the extralegal benefits it generates can refocus the priorities of protest-based activists away from their original goals and toward formal legal objectives.²¹ My data on the California LGBT

CALIF. L. REV. 87 (2014) [hereinafter *Before Marriage*].

¹⁵ Several articles published in the summer of 1990 reported on these relationship recognition cases and the legal difficulties encountered in relationships that "amount to divorces involving people who cannot legally marry." David Margolick, *Child-Custody Cases Test Frontiers of Family Law*, N.Y. TIMES, July 4, 1990, at A1; see also Anne Stroock, *Gay 'Divorces' Complicated by Lack of Laws*, S.F. CHRON., May 14, 1990, at A4.

¹⁶ QUEER NATION, YOU ARE CORDIALLY INVITED TO A QUEER WEDDING (1990) (copy on file with author).

¹⁷ Participants were also instructed to enter the city's marriage bureau in pairs, demand licenses, and then create a spectacle when they were refused — kissing at the window, refusing to leave, even calling the clerks "accomplices to murder." QUEER NATION, WHAT TO DO AT A MARRY-IN (1990) (copy on file with author).

¹⁸ QUEER NATION, QUEERNATION/CHICAGO ADVOCATES LEGAL RIGHTS FOR SAME-SEX COUPLES (available at San Francisco Gay and Lesbian Historical Society, copy on file with author).

¹⁹ QUEER NATION, WHAT TO DO AT A QUEER NATION MARRY-IN (1990) (available at San Francisco Gay and Lesbian Historical Society, copy on file with author).

²⁰ *Id.* ("Those who have problems with marriage in general can still express their outrage at an institution which we all agree oppresses us, whether by omission or commission. What a better place to hold a kiss-in and demand that the privileges associated with marriage be extended to everyone.").

²¹ This Article focuses on impact litigation, rather than legal services. Impact litigation involves "[t]est cases and planned litigation [which] often seek favorable judicial precedent or judicial orders requiring changes to political or social institutions that redress inequality or relieve marginalized groups from oppressive burdens." Scott Barclay & Anna-Maria Marshall, *Supporting a Cause, Developing a Movement, and Consolidating a Practice: Cause Lawyers and Sexual Orientation Litigation in Vermont*, in THE WORLDS CAUSE LAWYERS MAKE

movement from 1985 to 2008 show that litigation received the most news coverage of any movement tactic and that the movement organizations that used litigation had a greater likelihood of survival than organizations using other tactics. These benefits favored litigation compared to protest and other tactics, making litigation the most visible and stable tactic of the LGBT movement. An analysis of archival data collected from movement organizations further shows that protest groups seized on the mainstream media coverage of the movement to set their own agendas; protest groups organized actions in response to recent headlines (rather than members' primary issues of concern) to attract publicity and participants to the protest's timely and newsworthy focus. Because the media primarily reported on litigated issues, protest organizations' reactivity to media coverage appears to have redirected those organizations away from their original priorities and toward legal goals.²² The protest groups' agendas came to be centered not on their members' priorities, but rather the more limited set of issues that could be translated into formal legal claims. Profound implications follow, suggesting litigation may play a role in constraining radical politics.

The Article proceeds in three Parts. Part I provides background on the contemporary historical trajectory of the LGBT movement, showing how a civil rights agenda focused on assimilation and formal equality came to define the mainstream LGBT movement. Part II reviews legal, sociolegal, and sociological literatures about law and social movements to examine the theoretical frameworks that inform the study of litigation's effect on this movement. A critical read of this literature suggests that litigation generates resources like media coverage and organizational funding, making litigation a highly visible and stable movement tactic. Sociological scholarship also suggests that

171, 174 (Austin Sarat & Stuart Scheingold eds., 2005).

²² I must couch this argument carefully, both here and throughout this Article, to avoid "overstat[ing] the completeness, accuracy, or reach of the[] empirical claims" and causal story presented here. Gregory Mitchell, *Case Studies, Counterfactuals, and Causal Explanations*, 152 U. PA. L. REV. 1517, 1606 (2004). A single case study, such as the one used here (the case being the LGBT movement), is designed to generate theory, not to definitively establish causation; "the researcher distills from her single case study a causal relationship that she hypothesizes will hold, all other things being equal, for a larger class of cases." *Id.* at 1584-85; see *infra* Part IV (generalizing the deradicalization theory I propose narrowly to other movements "where lawyers predominantly use impact litigation focused on antidiscrimination law"). One drawback of single case studies is that they cannot isolate true causal relationships from spurious ones. Mitchell, *supra*, at 1592. To help compensate for this drawback and gain the reader's confidence in my hypothesized explanation, I will present and analyze alternative competing explanations wherever possible. *Id.*

social movement activists, even those who operate outside the courts, strategically select claims and issues that resonate with dominant forms of legal rhetoric (e.g., individual rights), elevating those claims and issues to the forefront of a movement's agenda. I argue that these literatures in combination predict that formal legal claims pursued through litigation will become central priorities on a social movement's agenda.

Part III draws on original data from archival, media, and organizational sources to investigate the processes through which the movement issues being litigated may become primary LGBT movement agenda items. First, a quantitative analysis of mainstream newspaper coverage of LGBT movement activity from 1985 to 2008 shows that litigation was the movement tactic that received the most frequent coverage in the mainstream news media. This suggests that litigation experienced more public visibility than other movement action.²³ Second, a quantitative analysis examining the survival rates of LGBT movement organizations finds that LGBT organizations that used litigation had significantly higher survival rates (i.e., they were less likely to disband) than those that did not litigate. This suggests that litigation and the issues pursued through litigation are stable and persistent features of LGBT politics.²⁴ Third, a qualitative comparison of strategy-formation processes in litigating, protest, and lobbying movement organizations examines the processes through which these different types of movement groups select which substantive issues to pursue.²⁵ I find that litigating organizations tended to be proactive in selecting their priorities; litigating groups looked ahead to define future goals and resisted deviation from those predetermined goals.²⁶ In contrast, protest organizations planned actions as a post hoc reaction to media events, and lobbying organizations based strategies around the opportunities for advocacy provided by legislators.²⁷ Consequently, litigating groups were more independent and autonomous than other organizations in how they constructed their substantive agendas. The same logic that made litigating organizations

²³ See *infra* Part III.A.

²⁴ See *infra* Part III.B.

²⁵ See *infra* Part III.C.

²⁶ See *infra* note 242 and accompanying text (defining *proactive* as “creating or controlling a situation by taking the initiative and anticipating events or problems, rather than just reacting to them after they have occurred; (hence, more generally) innovative, tending to make things happen”).

²⁷ See *infra* note 281 and accompanying text (defining *reactive* as “responds or reacts to a situation, event, etc.; *esp.* (of a person or organization) that reacts to existing circumstances, rather than anticipating or initiating new ones”).

proactive, however, may also play a role in orienting litigating groups' agendas toward the narrow set of possibilities for change that legal doctrine affords. Thus, although litigating groups were relatively more autonomous than protest groups (in that they chose forward-thinking priorities and stayed on task to achieve them), litigating groups nonetheless appear to have been constrained by the limited set of opportunities afforded by formal law. As I argue in this Article, the rub is that this constraint may have affected not only the litigating groups themselves but also the protest and lobbying groups, because groups that did not litigate nevertheless drew their agendas from news coverage shaped by movement litigation.

Part III then synthesizes my empirical findings and suggests that litigation both defined and constrained the LGBT movement's substantive agenda.²⁸ Litigation generated the most media coverage and greater organizational stability than other tactics, pushing the substantive issues being litigated to the forefront of the LGBT movement's agenda. Protestors seeking newsworthy and timely action concentrated primarily on recent events, typically those they found covered in the litigation-focused mainstream news media. Sometimes the events protestors targeted were not publicized in the media but rather in other places of public access, such as government buildings; yet these public-access events, such as criminal trials, litigation, or police commission meetings, also tended to be state sponsored and related to law. Thus, the reactive approach of the protest-based activists appears to have subtly shifted their groups' actions toward litigation-generated media events or state-generated public-access events; either way would have caused radical protest groups to become redirected toward legal priorities. Taken as a whole, my findings suggest a set of systemic processes through which radical protest groups' substantive goals may become displaced by the formal equality goals pursued through impact litigation.

The Discussion considers the implications of these empirical findings for inequality and social change. When a movement's legal priorities come to define its agenda, the movement narrows the universe of possible grievances to the identities and interests that fit with legal classifications and legal doctrine.²⁹ Yet, as critical race and queer theorists have documented, antidiscrimination law tends to

²⁸ See *infra* Part III.C.

²⁹ Lisa C. Bower, *Queer Acts and the Politics of "Direct Address": Rethinking Law, Culture, and Community*, 28 *LAW & SOC'Y REV.* 1009, 1019 (1994) ("Law has the capacity to reduce, rephrase, and normalize identities and interests so that they 'fit' (no matter how uncomfortably) into legal classifications.").

frame discrimination as an individual harm rather than as structural subordination and generally favors remedies that provide formal, rather than substantive, equality. To the extent that protest-based activists originally seek structural resolutions or substantive change, legalizing the movement's agenda may displace activists' most transformative goals.

Again, marriage equality provides a potent example.³⁰ Instead of attempting to undermine the monogamous, heterosexual pairings institutionalized through the legal definition of marriage,³¹ LGBT litigators and queer protestors alike have rallied behind a cause that many argue alienates alternative sexual relationships and family structures.³² Furthermore, marriage equality emphasizes removing only formal barriers to equality rather than more substantive changes to social subordination compounded by intersecting systems of racial, gender, and economic inequality.³³ The processes documented here, which "legalize" the LGBT movement's priorities, suggest an underexplored mechanism of marginalization within the LGBT movement. In particular, legalizing the LGBT movement's agenda may marginalize LGBT and queer activists of color, for whom the achievement of formal equality does little to combat the root of inequality.³⁴

This Article contributes to the emerging recognition among legal scholars that intentional behavior is not the primary cause of entrenched patterns of social subordination. Theories of institutional racism and institutional inequality suggest that persistent inequalities are more often the result of subconscious action³⁵ or impersonal institutional practices that assume and reify subordination³⁶ rather

³⁰ Events surrounding the recent U.S. Supreme Court decisions in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), and *United States v. Windsor*, 133 S. Ct. 2675 (2013), illustrate how central the marriage equality issue has become in contemporary LGBT politics.

³¹ See Ellen Willis, *Can Marriage Be Saved: A Forum*, NATION, July 5, 2004, at 16.

³² See NANCY POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 213-14 (2009); Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 433-36 (2012).

³³ Hutchinson, *supra* note 9, at 1371 ("[B]ecause women, people of color, and the poor within gay and lesbian communities experience subordination from gender, racial, and economic hierarchies, in addition to heterosexism, the achievement of formal sexual equality, including the right to same-sex marriage, will not completely insulate them from oppression.").

³⁴ *Id.*

³⁵ Bagenstos, *supra* note 3, at 2; Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 462-65 (2001).

³⁶ Catherine Albiston, *Institutional Inequality*, 2009 WIS. L. REV. 1093, 1096.

than the product of the intentional, animus-based discrimination that antidiscrimination laws recognize as a legal harm. The processes analyzed here show the implications of these theories for the construction of social movement agendas. Detached organizational processes — instead of direct interactions traceable to particular movement actors — may produce power disparities within movements. Thus, this Article moves contemporary critical scholarship beyond its current focus on individual and conscious strategic choices of the movement’s lawyers toward a more systemic account of the processes that can limit a movement’s ability to effectively advocate for truly transformative political projects. By examining the largely invisible mechanisms that may undercut these more transformational goals, the Article suggests that inequality is reproduced by shaping and narrowing the agendas of movements for social change.

I. THE LGBT MOVEMENT IN HISTORICAL PERSPECTIVE

During the historical timeframe of this study, the years between 1985 and 2008, the LGBT movement went from comprising mostly small, decentralized, locally-based liberationist groups to comprising — at least most visibly — a core set of large, national civil rights organizations.³⁷ The LGBT movement organizations that sought to establish or enforce the rights of LGBT people came to be viewed as the movement’s mainstream, the legitimate representatives of LGBT people and politics. The emergence and eventual solidification of civil rights organizations as the mainstream movement makes this time period an excellent one for examining why legal priorities emerge and dominate movement agendas.

Yet the rise of LGBT civil rights organizations was not uncontested. A short-lived alternative form of political mobilization, queer activism, emerged in the late 1980s with the specific purpose of critiquing the increasingly prominent civil rights approach. Queer groups used

³⁷ ELIZABETH A. ARMSTRONG, *FORGING GAY IDENTITIES: ORGANIZING SEXUALITY IN SAN FRANCISCO, 1950–1994*, at 176-79 (2002). The late 1980s marked a great expansion of LGBT civil rights organizations that have become established as the LGBT movement’s mainstream. See Craig A. Rimmerman, *Beyond Political Mainstreaming: Reflections on Lesbian and Gay Organizations and the Grassroots*, in *THE POLITICS OF GAY RIGHTS* 54, 58-59 (Craig A. Rimmerman et al. eds., 2000) (“The six largest [national civil rights] groups went from a combined budget of \$3.2 million in 1987 to \$8.8 million in early 1991, reflecting both the development of resources within gay and lesbian communities and the opening up of opportunities for activist entry into national politics.”).

protest (or “direct action”)³⁸ and set their sights on more cultural goals in concerted critique of the legally focused civil rights organizations. However, by the early to mid-1990s, most queer groups had been disbanded. This outburst of protest-based queer activism provides the opportunity to explore not only what factors privileged civil rights-style organizing but also how the civil rights groups ultimately prevailed over queer political groups as the movement’s core representatives. The contest between queer protest and LGBT civil rights organizations also illustrates how queer activism may have provided a more inclusive political model than the law-focused model that prevailed.

A. *The Emergence of the LGBT Movement Mainstream*

Gay and lesbian activists in the 1970s formed small and local “liberationist” organizations that celebrated gay pride and promoted the empowerment of sexual minorities. Lesbians and gay men often organized separately, splintering movement organizations along gender lines. Movement organizations were often further diversified by specific intersectional identities, such as intersectional racial-sexual identities, creating organizations with names like the Gay Asian Pacific Alliance and Gay American Indians.³⁹ Influenced by the larger progressive political climate of the 1970s, these early liberationist organizations often promoted multiple social justice issues beyond the affirmation of sexuality or sexual identity, such as antiwar or racial justice agendas.⁴⁰

Beginning in the early 1980s, gay and lesbian communities experienced a series of serious shocks that ultimately destabilized gay liberationist politics. The gay community was reeling from the AIDS epidemic and its ensuing underfunding and political denial. *Bowers v. Hardwick*,⁴¹ the 1986 Supreme Court decision finding state antisodomy legislation constitutional, shaped the legal landscape around gay rights issues and provided a justification for denying a

³⁸ Although there are some semantic differences between the terms *protest* and *direct action*, I use these terms interchangeably here to signify “the collective use of unconventional methods of political participation to try to persuade or coerce authorities to support a challenging group’s aims.” Verta Taylor & Nella Van Dyke, “Get Up, Stand Up”: *Tactical Repertoires of Social Movements*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 262, 263 (David A. Snow et al. eds., 2004) (defining “protest”).

³⁹ ARMSTRONG, *supra* note 37, at 1-2.

⁴⁰ *Id.* at 81-83.

⁴¹ 478 U.S. 186 (1986).

wide variety of rights and benefits to LGBT people.⁴² As homophobia and AIDS-phobia swept the nation, the reinvigorated anti-gay religious right gained increasing political power, and discrimination against gays and lesbians intensified, often with legal backing.

By the mid-1980s, gay and lesbian political organizing had shifted dramatically⁴³ in response to these challenges.⁴⁴ Gay men and lesbians merged together under a common sexual identity,⁴⁵ which they advocated and defended through increasingly large and bureaucratic national civil rights organizations.⁴⁶ These organizations used tactics such as lobbying, litigation, and electoral politics, often in conjunction but nearly always with a specialization in one of these tactics. In the early 1990s, these gay and lesbian civil rights organizations experienced a surge in funding,⁴⁷ helping establish them as the movement's mainstream.⁴⁸

Although the substantive goals of the mainstream LGBT movement have varied since the 1980s, the pattern has been to prioritize issues that seek formal equality⁴⁹ through legal and policy reform.⁵⁰ In the mid-1980s, AIDS-related policy work — which at the time was an issue subsumed within the ambit of lesbian and gay politics —

⁴² Joseph Landau, *Ripple Effect: Sodomy Statutes as Weapons*, NEW REPUBLIC, June 23, 2003, at A1.

⁴³ See Mary Bernstein, *Identities and Politics: Toward a Historical Understanding of the Lesbian and Gay Movement*, 26 SOC. SCI. HIST. 531, 562, 568 (2002).

⁴⁴ JOHN GALLAGHER & CHRIS BULL, PERFECT ENEMIES: THE RELIGIOUS RIGHT, THE GAY MOVEMENT, AND THE POLITICS OF THE 1990s, at 28-31 (1996); VAID, VIRTUAL EQUALITY, *supra* note 5, at 74; Rimmerman, *supra* note 37, at 58.

⁴⁵ See Jill Humphrey, *To Queer or Not to Queer a Lesbian and Gay Group? Sexual and Gendered Politics at the Turn of the Century*, 2 SEXUALITIES 223, 226 (1999).

⁴⁶ See Elizabeth Armstrong, *From Struggle to Settlement: The Crystallization of a Field of Lesbian/Gay Organizations in San Francisco, 1969-1973*, in SOCIAL MOVEMENTS AND ORGANIZATION THEORY 161, 161-88 (Gerald F. Davis et al. eds., 2005) (“Many scholars have remarked upon the transformation of gay liberation from a radical movement into one focused on identity building and gay rights.”); Rimmerman, *supra* note 37, at 54 (“[T]he lesbian and gay movement has embraced a narrow form of identity politics that . . . embraces the language and framework of liberal democratic institutions, interest group liberalism, and pluralist democracy.”).

⁴⁷ Rimmerman, *supra* note 37, at 54, 58-59 (“The six largest [national civil rights] groups went from a combined budget of \$3.2 million in 1987 to \$8.8 million in early 1991, reflecting both the development of resources within gay and lesbian communities and the opening up of opportunities for activist entry into national politics”).

⁴⁸ Bernstein, *supra* note 43, at 552.

⁴⁹ *Id.* at 570.

⁵⁰ See John D’Emilio, *Cycles of Change, Questions of Strategy: The Gay and Lesbian Movement After Fifty Years*, in THE POLITICS OF GAY RIGHTS, *supra* note 37, at 31, 36.

eclipsed most of the movement's other issues.⁵¹ The LGBT movement's other major legislative priorities at the time also included the passage of state and local laws prohibiting employment discrimination and a federal hate crimes statute.⁵² LGBT litigators also put the issue of gays in the military on the political agenda in the late 1980s, setting up the issue for the national prominence it would assume once Bill Clinton incorporated it into his 1992 presidential campaign.⁵³ The LGBT movement's cornerstone issue, relationship recognition (including the struggle for equal marriage rights for same-sex couples), surfaced as a movement priority beginning in the 1980s⁵⁴ and became increasingly central during the 1990s and throughout the 2000s.⁵⁵ Each of these issues, which have been central priorities for the post-1970s mainstream LGBT movement, is either an explicitly legislative priority (in the case of the antidiscrimination laws and hate crimes bills) or a priority that was put on the map through movement litigation (e.g., marriage, military service).

B. *Queer Critiques of the LGBT Movement Mainstream*

Nearly simultaneous with the emergence of the LGBT movement's mainstream was the emergence of the movement's radical flank⁵⁶: protest-based political groups, many of which identified as "queer" rather than "gay and lesbian" organizations to distinguish themselves as opponents to mainstream LGBT politics.⁵⁷ Queers criticized both the form and substance of mainstream LGBT political advocacy. The

⁵¹ Bernstein, *supra* note 43, at 560.

⁵² See VAID, *VIRTUAL EQUALITY*, *supra* note 5, at 10-11.

⁵³ Bernstein, *supra* note 43, at 562, 566.

⁵⁴ While many assume that the marriage equality movement originated in the 1990s after the Hawaii Supreme Court decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), LGBT litigators in fact pursued relationship recognition cases in the 1980s that set the stage for marriage equality. See Nejaime, *Before Marriage*, *supra* note 14, at 104-08.

⁵⁵ See JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 168 (2001) ("Marriage finally shoved its way to the forefront of the gay movement in the 1990s.").

⁵⁶ See JO FREEMAN, *THE POLITICS OF WOMEN'S LIBERATION: A CASE STUDY OF AN EMERGING SOCIAL MOVEMENT AND ITS RELATION TO THE POLICY PROCESS* 236 (1975) (using the term "radical flank" to refer to elements of the women's liberation movement whose goals deviated from the majority of mainstream movement organizations).

⁵⁷ Amy L. Stone, *Diversity Dissent and Decision Making: The Challenge to LGBT Politics*, 16 *GLQ* 465, 470 (2010) (book review) ("In the LGBT movement this radicalism has often taken the forms of direct action or queer activism that include the embrace of intersectionality within the movement and multi-issue agendas.").

substantive queer critique had to do not with the mainstream use of rights language per se but with the way in which these claims tended to assume a monolithic Gay identity. The legal protections LGBT civil rights organizations sought against discrimination, sexual harassment, constitutional rights violations, and hate crimes all hinged on the claimant's identity.⁵⁸ Queers considered the emphasis on sexual identity categories as falsely reductive, imposing artificial rigidity on the fluidity of sexual desire and behavior and imposing a false universality on the experience of sexuality.⁵⁹ Queers denounced identity politics⁶⁰ as exclusionary, saying that it fostered political projects that marginalized people of color,⁶¹ whose experience of sexuality may not fit a universally conceived, single-axis Gay identity. They also critiqued how identity claims marginalized bisexuals and transgender people of all races, whose gender performance or desires pose analytical challenges to an essentialized Gay identity.⁶² As an antidote to the single-issue civil rights organizations,⁶³ queers embraced a multiplatform political approach that "sought alliances

⁵⁸ Dan Danielsen & Karen Engle, *Introduction* to AFTER IDENTITY: A READER IN LAW AND CULTURE, at xii, xiv (Dan Danielsen & Karen Engle eds., 1994) (noting that rights claims "provide legal protection for identities through anti-discrimination statutes, sexual harassment policies, constitutional rights, hate crimes statutes, and affirmative action policies").

⁵⁹ Empirical research suggests considerable fluidity in sexuality. See Michael W. Ross et al., *Concordance Between Sexual Behavior and Sexual Identity in Street Outreach Samples of Four Racial/Ethnic Groups*, 30 SEXUALLY TRANSMITTED DISEASES 110, 110 (2003) (illustrating people's tendency to engage in sexual behavior that is inconsistent with their sexual identity categories).

⁶⁰ Bernstein, *supra* note 43, at 532.

⁶¹ See Gabriel Arkles et al., *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. SOC. JUST. 579, 603 (2012) ("Legal service organizations that claim to provide 'universal' poverty legal services ultimately end up erasing the needs of low-income people of color.").

⁶² See Humphrey, *supra* note 45, at 226 (defining queers as "people who suffer from a combination of material disadvantages and cultural devaluations on account of their sexual orientation (lesbians, gay men, bisexuals), sexual practices (sex workers and sado-masochists), gender performances (transvestites) or gendered identities (transgendered people)"); see also Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 405-06 (2000) (arguing that bisexuals are erased from gay and lesbian politics that is based on arguments for the immutability of sexual identity).

