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Beyond litigation: Policy work within cause lawyering organizations

David L. Trowbridge

Middle Tennessee State University, Murfreesboro, Tennessee, USA

Correspondence
David L. Trowbridge, Middle Tennessee State University Box 29, Murfreesboro, TN 37132, USA
Email: david.trowbridge@mtsu.edu

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Abstract
This article investigates why cause lawyering organizations choose policy work and how policy agendas are set. Interviews and documents from eight legal organizations in the LGBTQ movement reveal that policy work expands the scope of conflict, giving organizations not only more opportunities to act, but potentially providing greater autonomy to lawyers by allowing them to build their own opportunities. Furthermore, policy agendas are not simply tied to litigation and resources. Organizations balance perceptions of opportunity and need with resource availability. These perceptions are often informed by collaborations with state and local organizations, facilitating communication between groups, organizers, and activists at different vantage points. Thus, the nature of a legal organization's multidimensional strategy, which expands opportunities to reach their goals, may be shaping what those goals are. These findings contribute to our understanding of cause lawyering tactics and agendas.

INTRODUCTION

Cause lawyering and legal mobilization scholars have long engaged with the question of when cause lawyers litigate. Some have connected the choice to the presence of legal opportunity structures (Andersen, 2006; Ellmann, 1998). Others have explored the relationships with the broader social movement (Sarat & Scheingold, 2006), and the attitudes of the public, news media, and activist sector (Arrington, 2014; Barclay & Chomsky, 2014). There is also the matter of lawyers being bound by ethical and professional constraints when dealing with litigation.

Scholarship has also demonstrated that cause lawyers are doing more than litigation. They are actively participating in policy work such as lobbying, bill writing, and advising rule making (Aron, 1989; McCann & Silverstein, 1998; Ziv, 2001). From 1983 to 1984, three-quarters of cause lawyering organizations (hereafter legal organizations) engaged in nonlitigious activities, including legislative work (Aron, 1989, p. 32). Nearly four-fifths of those organizations lobbied Congress and/or state legislatures. More recently, LGBTQ legal organizations have pursued legislative strategies (Andersen, 2006; Stoddard, 1997; Zuber, 2017) alongside litigation and public education (Cummings & NeJaime, 2010).

Given the presence of policy work in the repertoire of cause lawyers, and our interest in understanding when cause lawyers act, this article asks: *why* do legal organizations choose policy work,

and *how* are their policy agendas set? Is the deployment of policy work simply tied to litigation and judicial strategies? How does an alternative venue to courts effect the scope of the issues organizations work on?

As a case study, I examined impact/reform groups and direct legal service providers that advocate on behalf of LGBTQ clients and interests. The issues of agendas and tactics, especially as they pertain to representation and client selection, is salient within the LGBTQ movement (Spade & Willse, 2013). Lawyers in the movement have been particularly scrutinized for how they select issues for litigation (Carpenter, 2014). Thus, the issues of when policy tactics are utilized by lawyers bears significance to the question of what cause lawyers do to and for movements (Sarat & Scheingold, 2006, p. 12).

Following explanations of the methodology and a review of policy work in the cause lawyering literature, the article is broken into three remaining sections. First, *why* policy work? As one interviewee put it, if you want to make real change on certain issues "you may have to work on policy rather than litigation" (Buseck, 2016). Issues that are not ripe for litigation might be addressed through policy and vice-versa, at the local, state, and federal level. A new tactic with new venues also expands the terrain to work on different issues, possibly moving lawyers between operating in legal opportunity structures to political structures, as others have observed (Hilson, 2002; Vanhala, 2012). This gives organizations freedom of movement and autonomy to pick their battles. Increasing policy work may result in a feedback effect, as interviewees noted that the increased presence of favorable legislation gave them greater opportunities to push policy and regulatory tactics. This suggests we need to look more closely at how political and legal opportunities interact, and how those who can utilize both structures may have tactical advantages over other movements or movement organizations.

These observations support other accounts of cause lawyering that show lawyers recognize limits to litigation and that lawyers are determined to use a repertoire of tools to bridge the gap between litigious success and realized rights (Cummings & NeJaime, 2010; McCann & Silverstein, 1998). Finally, as I will discuss in the third section, this also means that cause lawyers are potentially constructing their own windows of opportunity by moving from tactic to tactic and venue to venue.

The second section answers the closely related question of *how/when* organizations decide to deploy policy tactics. According to Zuber (2017, pp. 14–16), much of the legal opportunity scholarship focuses on the federal level and national politics, at the expense of missing opportunities that our system of federalism provides. Likewise, I find that policy agendas are often the result of collaboration with federal, state, and local levels organizations, creating spaces where movement lawyers can hear from a broad swath of their target constituency. This, among other factors, informs organizations about both community need and opportunity. Perceptions of need and opportunity were continually cited as key elements to determining when policy work is deployed. Additionally, resource availability is an important consideration that sometimes restrict policy work.

The third section explores how policy work by legal organizations intertwines political opportunities (Kingdon, 1984; McAdam, 1982) and legal opportunities (Andersen, 2006; Hilson, 2002; Tarn, 2010; Wilson, 2017). Observations show that the effect of this convergence might be greater autonomy for organizations because it allows them to build their own opportunities (Vanhala, 2012). This is demonstrated below through a case study of NCLR's work combating conversion therapy.

The findings in this study contribute to understanding of what "cause lawyers do *to* and *for* movements" (Sarat & Scheingold, 2006, p. 12) in three ways. First, the findings move us beyond litigation and interrogate the choices behind nonjudicial tactics. The choice to use or avoid policy work involves balancing a perception of opportunity, perception of need, and the availability of resources that together resemble theories of public agenda setting (Cohen et al., 1972; Kingdon, 1984). Quite often, lawyers *prefer* these nonlitigation tactics over litigation. The second lesson confirms what others have observed of cause lawyers collaborating with state and local groups (Levitsky, 2006; Zuber, 2017). Here, this relationship is credited with shaping policy agendas, which may bring some accountability to agenda setting processes. Finally, policy tactics may expand the scope of conflict and provide organizations more options, which in turn gives organizations autonomy to structure their own opportunities (Vanhala, 2012).

DATA COLLECTION AND ANALYSIS

I used a case study approach to answer these questions, focusing on legal organizations identifying with the LGBTQ movement.[1] By focusing on a single case, researchers can identify complex relationships which is especially useful at the theory-building and exploratory stages where multiple causal influences might be involved (Gerring, 2011; Seawright & Gerring, 2008).

Case selection in this study was conducted in two parts. First, in selecting the movement and second, in selecting the organizations.

I chose the LGBTQ movement because they have decades of experience in rights-based advocacy, the causes they advocate for are important and timely, and the legal organizations in the movement are representative of the broader nonprofit legal industry in other social movements including groups like the American Civil Liberties Union and NAACP Legal Defense and Education Fund. The legal sector within the LGBTQ movement also includes the different types of legal organizations (impact organization and direct legal service providers). This distinction between types of organizations is important. They differ in how they select cases and there is diversity in staff size and revenue among these organizations. Impact groups typically select cases based on their perceived potential to advance policy through courts. Compared to legal service providers, impact groups have more resources and their reach is regional or national. Providers typically take as many clients as their capacity allows provided clients meet need-based criteria. They are smaller operations with limited budgets. Given the mission and resource differences, there are differences in the type of nonlitigation work they conduct.

I contacted eight legal organizations within the movement that primarily focus on LGBTQ advocacy and whose mission is primarily legal advocacy. Together, these organizations accounted for a significant portion of the universe at the time the research was conducted. The eight legal organizations are listed in Table 1. I avoided referral services that match clients to lawyers because they do not tend to litigate themselves. From these eight organizations, I gathered organizational documents and/or conducted semi-structured interviews.

Organizational documents including annual reports and 990 IRS tax forms were collected using websites, GuideStar, archives, and office visits. Archive visits included the LGBT Community Center Archive in New York City, Yale University's Manuscripts & Archives, and one visit to the GLBT Historical Society Archive in San Francisco. Roughly, 400 documents were collected. Of those, I chose roughly 50 annual reports and newsletters by selecting one newsletter per year and each of the annual reports when available. These publications provide thorough accounts of the work organizations engage in. I looked for discussion of policy work and used the documents to corroborate interviews. Policy works includes lobbying, monitoring federal agencies, drafting legislation, advising

TABLE 1 Organizations

Name	Conducted interviews (# of) or examined material	Impact or DLSP
Equality Advocates Pennsylvania (EAP)	Both (4 interviewees)	DLSP
Free State Legal Project (FSLP)	Both (2)	DLSP/Impact
GLBTQ Legal Advocates and Defenders (GLAD)	Both (6)	Impact
Lambda Legal Defense and Education Fund (Lambda)	Both (10)	Impact
Mazzoni Center, Legal Services (Mazzoni)	Both (3)	DLSP
National Center for Lesbian Rights (NCLR)	Both (5)	Impact
Peter Cicchino Youth Project, Urban Justice Center (PCYP)	Interview only (1)	DLSP
Sylvia Rivera Law Project (SRLP)	Both (1)	DLSP
Transgender Law Center (TLC)	Interviews only (2)	Impact
Whitman-Walker, Legal Services (Whitman)	Interview only (1)	DLSP

lawmakers and bureaucrats on rule- making, and policy analysis (Aron, 1989, pp. 88–90; Chen & Cummings, 2012, pp. 259–260).

A selective snowball process was used to collect 37 semi-structured interviews with lawyers and staff, past and present. Interviews lasted between 45 min to over an hour. In selecting interviewees, I identified organizations and then sent emails to executive and legal directors. Through these interviews, I received permission to contact other staff and was given permission to use their names in contacting others outside the organization. I stopped requesting interviews once interviewees began suggesting the same people and when I had a diversity of position types (i.e., leadership, policy, education, and litigation-specific). With some organizations, due to availability or because the organization was small, I only interviewed one lawyer. I recorded interviews with permission from interviewees (both in-person and phone calls) and transcripts were made through a paid transcription service. Interviews were then coded in Atlas.ti to organize responses.