⁶³ ALEXANDRA CHASIN, *SELLING OUT: THE GAY AND LESBIAN MOVEMENT GOES TO MARKET* 230-31 (2001); see also Rickke Mananzala & Dean Spade, *The Nonprofit Industrial Complex and Trans Resistance*, 5 SEXUALITY RES. & SOC. POL'Y 53, 59 (2008) (stating "charges that the focus became assimilation, that the work increasingly marginalized low-income people, people of color . . . and that the resistance became co-opted by neoliberalism and conservative egalitarianism" (citations omitted)).

with people of color, bisexual and transgendered people, and anyone else defined by dominant discourse as somehow transgressing dominant cultural norms.”⁶⁴

Queer politics also departed from the mainstream civil rights organizations in its skepticism that legal methods could produce meaningful social change.⁶⁵ Instead of trying to become contenders in the existing political system, queer organizations aimed at more large-scale, structural transformation. Queers proclaimed their ultimate goal to be “destabilizing traditional meanings of sex and sexual orientation” and “undermining and reconstructing dominant forms of (hetero) sexuality.”⁶⁶ They used creative protest or direct action, which could be performed in diverse settings from suburban shopping malls to city streets, because those tactics could directly confront the cultural practices and value systems queer groups sought to transform.⁶⁷ The use of protest as a “tactic[] of cultural subversion”⁶⁸ became a defining feature of queer politics and distinguished queer groups as “less exclusive of cultural (as opposed to legal) action than other, more ‘assimilationist’ gay or lesbian groups.”⁶⁹

The protest groups that set out to propel queer agendas into the LGBT political mainstream were ultimately short-lived, with most groups going into decline in the mid-1990s.⁷⁰ Although some new queer groups have since been formed, the trend has largely been toward disbandment. That is not to say that queers had little impact on the LGBT movement, however. For example, the mainstream civil rights organizations in the 1990s actually addressed rather than ignored some of the major queer critiques. The mainstream groups

⁶⁴ Bernstein, *supra* note 43, at 561.

⁶⁵ This skepticism toward legal methods is a defining characteristic of radical social movement organizations. See Kathleen J. Fitzgerald & Diane M. Rodgers, *Radical Social Movement Organizations: A Theoretical Model*, 41 Soc. Q. 573, 580-81 (2000). For example, one leader of the Students’ Nonviolent Coordinating Committee (“SNCC”), a radical group in the Civil Rights Movement, stated in a speech: “The legal question is not central. There has been a failure to implement legal changes [ordered by the Supreme Court] and [segregated] customs remain unchanged. Unless we are prepared to create the climate, the law can never bring victory.” *Id.* at 581.

⁶⁶ Bower, *supra* note 29, at 1016.

⁶⁷ See Rimmerman, *supra* note 37, at 54 (identifying “increasing conflicts among those who consider themselves assimilationists . . . and liberationists, who are often associated with ‘outsider’ and grassroots political strategies”).

⁶⁸ Bower, *supra* note 29, at 1016.

⁶⁹ *Guide to the Queer Nation Records, 1990–1996 (bulk dates 1990–1991)*, ONLINE ARCHIVE OF CAL., http://www.oac.cdlib.org/findaid/ark:/13030/tf029000gc/entire_text/ (last visited Feb. 18, 2014).

⁷⁰ ARMSTRONG, *supra* note 37, at 182-83.

modified their mission statements to formally include transgender people, expanding their focus beyond sexual identity. The civil rights organizations also addressed the marginalization critique by taking measures to increase the racial diversity among their ranks.⁷¹ Although the substantive impact of these changes is questionable,⁷² the changes offer some evidence of the seriousness with which queer critiques were addressed; mainstream LGBT movement organizations acknowledged the importance of queer politics by incorporating symbolic structural changes to address queer demands. Furthermore, the fact that the mainstream groups adapted themselves to account for queer critiques suggests that, although the civil rights groups were increasing their budgets and growing at this time, their position as movement agenda setters had not yet fully solidified — that the queer critique was strong enough to threaten their position as movement leaders.

In summary, the time period under investigation is characterized by the growth of civil rights–style LGBT advocacy, followed by a critical period of intramovement contestation over the merits of that political model, out of which civil rights groups emerged victorious and secured an established position at the LGBT movement’s mainstream. This historical trajectory of the LGBT movement illustrates several key points that form major assumptions for this research. It exposes some of the major divisions within the movement, exemplifying the movement’s nonunitary, factional composition. This history is also a testament to the idea that movement agendas are constructed. It bears reminding that the contemporary civil rights model of LGBT politics, which is often taken for granted as the logical or natural way of “doing” LGBT politics, is ultimately just the political form with enough backing to become institutionalized. A motivating question for this research, then, is why the civil rights model triumphed and why its alternatives have since faded from view.

This history of the LGBT movement also underscores why this movement, and why these years, provide a particularly illustrative case study for research on legalizing LGBT politics. The defeat of protest-based models of political organizing combined with the stability of the civil rights model makes this an excellent test site for exploring why legal issues may come to dominate social movement agendas. Yet the mixture of queer protest and LGBT civil rights organizations during the 1980s and 1990s is equally important, as it allows me to observe the qualitative, strategic differences between these groups that may

⁷¹ Rimmerman, *supra* note 37, at 62-63.

⁷² See JANE WARD, *RESPECTABLY QUEER: DIVERSITY CULTURE IN LGBT ACTIVIST ORGANIZATIONS* 6 (2008).

have contributed to their relative success. Furthermore, selecting a case study in which rights-based strategies were not immediately and resolutely dominant, but were rather subject to serious critical scrutiny, allows me to develop a more nuanced theoretical account that specifies the conditions that mitigate or detract from the legalization of movement agendas. The selected snapshot of LGBT movement history thus offers the opportunity to uncover potential mechanisms that both generate and weaken intramovement resistance to legal priorities and promote the dominance of legal issues on a movement's agenda, despite concerted critique.

II. EXISTING FRAMEWORKS FOR INTERPRETING LITIGATION'S EFFECT ON SOCIAL MOVEMENTS

Why has the mainstream LGBT movement focused on the formal legal equality goals pursued through litigation rather than on the radical cultural transformation that protest-based queer groups claimed as a priority? This Part evaluates research from the legal, sociolegal, and sociological fields, each of which provides a relevant framework for understanding the effect of litigation on social movements. These literatures each suggest that litigation is privileged compared to other movement tactics and that legal issues are privileged compared to other issues on a social movement's agenda. Critical legal scholarship suggests that lawyers prioritize issues that can be pursued through litigation and pressure others to support those legal priorities. Sociolegal scholarship suggests that movement actors that use litigation attract greater resources than movement actors that use other tactics, elevating the issues being litigated as primary movement priorities. Sociological scholarship suggests that the issues litigated resonate with deep-seated political values, privileging litigation and legal issues over other tactics and priorities. Each of these literatures offers important insights into the conditions that privilege litigation over protest tactics — and in the case of the LGBT movement (where the movement's goals for radical cultural transformation are expressed through protest tactics), may subordinate radical goals to goals for legal reform.

I use elements from each of these literatures to construct a theoretical model of the influence of litigation over other movement strategies, and as a corollary, the dominance of legal issues over other issues on a social movement's agenda. I advocate a critical approach to movement agenda setting, which examines the organizational processes that generate greater resources for movement actors using litigation, and the systemic, contextual factors that foster this process

by reinforcing a widespread belief in the importance of legal goals. My approach focuses on dynamics among social movement organizations rather than on the one-on-one interactions between individual lawyers and other movement actors. I argue that litigating LGBT movement organizations may be systematically more likely than other movement organizations to tap into long-term organization-sustaining resources (i.e., media coverage and organizational support), allowing them to become highly visible and long-standing movement actors. I further contend that the contextual factors that privilege litigation over other movement tactics may also privilege legal goals over other movement goals — making legal issues the flashpoints for movement action of all types, including protest and lobbying efforts to advance LGBT equality.

A. *Critical Legal Scholarship on Lawyer Domination Within Social Movements*

Litigation is an important tool for social movements, which often “lack the power to seek their demands through the normal political processes or through direct action.”⁷³ Yet several critiques have emerged regarding the role of lawyers in the struggles of these powerless groups and the potential for social movement lawyers to exert disproportionate influence over progressive movement agendas. This critical work suggests that conventional legal practice has a deradicalizing effect on social movements. Movement lawyers, the argument goes, are often preoccupied with legally achievable ends, which are often formalistic and less radical or transformative than the substantive goals articulated at the movement’s grass roots.⁷⁴ Lawyers may substitute their own agendas for those of their clients⁷⁵ or overshadow their clients in their pursuit of rights-oriented legal change.⁷⁶ Lawyers may also co-opt their activist clients by forging

⁷³ HANDLER, *supra* note 2, at 22.

⁷⁴ See also *id.* at 25-26; MICHAEL W. MCCANN, TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM 78 (1986); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND POLITICAL CHANGE 170-72 (1975).

⁷⁵ See TUSHNET, *supra* note 2, at 146-58; Bell, *supra* note 1, at 471; Kessler, *supra* note 2, at 138; Neal Milner, *The Denigration of Rights and the Persistence of Rights Talk: A Cultural Portrait*, 14 LAW & SOC. INQUIRY 631, 649 (1989).

⁷⁶ Gerald López discusses how the expert-driven model of lawyering empowers lawyers, not clients, to “fram[e] problems and choices, identify[] and implement[] worthy strategies, and decid[e] how much and whose feedback qualifies as necessary for effective monitoring and evaluation” Gerald P. López, *Keynote Address: Living and Lawyering Rebelliously*, 73 FORDHAM L. REV. 2041, 2042 (2005).

relationships with activists who require the lawyers' technical expertise (e.g., to seek nonprofit tax-exempt status or to defend arrested protestors from criminal charges).⁷⁷ Through these subtle means of persuasion and domination over the lawyer–client relationship, the critical legal literature has shown, lawyers can operate as a mechanism through which conservative legal goals replace radical movement objectives.

Derrick Bell's analysis of the NAACP is a prime example from this area of scholarship.⁷⁸ Bell shows how lawyers in the civil rights movement displaced their clients' goals of substantive social change in the lawyers' pursuit of viable legal claims.⁷⁹ NAACP lawyers and their clients were part of a social movement intent on ameliorating racial inequalities in public education.⁸⁰ However, after the NAACP won a major victory in *Brown v. Board of Education*,⁸¹ NAACP attorneys and their clients became divided over the specific priorities they should pursue to achieve this goal. The attorneys were focused on achieving racial integration.⁸² The African American parents and public-school children they represented, however, were more concerned with increasing the quality of education within African American schools than with pursuing a racial balance.⁸³ Bell argues that the lawyers' strategy, which ultimately shaped civil rights law,⁸⁴ was less effective than their clients' proposals for furthering the movement's antistatist goals.⁸⁵

⁷⁷ SCHEINGOLD, *supra* note 74, at 139-40.

⁷⁸ See Bell, *supra* note 1, at 471.

⁷⁹ See *id.*

⁸⁰ *Id.* at 477-78.

⁸¹ 347 U.S. 483 (1954) (holding that segregation in children's public schools deprived minority children of equal opportunities, even though the facilities may be equal).

⁸² Bell, *supra* note 1, at 482 ("Having convinced themselves that *Brown* stands for desegregation and not education, the established civil rights organizations steadfastly [sic] refuse to recognize reverses in the school desegregation campaign . . .").

⁸³ *Id.* at 479 (noting that civil rights groups have long charged that "black schools are educationally bankrupt and unconstitutional per se"); see *id.* at 483 ("[B]lack representatives hoped to convince the lawyers to incorporate their educational priorities into the plaintiffs' Phase II desegregation plan.").

⁸⁴ See *id.* at 471 ("Largely through the efforts of civil rights lawyers, most courts have come to construe *Brown v. Board of Education* as mandating . . . school desegregation plans . . . whether or not those plans will improve the education received by the children affected.").

⁸⁵ *Id.* at 488 ("Much more effective remedies for racial subordination in the schools could be obtained if the creative energies of the civil rights litigation groups could be brought into line with the needs and desires of their clients.").

Critical legal scholarship identifies instances in which lawyers have taken control of the agenda through individual strategic negotiations with their clients. However, it does not provide a comprehensive theoretical approach for explaining the sources or scope of lawyers' power within movements. Professor Sandra Levitsky's work, for instance, exposes further ways in which movement lawyering may generate intramovement power imbalances. In a study of LGBT movement organizations in Chicago, Professor Levitsky finds that litigating organizations were able, in the words of one activist, to "hijack" the movement's agenda⁸⁶ because the litigating organizations had the financial backing to act independently without seeking other groups' cooperation.⁸⁷ The grassroots organizations, which had significantly fewer resources, were forced to contend with and support the highly visible litigation agenda. Levitsky's research suggests that litigating movement actors may garner power within their movement inadvertently, owing to the unique ability of litigation to attract resources and publicity.

A complete account of law and movement agenda setting must account for the differential ability of various political tactics to mobilize both financial resources and symbolic resources such as visibility and public recognition. This is an important aspect of lawyers' power within movements, as it operates inadvertently and thus cannot be resolved through the intervention of even more responsible lawyering styles that empower grassroots activists to take the lead in strategizing; the community representatives with whom lawyers consult may have already been influenced by the publicity surrounding movement litigation and may have shaped their desires and goals accordingly. The legal mobilization approach I outline next begins to contend with extralegal resource mobilization as an additional, and potent, factor linking litigation to agenda setting within social movements.

B. *Legal Mobilization Scholarship on Litigation Attracting Movement Resources*

The sociolegal literature on legal mobilization provides a second theory of law's agenda-setting capacity within movements. Sociolegal

⁸⁶ Sandra R. Levitsky, *To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements*, in *CAUSE LAWYERS AND SOCIAL MOVEMENTS* 145, 158 (Austin Sarat & Stuart A. Scheingold eds., 2006).

⁸⁷ *Id.* at 145, 146 ("[M]any activists in the movement perceive[d] legal advocacy organizations as operating independently from the rest of the movement, imposing their agendas without consultation with grassroots activists . . .").

scholarship on “legal mobilization” looks at the collective translation of movement grievances into an assertion of legal claims.⁸⁸ Focal questions for legal mobilization research are how and why movement actors engage with law, what meaning this has for the actors who do it, and what implications it has for the movement.⁸⁹

Empirical studies of legal mobilization emphasize how litigation and legal rhetoric attract three primary extralegal benefits to a movement’s cause (beyond the material legal remedies that may result from movement litigation).⁹⁰ First, litigation attracts significant coverage in the mainstream news media.⁹¹ In his study of the pay equity reform movement, Professor Michael McCann found that lawsuits generated a “tremendous amount of mainstream media attention.”⁹² News media coverage of litigation for pay equity reform was five to ten times greater than coverage of any other tactic, including legislation, electoral politics, and protest.⁹³ McCann also found that “the overwhelming majority of this coverage explicitly concerned law suits and legal issues.”⁹⁴ These findings square with other social science accounts, which would suggest that law and litigation are newsworthy items. The corporate structure of news organizations compels competition for readership. Reporters, operating under pressure to effectively gather stories under deadline, keep an eye on sites of routine news production such as political and legal institutions.⁹⁵ This

⁸⁸ MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 5-6 (1994) [hereinafter *RIGHTS AT WORK*].

⁸⁹ See MICHAEL PARIS, *FRAMING EQUAL OPPORTUNITY: LAW AND THE POLITICS OF SCHOOL FINANCE REFORM* 21 (2010).

⁹⁰ See Marc Galanter, *The Radiating Effects of Courts*, in *EMPIRICAL THEORIES ABOUT COURTS* 117, 139 n.4 (Keith O. Boyum & Lynn Mather eds., 1983); see also Christopher Coleman et al., *Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest*, 30 *LAW & SOC. INQUIRY* 663, 668 (2005) (exploring how social movements used the law “as a rhetorical resource, as a ‘club,’ . . . an inspiration and an aspiration — to gain the upper hand in the conflict”).

⁹¹ MCCANN, *RIGHTS AT WORK*, *supra* note 88, at 58; see also MARGARET E. KECK & KATHERYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 21-22 (1998); HELENA SILVERSTEIN, *UNLEASHING RIGHTS: LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT* 71 (1996); Steven E. Barkan, *Political Trials and Resource Mobilization: Towards an Understanding of Social Movement Litigation*, 58 *SOC. FORCES* 944, 954-55 (1980).

⁹² MCCANN, *RIGHTS AT WORK*, *supra* note 88, at 58.

⁹³ *Id.* at 59-60.

⁹⁴ *Id.* at 59.

⁹⁵ EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* 18-19 (2002) (“Economics dictates that [news media outlets] concentrate their resources where significant news often occurs, where important rumors and leaks abound, and where regular press conferences are held.

likely biases coverage toward movement issues and tactics that occur in those legal institutions.⁹⁶ News outlets also try to attract readership with general interest stories or drama.⁹⁷ Social movement litigation, which pits opposing parties in a dramatic, high-stakes contest over politically potent issues, offers a dramatic story line as well as identifiable protagonists for personal interest profiles.⁹⁸ Protest, by contrast, is typically much less disruptive,⁹⁹ and it may be difficult to identify individual representatives.

Second, litigation generates financial resources for social movement organizations¹⁰⁰ that contribute to those organizations' long-term survival.¹⁰¹ The publicity that lawsuits receive generates support for movement organizations and facilitates fund-raising.¹⁰² Litigation also attracts funding by offering a clear marker for success in the resulting judicial opinion. Organizations that specialize in litigation emphasize

The White House, the Pentagon, and the State Department, in Washington, D.C., are central nodes of such news activity. On a local basis, city hall and the police departments are the subject of regular news 'beats' for reporters.”).

⁹⁶ W. LANCE BENNETT, *NEWS: THE POLITICS OF ILLUSION* 94-95 (1988).

⁹⁷ HERMAN & CHOMSKY, *supra* note 95, at xxi (“Newspaper content is geared to the results of readership surveys, and newsroom organization has been reshaped by newspaper managers whose commitment to the marketing ethic is hardly distinguishable from their version of what journalism is.”).

⁹⁸ See Galanter, *supra* note 90, at 139 n.7 (noting courts “dramatiz[e] the seriousness, importance, dignity, rights, and duties of citizens, surrounding them with ceremonious deference”); see also Barkan, *supra* note 91, at 952 (describing political trials as “particularly high drama” and newsworthy).

⁹⁹ Doug McAdam et al., “*There Will Be Fighting in the Streets*”: *The Distorting Lens of Social Movement Theory*, 10 *MOBILIZATION* 1, 1 (2005) (finding disruptive protest action having decreased substantially since the 1970s). This may strike many as counterintuitive, likely due to perceptions of protest constructed from the news media, which tend to selectively report protests that happen to be dramatic. Pamela E. Oliver & Gregory M. Maney, *Political Processes and Local Newspaper Coverage of Protest Events: From Selection Bias to Triadic Interactions*, 106 *AM. J. SOC.* 463, 496 (2000) (finding selective news bias toward protests involving a counterdemonstration).

¹⁰⁰ Steven A. Boutcher, *Making Lemonade: Turning Adverse Decisions into Opportunities for Mobilization*, *AMICI*, Fall 2005, at 8, 10; Douglas NeJaime, *Winning Through Losing*, 96 *IOWA L. REV.* 941, 943-44 (2011) [hereinafter *Winning Through Losing*].

¹⁰¹ See Debra C. Minkoff, *The Organization of Survival: Women's and Racial-Ethnic Voluntarist and Activist Organizations, 1955-1985*, 71 *SOC. FORCES* 887, 890 (1993) [hereinafter *Organization of Survival*] (“I argue that organizations pursuing more legitimate action plans (centered on lobbying and litigation, for example) have better life chances than those that engage in more confrontational actions (such as direct action and other forms of disruptive protest).”).

¹⁰² HANDLER, *supra* note 2, at 218.

the outcomes of their legal cases — regardless of whether a case is a clear win or loss — to galvanize fund-raising and organizational support.¹⁰³ An outright win incentivizes support by allowing contributors to assess the impact of their efforts. Conversely, the “denial of the claim might serve to highlight more intensely the injustice suffered by the group,” creating “a sense of urgency for the movement” that motivates support.¹⁰⁴ Furthermore, unlike protest or lobbying tactics, the outcomes of litigation are clearly traceable to the litigating organizations themselves, whose official involvement is on public record. Protest and lobbying, by contrast, typically involve collective efforts by multiple movement entities, making it difficult to identify the impact of any particular movement actors. The contributions that result from protest and lobbying tactics are thus more likely than those that result from litigation to be diffused throughout the movement, rather than flowing to the individual organizations involved.¹⁰⁵ Accordingly, litigating organizations are more likely than protest or lobbying organizations to generate organization-sustaining resources.

A third extralegal outcome of litigation is its ability to galvanize movement activism outside the courts.¹⁰⁶ Litigation efforts can motivate activists by helping them name particular grievances, blame responsible parties, and lay claim to a specific remedy.¹⁰⁷ A public lawsuit can awaken a sense of collective rights entitlement¹⁰⁸ or provide activists rhetorical tools for claiming injustice,¹⁰⁹ sparking grassroots mobilization and protest. Litigation can also focus activists’

¹⁰³ See NeJaime, *Winning Through Losing*, *supra* note 100, at 980.

¹⁰⁴ *Id.* at 984.

¹⁰⁵ See Herbert H. Haines, *Black Radicalization and the Funding of Civil Rights: 1957–1970*, 32 SOC. PROBS. 31, 41 (1984) (finding that in the civil rights movement “as movement goals and tactics became more radical around 1965 and 1966, outside support groups came to see the NAACP as virtually the only acceptable recipient of funding”).

¹⁰⁶ See McCANN, RIGHTS AT WORK, *supra* note 88, at 54-57 (discussing the equal pay movement); SCHEINGOLD, *supra* note 74, at 131-32; Coleman et al., *supra* note 90, at 668; Francesca Polletta, *The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961–1966*, 34 LAW & SOC’Y REV. 367, 368 (2000) [hereinafter *Structural Context*].

¹⁰⁷ William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 LAW & SOC’Y REV. 631, 635 (1980–1981).

¹⁰⁸ Lisa Vanhala, *Social Movements Lashing Back: Law, Social Change and Intra-Social Movement Backlash in Canada*, in SPECIAL ISSUE: SOCIAL MOVEMENTS/LEGAL POSSIBILITIES 121, 131, 137 (Austin Sarat ed., 2011).

¹⁰⁹ Anna-Maria Marshall, *Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment*, 28 LAW & SOC. INQUIRY 659, 664 (2003).

obscure sense of grievance into pointed political effort with concrete goals.¹¹⁰ These factors enable litigation to sustain the momentum of collective action in the face of virulent opposition,¹¹¹ which may otherwise sap the energy of a mobilized group.

These resource-generating facets linking litigation to increased publicity, organizational support, and movement mobilization would appear to contradict the critical legal scholarship, which sees litigation as an agent of disempowerment and deradicalization. Legal mobilization scholarship, rather, rejects the critical notion of a “competitive, zero-sum relationship among political tactics,”¹¹² focusing instead on the “synergistic” and “mutually influential”¹¹³ relationship between protest and litigation. In this view, litigation is a “complementary and interactive” element of a social movement’s diversified tactical approach.¹¹⁴

While the legal mobilization literature generates several important insights into social movement litigation, it raises several concerns regarding litigation as a source of resource imbalance and agenda setting within social movements. The media and financial resources that litigation generates may not have equal benefits for all factions of a movement. Indeed, these benefits are likely to be disproportionately channeled toward the movement organizations that specialize in litigation. Furthermore, if such resources do disproportionately benefit movement litigation, this would suggest that the substantive issues being litigated will become movement agenda items. The next section puts these findings in conversation with sociological theory to provide a more comprehensive theoretical account of the mechanisms that privilege social movement litigation and their impact on movement priorities.

C. “Discursive Opportunity” Theory and the Privileging of a Movement’s Legal Tactics and Agenda

Sociological scholarship expands on the legal mobilization research by providing insight into the mechanisms through which litigation

¹¹⁰ See Kathleen E. Hull, *The Political Limits of the Rights Frame: The Case of Same-Sex Marriage in Hawaii*, 44 SOC. PERSP. 207, 208 (2001).