HOW POLICY WORK INFLUENCES AUTONOMY AND AGENDAS

Early scholarship on cause lawyering focused "much more on litigation than on legislation in relation to movements" (Gordon, 2006), with important exceptions (McCann, 1994). We see this in some of the field's canonical works (Rosenberg, 2008; Scheingold, 1974) and in literature reviews (McCann, 2006). Some scholars argued that we were unlikely to see lawyers engage in nonlitigation work (Komesar & Weisbrod, 1978; Rosenberg, 2005; Scheingold, 1974). But legal mobilization scholarship gave us a different way of conceptualizing 'legal tactics' and how the law could be invoked beyond the courtroom including policy tactics (Chua, 2019; McCann, 1994; McCann & Silverstein, 1998).

Chua (2019, p. 356) writes that legal mobilization could be "as simple as consulting a lawyer or even making a verbal appeal to the law to demand a particular behavior." But if policy work is part of legal mobilization, then why distinguish it as "policy work"? After all, policy work concerns many law-related activities. The answer is that there is analytical value in distinguishing types of tactics. Those like lobbying and bill writing involve different venues from litigation, and thus might present different opportunities and restraints, though they can still be claimed to be a part of a legal mobilization strategy writ large. As this project explores, the expanded repertoire into policy may also produce great accountability regarding agenda setting, and greater autonomy to cause lawyers regarding when they take action.

For example, some of the classic scholarship contends policy work is preferable because it is more durable and results in greater compliance than litigation (Handler, 1978; Rosenberg, 2008). Even when litigation has proven useful, that litigation "hinges on the presence of sympathetic judges in the court of ultimate authority" (Cummings, 2011, p. 1699). An advantage of legislative reform is that there is a greater opportunity to find allies. Reform is also won through a longer, deliberative process that may withstand counter mobilization better than court-generated reform.

Ziv (2001, p. 237) observed lawyers working on behalf of clients with disabilities, concluding that legislative-lawyering opened up cause lawyers to multiple roles: "partly a community organizer, a legal analyst, a drafter, a lobbyist, and a statesperson." Erskine and Marblestone (2006, p. 257) documented cause lawyers advocating for living wage ordinances (LWOs) and that "legislation, not litigation, was [their] primary legal tool." Flores and Barclay (2016) found that either legislation or the courts can help legitimate causes, including attitudes toward same-sex marriage.

Conversely, policy work has its own challenges, though these are quite like the drawbacks of litigation. These challenges include the potential for backlash, the availability of resources, and compromises on reform that are a result of collaboration with multiple stakeholders. Gordon (2006) found that legislative victories for the United Farm Workers were just as vulnerable to subversion as judicial victories. These kinds of victories were also vulnerable to backlash (Gordon, 2006, p. 277). Others have found that legislative victories can result in implementation problems including delays in compliance (Stewart, 1975).

All these features are perhaps why some have observed lawyers engaged in *multidimensional advocacy*, an approach to lawyering which utilizes litigation, policy, and public education in a variety of venues (Cummings & NeJaime, 2010). Former Lambda Legal executive director Thomas Stoddard argued that, compared to litigation, "legislative reform makes real change… more probable, since it is much more likely than other forms of lawmaking to engage the attention of the public" (Stoddard, 1997, p. 982). In studying the work of LGBTQ organizations (legal and nonlegal), of which Stoddard was a part of, Cummings and NeJaime (2010, p. 1312) found that "LGBT movement lawyers prioritized a nonlitigation strategy over litigation, and conceptualized litigation as a tactic that succeeds only when it works in conjunction with other techniques—specifically, legislative advocacy and public education." This concept demonstrates, as do the observations in the project below, that cause lawyers recognize limits to litigation and that nonlitigation tools are necessary to reach their desired goals (Barclay & Marshall, 2005; Jones, 2001; Marshall, 2006).

If we know that organizations are using these tactics, the question that arises is: when do they use them? Some of the literature on litigation tactics points to legal opportunity structures (hereafter LOS) (Andersen, 2006; Vanhala, 2012). But again, if cause lawyers are doing more than litigating, what might encourage and restrain their work in those other areas? Perhaps, as others have suggested, lawyers are moving between LOS and political opportunity structures (hereafter POS) (Hilson, 2002). Such movement might give organizations greater autonomy in deciding when it is going to pursue particular issues.

If the choices to deploy nonlitigation strategies are not bound by LOS, POS theory suggests organizations may act when they perceive (a) support of elite allies (politicians, organizations, businesses), (b) support or growing support of the public, (c) support of state-institutions, and (d) a weakening of opposition forces (McAdam, 1982; Tarrow, 1994). Public agenda setting theory likewise suggests that agendas resembles a garbage can model or a "confluence of streams" (Cohen et al., 1972; Kingdon, 1984). Several factors need to interact or intersect (with an element of chance) before an issue may climb the public agenda.

One could infer from both theories of opportunity structures that there is limited autonomy to when cause lawyers can take action. However, another vein of scholarship on LOS demonstrates that some cause lawyering activity is not always done in the presence of such structures (Tarn, 2010; Vanhala, 2018). Sometimes cause lawyers have to react to defend clients and movement interests, including against hostile regimes (Andrews & Jowers, 2018; Stone, 2012; van der Vet, 2018). Building on this theme, this project suggests that if organizations are able to engage in both political and legal opportunity structures, and even perhaps build their own opportunities, as Vanhala (2012) argued with regard to LOS, some cause lawyers might have greater autonomy than we have previously understood. However, this may depend on the type of cause lawyering organization, either impact/reform or direct legal service groups.

Finally, the use of multidimensional tactics complicates our understanding of agenda setting. Cause lawyers are critiqued for their prioritization of certain issues in the courtroom (Carpenter, 2014). Social movement organizations may be isolated from the community members they serve and value "elite" agendas over others (Arkles et al., 2010; Bell, 1976; Spade, 2015; Strolovitch, 2007). For example, some organizations may prioritize issues important to the middle-class over issues important to working-class people (Berry, 1999; Skocpol, 2004). This has occurred as organizations professionalized and moderated their goals (McAdam, 1982; Piven & Cloward, 1979). However, as explained above, cause lawyers are doing much more than litigating, which is quite often the tactic and venue these studies examine. So, how might the additional tactic of policy work effect the issues legal organizations are working on? As the observations below will demonstrate, policy work often entails collaboration with nonlegal groups at the local and state level. This means different voices and perspectives that may generate a level of institutionalized accountability into the organization's agenda.

WHY POLICY TACTICS?

Nonlitigation tactics have been a part of LGBTQ movement cause lawyering going back to the late 1970s and 1980s, but directors and staff were much more focused on litigation success as both a means and an end. The growth in policy work can be explained by lessons learned in early defeats, entrepreneurial staff, perceived changes to need, and greater opportunity with increasingly recognized rights.

Activists and movement leaders were disheartened by early court losses in Boutilier v. INS (1967), Doe v. Commonwealth's Attorney (1975), and Bowers v. Hardwick (1986) (Andersen, 2006; Stein, 2010; Stone, 2012; Zuber, 2017). While many considered the Constitution a refuge for LGB rights, these losses spurred a reconsideration of judicial tactics. State sodomy laws were being overturned legislatively as early as 1961 and through the 1990s. Beginning in the early 1970s, cities like New York, Minneapolis, and Portland created anti-discrimination ordinances for housing and employment. While federal courts seemed to close one opportunity, cause lawyers found other options with state and local policy (Andersen, 2006; Barclay, 2010; Zuber, 2017).

The shift toward policy work though was not all about hard lessons. Part of the shift related to perceived changes in the injuries, complaints, and harms experienced by the LGBTQ community, which I refer to hereafter as "community need." Andrew Park, founder and former executive director of Equality Advocates Pennsylvania (EAP), recalls that the organization began with little involvement in the state capital but over time, community leaders sought them out for help as legal experts (Park, 2016). For instance, EAP worked with the Philadelphia City Council around domestic partnership, coordinating and participating in grassroots lobbying and mobilization efforts. EAP continued to move away from its direct legal services as more lawyers became available to LGBTQ clients (Park, 2016; Sobel, 2016). Thus, as need shifted, EAP's work began to shift as well and the organization hired an executive director, Stacey Sobel, with a background in lobbying.[2]

Another factor, according to interviewees, was the increased legal recognition of LGBTQ people over the previous three decades. This meant more opportunity to interact with administrators and rulemaking. Kevin Cathcart, former executive director at Lambda Legal noted: "…the policy work has grown a lot in recent years. In part because it's opportunistic… there is work that we can do now around enforcement or regulations of things, that twenty years ago the agencies weren't there to work with us" (Cathcart, 2016).

Others point to changes as the local and state levels as encouraging more policy work. Scholars have noted developments around local city ordinances and state laws in the 1980s (Andersen, 2006; Stone, 2012; Zuber, 2017). Jennifer Pizer, the Law & Policy Director of Lambda, pointed to the work of Thomas Stoddard in the 1980s (Pizer, 2017). Not only was Stoddard coming to Lambda as an experienced legislative lawyer from the New York Civil Liberties Union, but Lambda was expanding its work into HIV/AIDS discrimination because of the significant need for anti- discrimination protections in employment, housing, and health care (Pizer, 2017). According to Pizer, policy advocacy grew into the 1990s, resulting in state level work that had "just enormous impact" on policy and lives (Pizer, 2017).

Part of that growth was from "internal advocacy" within the organization. Litigation was the main tool of the organization and the tactic that staff were trained and educated in. Yet some of the staff persuaded leadership that there was greater opportunity with policy due to receptive state legislatures, especially on the west coast. This speaks to Vanhala's (2018) observation of *strategy entrepreneurs*, who are lawyers in nonprofits that introduce new tactics, often litigation, into an organization's strategy. Here though, with organizations largely staffed by lawyers, some steered organizations away from litigation-centered strategies.

Answering "why policy" then is based on several factors related to improving the effect that the tactic might have on reaching organizational goals. As I explain in the next section, the "why" is also wrapped up in the "when" of policy deployment. That is, just as cause lawyers use policy work because it may generate further opportunities beyond litigation, when the tactic is used may be directly related to when those opportunities are perceived.

HOW AND WHEN LAWYERS DEPLOY POLICY

This section addresses when legal organizations use policy and how their policy agenda is shaped. I begin by answering whether policy is simply a tool to support litigation, or whether work in this area may be guided purely by perceived opportunities outside the courtroom. The rest of the section is divided between factors that encourage when policy work is deployed and factors that may restrict or discourage policy work.