¹¹¹ See Coleman et al., *supra* note 90, at 668-69 (arguing that a lawsuit challenging desegregation in Montgomery, Alabama after Rosa Parks’ arrest “helped to sustain the boycott in the face of mounting resistance from the city and from segregationists and white supremacist organizations”).

¹¹² MCCANN, RIGHTS AT WORK, *supra* note 88, at 295.

¹¹³ *Id.*

¹¹⁴ *Id.*

generates extralegal resources and the consequences this has for a movement's agenda. This research examines how a movement's social environment may constrain or enable opportunities for activism and thereby shape patterns of movement mobilization and sustained organization.¹¹⁵ While sociological research has focused mostly on how activists seize on shifting political or economic conditions as opportunities for action,¹¹⁶ a growing body of research suggests that movements may also respond to relatively stable features of their *cultural* environments. This research suggests that social movements' rhetorical strategies are constrained by "discursive opportunity structures," or the deeply embedded ideas and belief systems that dominate the political culture in which a movement operates.¹¹⁷ Movement activists strategically keep "a finger on the pulse" of the wider arena," much like business strategists do for the competitive marketplace, to perceive opportunities for action in the cues conveyed by their "targets, opponents, allies, potential allies, and the public."¹¹⁸ Activists who hope to convince these broad audiences of the value of their movement's cause must select rhetoric that "resonates" with culturally dominant values and systems of meaning.¹¹⁹

Legal norms and ideas derived from constitutional texts, court decisions, and statutes constitute many of the ideas and values that dominate political discourse and become privileged social movement rhetoric.¹²⁰ Social movement actors "draw upon critical concepts emphasized in the legal domain" to produce "claims [that] are more

¹¹⁵ See DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930-1970*, at 230-31 (2d ed. 1999).

¹¹⁶ See *id.* at 5-9.

¹¹⁷ See Myra Marx Ferree, *Resonance and Radicalism: Feminist Framing in the Abortion Debates of the United States and Germany*, 109 *AM. J. SOC.* 304, 306 (2003). Sociologists define these deeply held worldviews and normative systems as *ideologies*. See Pamela E. Oliver & Hank Johnston, *What a Good Idea! Frames and Ideologies in Social Movement Research*, 5 *MOBILIZATION* 37, 44 (2000) (defining ideologies as "systems of ideas which couple understandings of how the world works with ethical, moral, and normative principles that guide personal and collective action"); see also Holly J. McCammon et al., *Movement Framing and Discursive Opportunity Structures: The Political Successes of the U.S. Women's Jury Movements*, 72 *AM. SOC. REV.* 725, 731-32 (2007) [hereinafter *Movement Framing*] (discussing ideologies as "discourses that are long-lived and deeply embedded in the surrounding culture" which provide "opportunities for politically effective collective action framing").

¹¹⁸ HOLLY J. MCCAMMON, *THE U.S. WOMEN'S JURY MOVEMENTS AND STRATEGIC ADAPTATION: A MORE JUST VERDICT* 20 (2012).

¹¹⁹ See Ferree, *supra* note 117, at 304-05.

¹²⁰ See McCammon et al., *Movement Framing*, *supra* note 117, at 733 (describing sociological work which "emphasiz[es] the ways in which key legal institutions and their actors and texts define, develop, and maintain hegemonic ideas").

likely to resonate, and thus to persuade potential supporters.”¹²¹ In the United States, institutionalized legal discourse emphasizes rights claims that adhere to liberal legal principles of formal equality and limited state involvement in individual liberty. Empirical work suggests that these liberal assumptions that prevail in formal legal doctrine also prevail over alternative definitions and dominate movement discourse.¹²² Professor Myra Marx Ferree has shown that U.S. feminists frame abortion as a matter of individual choice, a liberal construction that defines rights as formal protections for individuals.¹²³ Feminists devised their strategies to conform to judicial rhetoric, which itself “drew upon longer-standing political traditions of liberal individualism.”¹²⁴

The sociological literature expands theoretical understandings of litigation as a source of extralegal movement resources (i.e., media and organizational support). Litigation is the sole social movement tactic that is inextricably linked to dominant legal principles; lawyers who seek to prevail in litigation (or who are at least ethically obligated to try) must “translate”¹²⁵ or “repackage”¹²⁶ their clients’ and movements’ grievances into a resonant legal claim. Movement litigation thereby engages dominant legal ideas and viewpoints by necessity. Furthermore, previous work has found that movement lawyers draw on dominant legal rhetoric during litigation — even when that rhetoric is widely viewed as problematic — to a greater extent than movement lobbyists advocating for legislative change.¹²⁷ This bolsters

¹²¹ See *id.*

¹²² See Ferree, *supra* note 117, at 305-06, 313-14; McCammon et al., *Movement Framing*, *supra* note 117, at 725-26.

¹²³ Ferree, *supra* note 117, at 313 (“Liberal individualism as a principle of social policy in the United States emphasizes ‘negative liberty,’ shielding individuals and markets from interference by the state. As applied to abortion by the Supreme Court, U.S. social policy places particular emphasis on the freedom of the individual woman to decide for herself whether abortion is appropriate . . .”). The trend is reversed in Germany, where feminists emphasized the public health imperative to protect women from the burden imposed by unwanted pregnancy and the health risks of illegal abortion. This framing was a better fit with the political values of the German welfare state. *Id.* at 314.

¹²⁴ *Id.* at 313.

¹²⁵ JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 55 (1996) (“[L]aw is a language into which other languages must be continuously translated.”).

¹²⁶ Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 455-56 (2001).

¹²⁷ See Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in TRANSGENDER RIGHTS 3, 21 (Paisley Currah et al. eds., 2006) (“While in much of the

the hypothesis from the legal mobilization literature that movement litigation will generate rhetoric that receives greater media coverage and organization-sustaining resources than other tactics.¹²⁸

The sociological literature on “discursive opportunity structures” further suggests that legal issues will become privileged priorities on a social movement’s agenda. If dominant legal principles shape social movements’ *rhetorical* strategies, as sociological research shows, dominant legal principles may also shape activists’ strategic selection of agenda items. Discursive opportunity may compel activists to prioritize grievances that may be translated into formal legal terms. Critical legal scholarship, which shows that lawyers pursue priorities that can be adapted into legal claims, supports this hypothesis.¹²⁹ Theories of discursive opportunity suggest this may be a more widespread phenomenon, wherein both lawyers and grassroots activists alike selectively focus on issues that resonate with the ideological structures of formal law.

This Article’s expansion on discursive opportunity suggests mechanisms that legalize social movement agendas. Important implications follow for theories of law and social change. I argue that litigation’s ability to mobilize protest should be interpreted not as a special benefit of movement litigation (as the sociolegal literature implies) but rather as part of a systemic process that privileges legal issues on a social movement’s agenda. From this perspective, protest and litigating organizations alike are mutually constrained by the strategic imperative to prioritize legal issues. Activists are therefore more likely to emphasize issues that resonate with legal frameworks rather than issues that defy legal translation. In many ways, this could be a good thing for the movement. It could make a movement more focused, more cohesive. It might even make the movement more politically effective by minimizing infighting and narrowing activists’ sights to political goals with greater appeal to powerholders and chances for success.¹³⁰ But legalizing a movement’s agenda could also

litigation discussed above ‘transgender’ figures strongly as a category of identity, its deployment in activism focused on legislative change is much more nuanced and limited.”). By and large, transgender activists want to disestablish the legal importance of gender as a fixed identity category. *Id.* at 24. Nevertheless, movement litigators tend to describe their clients’ identity in a way that reinforces such fixed notions of gender. *Id.* at 8-13.

¹²⁸ See Edward T. Walker & John D. McCarthy, *Legitimacy, Strategy, and Resources in the Survival of Community-Based Organizations*, 57 SOC. PROB. 315, 318 (2010).

¹²⁹ ALDON D. MORRIS, ORIGINS OF THE CIVIL RIGHTS MOVEMENT 13-14, 35-36 (1984); see TUSHNET, *supra* note 2, at 144-45.

¹³⁰ See Holly J. McCammon et al., *How Movements Win: Gendered Opportunity*

diminish movement diversity — and not just political diversity.¹³¹ Given that dominant legal constructions favor single-axis, identity-based claims of nondiscrimination¹³² over claims based on the intersection of multiple identities,¹³³ the legalization of movement agendas may foster the political marginalization of individuals facing multiple, intersecting forms of discrimination.

III. EMPIRICAL EVIDENCE FOR THE LEGALIZATION OF THE LGBT MOVEMENT

This Part draws on three original empirical studies to investigate potential mechanisms that may privilege litigation over other LGBT movement tactics so that the issues being litigated come to dominate the LGBT movement's substantive agenda. Considering the LGBT movement over the past thirty years, these studies investigate several questions: Which movement tactics — litigation, lobbying, or protest — have been most visible in the mainstream news media? Are organizations that use litigation, lobbying, or protest most likely to survive and become permanent movement players?¹³⁴ How do the strategy-formation processes used by primarily litigation-, lobbying-, or protest-based movement organizations vary with differences in each organization's relative ability to drive its own agenda or the agendas of others in the movement? The overarching theory here is that if litigation produces media visibility and confers organizational

Structures and the U.S. Women's Suffrage Movements, 1866 to 1919, 66 AM. SOC. REV. 49, 66 (2001) (“[T]he manner in which [suffragists] framed rationales for the vote significantly influenced whether they were successful in winning the vote.”).

¹³¹ Although by definition political diversity is diminished in a movement that is narrowly focused on legal goals, such a movement would exclude radical activists focused on “a radical restructuring of the system rather than incorporation into that system.” Fitzgerald & Rodgers, *supra* note 65, at 573.

¹³² Legal protections against discrimination and sexual harassment constitutional rights violations hinge on the claimant's identity. See Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629, 636-37 (2002).

¹³³ See Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 374-76; Zachary A. Kramer, *Some Preliminary Thoughts on Title VII's Intersections*, 7 GEO. J. GENDER & L. 31, 50 (2006) (“[I]t is often hard for courts to manage a gender stereotyping claim when it is brought by a lesbian or gay plaintiff.”).

¹³⁴ The decision to conceptualize survival as a consequence of a movement's tactics follows methods used in contemporary sociological studies of social movement organizations. See Minkoff, *Organization of Survival*, *supra* note 101, at 890 (arguing that “action strategy is the most salient feature in determining organizational life chances”).

stability, the organizations that litigate will rise to prominence in the movement, and their legal goals will come to dominate the movement's overall substantive agenda. I call this process the "legalization" of a social movement's agenda.

My empirical studies show that litigation received more media coverage than any other LGBT movement tactic, suggesting that litigation had greater visibility than other tactics. In addition, LGBT movement organizations that used litigation were at a statistically lower risk of demise (i.e., they were more likely to survive, and for longer) than other types of LGBT movement organizations. This finding suggests that litigation will become a stable presence in social movements and that litigating organizations will become more prominent and influential movement actors. A qualitative analysis of a small subset of LGBT movement organizations explores these findings in greater detail and reveals the processes through which litigation influences a social movement's broader agenda. Whereas litigating LGBT movement groups proactively pursued preplanned organizational priorities, protest groups formed their agendas reactively, focusing on the issues covered by the mainstream media. This phenomenon appears to have diverted protest groups away from their original priorities and toward the issues that the media found newsworthy. Given earlier findings that litigation coverage dominated news headlines, I argue that the processes identified here may enable litigation to dominate protest activism as well. These findings suggest that the media visibility and stability of social movement litigation can legalize the agendas of movement actors outside the courtroom.

This research focuses on LGBT movement organizations located in California.¹³⁵ It was crucial to observe state and local organizations because queer protest organizations are underrepresented in national politics.¹³⁶ Limiting the analysis to a single state ensured that the movement organizations in the study were operating within a common set of jurisdictional, political, and, to some extent, cultural constraints.¹³⁷ California LGBT organizations have traditionally been

¹³⁵ Both national organizations based in California, as well as statewide or local California LGBT organizations are observed.

¹³⁶ Queer protest groups in particular are "decentralized [and] local" in nature. Gamson, *supra* note 5, at 393.

¹³⁷ This methodological choice follows the common practice in sociological research to operationalize social movements as geographically bounded within a state or municipality, even when that movement operates within a larger societal sector. See ARMSTRONG, *supra* note 37, at 213-14 n.5 (discussing the LGBT movement in San Francisco); RAKA RAY, *FIELDS OF PROTEST: WOMEN'S MOVEMENTS IN INDIA 3* (1999) (discussing activist women and the women's movement in two Indian cities). This is

at the forefront of nationwide movement innovations,¹³⁸ which suggests that findings from California have implications for the U.S. LGBT movement as a whole.

There is also reason to believe that the findings from this research, though they are specific to the LGBT movement, may be generalizable to other social movements. The theoretical framework and predictions that form the basis for this research are derived from empirical studies that base their observations on a wide variety of social movements, from the animal rights movement¹³⁹ to the equal pay movement¹⁴⁰ to the civil rights movement¹⁴¹ to the disability rights movement.¹⁴² Thus, the theoretical processes captured by these findings likely apply to other social movements that involve litigation campaigns.

A. *Visibility: Media Coverage of LGBT Movement Litigation*

A preliminary question is whether LGBT movement litigation has received more media attention than other types of movement tactics. Media coverage plays an important role in movement agenda construction. Exploring patterns in media coverage of the LGBT movement helps gauge the public discussion and perception of the LGBT movement, which movement actors take into consideration when forming their agendas.¹⁴³ Media coverage can also *shape* people's perceptions of an issue's importance,¹⁴⁴ including the perceptions of activists within the movement. Movement issues that are prominently featured in the press may thus become prominently featured in movement activism as well.

justified because the institutional pressures that affect movement fields tend to be local rather than national. See ARMSTRONG, *supra* note 37, at 213-14 n.5. Some evidence suggests that this is particularly true for the LGBT movement, which is often characterized as influenced by regional concerns. See *id.*

¹³⁸ See ARMSTRONG, *supra* note 36, at 4-5, 213-14 n.5.

¹³⁹ See generally SILVERSTEIN, *supra* note 91 (discussing the relationship between law and social change through the animal rights movement).

¹⁴⁰ See generally MCCANN, RIGHTS AT WORK, *supra* note 88 (discussing the equal pay movement).

¹⁴¹ See generally Polletta, *Structural Context*, *supra* note 106 (examining how rights were conceived by southern civil rights workers from 1961-1966).

¹⁴² See generally Engel & Munger, *supra* note 108 (discussing the impact of the Americans with Disabilities Act of 1990 through two illustrative life stories).

¹⁴³ See TODD GITLIN, THE WHOLE WORLD IS WATCHING: MASS MEDIA AND THE MAKING AND UNMAKING OF THE NEW LEFT 3, 9 (1980).

¹⁴⁴ Maxwell McCombs & Amy Reynolds, *News Influence on Our Pictures of the World*, in MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH 1, 1 (Jennings Bryant & Dolf Zillmann eds., 2002).

Previous studies of social movement litigation suggest that litigation receives more media coverage than other social movement tactics.¹⁴⁵ Yet more systematic research is needed to verify those studies' findings; this study addresses that question by examining the relative frequency of mainstream newspaper articles reporting on the LGBT movement from 1985 to 2008. Newspaper articles often mirror mainstream television and radio news and thus provide a good barometer for mainstream media coverage more generally.¹⁴⁶ The articles in this study were selected from three major mainstream newspapers: one national newspaper, the *New York Times*, and two California newspapers, the *San Francisco Chronicle* and the *Los Angeles Times*.¹⁴⁷ Online searches of these newspapers in LexisNexis¹⁴⁸ and ProQuest¹⁴⁹ located every article published in these newspapers during the relevant time period that covered any form of LGBT social movement activity. From this large sampling frame,¹⁵⁰ I selected a random sample of 1,145 articles to analyze.¹⁵¹ Research assistants coded descriptive information from each article, including its date, word count, and newspaper, and the LGBT political tactics and issues

¹⁴⁵ MCCANN, RIGHTS AT WORK, *supra* note 88, at 59-60; *see supra* Part II.B.

¹⁴⁶ Newspaper coverage patterns provide an indication of larger trends in mass media coverage. Previous research has shown a high level of similarity in content among print, radio, and televised news media. *See* LEONARD DOWNIE, JR. & ROBERT G. KAISER, THE NEWS ABOUT THE NEWS: AMERICAN JOURNALISM IN PERIL 64 (2003) ("Television news depends on newspapers, as its practitioners freely attest. Radio news is often lifted right out of the newspapers."); Peter Clarke & Eric Fredin, *Newspapers, Television and Political Reasoning*, 42 PUB. OPINION Q. 143, 150 (1978). This is due in part to widespread syndication, corporate ownership, and agenda-setting by elite news sources such as the *New York Times*. *See* James P. Winter & Chaim H. Eyal, *Agenda Setting for the Civil Right Issue*, 45 PUB. OPINION Q. 376, 379, 381 (1981).

¹⁴⁷ The *New York Times* and the *Los Angeles Times* are available in searchable format through LexisNexis from 1985 to the present. The *San Francisco Chronicle* is also available on LexisNexis, although for a more limited time period (starting in October 1989). I used the searchable ProQuest Historical Newspapers website for the *San Francisco Chronicle* from 1985 to 1990.

¹⁴⁸ LEXISNEXIS NEWS, <http://www.lexisnexis.com/media/> (last visited Aug. 6, 2013).

¹⁴⁹ PROQUEST HISTORICAL NEWSPAPERS, <http://www.proquest.com/en-US/catalogs/databases/detail/pq-hist-news.shtml> (last visited Aug. 6, 2013).

¹⁵⁰ To ensure that all forms of LGBT movement tactics had an equal chance of being included in the search results, I searched by names associated with the LGBT movement rather than by specific activities.

¹⁵¹ Searches returned a sampling frame of 27,767 articles. From those articles I selected a random sample of 40 articles per newspaper per year from 1985–2008 to code (2,880 articles in total). Irrelevant articles (lists, events, obituaries, letters to the editor, and articles that did not cover LGBT movement activity) were excluded, generating a set of 1,145 articles for substantive coding.

each article reported. Because there were no significant differences among the newspapers in the proportion of coverage they gave to particular tactics,¹⁵² the articles were analyzed as a group.

I should emphasize at the outset that examining the frequency of newspaper coverage does not conclusively determine whether certain tactics have a higher probability of being reported than others. Without knowing the underlying frequency with which movement actors initiated each tactic, it is impossible to know the probability of each tactic receiving coverage. However, more important for the purpose of this study — which is about movement agenda construction and not media bias — these data help gauge which issues the public and activists within the movement alike will perceive to be top movement priorities.

The four primary tactics reported were protest,¹⁵³ lobbying,¹⁵⁴ litigation,¹⁵⁵ and voting activism.¹⁵⁶ Although other activities were coded, including education¹⁵⁷ and service provision,¹⁵⁸ these activities were omitted from the analysis because they were rarely reported in

¹⁵² See WILLIAM A. GAMSON, *TALKING POLITICS* 197 (1992).

¹⁵³ *Protest* articles cover direct action, marches, rallies, demonstrations, civil disobedience, boycotts, non-violent resistance, or any other collective action involving “temporary occupation by a number of people of an open place, public or private, which directly or indirectly includes the expression of political opinions” or demands. See Olivier Fillieule, *The Independent Psychological Effects of Participation in Demonstrations*, 17 *MOBILIZATION: AN INT’L J.* 235, 236 (2012). Articles covering LGBT pride parades were coded as protests if they framed the parade as advancing some movement goal, grievance, or demand. For example, an article describing a gay pride parade in India as “call[ing] for an end to discrimination and push[ing] for acceptance in a society where intolerance is widespread” was coded as a protest. *Gay Pride Events in Three Cities*, L.A. TIMES, June 30, 2008, at A6.

¹⁵⁴ *Lobbying* articles (177 total) covered activists’ attempts to influence the legislature through legislative lobbying, legislative committee testimony, and direct contact with agency or other government officials.

¹⁵⁵ *Litigation* articles (216 total) covered all stages of formal litigation, including filing briefs, serving other parties, conducting discovery, negotiating settlements, performing oral arguments, awaiting and receiving the final judgment of a case, and appealing a judicial opinion to a higher court.

¹⁵⁶ *Voter Activism* refers to all voting-related political action, including voter registration, activism regarding ballot initiatives, and voter education campaigns (44 articles total).

¹⁵⁷ *Education* articles (171 total) included coverage of LGBT activists and organizations conducting original research activities, such as publishing studies, performing public opinion polling, monitoring the media, as well as coverage of other ongoing educational services, such as the distribution of educational materials, classes, study groups, and lecture series.

¹⁵⁸ *Service Provision* (113 articles total) included the provision of community services such as religious services, shelters, medical services, and philanthropy.

isolation but rather were reported as supplementary tactics added to give more depth to articles that primarily focused on litigation, lobbying, protest, or voting activism. This pattern suggests that education and service activities do not independently drive media coverage, and thus they are less informative to the theoretical focus of this research.

There were significant differences in the frequencies of media coverage of different LGBT movement tactics. Litigation received the most coverage overall,¹⁵⁹ reported in 216 of the news articles. Lobbying was the next most prominent movement tactic, reported in 177 news articles.¹⁶⁰ Protest received the third highest number of articles (160 articles), followed by voter activism (44 articles). The difference between litigation and each of these other tactics was statistically significant,¹⁶¹ meaning that it is unlikely that the greater visibility of litigation in the news articles sampled in this study was due to chance.

A closer look at the content of the newspaper articles reveals a potential (yet partial) explanation for why litigation received the most coverage of all tactics. Articles reporting on litigation were more likely than articles reporting on other tactics to narrow coverage to a single issue (usually the legal issue presented in the case). The lobbying and protest articles had a higher percentage of coverage reporting several movement issues at once.¹⁶² Although the difference is minor, it may be that translating the movement's grievances into a simplified, finite set of legal issues¹⁶³ provides a more streamlined story narrative, which attracts reporters' attention.

¹⁵⁹ This finding is echoed in previous sociolegal scholarship. See McCANN, *RIGHTS AT WORK*, *supra* note 88, at 58. *But see* GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* 111-16, 229-34 (1991) (finding little media coverage of emblematic court decisions).

¹⁶⁰ The category coded as Lobbying included both coverage of lobbying specifically and coverage of a lobbying organization representative providing an opinion or analysis of a specific piece of legislation.

¹⁶¹ The difference between litigation and lobbying was significant at the $p < 0.05$ level; the difference between litigation and protest was significant at the $p < 0.01$ level; and the difference between litigation and voter activism was significant at the $p < 0.001$ level.

¹⁶² Ten percent of all lobbying articles (18/177) reported on more than one issue. Seven percent of protest articles (11/160) also reported on more than one issue. A slightly lower percent of litigation articles, six percent (12/216), reported on more than one movement issue.

¹⁶³ See Lucie White, *Mobilizing on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 545 (1987-1988).

A more comprehensive — though still tentative¹⁶⁴ — explanation for litigation’s media visibility might be that the mechanics and structural features of litigation distinguish it from other tactics in its ability to attract media coverage.¹⁶⁵ According to this theory, the high frequency and single-issue focus of litigation coverage might be attributed to the requirement in litigation that lawyers specify a constrained set of issues and enumerate them clearly in court documents. This mechanical feature of litigation may appeal to journalists, who tend to simplify coverage of political action by isolating stories from their background issues and broader movement demands.¹⁶⁶ Litigation may therefore attract news coverage by spoon-feeding reporters a manageable and accessible story. Conversely, reporters may avoid covering protest or lobbying due to the complex political intricacies embedded in those tactics, which would require more tedious factual investigation.¹⁶⁷ Protests typically involve multiple actors with diverse and complex motivations, leaving journalists unsure of what the story is amidst the “amalgam of grievances” they see being expressed.¹⁶⁸ Similarly, lobbying typically involves sustained, long-standing engagement among activists and politicians, often on multiple movement issues, producing a level of intricacy that deadline-driven reporters may find daunting.