When policy is independent of litigation

How closely policy work is done in coordination with litigation varies across organizations. One reason organizations may deploy policy work is to outright avoid litigation. When asked how policy agendas were set, Kate Kendell (former executive director of NLCR) answered that policy work focuses on the programmatic issues of the organization (e.g., family, youth, elder people, asylum seekers) but also "what [they] can pursue that avoids having to litigate, because litigation is always a blunt instrument and it's not very nuanced" (Kendell, 2016). She continued: "if you get the federal government to make statements that govern all private schools that [receive] federal funding, or governs public schools which [receive] federal funding, you don't have to litigate in every single state" (Kendell, 2016). This belief and others like it are a rejection of early claims that lawyers will favor litigation over other tactics (Bell, 1976; Handler, 1978; Komesar & Weisbrod, 1978).

Among the impact organizations, there is some separation between policy-centric lawyers and litigation-centric lawyers. When asked who sets the policy agenda, whether it is the litigation team or the policy team, Pizer of Lambda responded, "it is the policy team" (Pizer) and Julie Gonen (Policy Director of NCLR) commented that the policy team "work[s] pretty autonomously" (Gonen, 2017).

Policy decisions are often made independently of litigation, and sometimes done to avoid it. However, legal teams are consulted to ensure consistency and to seek advice. Within direct legal services, litigation staff and the policy staff may be the same. With often two or three lawyers, there are not the resources to create distinct teams. According to R. Barrett Marshall (staff attorney at Mazzoni Legal Services) and Amy Nelson (legal director at Whitman Walker), much of their policy work is determined from legal case work. This does not mean that policy choices are only influenced by ongoing litigation, but rather that the harms lawyers see in cases encourages alternative policy routes.

However, some interviewees carefully noted there is not always a clear line between lawyers working on policy and those working on litigation. Moreover, these teams often need to interact to ensure cohesive strategies. Shannon Minter, NCLR's Legal Director, explained that there is an "unbelievable" amount of communication between himself and the policy team, including "dozens of email chains, [and] two-to-three conference calls a week" (Minter, 2016). Gonen agreed, noting she often works with Minter whether it's about endorsing legislation or signing onto letters (Gonen, 2017). Pizer gave an example from Lambda:

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

Even some of the direct legal service providers, which are differently situated with resources and missions, see advantages to policy work related to their litigation goals. Patrick Paschall of Free State Legal explained: "we require both an emphasis on direct legal services and an emphasis on impact litigation on the litigation side and these can't be done effectively without policy advocates also pushing in the legislatures and in the regulatory policy spheres" (Paschall & DePalma, 2016).

Without data, it is difficult to say exactly how often litigation choices are affected by policy or vice versa. To explain this "synergy between litigation work" and "the public policy strategy" Jennifer Pizer of Lambda told the story of a 2003 same-sex adoption case.[3] The narrative demonstrates that lawyers think about what tools are most likely to maximize their potential for victory. What victory means is not just a legal win, but the human impact as well, demonstrating a grassroots lawyering quality of these elite impact organizations (Hilbink, 2006).

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

Immediately there was a legislative response. Assemblywomen Carole Migden and Sheila Kuehl of the California state legislature brought forth a legislative proposal to make it explicit that same-sex couples could adopt without severing the rights of the initial parent, in essence making second parent adoption legal. According to Pizer, "there was very good reason to think it would probably pass" (Pizer, 2017). However, Pizer along with lawyers at NCLR thought the legislation should wait.

The reason was that lawyers at both organizations were concerned about letting a dangerous court precedent stand. While legislation would certainly mean an immediate remedy for couples going forward, those thousands of previous adoptions would be at risk "because we had this court of appeals decision casting serious doubt on their judgments" (Pizer, 2017). Furthermore, other states had similar laws to California's and their courts had been reading them in the same way California had (Pizer, 2017). Thus, letting the ruling stand as precedent could endanger many adoptions across the country.

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

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

How perceptions of need and opportunity shape policy agendas

Pizer's description of the adoption experience also presents two significant factors regarding when policy is deployed: the perception of need and perception of opportunity. Some interviewees report, as we would expect, that they consider community need in setting their policy agendas. But for impact organizations, what kinds of policy issues are pursued is often a matter of balancing that perception of need with opportunities. Gonen explained:

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

Interviewees who spoke about policy agendas noted that there was increasing work around receptive agencies and new executive (presidential or gubernatorial) administrations. Recognizing again the importance of federalism, Lambda and NCLR worked in California for years to pass bills with a receptive state legislature. However, it was not until Gray Davis became governor and began signing bills that Lambda increased their state level policy work in California (Pizer, 2017). Thus, these organizations invest more in policy work when there is a perception of an opportunity to win.

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

Sometimes, what issues get prioritized is serendipity and about finding those moment of opportunity, reflecting theories in public agenda setting (Kingdon, 1984). Pizer explained:

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

Of course, it is not all just waiting around for the next opportunity. Staffers working in the policy arena are constantly trying to carve out new paths for their goals. Reminiscent of the confluence of streams theory, Gonen explained NCLR's deeper move into policy work: "we didn't necessarily want to just wait until there was a confluence where we had to file a lawsuit… sometimes it's better to be proactive and try to influence policy upfront" (Gonen, 2017). Thus, organizations are looking to both take advantage of and structure opportunities themselves. This expands on theories about the intertwinement between POS and LOS (Hilson, 2002), as well as the argument that some movement activists may be able to construct their own LOS (Vanhala, 2012). Here, moving into the policy realm in addition to litigation may give cause lawyers the ability to construct opportunities more broadly because they are operating in an expanded terrain.