Linking the mechanics of movement tactics to news-gathering routines could also help explain why lobbying was a tactic that received the second highest coverage. For example, the structural location of litigation and lobbying within state institutions may help elevate media coverage of both tactics. Previous research has found that journalists monitor actions that take place in lawmaking organizations, including both courts and legislatures, because those organizations regularly produce events that seem newsworthy.¹⁶⁹ Time-starved reporters who narrow their vision to these sites of routine news production can efficiently gather stories under

¹⁶⁴ See Mitchell, *supra* note 22, at 1606.

¹⁶⁵ See *supra* Part II.B.

¹⁶⁶ See SHANTO IYENGAR, IS ANYONE RESPONSIBLE? HOW TELEVISION FRAMES POLITICAL ISSUES 8 (1991); see also BENNETT, *supra* note 96, at 23.

¹⁶⁷ See Jackie Smith et al., *From Protest to Agenda Building: Description Bias in Media Coverage of Protest Events in Washington, D.C.*, 79 SOC. FORCES 1397, 1402 (2001); cf. Jules Boykoff, *Framing Dissent: Mass-Media Coverage of the Global Justice Movement*, 28 NEW POL. SCI. 201, 206 (2006) (alluding to how information biases lead to inaccurate reporting of news).

¹⁶⁸ Boykoff, *supra* note 167, at 221-22.

¹⁶⁹ See BENNETT, *supra* note 96, at 95.

deadline.¹⁷⁰ Public, state-run institutions are also easier to report on because they often provide transparent, publicly available announcements of their activities. Reporters who spend the bulk of their time monitoring courtrooms and legislatures are more likely to be exposed to litigation and lobbying than they are to protest.

Journalistic conventions compelling coverage of “newsworthy” issues and events may also heighten media coverage of litigation. Although protests would immediately come to mind as satisfying one key indicator of newsworthiness, public drama, empirical research shows that since the 1970s protests have become more peaceful and routine.¹⁷¹ The mechanics of lobbying, much of which takes place through closed-door negotiations with lawmakers, also fail to produce frequent dramatic public events. The media’s penchant for drama may not always work to the benefit of litigation — certainly litigation can involve a great deal of dry, esoteric legal argument as well as closed-door negotiations with opposing parties — but it can also provide a highly dramatic storyline, which pits two opposing sides in a high-stakes contest, often over issues with great political weight. Furthermore, litigation delivers on another newsworthiness criterion, human interest, by identifying specific protagonists in the parties and lawyers in the case.¹⁷² Many articles reporting on litigation prominently feature these parties’ personal profiles.¹⁷³

While my data (and previous literature) support a theory linking litigation’s media visibility to its specific structural features, future research is needed to more conclusively assess the mechanisms that generate greater litigation coverage. This study provides suggestive evidence, but there are certainly alternative explanations my data cannot rule out. For instance, without knowing the baseline of LGBT movement tactics actually conducted, it is impossible to rule out the

¹⁷⁰ HERMAN & CHOMSKY, *supra* note 95, at 18-19 (“Economics dictates that [news media outlets] concentrate their resources where significant news often occurs, where important rumors and leaks abound, and where regular press conferences are held. The White House, the Pentagon, and the State Department, in Washington, D.C., are central nodes of such news activity. On a local basis, city hall and the police departments are the subject of regular news ‘beats’ for reporters.”).

¹⁷¹ See McAdam et al., *supra* note 99, at 1.

¹⁷² See Scott L. Cummings & Douglas Nejaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1288-89 (2010) (“Leaders from Equality California attempted to turn the *Lockyer* decision into an opportunity for public education Media coverage was widespread, and LGBT advocates used it ‘to put a human face on the issue.’”).

¹⁷³ See Ariel Levy, *The Perfect Wife: How Edith Windsor Fell in Love, Got Married, and Won a Landmark Case for Gay Marriage*, NEW YORKER, Sept. 30, 2013, at 54 (in the “Profiles” column).

potential that the LGBT movement simply conducted more litigation than protest and that the media coverage reflects this. However, I should note that the available data provide no support for this alternative. My data on California movement organizations that existed during the same timeframe of this media study¹⁷⁴ reveal a higher percentage of articles reporting on LGBT litigation than movement organizations using the tactic.¹⁷⁵ Conversely, these data show a higher percentage of LGBT movement organizations using protest than newspaper articles covering protest.¹⁷⁶ Furthermore, although many LGBT movement activists and scholars remember the late 1980s and early 1990s to be a particularly protest-heavy time in the LGBT movement's history, my media data show that litigation was the top tactic receiving coverage even then.¹⁷⁷ Thus, the available data detract from (but do not defeat) the alternative explanation that the media coverage of LGBT movement tactics reflected the extent to which those tactic were actually being implemented.

Another alternative hypothesis could be that it was not litigation per se that powered media coverage but rather the specific issues addressed in that litigation. LGBT litigating organizations initially spearheaded the campaign for same-sex marriage, an issue that produced enormous public controversy and media attention;¹⁷⁸ litigators' focus on such a controversial issue could explain why litigation attracted that coverage. However, at the time when LGBT litigators were the primary movement actors targeting the marriage issue (the mid-1990s), media coverage of litigation focused on other issues. From 1985 to 2002, only five news articles covering litigation even discussed marriage. During those same years, 135 articles about

¹⁷⁴ See *infra* Part III.B.

¹⁷⁵ Litigation was reported in 18.9% of the newspaper articles covering LGBT movement activity, but only 13.5% of all organizations used litigation at any point in their lifespan.

¹⁷⁶ While 16.0% of LGBT movement organizations used protest at any point in their lifespan, protest activity was only covered in 14.0% of the newspaper articles on LGBT movement action.

¹⁷⁷ Although protest did receive an average of 9.0 articles per year from 1988 to 1992 (greater than the average protest coverage of 6 articles per year), litigation received more coverage on average during the same years (9.8 articles on average from 1988 to 1992). Thus, even during the period in LGBT movement history popularly remembered as the heyday of protest, litigation remained the most visible tactic in the media.

¹⁷⁸ See Jon W. Davidson, *Winning Marriage Equality: Lessons from Court*, 17 YALE J.L. & FEMINISM 297, 300 (2005) (“[M]arriage has grabbed most of the headlines this year.”) (quoting the legal director from Lambda Legal, the best-funded LGBT litigating organization).

litigation were published on topics other than marriage. There were also thirty articles published before 2002 that did not mention litigation. If the controversial marriage issue were driving coverage, one would predict that the media would have paid more attention to marriage litigation during the years that LGBT litigators were at the forefront of this issue. Furthermore, marriage litigation accounts for only 24% of litigation articles. A higher proportion (40%) of voter activism articles focused on marriage, and voter activism was the tactic that received least coverage of all. These data suggest that something other than the salience of the issues litigated drives the high media coverage of litigation.¹⁷⁹

Finally, my data provide little support for the alternative possibility that litigating organizations had a more sophisticated media approach than protest organizations. The qualitative facet of this research investigated the media strategies of both litigating and protest organizations and found that protest organizations were at least as savvy, if not savvier, than litigating organizations in terms of attracting media coverage.¹⁸⁰ The protest organizations' records were replete with handbooks, guides, and memoranda focused on best practices for garnering positive and frequent media coverage. Protest groups would even plan each action to increase the chances of getting media coverage. Litigating organizations' media strategies were more focused on how lawyers would balance their legal work while managing the constant influx of press calls. The differences in media approach between litigating and protest organizations are more indicative of the different levels of attention those organizations received from reporters — the litigating organizations received a constant flow of reporter attention, whereas the protest organizations tried to cultivate it — than of different levels of media sophistication.

¹⁷⁹ It does not appear, however, that litigation receives more coverage simply because it is a more open tactic than lobbying, presenting an available option to pursue when lawmakers are closed to LGBT concerns. However, the empirical research I conduct in Parts III.B and III.C of this Article suggest that LGBT movement organizations tend to specialize in either lobbying or litigation, but not both. Thus, when lobbying campaigns become stagnant, organizations tend to look for other ways of pursuing legislative change, for example, by moving to different levels of government rather than changing the tactics in which they specialize. Even an extremely negative high-court precedent such as *Bowers v. Hardwick*, 478 U.S. 186 (1986), did not stop litigating LGBT groups from operating within the courts (or even pursuing anti-sodomy law litigation); instead those groups shifted their focus to state courts. See Cummings & Nejaime, *supra* note 172, at 1249.

¹⁸⁰ See *infra* Part III.C.

The primary finding in this section, that litigation received the most media coverage of any LGBT movement tactic, speaks to public and intramovement perceptions of LGBT politics. Media coverage shapes popular perceptions of social issues.¹⁸¹ Although public opinion does not blindly follow media representations, the media influence how people interpret issues.¹⁸² The media provide news consumers with cues about which issues are salient, and people often rank their policy priorities accordingly.¹⁸³ It would make sense, then, that even other LGBT activists who see extensive media coverage of litigation would come to perceive legal issues as central movement priorities. Furthermore, media coverage likely confers visibility not just to litigation itself but, by extension, also to the organizations that perform it. This visibility is an important resource that can generate increased funding, legitimacy, and other crucial resources for litigating organizations.¹⁸⁴

B. *Stability: Survival of LGBT Litigating Organizations*

The previous section analyzed media coverage of LGBT politics to show that litigation generated more news articles than protest or lobbying. This section now turns to examining whether organizations that litigate survive longer on average than organizations that do not. Organizational survival is a criterion of success in its own right.¹⁸⁵ Movement organizations that persist become stable movement fixtures, engrained in the very identity of a social movement, and therefore may have more influence over the movement's agenda. Accordingly, if organizations that litigate tend to persist longer than organizations that engage in protest or lobbying activities, organizations that litigate are likely to have more influence and clout within the movement.

¹⁸¹ See Maxwell E. McCombs & Donald L. Shaw, *The Agenda-Setting Function of the Mass Media*, 36 PUB. OPINION Q. 176, 177 (1972).

¹⁸² See *id.*

¹⁸³ BERNARD COHEN, *THE PRESS AND FOREIGN POLICY* 13 (1963) (“[The press] may not be successful much of the time in telling people what to think, but it is stunningly successful in telling its readers what to think *about*.” (emphasis in original)); McCombs & Reynolds, *supra* note 144, at 2.

¹⁸⁴ See Felix Kolb, *The Impact of Transnational Protest on Social Movement Organizations: Mass Media and the Making of ATTAC Germany*, in *TRANSNATIONAL PROTEST AND GLOBAL ACTIVISM, PEOPLE, PASSIONS, AND POWER* 95, 103 (Donatella della Porta & Sidney Tarrow eds., 2005).

¹⁸⁵ Minkoff, *Organization of Survival*, *supra* note 101, at 888.

To determine the relative survival rates of organizations that engage in litigation, protest, or lobbying, this study collected original data on every California-based LGBT movement organization listed in annual publications of the *Encyclopedia of Associations* from 1985 to 2008.¹⁸⁶ The organizations included were nonprofit groups whose primary purpose involved: advocacy for sexual minorities (gay, lesbian, homosexual, bisexual, transgender, transvestite, queer, or intersex people); attempts to influence the public debate, public policy, or laws affecting sexual minorities; attempts to change patterns of discrimination toward sexual minorities; or attempts to otherwise improve sexual minorities' living conditions.

This database is the best available representation of the entire population of California LGBT movement organizations during these years.¹⁸⁷ The database consists of 1,564 entries, each of which represents a particular organization during a particular year; that is, each entry is an "organization-year."¹⁸⁸ Each entry contains variables coding the organization's tactics, age, disbandment rates, and, where available, the numbers of members and staff it employs for the designated year.¹⁸⁹ Because organizations may use more than one tactic, each tactic was coded as a dichotomous (1/0) variable indicating whether an organization engaged in a particular tactic (or not) in a given year.¹⁹⁰

This study uses event-history analysis of organizational survival to determine which organizational characteristics increase the ability of LGBT organizations to survive.¹⁹¹ This method correlates the risk¹⁹² of

¹⁸⁶ The *ENCYCLOPEDIA OF ASSOCIATIONS* (Gale Research Corp. 2007) is an annual publication providing data on voluntary associations at the national, regional, state, and local levels, which editors locate through news-clipping services, referrals, and voluntary solicitations.

¹⁸⁷ Although the *ENCYCLOPEDIA OF ASSOCIATIONS*, *supra* note 186, may under-represent protest organizations, empirical research has found that it includes most existing organizations in a social movement's organizational population. See Andrew W. Martin et al., *Measuring Association Populations Using the Encyclopedia of Associations: Evidence from the Field of Labor Unions*, 35 *SOC. SCI. RES.* 771, 777 (2006).

¹⁸⁸ There were an average of 65.2 organizations listed in the *Encyclopedia* per year, with an average of 9.3 per year using lobbying, 8.8 per year using litigation, and 10.4 per year using protest. In total, 92.0 organizations were examined.

¹⁸⁹ Budgetary data is omitted from this study due to the large amount of missing data (1077 observations missing); statistical software removes all variables for missing observations, drastically reducing the power of the model.

¹⁹⁰ This method allowed me to assess the independent effect of each tactic on organizational survival, even where an organization used multiple tactics or changed tactics over time.

¹⁹¹ See Minkoff, *Organization of Survival*, *supra* note 101, at 893.

organizational disbandment with various organizational properties. In this model, the dependent variable is technically the rate of failure, although I refer to its converse, the rate of survival, because survival is the key theoretical question.¹⁹³ The independent variables in this analysis are the tactics (litigation, lobbying, and protest) and structural features (age, staff, and membership numbers) that are relevant to organizational survival.

Table 1 presents the maximum-likelihood estimates of the predictors of organizational disbanding in the LGBT organizations. The hazard ratios represent the effect of each independent variable (e.g., whether the organization litigates) on risk of disbandment. Hazard ratios greater than 1 indicate that the independent variable increased the disbanding rate, whereas hazard ratios less than 1 indicate that the independent variable decreased the disbanding rate.¹⁹⁴ For example, a hazard ratio of 2 for litigation would indicate that litigating organizations were twice as likely to disband as organizations that did not engage in litigation.

Table 1 presents four models to detail how adding particular independent variables affects the estimates. Model 1, in the first column, includes the independent variables for organizational tactics. Only lobbying and litigation have statistically significant effects on the rate of survival, but in opposite directions. Litigation has a significant positive effect on survival, but lobbying has a much larger negative effect on survival. In other words, litigation seemed to improve survival, but lobbying seemed to reduce survival.

¹⁹² Rate and risk for organizational disbanding are both used in event-history terminology.

¹⁹³ *Id.* at 900.

¹⁹⁴ For hazard models, coefficients less than one increase the survival rate because the coefficient for hazard is a ratio; the numerator is the hazard of disbandment for litigating organizations, and the denominator is the hazard for disbandment for nonlitigating organizations.

Table 1. Hazard Ratios of Organizational Disbandment (with standard errors in parentheses)¹⁹⁵

Organization characteristics	Model 1	Model 2	Model 3	Model 4
Use of protest	0.96 (0.43)	1.00 (0.45)	0.89 (0.40)	0.93 (0.42)
Use of litigation	0.22 (0.16)*	0.24 (0.18)+	0.27 (0.21)+	0.29 (0.22)+
Use of lobbying	2.33 (0.89)*	2.18 (0.84)*	3.16 (1.28)**	3.04 (1.24)**
Membership		1.00 (0.00)	–	1.00 (0.00)
Staff		0.94 (0.05)	–	0.96 (0.04)
Age			0.93 (0.02)**	0.93 (0.02)**

It is possible, however, that litigating organizations are larger than either protest or lobbying organizations and that larger staffs or membership could explain this effect. Organizational scholars argue, for example, that organizational professionalization (typically measured by staff size) improves survival by increasing organizations' internal capacity to garner resources. Model 2 controls for membership and staff, variables that represent increasing organizational professionalization.¹⁹⁶ Even with these controls, the same pattern of effects persists, although the effect for litigation is now marginally significant. While this goes against what theoretically one would expect to be a major influence on survival, previous research on social movement organizations has actually found similar results.¹⁹⁷

Model 3 tests the influence of organizational tactics when controlling solely for organizational age. The significance of litigation diminishes when age and organizational structure are taken into account. This is likely because, as Table 1 shows, age is the strongest factor decreasing organizational disbandment. Note that both age and litigation are significant in this model, indicating that as organizations

¹⁹⁵ Statistical significance is indicated with the designation “+” where $p < 0.10$; “*” where $p < 0.05$; “**” where $p < 0.01$; and “***” where $p < 0.001$. The null hypothesis is that the hazard ratio equals 1 (not 0).

¹⁹⁶ Suzanne Staggenborg, *The Consequences of Professionalization and Formalization in the Pro-Choice Movement*, 53 AM. SOC. REV. 585, 594 (1988).

¹⁹⁷ Minkoff, *Organization of Survival*, *supra* note 101, at 902.

become older, their risk of disbandment decreases, regardless of whether they litigate. Prior research finds similar results. Newly formed organizations are more prone to disband, a principle that sociologists call the “liability of newness.”¹⁹⁸ Whereas older organizations have established stable structures and ties to resources, new organizations are vulnerable to disbandment because they must compete with established groups.¹⁹⁹

Finally, Model 4 shows the estimates with all the dependent variables included in the model. Litigation continues to have a positive, marginally significant effect on survival.

These models indicate that LGBT groups that engage in litigation or lobbying are significantly less likely to disband than groups that do not use litigation or lobbying. In the first column of Table 1 (Model 1), we see that LGBT organizations that litigate have a hazard ratio of 0.22, which indicates that they are about 22% less likely to disband, compared to organizations that do not litigate. In other words, litigation has a positive effect on survival, and this effect persists (although with diminished significance) even when controlling for an organization’s size (i.e., staff and membership) and the liability of newness (i.e., age).²⁰⁰

Figure 1 illustrates how the probability of survival changes for litigating organizations over time. The numbers on the *x* axis from 0 to 20 represent years, showing the passage of time from 1985 to 2008. The trendline that steps steeply upward represents the hazard function for the survival of nonlitigating groups. It shows that in the end years of the study, nonlitigating groups faced a much greater danger of disbanding.²⁰¹ The danger of disbanding in later years is much less for litigating groups, lingering much closer to zero and remaining steadily low over time. Whereas litigating groups experience a slight increase in their chances of disbanding after ten years, this increase is much less dramatic than the increase after ten years for organizations that do not use litigation. This again indicates that litigation protects LGBT movement organizations from disbandment.

¹⁹⁸ John Freeman et al., *The Liability of Newness: Age Dependence in Organizational Death Rates*, 48 AM. SOC. REV. 692, 692 (1983).

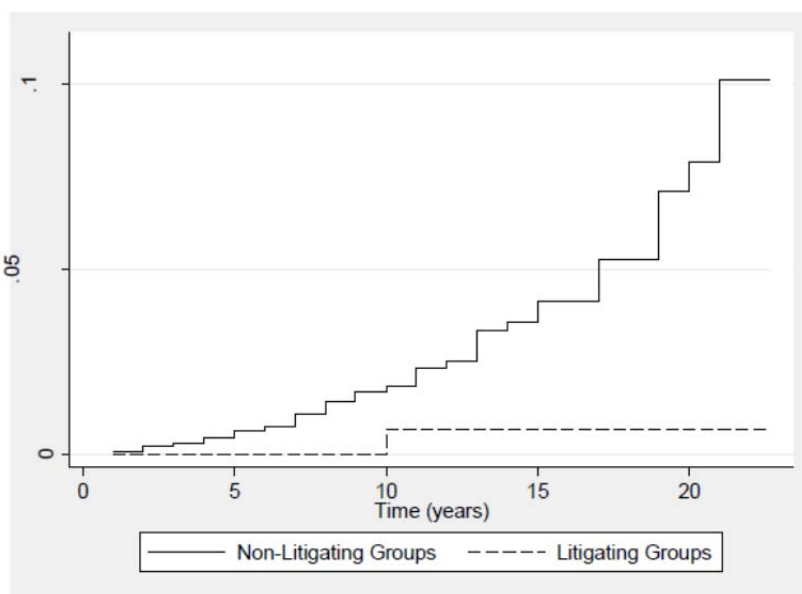
¹⁹⁹ *Id.*

²⁰⁰ This statistical correlation may help explain why 6 (35%) of protest and 9 (53%) of lobbying organizations disbanded, while only 2 (15%) of litigating organizations disbanded.

²⁰¹ See *Statistical Computing Seminars: Survival Analysis with Stata*, INST. FOR DIGITAL RES. & EDUC., http://www.ats.ucla.edu/stat/stata/seminars/stata_survival/ (explaining the interpretation of these graphs).

One particularly surprising finding from this analysis is how negative the effect of lobbying is for organizational survival. Lobbying groups were about twice as likely to disband as groups that did not lobby. This is a counterintuitive result, given how frequently sociological studies lump lobbying and litigation together when measuring the effect of tactics on organizational survival.²⁰² In fact, I know of no study of social movement organizations that distinguishes these two types of tactics. The drastically different impact of litigation and lobbying found here suggests that grouping these tactics as a single category may add statistical noise to previous models and suggests further inquiry into the validity of those findings.

Figure 1. Baseline Hazard for Disbandment in Litigating and Nonlitigating LGBT Organizations



Another unexpected result was that the structural organizational characteristics, membership and staff, did not significantly affect organizational survival; these variables were not significant when they were added to the analysis in Model 2. This finding is surprising

²⁰² See, e.g., David S. Meyer & Debra C. Minkoff, *Conceptualizing Political Opportunity*, 82 SOC. FORCES 1457 (2004) (treating lobbying and litigation tactics as the same); Minkoff, *Organization of Survival*, *supra* note 101 (treating lobbying and litigation tactics as interchangeable).

because membership and staff variables are measures of an organization's size and degree of formalization, which previous work has found to be associated with decreased disbandment.²⁰³ One explanation could be that organizations did not consistently report these data. My study follows previous research in imputing this information by assuming that organizations with blank staff numbers employed 0 staff and organizations with blank membership numbers had at least 1 member.²⁰⁴

In summary, the findings from the event-history analysis suggest that litigation is correlated with increased organizational survival. This may be true for a number of reasons. Previous empirical work has shown that litigation attracts media coverage and financial resources to the movement organizations that use it.²⁰⁵ Indeed, the previous section's content analysis of mainstream news media coverage provides indirect support for this finding (although once again, the media data are intended to inform our understanding of the public image of the LGBT movement and not to support an inference of media bias). Thus, one interpretation could be that media coverage of litigation puts litigating groups in the spotlight and provides a clear target for funders willing to contribute to movement efforts.

A second argument, which is consistent with sociological theories of organizations, is that certain structural features of litigation — specifically its proximity to the state — make movement participants and funders particularly likely to view litigation as a legitimate tactic. The social movement organizations that survive the longest on average are those that relevant movement participants value and view as legitimate, which compels those participants to invest financially in the organizations using legitimate tactics.²⁰⁶ Sociologists have found that social movement organizations that use the standard, institutionalized political channels to effect reform, such as the courts and legislatures, tend to have greater legitimacy and chances for survival than groups using more insurgent tactics like protest.²⁰⁷

²⁰³ Staggenborg, *supra* note 196, at 585-605.

²⁰⁴ See Minkoff, *Organization of Survival*, *supra* note 101, at 897.

²⁰⁵ See *supra* Part II.B.

²⁰⁶ Aldrich & Auster, *supra* note 128, at 181 (arguing that organizations that are considered legitimate attract financial resources, which in turn promote their survival).

²⁰⁷ Minkoff, *Organization of Survival*, *supra* note 101, at 890 (“I argue that organizations pursuing more legitimate action plans (centered on lobbying and litigation, for example) have better life chances than those that engage in more confrontational actions (such as direct action and other forms of disruptive protest).”).

Groups using more radical tactics like protest may alienate all but a narrow margin of supporters, causing those groups to disband more quickly.²⁰⁸ Thus, another explanation could be that the fact that litigation takes place within court buildings may shore up the support of movement participants and allies, who endow litigating groups with financial contributions.²⁰⁹ Furthermore, as I explore in the next section, litigation may have a broader appeal to diverse activist communities within the movement, radical and conservative alike: Litigation provides just enough challenge to the state to appeal to radicals, while it provides just enough “embeddedness,”²¹⁰ or relation to state actors, and inside-the-beltway legitimacy to appeal to conservatives. I explore these broad sources of appeal in the next Part, along with the implications of these findings for litigating organizations’ ability to set agendas and define the LGBT movement’s priorities.

Although this study cannot prove that the use of litigation causes organizations to survive longer, it can rule out some plausible alternative explanations. One interpretation of these findings might be that organizations turn to litigation as they age — meaning that older age causes organizations to pursue litigation, not the reverse. The data do not support that explanation. LGBT organizations did not tend to incorporate litigation as they got older; for the most part, they started out using litigation and continued to do so throughout their long organizational lives.²¹¹ Another explanation could be that litigation is a traditional strategy that organizations of a certain era adopted — and that those older organizations were able to survive for other reasons unrelated to age. However, lobbying for movement causes is just as common a historical movement practice as litigation,²¹² and yet

²⁰⁸ *Id.*

²⁰⁹ Heather A. Haveman et al., *The Winds of Change: The Progressive Movement and the Bureaucratization of Thrift*, 72 AM. SOC. REV. 117, 120 (2007) (stating that legitimate organizations are those that have received “approval by authorities such as the state and renowned activists”).

²¹⁰ Edward T. Walker & John D. McCarthy, *Legitimacy, Strategy, and Resources in the Survival of Community-Based Organizations*, 57 SOC. PROBS. 315, 318 (2010) (stating an organization’s “adhere[nce] to institutional norms . . . generally help[s] to protect organizations from instability and competition in the external environment” giving organizations embedded in the institution “enhanced legitimacy and survival rates”).

²¹¹ There has been an increase in the use of litigation among all LGBT organizations in recent years, but this came in large part from newer organizations, which also use lobbying or direct action as core tactics (e.g., Marriage Equality USA, Equality California, and American Veterans for Equal Rights).

²¹² Service organizations, for example, are a form of social movement organization

lobbying is negatively correlated with LGBT organizational survival. Finally, a separate analysis of the moderate data I was able to gather on the issues these organizations pursue suggests that issue-focus plays little role in organizational survival. For example, the thirty organizations that reported to focus on marriage were not significantly more or less likely to survive than other organizations. This evidence suggests that those alternative explanations are not driving the patterns seen here.

The ability of litigating organizations to survive is central to this study as a key indication that litigation tactics will have a long-term influence on the LGBT movement. If litigation affects movement goals, it will do so over the long term rather than as any fluctuating, “hot-topic” issue would. At the same time, if litigating organizations have a higher likelihood of survival, this also suggests that litigation itself is well supported by movement participants — that movement participants feel strongly enough that litigation is important that they contribute financial donations to the organizations that pursue it. Thus, the survival of litigating groups, although not a *direct* measure of litigation’s value and support as a movement tactic, would strongly suggest the existence of such support.

C. Agenda Setting: Litigation Defines the LGBT Movement’s Priorities

The data presented in Parts III.A and III.B reveal that LGBT movement litigation receives the most coverage and confers the greatest organizational stability of all LGBT movement tactics. I now explore the implications of those findings for the LGBT movement’s substantive agenda through an in-depth qualitative analysis of a small sample of LGBT movement organizations.²¹³ This analysis investigates how the visibility and stability of litigation, along with organizational dynamics within and among LGBT movement groups, may affect the substantive priorities that define the LGBT movement’s agenda.

This Part first identifies differences among LGBT movement groups that primarily use litigation, protest, and lobbying in the internal

that experienced growth among women’s and racial minority movements from the 1960s to the mid-1980s. Debra Minkoff, *From Service Provision to Institutional Advocacy: The Shifting Legitimacy of Organizational Forms*, 72 SOC. FORCES 943, 953-54 (1994).

²¹³ The organizations in the sample are Queer Nation San Francisco and Lesbian Avengers (which primarily used protest); ACLU Gay Rights Chapter of Southern California and National Gay Rights Advocates (which primarily used litigation); and International Gay and Lesbian Human Rights Commission and Lesbian/Gay Lawyers’ Association (which primarily used lobbying).

procedures these groups use to identify their goals and plan their actions.²¹⁴ I find that litigating organizations *proactively* pursue actions that build on long-term planning efforts and target members' predefined priorities. Protest organizations, conversely, *reactively* pursue actions by planning protests in response to events and focusing on newsworthy issues. I argue that these organizational differences affect the degree of control that litigating and protest organizations have over their own agendas. In particular, protest groups' tendency to focus on newsworthy events tends to derail those protest groups from their members' original goals. Litigating organizations thus have comparatively greater autonomy than protest groups in pursuing expressed priorities and controlling their own agendas.

The internal organizational differences between LGBT protest and litigating groups not only provide litigating groups comparatively greater autonomy than protest groups; these organizational differences may also empower litigating groups to set the LGBT protest agenda.²¹⁵ Given that litigation is the focus of mainstream media coverage,²¹⁶ protest groups' reactivity to newsworthy events may cause those protest groups to substitute members' original priorities for the issues being litigated.²¹⁷ Protest groups are also reactive to routine, public events, which long-standing litigating groups have the organizational capacity to regularly plan and carry out.²¹⁸ Finally, the frequent interaction that occurs between protest groups and movement lawyers, as lawyers provide protest groups valuable professional services and expertise, further enhances movement lawyers' capacity to influence LGBT protest action.²¹⁹ I argue that the processes identified here may circumscribe the LGBT movement's agenda to focus on the possibilities for change provided by formal law: While litigating groups purposefully direct their efforts toward the opportunities provided under current legal doctrine, protest groups may also inadvertently direct their efforts toward the issues being litigated in attempts to attract media attention.

²¹⁴ See *infra* Part III.C.1.

²¹⁵ See *infra* Part III.C.2.

²¹⁶ See *supra* Part III.A.

²¹⁷ See *infra* Part III.C.2.a.

²¹⁸ See *infra* Part III.C.2.b.

²¹⁹ See *infra* Part III.C.2.c.

1. Differences Between Litigating, Protest, and Lobbying LGBT Organizations

My observations in this section focus on six California-based LGBT movement organizations, two of which primarily used protest (Queer Nation San Francisco and Lesbian Avengers), two of which primarily used litigation (ACLU Lesbian & Gay Rights Chapter of Southern California and National Gay Rights Advocates), and two of which primarily used lobbying (International Gay and Lesbian Human Rights Commission and Lesbian/Gay Lawyers' Association). The paired organizations that specialize in each tactic were strategically selected because they varied with regard to key structural features — membership, age, and size — which could independently influence the internal organizational procedures that are the focus of this study. I selected organizations that used the same primary tactic (litigation, lobbying, or protest) but varied in their membership,²²⁰ age,²²¹ and affiliation with a larger national organization.²²² Selecting pairs of tactically similar organizations that possessed these key structural differences allowed me to get more traction on how much “work” the tactic itself was doing to produce the resulting findings.

This study focused on LGBT movement organizations that were active between 1985 and 1995 to observe interactions among the rights-based litigating and lobbying groups and the critical queer protest groups that were active at this time. The mid-1980s through mid-1990s was a period of internal contestation within the LGBT movement regarding the tactics and goals that would most effectively improve the lives of LGBT people.²²³ The contest among civil rights and protest-based queer LGBT movement organizations makes this time period an especially fruitful one for examining the interactions between and power dynamics among movement groups that espoused these distinct political perspectives.²²⁴

²²⁰ Queer Nation (protest) and IGLHRC (lobbying) were high-membership organizations during the time period studied; Lesbian Avengers (protest) and LGLA (lobbying) had low memberships. The litigating organizations did not vary significantly on this criterion.

²²¹ Queer Nation (protest) and NGRA (litigation) were much shorter-lived than other organizations of their type; Lesbian Avengers (protest) and the ACLU Gay Rights Chapter (litigation) survived longer than other organizations of their type. The lobbying organizations did not vary significantly on this criterion.

²²² The ACLU (legal) and LGLA (lobbying) were chapter organizations, while NGRA (litigation) and IGLHRC (lobbying) were stand-alone organizations. The protest organizations did not vary significantly on this criterion.

²²³ See *supra* Part I.

²²⁴ Furthermore, the tactical diversity that existed during this time period suggests

The analysis in this section is based on both archival and interview data. I first gathered more than three thousand archival documents, including newsletters, meeting minutes, internal memoranda, personal letters, budgetary reports, and IRS filings, produced by the organizations in my sample.²²⁵ I then conducted in-depth interviews with activists from those organizations, whom I located through the archival material and through references from known activists.²²⁶ I conducted a total of twenty interviews, which ranged from sixty to one hundred minutes.²²⁷ All the interview and archival data were digitally transcribed and then coded and analyzed using Atlas.TI software.²²⁸

A brief description of each organization in the analysis is in order. The two litigating organizations were the ACLU Lesbian & Gay Rights Chapter of Southern California²²⁹ and the National Gay Rights Advocates (“NGRA”).²³⁰ Both organizations primarily used impact litigation to achieve equality for LGBT people. They focused in large part on challenging discrimination against LGBT people and people

that there was no surely dominant tactic in the movement. This is important methodologically, as it means that I have selected the “hard case” to investigate the systemic privileging of social movement litigation.

²²⁵ These materials were collected from the ONE archives in Los Angeles and from the LGBT Historical Society in San Francisco. I used a digital camera in the archives to generate electronic copies of all documents. I then used a transcription service to convert the documents into digital form, which allowed me to perform electronic searches on the text of these documents. The archival texts were all digitally entered into Atlas.TI software and coded.

²²⁶ This interview method is known in the sociological literature as “snowball sampling.” ROBERT S. WEISS, *LEARNING FROM STRANGERS: THE ART AND METHOD OF QUALITATIVE INTERVIEW STUDIES* 25 (1994).

²²⁷ A semi-structured interview format was used, which allows for both the investigation of predetermined questions regarding organizational strategy and the investigation of additional issues that emerge during the conversation. Kathleen M. Blee & Verta Taylor, *Semi-Structured Interviewing in Social Movement Research*, in 16 *METHODS OF SOCIAL MOVEMENT RESEARCH* 92, 92 (Bert Klandermans & Suzanne Staggenborg eds., 2002).

²²⁸ The coding scheme I used in this analysis focused on determining which issues and substantive goals each LGBT movement organization prioritized, as well as any relevant themes that emerged from the data. After coding all documents, I employed a three-part analysis. First, I called up and analyzed all statements relating to organizational strategy, including statements regarding the organization’s motive(s) for pursuing a particular action. I used this as direct evidence of the organizations’ strategic process. Second, I constructed a list of all the actions taken by each organization, and compared that to the issues organizations claimed to prioritize rhetorically. This gave me a sense of whether organizations stuck to, or got derailed from, their self-defined goals.

²²⁹ Archival documents for the ACLU are available from 1986 to 1995.

²³⁰ Archival documents for NGRA are available from 1985 to 1991.

living with HIV/AIDS in employment, housing, and public accommodations. The ACLU is the older of the two organizations, formed in 1976 by gay rights advocates who felt that the national ACLU had not given enough concerted attention to the civil liberties of gay men and lesbians. Aside from its antidiscrimination litigation, the ACLU distinguished itself among the LGBT litigating organizations in its focus on criminal justice issues for gay men and lesbians, pursuing cases that challenged loitering and lewd conduct laws that provided justification for police surveillance and harassment of LGBT people in public spaces.

The other impact litigation group, NGRA, specialized in opposing HIV/AIDS discrimination, especially in challenging discrimination against gay men by insurance companies seeking to deny coverage to people with HIV/AIDS. Although NGRA disbanded in 1991 after only six years in operation²³¹ — a fleetingly short time compared to most other California LGBT impact litigating organizations — it was once the best-funded litigating organization of its day.²³² Both the ACLU and NGRA, like most of the other LGBT litigating organizations, were well connected with the LGBT legal community²³³ and possessed formal, bureaucratic, nonprofit organizational structures with appointed boards of directors, staff attorneys, and other hired staff.

The protest organizations, Queer Nation²³⁴ and the Lesbian Avengers,²³⁵ were both San Francisco-based organizations that used

²³¹ NGRA generated enormous controversy in the LGBT legal community in 1989 after the organization summarily fired its three attorneys and other staff when they critiqued NGRA's fund-raising tactics and allocation of resources. Randy Shilts, *AIDS Legal Group in Turmoil After Bitter Power Struggle*, S.F. CHRON., Nov. 25, 1989, at A4. The controversy surrounding this internal power struggle is thought to be the primary reason for the group's loss of funding and eventual demise. See David Tuller, *Gay Rights Law Firm Shuts Down*, S.F. CHRON., May 18, 1991, at A12 ("[T]he group is \$200,000 in debt and has never fully recovered from a bitter power struggle in 1989.").

²³² Shilts, *supra* note 231, at A4 ("NGRA [is] the second-richest gay organization in the country, with a current budget of \$ 1.6 million"; "[b]y comparison, the nation's other leading gay legal group, the Lambda Legal Defense and Education Fund in New York City, has a budget of about \$ 1.2 million.").

²³³ Several formal strategy sessions occurred on a regular basis, such as Lavender Law (the annual — formerly biennial — conference on LGBT legal issues) held by the National LGBT Bar Association, started in 1988. In addition, two yearly legal strategy sessions were held by attorneys and legal strategists from leading national LGBT litigating organizations (Lambda Legal, NGRA, ACLU Gay Rights, NGLTF). Interview with Anonymous, NGRA, in L.A., Cal. (Sept. 17, 2012) (interview no. 50917) (transcript from primary source on file with author) [hereinafter Interview No. 50917].

²³⁴ Archival documents for Queer Nation/San Francisco are available for both the

almost entirely protest or direct-action tactics to accomplish social change. They shared the similar core political objective of increasing the visibility of LGBT people in society and pursued visibility by using flamboyant, media-seeking protest tactics. Both protest groups identified as “queer,” not only to emphasize their members’ aversion to binary gay-straight categories but also to affirm themselves as politically radical. The groups were also anti-assimilationist, meaning that they sought widespread social transformation that would fully embrace sexual minorities rather than assimilate them into the heteronormative mainstream. Although both Queer Nation and Lesbian Avengers were loosely affiliated with national organizations of the same name, they remained autonomous, did not rely on the national chapters for funding, and clearly demarcated their chapters’ unique identities. While Queer Nation and Lesbian Avengers each took action on a broad range of issues, they were similar in their focus on resisting the Right Wing, drawing attention to police harassment and brutality, and eliminating racial injustice both within and outside of the LGBT community. Like the litigating organizations, the protest organizations employed formal decision-making procedures with specific, preordained protocols. However, unlike the litigating organizations, Queer Nation and Lesbian Avengers were not hierarchical and did not have directors with the authority to initiate organizational action unilaterally.²³⁶

The two lobbying organizations were Lesbian/Gay Lawyers Association of Los Angeles (“LGLA”)²³⁷ and International Gay and Lesbian Human Rights Commission (“IGLHRC”).²³⁸ Although both these groups used predominantly “insider” tactics, such as legislative lobbying and direct advocacy to state and private organizations, that is where their similarity ends. The LGLA was the lesbian and gay affiliate of the Los Angeles County Bar Association.²³⁹ Accordingly, a significant part of its advocacy efforts involved trying to get the state

years of its existence (1990–1991), and some early pre-formation documents from group members are available as well (1989).

²³⁵ Archival documents for the Lesbian Avengers are available from 1993 to 1997.

²³⁶ Lesbian Avengers operated by a two-thirds majority vote, and Queer Nation operated by consensus. See Special Agenda, San Francisco Lesbian Avengers (Nov. 8, 1993) (available at the San Francisco Gay and Lesbian Historical Society, copy on file with author).

²³⁷ Archival documents for LGLA are available from 1985 to 1991. The organization was known as Lawyers for Human Rights (“LHR”) until 1986.

²³⁸ Archival documents for IGLHRC are available from 1992 to 2002.

²³⁹ While it is comprised entirely of lawyers, the LGLA is not a litigating organization, but rather a legislative lobbying and advocacy-based organization.

bar or a county bar association to support LGBT-related issues, in hopes of leveraging the bar's political power to advance LGBT causes.²⁴⁰ IGLHRC, conversely, was a human rights organization that worked primarily with other organizations in the international human rights advocacy community. Aside from its lobbying and advocacy efforts, IGLHRC performed human rights monitoring, or the documentation and diffusion of information about human rights abuses worldwide. An important tactical difference between the two lobbying organizations was that whereas IGLHRC prided itself on its use of grassroots organizing and participation in protests,²⁴¹ LGLA shied away from protests, limiting its nonadvocacy work to social networking with lawyers and other professionals.

There were striking differences in the ways in which LGBT litigating, lobbying, and protest organizations understood their organizations' role in the movement and in the very logic that drove their action-planning process. The next sections describe how these litigating, lobbying, and protest groups varied in the procedural processes they used to plan actions, and how those differences, along with the greater visibility and stability afforded to litigation, coalesced to systemically elevate legal issues on the LGBT movement's agenda.

a. Litigating Organizations: Proactive Planning

Litigating groups were *proactive*²⁴² in the process they used to plan organizational action: Members devised specific, long-term objectives

²⁴⁰ See, e.g., PROPOSITION 64: ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS) (Cal. 1986) (declaring that AIDS "is an infectious, contagious and communicable disease and the condition of being a carrier of the HTLV-III virus is an infectious, contagious and communicable condition").

²⁴¹ As it stated in one 1993 Mission Statement document: "We are unique in our method of combining traditional human rights monitoring, documenting, advocating, and lobbying techniques with grassroots organizing, and with the distribution of resources to groups in developing countries." IGLHRC, IGLHRC'S MISSION (c. 1994) (available at the San Francisco Gay and Lesbian Historical Society, copy on file with author). The grassroots advocacy was discussed here because (a) little to no accounting of these actions was given, making it difficult to assess what drove strategizing around those efforts, and (b) nearly 100% of the grassroots organizing was done around general LGBT issues, rather than on a specific issue, suggesting that grassroots organizing was not a strategy that affected organizational priorities.

²⁴² I define proactive as "creating or controlling a situation by taking the initiative and anticipating events or problems, rather than just reacting to them after they have occurred; (hence, more generally) innovative, tending to make things happen." OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com/view/Entry/151671?redirectedFrom=proactive> (defining "proactive, adj."). Using this definition, a social movement organization is *proactive* if it creates forward-looking priorities

(focused on winning favorable legal precedent); they mapped out the intermediate steps necessary to achieve those objectives; and they selected cases that promised to advance their priorities. This proactive stance allowed litigating organizations to retain a high level of control over their agendas; as this section explains, the litigating groups pursued actions that adhered to members' long-term priorities, rarely deviating from their charted course. Litigators certainly did not possess *complete* control over the direction their organizations would take. They had little say, for instance, in determining how receptive the legal doctrine, or the judges interpreting that doctrine, would be to LGBT rights — factors that fundamentally shaped the set of issues the doctrinally-focused LGBT litigators would come to recognize as top priorities.²⁴³ Yet the litigating groups were unique in their ability to follow a premeditated course of action and avoid getting sidetracked by issues that deviated from their members' predefined priorities.

In deciding which issues to prioritize — the first step of the litigating groups' proactive planning process — lawyers looked mainly to legal doctrine, seeking out areas of law that offered the greatest opportunity for setting favorable precedent.²⁴⁴ Legal developments, such as the passage of a ballot proposal or piece of legislation or growing judicial acceptance of a particular legal argument, shaped attorneys' considerations of which issues to prioritize; favorable developments in one area of law attracted attorneys by providing them tools for expanding on existing legal precedent.²⁴⁵ The potential to

(“anticipating” where the movement and law will be in the years to come); formulates step-by-step plans to achieve those priorities (i.e., “taking the initiative” in planning and anticipating contingencies); and determines which select cases advance the organizations' objectives and plans “rather than just reacting to [events or problems]” that occur.

²⁴³ See ELLEN ANN ANDERSEN, *OUT OF THE CLOSETS AND INTO THE COURTS* 12-14 (2005) (describing how litigating groups select priorities based on existing legal opportunities).

²⁴⁴ Leonard Graff, Legal Director, *NGRA Sets the Gay Rights Agenda*, NGRA ANNUAL REPORT (1988) (copy on file with author) (stating that the NGRA Litigation Committee planned litigation by “identify[ing] where the gains are to be made in protecting and advancing our rights and then pursu[ing] litigation which will achieve that goal”); see ACLU GAY RIGHTS CHAPTER, ACLU GAY RIGHTS CHAPTER FACT SHEET (c. 1989) (copy on file with author) (“ACLU-GRC is actively seeking cases that will have litigatory impact on gay rights issues.”).

²⁴⁵ See, e.g., Memorandum from Jon Davidson to ACLU-LGRC (Jan. 28, 1994) (copy on file with author) (“The ruling in Hawaii, coupled with a recent Unruh Act court of appeal case (*Engel v. Worthington*), has raised the interesting possibility of casting other forms of discrimination against lesbian and gay couples as actually forms of sex discrimination, entitled to heightened scrutiny review under California law. I have begun looking at this, with an eye toward finding a possible test case for further

shape legal doctrine was the most frequent justification that litigation strategists cited when advocating for their organization to pursue action on a particular issue — outweighing even the issue’s relevance to or substantive impact on the LGBT community.²⁴⁶ Members of litigating organizations continually referenced the need to win favorable precedent throughout their planning notes and newsletters,²⁴⁷ seeming to value it as the natural or “common-sense” goal of impact litigation.²⁴⁸

The focus on setting positive precedent forced litigation strategists to take a forward-looking approach, anticipating whether the courts and the LGBT community would embrace a proposed issue several years down the line, after a test case had been fully litigated and concluded.²⁴⁹ Accordingly, lawyers tended to think of themselves as movement leaders,²⁵⁰ or as one LGBT attorney described it, as “social

development of this theory.”).

²⁴⁶ Previous research has reached similar findings. See Deborah Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2050 (2008) (finding that most of the public interest legal organizations in her national, multi-movement survey were driven by legal staff because “most leaders felt that lawyers deserved deference because they had the greatest expertise”). Other legal scholars have challenged this dominant method of selecting cases based on the expertise of legal professionals and existing legal doctrine rather than by identifying areas of greatest community need. See Leonore F. Carpenter, *Getting Queer Priorities Straight: How Direct Legal Services Can Democratize Issue Prioritization in the LGBT Rights Movement*, 17 U. PA. J.L. & SOC. CHANGE 19-20 (forthcoming 2013).

²⁴⁷ NGRA, for example, discussed a case’s projected positive legal outcome in accounts of over half their cases, highlighting, for example, the case’s opportunity to “set a landmark precedent.” *Military Challenge in Appellate Court*, NGRA NEWSLETTER (NGRA) Winter 1988–1989, at 2 (copy on file with author); see, e.g., ACLU GAY RIGHTS CHAPTER, *supra* note 244 (“ACLU-GRC is actively seeking cases that will have litigatory impact on gay rights issues.”).

²⁴⁸ The NGRA legal director listed as the number-one criteria for public interest law firms in selecting cases as the “[p]recedential (law reform) value of the case.” Paul A. Di Donato, NGRA Legal Director, Address at Lavender Law, Panel Discussion: Public Interest Law Firms: How They Choose Cases and Utilize Cooperating Attorneys (1990) (copy on file with author) (listing the “Substantive Criteria for Selecting Cases”). Note, however, that previous research has found that not all public interest litigation organizations focus their efforts on the strongest areas of law where winning is most likely. See NeJaime, *Winning Through Losing*, *supra* note 100, at 977 (“While TMLC certainly hopes and attempts to win, it has a tendency to take on relatively weak cases that other firms might decline.”).