The other end of this balancing act is perception of need. Cathcart of Lambda summarized the role as: "program priorities [are] based in part about what people are calling us about. It's also based in part what we hear from people on the streets" (Cathcart, 2016). Based on interviews, there are three sites where community need is evaluated: call centers, outreach work, and collaboration with state and local organizations.

Call centers were the most frequently cited answer to my question: how do organizations determine community need? During weekly meetings, rank and file staff hear about trends which often solicit ideas and comments (Wong, 2016). These numbers may translate into action because from them organizations "can at least come to the conclusion that there are a lot of people with [a] problem" (Carpenter, 2016). For example, EPA started a youth-based project that was "based on the number of people who call[ed] us with school bullying problems and with harassment or discriminatory treatment in schools" (Carpenter, 2016).

However, some found a problem with solely relying on intakes (Buseck, 2016; Cathcart, 2016). Suzanne Goldberg, a staff attorney for Lambda Legal in the 1990s, noted that while intakes were always important, they "did not drive the decision-making." Instead, staff participated with the community and went to conferences "where you can get a feel for what issues were pressing" (Goldberg, 2016). In other words, outreach work, typically part of public education strategies (Trowbridge, 2019), is also important to determining need. One example is NCLR's Rural Pride Campaign. Gonen

explained that the intent of Rural Pride was to provide education for people who did not have access to informational resources and as a "listening tour" to hear about what issues mattered to attendees (Gonen, 2017). GLAD executive director Janson Wu explained that information like this, "the kind of information you get from the community, is particularly critical" (Wu, 2017).

Again, one of the elements for determining need is collaboration with state and local groups. The policy agendas of legal organizations in this study are influenced by collaborations with other organizations. Those collaborations can move issues into action. This is significant given literature that suggests legal organizations working with local groups may give direction but are not likely to take direction themselves from these same groups (Levitsky, 2006).

In this study, some lawyers argue that the relationship between legal organizations and nonlegal groups is not unidirectional. From research to bill drafting, lawyers say they are in constant communication with other organizations and interviewees felt there was often a give-and-take. It is important to emphasize that this is the perspective of lawyers, not the organizations they work with.

Gonen of NCLR believes that "the policy work that happens is almost entirely or maybe even entirely is in coalition with other organizations… you just don't do policy work on your own." (Gonen, 2017). Kors of NCLR added: "There is a weekly call on LGBT issues happening in the states with the national groups and the Equality Federation and others" (Kors, 2016). Pizer of Lambda reported that a "collaborative team" worked together on a nondiscrimination bill in Pennsylvania. This team consisted of a lawyer from the ACLU, a lawyer from the Human Rights Campaign, and a lawyer from the National Center for Transgender Equality (Pizer, 2017).

With federalism in mind, collaboration goes beyond national lawyering groups. As Zuber has observed (2017), lawyers often work closely with state and local movement groups, especially when federal windows close. Some interviewees feel this is important because state groups have the expertise and knowledge about on-the-ground situations. Kors notes the influence is "sometimes litigation groups, sometimes the more established political groups. But often it really is from the grassroots up. Often the strategy is from the political and legal groups, but I think the issues often get pushed up through the grassroots" (Kors, 2016). Pizer recalled that when she returned to Lambda, she did so "in order to set up a policy program that was more formalized and specifically dedicated to helping the states" (Pizer, 2017). Working with local groups also helps create legitimacy around the lawyer's involvement. As Cathcart put it: "it's important politically to have people on the ground who are part of the local or state legal communities because it sends a certain message that is not just 'oh yea, Lambda Legal came from New York to do this'" (Cathcart, 2016).

The exception to these sites of determining need is direct legal service providers. For providers like Whitman-Walker and Mazzoni, policy work and much of their conception of need spring from what they see from their clients (Nelson, 2016; Marshall, 2016). Marshall of Mazzoni remarked: "our largest policy projects at this point all started out as individual cases. Someone had a problem and needed help… I think there is a kind of purity there that is really meaningful and that matters" (Marshall, 2016). In this regard, the nature of client selection and purpose—focusing on individual needs over policy impact—shapes who comes to their door and what they see. These are also smaller operations, with less resources, and focused on particular issues like healthcare.

There is much more to unpack in how organizations determine need and whether these methods result in action. However, for the purposes of this project, it is enough to say that community need is *perceived* by staff to have influence on policy agendas and that perception of need is coming from different spaces, though not definitively from spaces representative of the target community and/or most marginalized (Arkles et al., 2010; Carpenter, 2014).

Using policy in response to threats

The literature suggests that activists and cause lawyers alike will have to make tactical and agenda choices around legal threats (legislation, referendums, court decisions). However, this phenomenon

did not come up in interviews regarding policy work. Likewise, neither did the important of agency monitoring and ensuring compliance. The simplest answer to why these issues did not come up is the timing of the interviews. Most of the interviews took place in 2016 and 2017, just as LGBTQ legal organizations were leaving a more receptive political environment at the federal level. The feedback regarding opportunities suggests that more receptive administrations (state or federal) will lead to more work. Thus, it is possible that in reflecting on more recent activity, opportunity rather than "defense" was more on the mind of staff. It would be interesting to see how policy work changes from friendly administration to hostile administration, though interviews suggest that the policy work would simply become more grounded in state and local work.