²⁴⁹ NGRA, for example, formulated organizational strategy four years in advance: “National Gay Rights Advocates has embarked upon a planning process that will map the organizational objectives for the next four, critical years.” *NGRA Is Preparing Now for the Future*, NGRA YEAR IN REVIEW 10 (1988) (copy on file with author).

²⁵⁰ See Deborah L. Rhode, *Lawyers as Leaders*, 2010 MICH. ST. L. REV. 413, 417 (citing “forward looking” vision as an attribute of effective leadership).

change agents; as creative strategists; as a role model for others interested in justice for lesbians, gays, and bisexuals.”²⁵¹ Lawyers specifically sought to lead the LGBT community forward on the issue of marriage equality, for example. Although most LGBT activists in the 1980s did not think of marriage equality as a top priority, NGRA decided to pursue a marriage case in 1989 in Alaska state court, where they were “likely to get [a] positive result down the road.”²⁵² The attorneys at NGRA hoped that support for marriage equality would increase in the LGBT community in the years to come, as the case garnered publicity and worked its way toward a favorable outcome.

Although the focus on creating favorable precedent sometimes pushed LGBT lawyers into new political territory (as in the marriage equality context), oftentimes it had the opposite effect, compelling a more conservative political approach. Litigating groups tended to prioritize issues where they had “strong law on our side” — where attorneys had the sufficient legal tools at their disposal to prevail in court.²⁵³ For example, HIV/AIDS had been a recent development in the 1980s that generated a wide range of legal complications for LGBT people, from discrimination in employment to discrimination in public accommodations and the criminal justice system. The law at that time was far too uncertain to permit accurate predictions in long-term HIV/AIDS-related impact litigation.²⁵⁴ In the face of such uncertainty, one litigating group (NGRA) focused the bulk of its HIV/AIDS efforts in an area where there *was* sufficient legal certainty to predict and proactively implement precedent-setting litigation: HIV/AIDS-related insurance discrimination. At the time, all jurisdictions in the United States had adopted some form of the model Unfair Trade Practices Act, which prohibits “unfair discrimination between individuals of the same class and equal expectation of life,”²⁵⁵

²⁵¹ Cynthia Cumfer, *Judicial Education and Strategies Around Same-Gender Parenting Issues*, Address at Lavender Law (Oct. 22–23, 1994) (copy on file with author).

²⁵² Interview No. 50917, *supra* note 233.

²⁵³ Press Release, National Gay Rights Advocates, *Settlement Victory for Gay Man Denied College Diploma* (Jan. 27, 1989) (quoting Leonard Graff, NGRA Legal Director) (on file with author).

²⁵⁴ See Interview No. 50917, *supra* note 233.

²⁵⁵ See *Piquard v. City of E. Peoria*, 887 F. Supp. 1106, 1120 (C.D. Ill. 1995) (“Since 1960, all 50 states and the District of Columbia have adopted provisions of the NAIC’s Unfair Trade Practices Act (‘UTPA’) in various forms Section 4G(2) of the Model UTPA, which has been adopted in whole or in part by 49 states, prohibits: ‘Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium.’”).

making it discriminatory to reject gay and bisexual men from insurance without also rejecting other high-risk groups.²⁵⁶ Several states had also enacted statutes that expressly prohibited insurance discrimination based on sexual orientation, even as early as the mid-1980s.²⁵⁷ NGRA drew on these laws to challenge insurance companies that discriminated against men perceived to be gay.²⁵⁸ With these antidiscrimination protections at their disposal, the NGRA attorneys were often able to settle insurance discrimination complaints without ever going to court.²⁵⁹ As the organization touted in one 1989 newsletter, this enabled NGRA to be “fully prepared to take legal action against insurers who violate the rights of their clients.”²⁶⁰

Once the litigating groups identified a priority — an area “where the gains are to be made in protecting and advancing our rights” — they laid out specific plans for how to “pursue litigation which [would] achieve that goal.”²⁶¹ These were complex plans that mapped out step-by-step processes that litigating groups would carry out over the course of several years. Oftentimes those groups would take an incremental approach, cautiously building up good precedent by first targeting more favorable forums and arguments before moving to more difficult areas.²⁶² Litigators carefully planned the specific arguments they would

²⁵⁶ See Benjamin Schatz, Commentary, *The AIDS Insurance Crisis: Underwriting or Overreaching?*, 100 HARV. L. REV. 1782, 1790 n.54 (1987).

²⁵⁷ As early as 1987 there were at least three jurisdictions with insurance statutes that expressly prohibited denial of insurance based on sexual orientation. See CAL. ADMIN. CODE tit. 10, § 2560.3 (1986); D.C. CODE § 35-223(b)(1) (1987); ILL. ADMIN. CODE tit. 50, § 2603.30 (1985).

²⁵⁸ See Press Release, National Gay Rights Advocates, Breakthrough Settlement in Landmark AIDS Discrimination Case (May 3, 1990) (on file with author) (claiming that insurance company’s underwriting practices discriminated against male homosexuals in violation of California’s insurance regulation prohibiting discrimination on the basis of sexual orientation); see also Press Release, National Gay Rights Advocates, AIDS Insurance Discrimination Complaints Filed in 48 States (Apr. 7, 1988) (on file with author) [hereinafter NGRA AIDS Insurance Discrimination].

²⁵⁹ Between 1986 and 1988, NGRA settled at least three complaints against insurance companies filed in the state of California alone. See *NGRA Wins Insurance for Man with AIDS*, NGRA NEWSLETTER, Autumn 1986, at 5 (copy on file with author); Press Release, National Gay Rights Advocates, NGRA Continues Fight Against AIDS Insurance Bias (July 21, 1989) (on file with author) [hereinafter NGRA Continues Fight].

²⁶⁰ NGRA Continues Fight, *supra* note 259 (quoting Jean O’Leary, NGRA Executive Director).

²⁶¹ Graff, *supra* note 244 (describing the purpose of the Litigation Committee).

²⁶² NGRA’s relationship recognition cases reflect this strategy. Attorneys were first sought out on behalf of lesbian and gay couples in jurisdictions with strong antidiscrimination statutes. For example, NGRA took the case of a lesbian state

challenge in sequence.²⁶³ They also carefully planned whether to target state courts, federal courts, or both, based on their assessment of those courts' receptivity to LGBT rights claims — an assessment that often involved detailed monitoring and research on several specific judges.²⁶⁴ Like good chess players, litigation strategists thought through the likely outcomes of pursuing a particular strategy (an argument or forum) and planned in advance for a fallback position to take in case things did not go according to plan.²⁶⁵

The final step of the proactive litigation-planning process was to select the cases the organizations would litigate. By and large, individual cases were selected from the call-in phone services that these groups (like many others²⁶⁶) provided for LGBT people seeking legal help. Attorneys used this public interface to handpick “individuals who could be good cases [or] good plaintiffs”²⁶⁷ for their preplanned litigation strategies. Litigation strategists reported having literally “hundreds” of cases from which to choose.²⁶⁸ Thus, even

employee in Wisconsin whose lifetime partner was denied health insurance, *Phillips v. Wis. Personnel Comm'n*, 167 Wis. 2d 205 (Ct. App. 1992), because “Wisconsin [was] one of the few states with a statute banning employment discrimination based on marital status and sexual orientation.” *NGRA Takes State of Wisconsin to Court*, NGRA NEWSLETTER (NGRA), May/June 1990, at 3 (copy on file with author).

²⁶³ The minute meetings from one ACLU-LGRC strategy meeting illustrate how closely litigating groups monitored each argument and strategized how it would play out at different levels of judicial review. ACLU-LGRC attorneys had been advising a different LGBT organization, Lambda, on a case challenging discrimination in U.S. military service, and they recalled their experience on a different military discrimination case, *Watkins v. U.S. Army*, 875 F.2d 699 (9th Cir. 1989): “If we had been able to win the case on equal-protection grounds, that would have been better for us, but there was less of a chance to win it on those grounds. If the lower [court] had ruled that *Watkins* had equal protection, the Supreme Court almost certainly would have taken the case and reversed the ruling.” Minutes, ACLU-LGRC, Minutes of the Board of Directors Meeting (Mar. 9, 1991) (copy on file with author).

²⁶⁴ Cumfer, *supra* note 251 (“Lawyers interested in fair judicial decisions on lesbian/gay/bisexual issues carefully collected and shared information about the judges. We looked for attitudes toward lesbians and gays expressed by judges, which judges had gay friends, etc.”).

²⁶⁵ See also ANDERSEN, *supra* note 243, at 130 (describing the complex, contingency-ridden planning involved in litigation; quoting one LGBT litigating organization's executive director comparing its litigation strategy to “an old computer-programming flowchart: if this, then that”).

²⁶⁶ See Carpenter, *supra* note 246, at 19-20 (many major LGBT impact litigation organizations “offer the public some variety of conduit to present a legal problem,” such as phone-in advice lines).

²⁶⁷ See Interview No. 50917, *supra* note 233.

²⁶⁸ The litigation committee of NGRA would review “hundreds of case proposals each year and work with NGRA staff in selecting the test cases which the organization

while the organizations' priorities were more focused on addressing legal opportunities, rather than community need,²⁶⁹ the general abundance of community need allowed — indeed, required — litigators to be selective in deciding which injustices to litigate. A case's fit with a predetermined organizational priority or a litigation plan provided that decisive selection factor.²⁷⁰

Litigating groups' proactive stance infused a set of procedural values — values associated with the proactive strategizing process rather than with the substantive outcomes of their cases — into those groups' case-selection decisions, ultimately bolstering those organizations' control over their own agenda.²⁷¹ For example, litigating groups independently valued a case's relevance to the groups' predefined organizational priorities, regardless of the substantive issues the case presented.²⁷² Newsletter descriptions continually underlined the importance of particular cases by highlighting their relation to a “top priority”²⁷³ or to the organization's “ongoing efforts”²⁷⁴ in a particular area. A case's relevance to organizational priorities also factored strongly into

will undertake.” *A Credible Voice for Our Civil Rights*, NGRA ANNUAL REPORT (1988) (copy on file with author).

²⁶⁹ The lawyers also reported using such call lines more as a way of selecting plaintiffs than determining which issues were most relevant to community's needs. No formal analysis of call issues was used by any of the organizations to shape litigation strategy. *Id.*; see Carpenter, *supra* note 246, at 19-20 (arguing that “there is little evidence that the [major LGBT impact litigation] organizations use those [call-in advice] lines to assess the LGBT community's legal needs and allocate their litigation priorities accordingly”).

²⁷⁰ This explains why litigation can be described as *proactive* — even though individual cases are predicated on finding flesh-and-blood litigants willing to sue — rather than reactive. Although it is true that each individual case reacts to a particular event (e.g., a denial of health care benefits, a termination of employment), the overabundance of community need provided sufficient fodder to fuel a proactive litigation strategy.

²⁷¹ In sociological terms, the independent value of priority-driven cases facilitates the *institutionalization* of proactive action-planning in litigating groups. Organizational practices become institutionalized as the values associated with them are “taken for granted as legitimate, apart from evaluations of their impact on work outcomes.” John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340, 344 (1977).

²⁷² In a panel presentation to LGBT litigation groups at Lavender Law, NGRA legal director Paul Di Donato listed “compatibility of a case with organizational agenda” as the top organizational issue that factored into public interest law firm case selection. Di Donato, *supra* note 248.

²⁷³ *Texas Insurer Won't Pay for AIDS*, NATIONAL GAY RIGHTS ADVOCATES NEWSLETTER, Autumn 1987, at 30 (copy on file with author).

²⁷⁴ National Gay Rights Advocates, Minutes of Regular Meeting of Board of Directors (Nov. 14, 1987) (on file with author).

strategic discussions regarding whether to take a proposed case. Cases that failed to advance pre-existing agenda items would be rejected or scrutinized in great detail to determine whether they presented alternative benefits that justified the organization's deviation from predefined priorities.²⁷⁵ Realizing the uphill struggle it would be to garner support for cases unrelated to organizational priorities, attorneys often refrained from pitching such cases at litigation strategy meetings.²⁷⁶ Giving more weight to cases connected to preexisting values not only facilitated further proactive planning (as sticking to predefined priorities ensured a continued investment in anticipatory goal setting and long-term planning) but also ensured that litigating organizations pursued actions that advanced, and would not distract the organizations' members from, collectively determined goals.

Another consideration that figured strongly in litigating groups' decisions to take a case was the case's predictability — whether attorneys could calculate the proposed case's outcome.²⁷⁷ Litigation strategists looked for cases with clear-cut fact patterns, which involved behavior that “clearly”²⁷⁸ or “quite plainly”²⁷⁹ triggered the legal priorities their organizations were targeting. The strategists valued such clear-cut cases not solely for their potential to win favorable legal precedent (again, a fundamental goal shared by litigation strategists) but also because clear-cut cases facilitated the complex, contingency-ridden planning in which litigating groups engaged. Selecting cases with clear facts evoked a cleanly delimited set of legal issues, allowing lawyers to predict all the legal issues, arguments, and counterarguments they would confront during litigation. This enabled lawyers to proactively plan a long-term route forward. At the same time, emphasizing calculability in case selection decreased the likelihood that litigating groups would become derailed from

²⁷⁵ Interview with Anonymous, in L.A., Cal. (Sept. 20, 2012) (interview no. 10920) (notes from primary source on file with author).

²⁷⁶ If an off-topic case was likely to be rejected, lawyers would not invest the time it took to do the background legal research necessary to pitch the case. *Id.*

²⁷⁷ This emphasis in proactive strategizing on predictability and planning mirrors the rational operating logic of “modern” legal institutions, which prioritize calculability and predictability in the law to ensure that the governed can rely on consistent punishment for legal infractions. MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 40 (Talcott Parsons ed., 2009) (discussing rationality as the governing ethic of “modern” law). Rational legal systems prioritize consistent punishment to ensure that the governed can predict the consequences of their behavior. *Id.* at 330.

²⁷⁸ NGRA AIDS Insurance Discrimination, *supra* note 258.

²⁷⁹ See also Press Release, NGRA, Suit Filed to Protect Gay Couples' Rights (Jan. 12, 1988) (on file with author).

members' priorities because it forced litigators to anticipate, and to decide whether they were ready to engage with, legal issues outside their agendas that would inevitably arise.

In summary, the litigating organizations took a concerted proactive approach, which involved determining long-term organizational priorities and creating multistep, anticipatory action plans aimed at targeting those goals.²⁸⁰ This proactive planning process promoted adherence to predetermined organizational priorities; litigating groups rarely ever pursued actions that did not reflect members' predefined goals. However, litigating groups' members were not entirely autonomous in assessing the substantive priorities that would come to drive their organizations' actions. Instead, the black-letter law provided the bedrock for litigators' assessment of what priorities their organizations should pursue. Their agendas were fundamentally shaped by the tools, opportunities, and threats that the legal doctrine allowed — even more so, according to my archival data, than any empirical assessment of community need. As a result, litigating organizations were characterized by decisive action planning that targeted the specific legal issues for which the structure of legal doctrine provided an opportunity for action. Accordingly, although the litigating groups showed significant autonomy in their ability to tie actions to organizational priorities, the substantive issues that became those groups' priorities were ultimately constrained by formal law.

b. Protest Organizations: Reactive Planning

Protest organizations were *reactive*²⁸¹ in the process they used to plan organizational action; they planned each action in response to a specific stimulus, typically a dramatic news story relevant to LGBT people. Members would seize on the sense of urgency generated by a current event to provoke members and inspire their participation in a responsive protest action.²⁸² Nearly every protest was organized either

²⁸⁰ Derrick Bell's description of the NAACP's litigation strategy mirrors this proactive account. Bell described the NAACP's impact litigation as "the careful selection and filing of class action suits seeking standardized relief in accordance with set, uncompromising national goals." Bell, *supra* note 1, at 515.

²⁸¹ I define *reactive* as action that "responds or reacts to a situation, event, etc. . . . rather than anticipating or initiating new ones." OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com/view/Entry/158844?redirectedFrom=reactive> (defining "reactive, adj."). Using this definition, a social movement organization is reactive if it plans actions in response to particular developments or events, rather than planning actions that advance members' stated priorities.

²⁸² See Letter from Allen Carson to Queer Nation (Feb. 6, 1991) (available at the San Francisco Gay and Lesbian Historical Society, copy on file with author) ("The

directly in response to an event or to coincide with an upcoming event. For example, the Lesbian Avengers conducted a series of actions around the story of Lorena Bobbitt,²⁸³ a woman who severed her husband's penis after enduring years of physical and emotional abuse in their marriage. The Avengers were initially motivated to take action on the Bobbitt story when the incident hit the headlines. Members planned to hold a "Bobbit-que," a protest featuring a public hot-dog roast, intended to raise awareness about domestic violence and marital rape. They later decided to hold off on the protest to further capitalize on the media and public attention to the issue by timing the protest to coincide with Bobbitt's criminal trial.²⁸⁴ This example illustrates how protest strategies were both generally motivated in response to news events and were timed to coincide with upcoming events that promised to be newsworthy.

Protestors focused on current events as a conscious, organizing decision, considering such events to be effective or natural vehicles for inspiring collective action. Recent events provoked a sense of urgency that increased people's willingness to act, and act quickly.²⁸⁵ Flyers advertising protests would often emphasize a recent event as providing an immediate need for action (e.g., "Arrests were threatened last weekend, and that's why we're here today").²⁸⁶ As one Queer Nation activist noted, "I feel that reactive stuff is also easier for people to grasp. It's so much easier to focus on and strategize about . . . proactive stuff — now you have to make *that* a party."²⁸⁷ It is

question, at this point is, how much real justice do we do to these issues by only addressing them through this raw, un-focused anger? A more important question may be, how does this method move us from problem to solution?"

²⁸³ LESBIAN AVENGERS, HIGHLIGHTS FROM THE SAN FRANCISCO CHAPTER 2 (c. 1994) ("During Lorena Bobbitt's trial in Virginia for slicing off her husband's penis, we had a party on the corner of Shattuck Ave. and Virginia St. in Berkeley to barbecue in effigy John Wayne Bobbitt's penis. There was also a special guest appearance of the penis of Judge Buford Parsons, the Virginia judge who removed a four-year-old child from his mother, Sharon Bottoms, because she is a lesbian.") [hereinafter HIGHLIGHTS FROM THE SAN FRANCISCO CHAPTER].

²⁸⁴ *See id.*

²⁸⁵ The following account of strategizing within Queer Nation illustrates how reacting to events can create rapid direct action: "At last week's meeting, for example, Queer Nation called for a kiss-in at Castro Street bar that had failed to help a couple of fellow gays who had been bashed out on the street. The kiss-in was carried out that night." Phillip Matier & Andrew Ross, *The Insider: Queer Nation New Breed of Gay Activists*, S.F. EXAMINER, Oct. 10, 1990, at B4.

²⁸⁶ QUEER NATION, SERRAMONTE SHOPPING CENTER TRIP/LEGAL CARD (Queer Nation, San Francisco), Feb. 9, 1991.

²⁸⁷ Interview with Anonymous, Queer Nation, in L.A., Cal. (Aug. 29, 2012) (interview no. 60829) (transcript from primary source on file with author)

not that it was *impossible* to proactively organize protest events focusing on members' predefined priorities rather than news headlines; doing so just consumed greater resources. Reacting to events conserved time and energy and was thought to be more useful for facilitating collective protest action.

Reacting to events was also an effective means of accomplishing another crucial goal of protest organizations: garnering media attention. Although protestors and litigators alike would hold press conferences in attempts to attract journalists' attention, the protest groups seemed much more preoccupied with (and had much more difficulty) turning those press conferences into actual coverage.²⁸⁸ At the same time, protestors understood the success of a protest to be dependent on the protest's public impact, which they saw to be ultimately a product of the media's attention to the protest.²⁸⁹ Accordingly, protest groups went far beyond press meetings in attempting to attract media attention; instead, members "weighed in every action its potential for producing coverage" and selectively implemented those practices that increased the likelihood of coverage.²⁹⁰ Because journalists typically do not find protests newsworthy in their own right, protestors often specifically planned their actions to coincide with a current news story, on the theory that bringing their protests in close "proximity to a news event engendered more coverage" of the protest itself.²⁹¹ The need to "respond immediately to pressing issues in the media" was so crucial that the protest groups even implemented special procedures to get around cumbersome consensus- or majority-based planning processes, enabling their members to respond quickly and implement protest action while an LGBT-related issue remained in the limelight.²⁹²

[hereinafter Interview No. 60829].

²⁸⁸ Many of the attorneys I interviewed reported close connections and frequent contact with the press. *See, e.g.*, Interview No. 50917, *supra* note 233 ("We would be called all the time . . . you know we all kept our suits on the back of our door so when the news reporters were on their way we could put them on.").

²⁸⁹ Interview with Anonymous, Queer Nation, in L.A., Cal. (Sept. 5, 2012) (interview no. 60904) (transcript from primary source on file with author) [hereinafter Interview No. 60904] (stating that media coverage "multiplied manifold" the "limited impact of our [protest] action").

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² Queer Nation permitted focus groups to carry out action without going through the typical consensus review process in the general body. The Lesbian Avengers implemented an accelerated planning process that would "empower[] [members] to respond immediately to pressing issues in the media." Lesbian Avengers, Minutes of the Meeting (Apr. 27, 1992) (copy on file with author). The Avengers justified the

Protest groups reacted to current events not only as a strategic device to shore up participation and media attention; protest group members' very definitions of protest and their formulas for planning protest action were steeped in a logic of reactivity. One Queer Nation member pondering whether a Queer Nation-style direct-action group could exist today said, "It might not be necessary. . . . What would we react to?"²⁹³ A similar sentiment was expressed by a Queer Nation member as he recounted the essential elements of a protest: "[T]hat was what the tactics were about: you needed a place to put on the show, and you needed a timely hook to put it on with."²⁹⁴ These statements suggest a sense that the purpose of using direct action, and the very existence of a direct-action group, turns on its reactivity.

Protest groups' reactivity influenced the types of issues those groups would pursue as targets for direct action. Instead of focusing on the issues that members laid out in advance, protest organizations instead took up the issues that happened to produce regular or frequent events, which protest strategists could use to hook media coverage or popular participation.²⁹⁵ Police brutality became a major focus of protest activity, owing largely to the ongoing adjudication of instances of police brutality, which produced frequent, regular stimuli for protest organizing. Even a single case of police misconduct could generate several formal phases of adjudication, from police commissioner investigations to disciplinary hearings to civil lawsuits. For example, most of Queer Nation's policing protests targeted multiple formal legal developments resulting from a single act of police violence: a brutal police sweep of San Francisco's Castro district on October 6, 1989. Activists used the administrative hearings from the police commission's investigation of the incident, and the legal proceedings that were part of the lawsuit filed against the city as a

decision as follows: "We want to be able to respond quickly because without our response, the issue will fade from notice and be forgotten." *Id.*

²⁹³ Interview with Anonymous, Queer Nation, in L.A., Cal. (Sept. 12, 2012) (interview no. 60912) (transcript from primary source on file with author).

²⁹⁴ Interview with Anonymous, Queer Nation, in L.A., Cal. (Aug. 21, 2012) (interview no. 60821) (transcript from primary source on file with author) [hereinafter Interview No. 60821].

²⁹⁵ Queer Nation members, for example, organized focus groups around the following priorities: art, anti-violence, right wing, military, feminism, bisexuality, international, legal, academia, suburban outreach, racism, public spaces, policing, mainstream media, ecology, youth. *Queer Week*, Queer Nation (Jan. 2, 1990). However, the issues raised in the organization's actual demonstrations reflect a much narrower range of concerns; legal issues, policing, and the anti-gay right wing were the most common issues for Queer Nation action. QUEER NATION, QUEER NATION MISSION STATEMENT (c. 1990).

result of the incident, as the hooks for several protests on policing issues — often directly referring to the dates and times of those upcoming legal proceedings to invoke a sense of urgency around the issue.²⁹⁶ As one Queer Nation strategist acknowledged in an interview: “[O]ur main strategy was to keep alive the anger and the focus and the pressure around the misconduct cases and the lawsuits that were moving forward from the Castro sweep. . . . [We] were looking for ways to keep it fresh, and entertaining, and interesting.”²⁹⁷ This quote shows how protest activists would strategically frame ongoing phases of legal proceedings related to police misconduct as vital new developments. This converted a single instance of police violence into a series of “fresh” and timely events. By continually generating new legal events, adjudication of police brutality expanded a single newsworthy act into an ongoing set of protest hooks.

Perhaps as a result of the large number of event hooks associated with adjudication (and, to a lesser extent, legislation), the queer protest groups focused a large number of their actions on legal issues. Protest group members routinely organized actions targeting events taking place in state-based legal and political institutions.²⁹⁸ Both the Lesbian Avengers and Queer Nation organized protests around the criminal prosecutions of perpetrators of hate crimes or domestic violence, the defense trials of protestors arrested during direct action, and numerous other civil²⁹⁹ and criminal cases.³⁰⁰ Protestors also targeted several actions at pending legislation, including AB-101

²⁹⁶ One Queer Nation protest targeting a police commission hearing of a police captain accused of anti-gay brutality urged, “We have two weeks to demand that the Police Commission reject the charges as they stand and return them to the Police Department to be redrawn.” Memorandum from SQUELCH to Queer Nation, *Who Cares When Cops Bash Queers?* (Dec. 19, 1990) (copy on file with author).

²⁹⁷ Interview No. 60821, *supra* note 292.

²⁹⁸ I counted thirty-three such events in the Lesbian Avengers’ archives.

²⁹⁹ One example of a civil case Queer Nation protested is a lawsuit by the Concord Chamber of Commerce challenging a city antidiscrimination ordinance. John Koopman, *Gays Protest Chamber Policy; Opposition to Anti-Bias Laws Sparks Demonstration*, *Contra Costa Times*, Aug. 26, 1990. Another is a federal district court case in which the judge called one party a “homo.” Memorandum on Judge Calling a Former Navy Cadet a “Homo” (undated) (on file with author). The Lesbian Avengers protested dressmaker Jessica McClintock for resisting a wage claim by female garment workers; the anniversary of *Roe v. Wade*; as well as the family law case of Sharon Bottoms, denied custody for being a lesbian. Lesbian Avengers, *Minutes of the Meeting* (Nov. 26, 1995) (copy on file with author).

³⁰⁰ The Lesbian Avengers organized protests around domestic violence-related criminal trials as well as around various appeals in the case of Mumia Abu-Jamal. Lesbian Avengers, *Minutes of the Meeting* (Apr. 16, 1996) (copy on file with author).

(which one activist described as the “gay marriage issue” of the day³⁰¹), as well as other local and statewide antidiscrimination and domestic partnership legislation. In the end, protests focusing on particular legal issues or events were far more common than protests seeking change in any other area, including in private organizations (corporations, Boy Scouts, employers), government (police accountability), the Right Wing, and the media.³⁰² This is a surprising finding given that protest group members considered themselves and their organizations to be “radical” and specifically sought to steer clear of institutional politics.³⁰³

Not only did the queer protest organizations plan actions around the (mostly legal) issues that generated a steady supply of events, those protest organizations also avoided action on issues that failed to generate events — even if protest group members considered those issues to be crucial movement priorities. For example, members of both the Lesbian Avengers and Queer Nation considered violence against LGBT people a particularly important issue. Queer Nation newsletters cited anti-gay violence as an important movement problem more frequently than any other issue. Yet with the exception of a few protests targeting the civil and criminal trials of perpetrators of anti-LGBT violence, the protest groups rarely initiated protests (or candlelight vigils) against violence.³⁰⁴ One possible explanation is that homophobic violence, despite how commonplace it may have been, often went unreported or misrepresented in the news media,³⁰⁵

³⁰¹ Interview with Anonymous, Queer Nation, in L.A., Cal. (Mar. 21, 2013) (interview no. 60321) (transcript from primary source on file with author).

³⁰² Fifty-five percent of Lesbian Avenger protests were either specifically protesting or were motivated by a particular court case or piece of legislation. For Queer Nation, twenty-seven percent of protests were either specifically protesting or were motivated by a particular court case or piece of legislation. The issue that received the second highest amount of attention in Queer Nation was the right wing (19%), and the issue that received the second highest amount of attention in Lesbian Avengers was violence (both domestic violence and anti-LGBT violence) with 10%.

³⁰³ Lesbian Avengers, Minutes of the Meeting (Aug. 1, 1989) (copy on file with author) (quoting Lesbian Avengers members seeking to avoid participation in institutional politics); see Letter from Annette Gaudino, Reflections on the Achtenberg Incident, to Queer Nation (c. 1991) (copy on file with author) (“Does anyone really believe we will find the door to liberation in city hall?”).

³⁰⁴ Only six of Queer Nation’s eighty-six protests (including candlelight vigils) focused on anti-LGBT violence. When Queer Nation did do work on anti-LGBT violence, it tended to use other sorts of non-protest tactics to promote anti-violence, such as performing services (e.g., self defense workshops, a street patrol).

³⁰⁵ For example, the Queer Nation meeting minutes noted that one act of violence involving a kidnap, rape, and murder of a lesbian, was “not reported as a hate crime because she was classified as a crossdresser, not a lesbian.” Queer Nation, Minutes of

without media exposure, instances of violence may have either escaped the protest groups' attention or may have been considered as insufficient news hooks.

The tendency for the LGBT protest groups to reactively plan protests around newsworthy events generated palpable tension within those protest groups. Protest group members acknowledged the divide that their reactive approach created between their own priorities and their groups' default focus on event-producing issues. One Queer Nation member criticized his organization's reactive approach in an open letter to the organization in 1991, stating that "issues are only brought before the group when anger boils over as a result of . . . outrage at particular incidents."³⁰⁶ The Lesbian Avengers issued similarly strong critiques of their own reactivity. Minutes taken from one meeting questioned whether the Avengers were experiencing an "identity crisis" and urged the group to "set up clear goals and strategies."³⁰⁷ A flyer circulated at another meeting, which bore the heading "Proactive vs. Reactive," asked, "Should we create our own agenda by researching issues rather than (primarily) reacting to headlines?" The flier noted, "Part of the issue here is that when we are reactive, we feel as though we are on a super time crunch. Another issue is that when we are reactive we are letting 'them' set our agenda." This flier suggests a problematic secondary effect of reactive protest planning: It derails protest-based activists from their self-defined priorities.

In summary, protest groups planned each action around a particular event, typically one that stimulated news media attention. Rather than planning actions that fit with members' predefined priorities, protest groups accordingly focused the bulk of their actions on the issues that happened to create regular, newsworthy events. LGBT-related issues that were subject to adjudication were particularly likely to produce such events and thus became the default focus of much of the protest groups' action. Owing to this reactive planning process, protest group members often found their organizations' actions to be focused on issues that were unrelated to their most pressing political concerns, which created tension within the protest groups. Thus, the protest groups' reactive approach diminished their members' control over the set of substantive issues that ultimately defined the organizations'

the Meeting (Oct. 1, 1994) (copy on file with author).

³⁰⁶ Letter from Allen Carson, Queer Nation, to Queer Nation (Feb. 6, 1991) (copy on file with author).

³⁰⁷ Lesbian Avengers, Minutes of the Meeting (Aug. 21, 1995) [hereinafter Lesbian Avengers Minutes, Aug. 21, 1995] (copy on file with author).

agendas — exacerbating internal tensions that may have ultimately facilitated those groups' decline.

c. Lobbying Organizations: Proactive and Reactive Planning

The lobbying organizations used a planning process that was at times proactive and at times reactive to the legislative agenda. These lobbying organizations worked proactively by initiating campaigns to push legislators forward on certain LGBT issues. One proactive approach was to work with legislators, politicians, and other insiders who supported LGBT rights. In 1992, for example, IGLHRC cosponsored a delegation to Russia with Massachusetts representative Barney Frank to seek the release of hundreds of men imprisoned for consensual gay sex. IGLHRC also sought to garner new supporters by meeting with legislators and “educating these [lawmaking] institutions to take on our issues.”³⁰⁸

Drafting model legislation was another proactive tactic that the LGLA used to forge bonds with sympathetic legislators. LGLA members drafted model legislation to amend California's Fair Employment and Housing Act to include AIDS discrimination.³⁰⁹ This tactic was likely unique to the LGLA, as this group consisted entirely of lawyers. As Professors Douglas Nejaime and Scott Cummings have shown, drafting model legislation is one legislative tactic that is particularly useful for lawyers; drafting can help equip lawyers with useful legal tools that may facilitate future litigation.³¹⁰ Interestingly, the LGLA's unique lawyer membership base provided the organization a possibility for proactive engagement with the legislature that IGLHRC, a nonlawyer group similarly focused on legislative advocacy, could not match.

The lobbying organizations also sometimes planned actions reactively, organizing advocacy campaigns in response to proposed legislation or ballot initiatives that affected LGBT people in each organization's geographical focus (California for the LGLA, foreign countries for IGLHRC). IGLHRC worked to oppose a draft law on

³⁰⁸ *Mainstream*, IGLHRC HOMOGLOBE, Dec./Jan. 1992, at 5 (on file with author) (discussing a meeting with Representative Jim McDermott, co-chair of the International AIDS Task force).

³⁰⁹ This was only one of two times the organizations used legislative drafting, however. Legislative drafting is a tactic that litigating groups commonly use to supplement their litigation strategies. In fact, the litigating groups involved in this study used more legislative drafting than LGLA.

³¹⁰ Cummings & Nejaime, *supra* note 172, at 1268 (“Although the domestic partnership bills were important on their own terms, the lawyers who drafted them did so with an eye toward eventual marriage litigation.”).

HIV/AIDS in Russia that would require HIV antibody tests for anyone suspected of belonging to a “risk group.” The LGLA initiated campaigns to support the passage of nondiscrimination statute AB-101 and to oppose the Block Initiative (Proposition 96) as well as various bills asking for HIV testing to determine insurability. Like the protest group members, lobbying group members were critical of the more reactive aspects of their action planning. One LGLA member argued that his organization’s standard practice of “review[ing] current or proposed legislation affecting our community” should be substituted for a more proactive approach, involving “brainstorming about what the future holds for us” and attempting to direct legislative action through the increased use of model law drafting.³¹¹

Although IGLHRC and LGLA both had proactive and reactive elements in planning their formal lobbying efforts, these groups diverged in the extent of their reactivity in planning for other, non-lobbying forms of organizational activity. The degree to which the organizations relied on popular participation in their other tactics coincided with the degree to which they were reactive. IGLHRC, which actively sought member involvement in the form of letter-writing campaigns targeting the organizations’ advocacy work,³¹² also used the event-hook style of reactive strategizing seen in the protest groups. For example, IGLHRC would attract member involvement in its advocacy for the repeal of sodomy laws in foreign countries by recounting dramatic events, such as a mass arrest of LGBT people under such a law in Russia or the initiation of a legal challenge to such laws in Nicaragua and India.³¹³ These events emphasized a sense of urgency to provoke members’ action.

³¹¹ Letter Announcing a New LHR Project (Nov. 6, 1986) (copy on file with author). LGLA did in fact draft two pieces of legislation this same year (1986): one with the City of Los Angeles in the drafting of its antidiscrimination ordinance for people with AIDS, and the other drafting model legislation amending the California Fair Employment and Housing Act to include AIDS. Letter from Lawyers for Human Rights to Richard Walch, Executive Director, Los Angeles County Bar Association (Sept. 4, 1986); Letter from Lawyers for Human Rights to Roger A. Grable, Chair 1986 Resolutions Committee for the State Bar of California Conference of Delegates (Feb. 13, 1986); LGLA, Minutes of the Board Meeting (Mar. 3, 1986) (on file with author).

³¹² IGLHRC sought member involvement through its Emergency Response Network publication.

³¹³ Unlike the protest organizations that tended to focus on events found in newspapers, IGLHRC relied more heavily on information it received through connections with grassroots LGBT organizations abroad. IGLHRC only cited media coverage as an information source in six of its advocacy actions, while it cited other LGBT organizations as the source of information in eighteen of its actions.

The LGLA, conversely, did not solicit member participation in its advocacy actions. The organization's advocacy work was carried out by the LGLA board member who had a personal connection to or investment in that work,³¹⁴ and when the member no longer had time, the project was abandoned.³¹⁵ Instead of prioritizing issues based on the perceived need to respond to events, the LGLA accordingly prioritized issues that reflected the individual interests of its board members.³¹⁶

These differences between the LGBT lobbying groups are important for two reasons. First, the fact that IGLHRC used a much more reactive, event-driven strategy specifically when it solicited popular participation suggests that popular participation may drive reactivity.³¹⁷ This also suggests that reactivity may be more intractable for protest organizations than for lobbying organizations; protest tactics *require* popular participation, whereas lobbying organizations can choose the degree to which they solicit popular participation (and curtail it if they want to be more proactive). A second implication of these findings is that an organization's degree of professionalization (i.e., its employment of wage-earning workers to carry out organizational functions)³¹⁸ likely does not drive an organization's degree of proactivity. IGLHRC, a lobbying group, employed several staff members (including a designated media representative), as did the litigating groups NGRA and the ACLU. Yet, unlike the litigating organizations, IGLHRC was reactive to current events. As in the

³¹⁴ For instance, the LGLA Board decided to undertake an advocacy campaign for stricter enforcement of Los Angeles's antidiscrimination ordinance based on inside information from one LGLA member who worked in the Los Angeles City Attorney's office. LGLA, Minutes of the Board Meeting (Mar. 1, 1988) (on file with author). Similarly, the Board also decided to review Governor Deukmejian's record on gay rights based on one LGLA member's connections to politician "Sheila Kuehl[, who] has urged L.H.R. [LGLA] through Mary, to become involved in the project." LGLA, Minutes of the Board Meeting (Apr. 4, 1989) (on file with author).

³¹⁵ For example, one LGLA member who worked on behalf of the organization on a project with the CALIF legislation committee had to resign from the effort because "he has not found much membership interest" and "it is difficult for him to deal with these projects adequately on his own." See sources cited *supra*, note 312.

³¹⁶ Again, this may be explained by the unique composition of the LGLA's membership, who were all active lawyers.

³¹⁷ See discussion *supra* Part II.B. Data from the organizational analysis would confirm this interpretation; a separate quantitative analysis of these data showed that litigating organizations (the least reactive of the LGBT movement organizations) also tended to have the lowest membership, suggesting that they are the least dependent on popular participation.

³¹⁸ Staggenborg, *supra* note 196, at 586-602.

previous section's event-history analysis,³¹⁹ these qualitative findings suggest that organizational structure may be less important than tactics in determining whether a movement group will possess advantages related to movement agenda setting.³²⁰

2. Litigation Sets the Protest Agenda

The data presented in the previous sections suggest that LGBT protest organizations' reactive approach fundamentally shaped those organizations' priorities.³²¹ Protest groups, seeking to attract participation and media coverage, planned each action to coincide with a current event. As a result, those protest organizations came to de-emphasize members' priorities that failed to generate an adequate supply of such current events (e.g., anti-gay violence) and instead focused their actions on the types of issues that would produce regular, newsworthy events (e.g., policing).

LGBT impact litigation organizations did not appear vulnerable to becoming derailed from members' priorities. In fact, the proactive approach used by litigating organizations, which placed high value on anticipatory goal setting, contingency planning, calculability, and control, helped litigating organizations tailor their dockets to effectively pursue members' predefined priorities. The argument here is *not* that the litigating organizations had complete autonomy in developing their substantive agendas. As the previous section emphasized,³²² LGBT impact litigation was deeply shaped by the structure of formal law; the desire to create favorable precedent drove litigation strategists to situate their goals within areas of law that afforded them the greatest prospects for success. Yet a key advantage of litigating groups' proactive approach was that it ensured that these groups would not become derailed from their members' legal objectives. This protected LGBT litigating organizations from the organizational strife that arose from protest group members' sense of "identity crisis"³²³ and lack of control.

In this section, I argue that the reactivity of LGBT protest groups may have acted as a mechanism through which legal issues, and specifically the issues being litigated, came to be prominently featured in the protest groups' agendas. I argue that the protest groups' reactive

³¹⁹ See *supra* Part III.B.

³²⁰ See *supra* Part III.B.

³²¹ See *supra* Part III.C.1.

³²² See *supra* Part III.C.1.

³²³ Lesbian Avengers Minutes, Aug. 21, 1995, *supra* note 307.

action planning pushed those groups toward legal goals. Reactivity to news stories focused protest groups on the issues receiving news coverage, which were largely litigation related. Furthermore, reactivity to events focused protest groups on routine sources of public events, which were typically state sponsored and court centered. Finally, despite their critique of the LGBT civil rights groups, protest group members were not exempt from the lure of the law; they shared the common view of law and litigation as crucial to creating change, and they considered lawyers to be legitimate movement leaders.

a. Routine Production of Legal Events

As the previous section has shown, the reactive planning of protest action directed protest groups toward issues that could provide frequent, regular events around which to organize. Litigation provides a series of routine, predictable events in the form of step-by-step procedural phases and deadlines, which protest groups frequently used as event hooks for protest.³²⁴ Protest groups drew on the regularity of litigation procedures to provide events, stimulating momentum for the issues that they targeted in their actions.

Court proceedings and other government-related events are also good targets for protests because they are prominently advertised and publicly accessible. Members of protest group Queer Nation would monitor government bulletins for relevant upcoming events that could serve as hooks for protests. The advance notice and advertisement of those events provided plenty of time for protest groups to organize, as well as the opportunity to network with other LGBT organizations working on the issue.³²⁵ As one Queer Nation member recalled:

[F]or official city events — board and commission meetings, hearings, and so on — various attorneys, advocates and activists followed the public agendas of the bodies in question, and they would spread the word about any items that might merit intervention. For instance, I remember receiving calls from the staff at the ACLU . . . alerting me to San Francisco Police Commission hearings — and then making calls myself to other activists to start the organizing for a major queer presence at the events.

As this quote indicates, activists' common access to public records allowed for coordination around legal events. With litigation, the

³²⁴ See *supra* Part III.C.1.b.

³²⁵ Interview No. 60821, *supra* note 297.

formal participation of movement attorneys provided yet another conduit for LGBT activists to become informed about relevant cases. Litigation also operates under a particularly rigid timeline, enforced by the threat of sanctions, making it a particularly clear source of targets for activism.

Interestingly, the multiple procedural phases associated with litigation may be related to the long-term survival that LGBT litigating organizations experienced. The proactive planning that was necessary to carry out the various procedural stages of litigation provided a clear vision for litigating groups' continued, long-term action, giving members a specific motivation for survival. One ACLU newsletter even suggested that proactive planning for these procedural phases and sticking it out for the long term of a case were considered essential to litigating groups' goal of generating a legal impact: "Winning requires standing up and fighting; struggling through bureaucratic appeals, proceedings, and delays requires energy and steadfastness. Whenever one of us is wronged, we must show we have the determination to see it through to the end."³²⁶ The requirement for litigating groups to keep up with the predictable, precharted procedural deadlines that structure litigation may have augmented these groups' incentive to survive and advance planning for survival, contributing to their overall longevity.

Regardless of whether the procedural phases of litigation contributed to the survival of litigating organizations, those procedural phases did effectively facilitate protest groups' reactive planning style by providing multiple, scheduled events that protestors used to coordinate and inspire collective action. Many of the factors that made adjudication so amenable to protest planning — the public accessibility of information on state action, the multiple events associated with a single case — are also factors that made litigation particularly amenable to time-crunched news-gathering practices.³²⁷ But the high level of media attention to litigation itself also provided an independent justification for protest groups to focus on litigation-related events: the possibility of engendering greater news coverage of protests associated with litigation.³²⁸ The next section explores the role

³²⁶ ACLU NEWSLETTER, Sept. 1986, at 4.

³²⁷ See *supra* Part III.A.

³²⁸ Elaine Elinson, Pub. Info. Dir., ACLU of N. Cal., Panel Discussion at Lavender Law Conference: Using the Media Effectively for Gay and Lesbian Rights Litigation (Nov. 11-13, 1988) ("If you are working on a legal case, for example, you may want to have a press release when you file the case (because you are in control of the timing), a press release when the case goes to court, a 'phone around' when some preliminary

of media coverage in refocusing protest action around the issues being litigated.

b. Focus on Law-Dominated Media Coverage

The reactive focus of protest organizations meant that activists were constantly scanning newspapers to find newsworthy events to hook on to and use to heighten coverage of their actions. Members found most of these event hooks in the mainstream press,³²⁹ not in the LGBT media outlets that had already become an established presence in several California cities. While the LGBT press covered relevant, movement-related events more frequently, finding events in the community's own publications rather than the mainstream media would not have accomplished the central purpose of hooking protests to media events: to appeal to mainstream audiences outside the LGBT community.³³⁰ Thus, the fact that mainstream newspaper coverage of the LGBT movement focused mainly on litigation, as Part II.B has shown, made protestors more likely to learn about, and plan protests in reaction to, the issues and events being litigated.

Furthermore, protest strategists were so savvy about how the media worked that they knew of litigation's media appeal — and they purposefully hooked protests to litigation and courtroom events as a way to enhance protest coverage. The Lesbian Avengers' strategic timing of the Bobbit-que to coincide with Lorena Bobbitt's trial is one example.³³¹ Another example is the Lesbian Avengers' decision to target the trial of a municipal worker who "allowed a queer man to be beaten up on his bus," a trial that promised "mass coverage." The Lesbian Avengers stated that they would "like to take advantage of this press opportunity."³³² As one protestor explained, "Law covers everybody. . . . And so we felt like the governor, law, those are big ticket items and they would get us good media coverage."³³³ Indeed,

decision is made, and another press conference at the time of the decision.").

³²⁹ Interview No. 60829, *supra* note 287 ("Homophobic things that ended up in the newspaper got responded to, was basically how we operated.")

³³⁰ Interview No. 60904, *supra* note 289 ("What we did was that we weighed in every action its potential for producing coverage, and elected those forms that we knew that would be most appealing. Kiss-ins we knew would produce good visuals. This was entirely structured by a recognition that the delimited impact of our action in a city like SF would be multiplied manifold by media coverage.")

³³¹ See HIGHLIGHTS FROM THE SAN FRANCISCO CHAPTER, *supra* note 283.

³³² Lesbian Avengers, Minutes of the Meeting (Feb. 24, 1997) (on file with author).

³³³ One example was in Queer Nation's focus on AB-101, the antidiscrimination legislation that the governor refused to sign. Interview No. 60904, *supra* note 289 ("Q: Were there any issues that the media was focused on that you think drove you to act

previous empirical work confirms that the queer activists had the right intuition; protests that are connected to legal issues receive more media coverage than those that are not.³³⁴

The channeling of protest actions toward newsworthy events suggests that media coverage heightens the agenda-setting power of litigation in more ways than one. Protest groups' strategic reactivity to media coverage shifts protestors' attention toward the litigation-related issues that tend to dominate headlines. In addition, as argued in Part II.B, the visibility of litigation in the mainstream press makes movement activists and allies alike more likely to perceive the issues being litigated as particularly important priorities.³³⁵ Thus, the media may shape a movement's agenda not only by shifting protestors' strategic planning (as protestors draw on litigation to enhance the attention to and the effectiveness of their own actions) but also potentially by shaping activists' assessments of the importance of litigation as a legitimate movement tactic. The next section turns to discussing how the protest-based LGBT activists in this study actually perceived the value of litigation and the lawyers who were doing it.

c. Cultural Legitimacy of Law

Another reason protestors may focus on litigation is that they perceive litigation as an important movement strategy around which to coordinate protest actions. Whereas protest group members typically framed the decision to target court cases as a strategic choice aimed to increase the efficacy of their actions, many of them also genuinely felt that legal issues subject to litigation were important in their own right, and independently worthy as targets for LGBT movement action. For example, one interviewee from Queer Nation, after describing how the group would strategically target major legal cases to garner media coverage, paused for a brief moment and then added, "Well, we were doing it because the media was interested in it, but we were also doing it because it was absolutely determinative of the texture of our lives."³³⁶ Although the instrumental focus on the

in that direction more than you otherwise would have?"; "A: Certainly the governors' repeated refusal to sign a bill protecting us . . . you know what I'm referring to?"; "Q: AB-101?"; "A: Yes.").