When lawyers avoid policy work

Responding to threats raises another important aspect to policy work: when do legal organizations avoid it? One reason was just alluded to. That is, legal organizations may avoid policy work when there is not the perception of receptive or allied actors in the target policy venue. This does not necessarily mean that cause lawyers will avoid policy altogether. If the cause lawyering activity is broad enough—such as the work of the large impact legal organizations in this study—they simply might move from one level (federal or state) to another level (federal or state). But without someone to work with on bill drafting, training, or rule-making, policy work may be a futile effort and organizations may wait for changes to the administration. Other significant factors include perceptions of need and opportunity, as well as limited resources.

At least one organization in this study did not utilize most kinds of policy work discussed here. Lee Strock, executive director of the Peter Cicchino Youth Project (PCYP), part of the Urban Justice Center in New York City, described an organization focused on litigation and direct legal services. By the latter, Strock meant that lawyers act as advocates on behalf of clients, often homeless LGBTQ youth, in matters involving safe shelter access, health care access, and assistance with immigration documents. Strock commented: "I would say that 90 to 95% of our work is the direct provision of legal services so that's [policy] not really the focus of what we do. We don't have a lobbyist. We don't have a communications person. We're not in the position that some place like Lambda Legal is to do big impact litigation or policy work" (Strock, 2016).[4]

Part of the reason to avoid litigation is about perception of need. Some direct legal service providers argue that they are fulfilling a need by doing direct services that is not met by large impact litigation cases. They are taking on people who need help today, not three to 7 years after a case has reached the Supreme Court. This is not to say that these lawyers do not believe there is a need for impact litigation. A few stated clearly that there needs to be a balance between both strategies. They agreed that both are part of achieving change in the same ecosystem and their particular role as service providers is one part of that balanced approach.

The other reason is limited sources. Indeed, the literature suggests we should expect agendas of legal organizations to be guided by resources (Komesar & Weisbrod, 1978). However, findings in this project suggest resources are restrictive but not determinative of issue prioritization. In other words, some resources are often a necessary condition to commit to work in an area, but not sufficient.

Putting aside lobbying, where records show little investment and where there are state restrictions, interviews suggested that policy work may take upwards of 30% of an organization's budget. But this is not always enough to meet demand. "In an ideal world" Patrick Paschall of Free State Legal commented, "we'd have an army of lobbyists explain the real issues that LGBTQ people experience so that legislators understand that we're not talking about academic issues here" (Paschall & DePalma, 2016). Instead, organizations are sometimes restricted in what policy work they can do based on their organizational capacity. That does not mean that organizations will cease to pursue a given issue without staff. Based on their own agenda, legal organizations will determine where

resources go, including the expertise of people they hire. Thus, resources (pecuniary and skilled labor) may be constrictive but not necessarily determinative of policy agendas.

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

Suzanne Sobel of EAP, acknowledged that "money did effect some of it [the agenda]" (Sobel, 2016). According to Sobel:

> Getting grants for legal work, getting grants for fellowships were just easier. It was easier to fund the legal work. Some people only wanted to give to legal… then there were other people who just really desperately wanted to have a junior HRC [Human Rights Campaign] and only cared about the legislation and being flashy. (Sobel, 2016)

The added challenge, in looking for pecuniary resources for policy work specifically, is finding grants that allow organizations to do work they want to do. Sobel: "part of what happens with a nonprofit, depending on your percentage of grant [and] individual donation dollars, is your grant money has to be spent on whatever it is you asked for … that has a big impact on what work you do" (Sobel, 2016). Another long-time lawyer within the movement noted anonymously, when asked about how organizations decide between litigation and policy:

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

The point is that "you could work on policy" but while "it is true litigation can take a while", organizations can end up "with a lot of wins" with litigation as opposed to investing significant resources in legislation that is unlikely to succeed. This, and other comments directly below, speak to the debate over policy reform versus court-centric strategies, and they suggest litigation and policy have similar disadvantages (Gordon, 2006).

Multi-state litigation strategies could also have enormous costs. Pizer explained that "we could be litigating, sometimes for a decade, to address a problem. And we might win… we do have a very good track record… but that's a decade of intensive work… that's an enormous effort that has uncertainty built into it" (Pizer, 2017). However, both Pizer of Lambda and Buseck of GLAD pointed out that policy work can also drain resources. Buseck: "litigation can get a victory quicker than policy work (it could take years) and it's harder to fundraise off of years of work with no victory… to invest six or seven years and significant resources in a bill that you know that is going to take six or seven years and because it is kind of controversial you have a good sense that the legislature doesn't really want it" (Buseck, 2016).

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

To summarize, a lack of pecuniary resources can influence policy agendas within these legal organizations, especially direct service providers. Less tangible wins, like those that might come with a judicial victory, might result in less grant funding. However, only the direct service providers

mentioned issues with grants. This makes sense given the reliance these organizations have on grant funding as opposed to larger organizations that are sustained by greater member donations. Yet, resources are not solely determinative of agendas. Organizations, after all, will determine where resources go including what kind of people they hire (i.e., expertise in policy), based on their own agenda. Thus, we might view resources as constraining but not determinative of agendas. There are other restrictive factors as well: shifts in perceptions of need and opportunity, and how receptive policy venues are to proposals.