³³⁴ Oliver & Maney, *supra* note 99, at 469-71.

³³⁵ COHEN, *supra* note 183, at 13 ("[The press] may not be successful much of the time in telling people what to think, but it is stunningly successful in telling readers what to think about."); McCombs & Reynolds, *supra* note 144, at 1-2 (stating that press coverage influences the publics' perception of important issues).

³³⁶ Interview No. 60904, *supra* note 289.

media brought protestors' attention to the issues being litigated, the fundamental belief that those litigated issues were important to LGBT people and that pursuing those issues would effectively create social change provided an equally important impetus for protestors' decisions to target those issues in their own actions.

The legitimacy of lawyers also made protest organizations more likely to plan protests around issues being litigated. Protestors would often speak of lawyers as essential movement actors, in part because of the valuable services they provided, such as legal rights training. Protestors had a high chance of arrest at nearly every action,³³⁷ and in many cases, they would prepare by soliciting litigating organizations to offer the group rights training or by discussing the legality of their actions with a lawyer.³³⁸ Movement lawyers also went to many of the protest actions³³⁹ and would offer to provide legal representation for those who were arrested.³⁴⁰ Interactions like these, in which lawyers voluntarily offered their services in support of radical protest action, formed bonds between protestors and lawyers and identified lawyers as allies of protest groups.

The high contact between lawyers and protestors seemed to convince protestors that LGBT movement litigation was compatible with protest goals. Accordingly, the protest organizations welcomed solicitations by movement lawyers to get on board with their projects. Attorneys from the ACLU, which had projects devoted to LGBT and policing issues, informed Queer Nation organizers about the regular commission meetings that Queer Nation members would use for protest hooks. The Lesbian Avengers also had some contact with the ACLU. Lawyers from the ACLU and the National Center for Lesbian Rights attended different Lesbian Avengers meetings to bring attention

³³⁷ Lesbian Avengers, Minutes of the Meeting (Dec. 18, 1995) (on file with author) (preparing for Pete Wilson protest, saying "Need to expect suspicion or possible arrest by just being there"); see Interview No. 60829, *supra* note 287 ("Because ACT UP had a history of getting arrested, so Queer Nation had to plan for the same thing.").

³³⁸ See Lesbian Avengers, Minutes of the Meeting (May 25, 1994) (on file with author) (in preparing for a protest where they expected arrests, said "Call ACLU and ask for lawyer"). Lesbian Avengers also consulted with lawyers on January 9, 1995, regarding the legality of a protest at Exodus International. Lesbian Avengers, Minutes of the Meeting (Feb. 14, 1995).

³³⁹ Interview No. 60829, *supra* note 287 ("[W]e [in Queer Nation] always had a lawyer who was in on the action, who was supporting our cause. Probably they were a law student or recent graduate to represent us. Because ACT UP had a history of getting arrested, so Queer Nation had to plan for the same thing.").

³⁴⁰ Lesbian Avengers, Minutes of the Meeting (Apr. 10, 1995) (on file with author) (stating that "NCLR offered legal support" in response to a Lesbian Avenger protest of radio station KSFO for a homophobic DJ's comments).

to policing and other movement issues, such as family rights and transgender discrimination, issues on which Lesbian Avengers members took diligent notes and around which they subsequently took action.³⁴¹

Protestors seemed to hold lawyers and litigating organizations in much higher regard than lobbyists and other “insiders.” Many interviewees expressed “skepticism of [members being] involved in insider politics.”³⁴² Legislative advocacy requires seeking a “principled compromise”³⁴³ and many protestors suggested a tendency for lobbyists to get co-opted in the process.³⁴⁴ Others considered protest and lobbying groups to be in competition, with each side highly suspicious of the other.³⁴⁵ Accordingly, solicitations by politicians and traditional lobbying groups tended to be much more problematic for protest group members than solicitations by litigating groups and caused more internal debate.³⁴⁶ This distinction between litigating and lobbying movement groups suggests that, although protestors considered the legal goals pursued by lobbying groups to be important, they considered litigating groups to be more legitimate movement actors. This provides a more nuanced understanding of the legitimacy of movement litigation, which may help explain why litigating groups have the highest survival rates.

This section has argued that the legitimacy of movement litigation and lawyers may have helped enable litigation to systematically shape the LGBT and queer protest agenda. The legitimacy of law and lawyers in the eyes of protest-based activists suggests that law, as an important cultural institution, contributes not only to the relative power of litigating organizations (in terms of allowing them to survive and thrive), but also to the agenda-setting power of litigation in framing the issues and setting the goals that become the target of protest action.

³⁴¹ Lesbian Avengers, Minutes of the Meeting (Jan. 30, 1995) (on file with author).

³⁴² Lesbian Avengers, Minutes of the Meeting (Dec. 13, 1993) (on file with author) (reporting an invitation by Tom Ammiano for Avengers to get involved in police reform).

³⁴³ Nan Hunter, *Lawyering for Social Justice*, 72 N.Y.U. L. REV. 1009, 1014-15 (1997).

³⁴⁴ Interview No. 60821, *supra* note 292 (“[I]f you simply had people inside, those people would be co-opted, so you also need people on the outside making the amount of trouble required so the people on the inside could force their institutions to move along.”).

³⁴⁵ *Id.*

³⁴⁶ *See id.* (“So there are few people who managed to get inside the power structure, and really comfortably look for ways to pervade it but the vast majority . . . became the heart of the problem but if you played them carefully you might manage to make use of them in some way.”).

This final section has outlined a set of mechanisms that may have caused LGBT protest organizations to pursue the formal legal goals advanced through litigation, despite those protest organizations' concerted critique of rights-centered political strategies. If the issues being litigated set the LGBT movement's protest agenda, this further suggests that formal legal goals set the LGBT movement's agenda as a whole. Attaining formal legal rights was clearly the dominant priority of the litigating and lobbying sectors of the LGBT movement; litigating organizations focused on creating favorable legal precedent, and lobbying organizations focused on legislative reform. Thus, when protest groups become reoriented away from nonlegal goals toward a focus on legal rights, those protest groups enter the fold of the movement's legal agenda — undercutting their internal critique of that legal agenda and legalizing the movement as a whole.

IV. DISCUSSION

The primary contribution of this Article has been to expose a set of advantages that may be associated with social movement litigation — media visibility and organizational stability — and to illustrate how these advantages may work to elevate the issues being litigated to top priorities for protest-based activists operating outside the courtroom. In this Part, I dig deeper into the normative consequences that this work implicates for the LGBT movement and for current understandings of litigation as a tool for social change. I argue that the consequences of legalization of a social movement's agenda depend on two factors: first, the extent to which movement litigation focuses on legal impact (winning favorable precedent), and second, the dominant framing and assumptions inherent in the law that movement actors deploy. In movements like the LGBT movement, where lawyers predominantly use impact litigation focused on antidiscrimination law, the legalization of movement goals has the potential to marginalize the movement's more far-reaching visions for social change.

The refocusing of a movement around litigation priorities has substantive consequences only if litigation strategies are divorced from the larger movement's needs and goals. This is something that is particularly likely to occur in conventional impact litigation, which prioritizes formal legal outcomes. Focusing on gaining formal legal advances leaves little need for litigating groups to assess what other activists are doing or what change most constituents desire.³⁴⁷

³⁴⁷ See Bell, *supra* note 1, at 512-13 (“[T]he quest for symbolic manifestations of new rights and the search for new legal theories have too often failed to prompt an

Focusing on winning favorable precedent further pushes lawyers toward “juridically intelligible” issues and claims,³⁴⁸ which have the greatest likelihood of succeeding in court. Impact litigation groups tend to select priorities based on legal expertise rather than democratic concerns for community goals.³⁴⁹ My analysis in this Article, which corroborates findings from previous work,³⁵⁰ suggests that has been the dominant pattern in LGBT movement impact litigation. When law-focused impact litigation groups operate in pluralistic movements with diverse political factions and demands — as they do in the LGBT movement³⁵¹ — legalization will likely generate a substantive change in movement focus (and risk subordinating the priorities of protest groups).³⁵²

Does the legalization of a movement’s priorities *harm* that movement? It depends on whose perspective you take. Some might argue that legalizing a social movement’s agenda could be advantageous for a movement in that it would weed out the more radical movement subgroups, reducing movement infighting and concentrating movement efforts into common, perhaps more attainable, goals. Yet eliminating radical dissent in a movement is only beneficial to the extent one discounts radical politics as ineffective — a position which privileges a reformist view of movement success.³⁵³

assessment of the economic and political condition that so influence the progress and outcome of any social reform improvement.”).

³⁴⁸ See Currah, *supra* note 127, at 13 (“[I]dentity-based claims remain more juridically intelligible in the way they link identities to bodies, and so often produce better results.”).

³⁴⁹ See William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1656-57, 1662-65, 1675 (1996–1997) (discussing the factors that structure group decisions about litigation, which include individualization, democratic, and expertise models).

³⁵⁰ Carpenter, *supra* note 246, at 19-20; see Arkles et al., *supra* note 61, at 580 (“Broadly speaking, almost all national LGb“T” legal advocacy since its inception in the 1970s has focused on attaining ‘formal legal equality’ in legislation and court decisions, particularly in the areas of sodomy laws and gay marriage.”).

³⁵¹ See *supra* Part I.

³⁵² See Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1475 (2005) (“Nevertheless, the privileging of elite political and legal agendas, as exemplified in the affirmative action debate, is not an aberration; it reflects a historical continuity. As recent historical scholarship has shown, the priorities of elites often have been privileged over theories and strategies of social justice that focused on the plight of the working class and poor.”).

³⁵³ See Fitzgerald & Rogers, *supra* note 64, at 577 (arguing reformist “[d]efinitions of success or failure hinge upon whether or not the [social movement] organization succeeds in incorporating its participants into the existing political/economic

Radical movement factions tend to envision their own contribution not in terms of attaining a checklist of political gains, but rather as cultivating an alternative vision of society that the current system is incapable of producing.³⁵⁴ By this definition, sacrificing movement segments that earnestly advocate and attempt to diffuse an alternative vision of change that cannot be addressed through legal reform would instead diminish a movement's prospects for success.

Instead of considering the harm that legalization might cause a social movement — a normative judgment that shifts depending on how one evaluates movement effectiveness — it is more useful to consider the effects of legalization in terms of its ability to redefine the scope of movement goals. Legalization of a movement's agenda helps enshrine within the political culture of that movement the set of values that dominate the legal landscape — and history tells us that those values can be “left” or “right” values, depending on the context.³⁵⁵ For movements whose central purpose is to promote equality for a disadvantaged group, what is crucially important is the extent to which the law supports a vision of equality that would adequately address the plight of a movement's constituents. Some commentators have held that U.S. law is inherently incapable of ameliorating, or even having an adequate language for conceptualizing, persistent social inequalities;³⁵⁶ this would suggest

structure, as well as its ability to acquire resources”).

³⁵⁴ See *id.* at 580-81.

³⁵⁵ See, e.g., Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 STAN. L. REV. 2113, 2116-17 (2003) (discussing the “conservatism” of formalist legal interpretation: “[C]onservatism, in this sense, does not mean ‘right wing’ (in modern political parlance). That is, the values that the system may embody (which formalism does not question) may be ‘left’ values, ‘right’ values, what sometimes are called ‘traditional liberal’ values, or any other set that somehow came to be rooted in the legal landscape, or codes. It is conservative as against reformist or radical in its view of the role of legal scholarship, but what it conserves is quite another matter.”).

³⁵⁶ See BETH ELLEN HARRIS, DEFENDING THE RIGHT TO A HOME: THE POWER OF ANTI-POVERTY LAWYERS 107 (2004) (“[T]he legal system and legal discourses fail to define adequately the problems faced by the ‘have-nots’ and are likely to lead to remedies that legitimate existing relations of power.”); see also Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 684 (1987-1988) (noting the “narrow treatment of cases as distinct unrelated disputes, without reference to larger class continuities, sacrifices a valuable opportunity to unmask domination and promote counter hegemony by organizing around legal controversy”); Wendy Brown, *Rights and Identity in Late Modernity: Revisiting the “Jewish Question,”* in IDENTITIES, POLITICS, AND RIGHTS 85, 118 (Austin Sarat & Thomas Kearns eds., 1995) (arguing that liberal rights discourse transforms “social problems into matters of individualized, dehistoricized injury and

that the privileging of political goals that can be framed in law's terms will necessarily constrain equality movements from pursuing more effective alternative strategies. I would not so resolutely discount the potential for law to support transformative politics. Social movements often cultivate their own interpretations of legal principles, which may fly in the face of official understandings,³⁵⁷ as an organizing tool in politics. The law is then, at the very least, *capable* of radical interpretation and expressing transformative visions of equality and social change.

Yet though law contains the potential for radical interpretations promoting substantive equality, this potential often remains latent.³⁵⁸ Antidiscrimination law in particular — the typical target of equality movements — has become settled around quite limited understandings of equality. Judicial interpretation has crystallized around a definition of equality as formal access to equal opportunity³⁵⁹ and discrimination as isolated, intentional acts by prejudiced perpetrators, which cause harm to individual victims.³⁶⁰ This interpretation not only denies remedies for the structural factors most responsible for perpetuating inequality, it also places the focus on preventing individual wrongdoing rather than producing substantive outcomes and creating real change.³⁶¹ Thus, when antidiscrimination litigation comes to define an equality movement's priorities, the movement may find itself privileging issues with little hope of creating social transformation through substantive equality.

entitlement”).

³⁵⁷ Gwendolyn M. Leachman, *Legal Framing*, 61 *STUD. L. POL. & SOC.* 25, 27 (2013).

³⁵⁸ See Rober M. Cover, *Nomos and Narrative*, 97 *HARV. L. REV.* 4, 54 (1983) (“[J]udges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest.”).

³⁵⁹ See Karl Klare, *Law-Making as Praxis*, 40 *TELOS* 123, 132 n.28 (1979) (describing the “underpinnings of liberal legalism” as, among other things, “a commitment to a formal or procedural rather than a substantive conception of justice”).

³⁶⁰ See Bagenstos, *supra* note 3, at 45 (the intent-based understanding of discrimination is evident in both the decline in disparate impact doctrine and courts' hesitation to read disparate treatment doctrine as embracing implicit or subconscious bias); see also Gerardo R. López, *The (Racially Neutral) Politics of Education: A Critical Race Theory Perspective*, 39 *EDUC. ADMIN. Q.* 68, 82 (2003) (“Although this type of blatant racism certainly does occur, such a belief incorrectly assumes that it is only found at this surface level and does not penetrate our institutions, organizations, or ways of thinking.”).

³⁶¹ Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331, 1341-42 (1987-1988).

The emphasis on single-axis identity categories in antidiscrimination law³⁶² raises another potential harm in the legalization of movement goals: marginalizing intersectionality. Although those who have multiple subordinated identities experience discrimination differently than those who have a single subordinated identity, antidiscrimination law provides few opportunities for claims based on the combination of more than one protected identity category.³⁶³ Very few courts have acknowledged intersectional discrimination³⁶⁴ and instead typically address intersectional claims in the alternative.³⁶⁵ Courts' requirement of a comparator group in discrimination claims further complicates effective intersectional claims-making.³⁶⁶ It is unsurprising, then, that civil rights advocacy tends to reflect the law's single-axis paradigm.³⁶⁷ The legalization of movement goals around antidiscrimination litigation may accordingly facilitate the marginalization of movement goals focused on

³⁶² Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 58-64 (David Kairys ed., 1990) [hereinafter *Demarginalizing the Intersection of Race and Sex*].

³⁶³ See Suzanne B. Goldberg, *Intersectionality in Theory and Practice*, in *INTERSECTIONALITY AND BEYOND: LAW, POWER AND THE POLITICS OF LOCATION* 132 (Emily Grabham et al. eds., 2008) [hereinafter *Intersectionality in Theory and Practice*] (“While few courts have rejected these claims outright, there has been almost no success in having courts embrace the full nuance or complexity of identity.”).

³⁶⁴ Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 362, at 361. Courts have also dealt poorly with the intersection of gender and sexual identity. See Kramer, *supra* note 133, at 50 (“[I]t is often hard for courts to manage a gender stereotyping claim when it is brought by a lesbian or gay plaintiff.”). Because “sex,” but not sexual orientation, is a protected classification under Title VII, courts are forced to grapple with the problem of parsing claims involving both forms of discrimination. Suspicious that lesbians and gay men will “bootstrap” legal protection for sexual orientation discrimination through meretricious gender discrimination claims, courts often dismiss claims in which gender and sexual orientation discrimination intersect.

³⁶⁵ Caldwell, *supra* note 133, at 365-67.

³⁶⁶ Suzanne B. Goldberg, *Discrimination by Comparison*, 120 *YALE L.J.* 728, 764-65 (2011).

³⁶⁷ Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 *UCLA L. REV.* 1467, 1469 (2000) (showing how “black antiracism and white gay and lesbian civil rights advocacy continues to reflect essentialized notions of black and gay identity” by making claims that assume a single-axis notion of discrimination as based on sexuality or race rather than their combination); see Goldberg, *Intersectionality in Theory and Practice*, *supra* note 363, at 132 (“Antidiscrimination law itself has a single-identity focus. . . . It would be logical, then, for organizations concerned with securing identity-based rights to respond to these categories and focus their resources on one identity feature or another.”).

intersectional subordination and crosscutting, multi-issue goals.³⁶⁸ In the LGBT movement's case, this might help explain why issues like "support for working families, ending violence against women, prison reform, poverty, and redistribution — all once critical parts of our LGBT liberation movement's agenda have disappeared in the national LGBT movement discourse."³⁶⁹

In summary, the elevation of litigation priorities on a movement's agenda may circumscribe the movement's goals, but the potential for litigation to do so depends on the approach movement lawyers take — what doctrine they target, and how instrumentally focused they are on law reform goals. In movements that use impact litigation focused on antidiscrimination law, there lies the danger that legalizing the agenda could marginalize a movement's structural demands and attempts to address multiple dimensions of subordination. These goals are arguably more transformative than goals that resonate with the existing antidiscrimination paradigm, in that they target particularly intractable inequalities, which are given scant public attention and often go undetected and unchallenged. Because there is no surer way to diminish the possibilities for far-reaching reform than to undercut efforts to achieve it, the reorientation of movement activists around a more conservative set of legal priorities can work to undermine a movement's potential to produce transformative change.

CONCLUSION

The original empirical research presented in this Article suggests that litigation strategies in the LGBT movement have become the most visible and stable forms of LGBT activism and that the organizations that use litigation have become independent, agenda-setting movement leaders. With the media as its megaphone, and the stable organizational support behind it, litigation appears to have been privileged vis-à-vis other tactics for social change, drawing protest groups away from more radical priorities for cultural transformation and toward the legal reform goals articulated through movement litigation. In short, the substantive issues being litigated become the default agenda of the whole LGBT movement, radical and state-oriented factions alike.

³⁶⁸ See Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 362, at 362-63 ("This focus on the most privileged group members marginalizes those who are multiply-burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination.").

³⁶⁹ URVASHI VAID, *IRRESISTIBLE REVOLUTION: CONFRONTING RACE, CLASS AND THE ASSUMPTIONS OF LGBT POLITICS* 41 (2013).

The primary contribution of this Article has been to introduce a set of systemic, unintentional mechanisms, outside the strategic choices made by lawyers in the attorney-client relationship, which may privilege legal frameworks for imagining inequality and advancing social change in a social movement's political agenda. In the case of the LGBT movement (and perhaps other contemporary equality movements that target antidiscrimination law), this privileging of legal frameworks for change may have diminished the more expansive visions of social change espoused by the movement's more radical factions. The LGBT movement has come to be defined by legal reform goals based on sexual and gender identity, marginalizing many of the broader priorities espoused by queer activists (e.g., sexual liberation, challenging the patriarchal nuclear family, support for working families, poverty, redistribution).³⁷⁰ The marginalization of those queer movement priorities appears to have occurred through institutional mechanisms similar to those identified by previous antidiscrimination scholarship;³⁷¹ instead of being intentionally cut out from the broader movement agenda, queer priorities may have instead been diminished by a set of unintentional, systemic processes — arising from factors like journalistic practices, interactions among movement organizations, and protest planning routines — which may elevate social movement litigation and the dominant, legalized views of inequality that it typically promotes.

Though the processes that legalize movement agendas operate beyond individual attorneys' control, attorneys can limit the potential that litigation strategies would generate the movement-dominating effects I have identified. First, attorneys must develop litigation strategies that are not narrowly focused on formal legal outcomes. Litigation need not privilege law reform goals to effectuate social change; there is plentiful legal scholarship laying out the practical steps lawyers can take to infuse litigation with extralegal goals, such as client empowerment³⁷² or community need.³⁷³ One can similarly imagine litigation strategies designed to publicize the demands of a movement's protest-based activists³⁷⁴ (which may otherwise be

³⁷⁰ See *id.*

³⁷¹ See generally Albiston, *supra* note 36 (discussing the way institutions reinforce historical social practices of marginalizing women in the workforce).

³⁷² See generally GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992) (outlining various ways lawyers can work with clients to help and encourage them to engage in problem-solving).

³⁷³ See Carpenter, *supra* note 246, at 19-20.

³⁷⁴ See, e.g., NeJaime, *Winning Through Losing*, *supra* note 100, at 979 (discussing

excluded from mainstream discourse³⁷⁵). This would require attorneys to move beyond traditional assessments of a case's value for its "winnability" and take cases with low chances of success.³⁷⁶

A related recommendation is that attorneys articulate legal claims that challenge, rather than reinforce, problematic official interpretations of law. In the antidiscrimination context, this would mean pushing forward claims of intersectional or structural subordination.³⁷⁷ Again, this would require attorneys to face the possibility that their arguments, potentially even their cases, might fail. Yet persistent advocacy to reframe particularly problematic assumptions in law serves important purposes beyond law reform; not only can it teach judges alternative legal interpretations (which may gain traction in judicial opinions³⁷⁸), but it can also leverage the bully pulpit of movement litigation to promote the broader goals espoused by diverse movement activists operating outside the courtroom.

how the religious right provides a counterintuitive example of how a movement can use litigation to publicize radical demands). Nejaime has shown how one conservative group "put religious principles above legal rules" in their litigation strategy. *Id.* The litigators would bring cases challenging the teaching of evolution in public schools — an issue clearly likely to lose in court — in order to attract media attention and publicize the issue. *Id.* at 977-79.

³⁷⁵ Ferree, *supra* note 117, at 306, 336, 339.

³⁷⁶ See Arkles et al., *supra* note 61, at 615 ("A classic example of the complex role of empowerment within the legal agenda setting is the question of whether to take cases that have low chances of success. The traditional approach would suggest not taking the case, or settling for limited outcomes that may not meet the client's expectations. However, when our goals shift to empowerment, our strategies change as well.")

³⁷⁷ See Goldberg, *Intersectionality in Theory and Practice*, *supra* note 363, at 124, 145-46 (arguing that attorneys "press[] courts to understand the analytic error in treating identity categories as independent of one another" in "brief after brief"; this would "go a long way toward pushing back against and perhaps even redirecting judicial orientation").

³⁷⁸ Elizabeth Holzer, *Borrowing from the Women's Movement "For Reasons of Public Security": A Study of Social Movement Outcomes and Judicial Activism in the European Union*, 13 MOBILIZATION: INT'L Q. 25, 26, 28-29 (2008).