CAN MULTIDIMENSIONAL ADVOCACY INCREASE LAWYER AUTONOMY?

Much of what has been discussed so far involves the concept of opportunities. First, that legal organizations believe that policy tactics alongside litigation expands the scope of conflict, giving them greater chances to succeed (i.e., "why" policy). Second, that perceived opportunities (perhaps like those described by LOS and POS theories) partially dictate when organizations utilize policy (i.e., "when" policy tactics are used). Engaging with these observations also reveals another important phenomenon: the construction of opportunities.

Scholars have demonstrated that social movement activists may be able to construct their own legal opportunities in court (Vanhala, 2012). Does this extend to cause lawyers using nonjudicial tactics? The literature suggests this is possible. We have observed, for instance, that political and legal opportunities may very well be intertwined (Hilson, 2002; Tarn, 2010; Wilson, 2017). We have also observed that a lack of perceived political opportunity may influence the adoption of litigation as a tactic in lieu of policy and other nonlitigation strategies (Hilson, 2002). Likewise, a lack of perceived legal opportunity might encourage protest tactics (Hilson, 2002).

The choice of tactics by cause lawyers in this study included a balancing act between perceptions of opportunities in different venues. This ability to choose venues through different tactics though have also enabled organizations to "build" their own windows of opportunity. Interviewees believed that they "need statutes and litigation to enforce laws" (Pizer, 2017) and "we need policy advocacy pushing while impact litigation is on-going" (Paschall & DePalma, 2016). Litigation can be used to "fill in the gaps" in the places where policy is not effective (Sakimura, 2016). Clear statutes "remove doubt" about the interpretation of law and "effective litigation" enforces those laws (Pizer, 2017). Public education can then be used to combat stereotypes in order shift support for legislation (Trowbridge, 2019) or to educate lawmakers and agency actors (Gonen, 2017). Some lawyers believe that policy, education, and litigation feed off each other and offer new opportunities when one window closes. One illustration of this multidimensional framework is NCLR's pursuit of ending conversion therapy. It contains many elements of the narratives above: multiple venues, foreclosed opportunities in one space but finding opportunities in another, working past resource constraints, collaborations, constructing a network of allies, using multidimensional tactics, and relying on a political environment shaped by marriage equality.

Getting on the agenda

Conversion therapy, also referred to as ex-gay therapy or sexual orientation change efforts, is the practice of trying to change a person's sexual orientation using a variety of psychology and/or spiritual techniques. There is no scientific evidence that such therapy works. The American Psychiatric Association opposes this practice (Commission on Psychotherapy by Psychiatrists, 2000), and several American and International medical professional associations consider it abusive (Daniel & Butkus, 2015). Youth are especially at risk of being caught in these practices because they typically do not have access to legal resources to defend themselves.

As interviewees recalled, barely anyone was working on the issue of conversion therapy in the late 1980s and early 1990s. Neither was there a perceived landscape of political or legal opportunity. Tucked into page three of NCLR's fall 1993 newsletter, a headline reads: "New Project Targets Psychiatric Abuse of Gay Youth" (NCLR Staff, 1993). The publication brought other important news: two new legal fellowships had been secured to fund attorneys, one of which would lead to the "Youth Project" though its official title was the "Institutionalized Lesbian and Gay Youth Project" (NCLR Staff, 1993). The project was funded by a fellowship from the National Association for Public Interest Law, known today as the Equal Justice Works (EJW) Foundation.

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

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

But Minter's introduction to this issue came before this appointment. In his last months working as a law clerk, NCLR received a call about a lesbian teenager who escaped from a psychiatric facility in West Jordan, Utah named Rivendell Psychiatric Center (Minter, 1994; Ocamb, 2012). Lyn Duff, a 15-year-old from San Diego, was confined for 6 months before escaping to San Francisco (Ocamb, 2012).[5] According to Minter, he was contacted by journalist Bruce Mirkin. Mirkin was approached by Duff and Mirkin in turn reached out to Minter, asking: "What could we do? Can you do something to help her?" (Minter, 2017). Minter was shocked, recalling: "'Oh my gosh' I was just a student" (Minter, 2017).

Minter then contacted an ACLU attorney working in Utah, Kate Kendell, who would later become executive director of NCLR. Kendell recalls:

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

Minter and the NCLR legal director immediately contacted the Legal Services for Children. Together they worked to get Duff out of the facility.[6] How did they get Lynn out? Was it through a case or public pressure? "Nope, it was a letter" said Kendell, "It was communication with the facility" (Kendell, 2017). Speaking about the tools available to them, Kendell explained:

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

It had been unclear to organizations and others in the LGBTQ community just how pervasive this practice was. Duff's experience sent Minter on a mission to find more young people trapped at

this facility and in others (Ocamb, 2012). Subsequently, Minter was offered the Equal Justice Fellowship to return to NCLR and continue this work.

Thus, recognition of serious harms perpetrated on LGBTQ youth catalyzed conversion therapy onto NCLR's agenda. Foundation or donor interests did not push this issue. Though funding from EJW was critical to bringing Minter aboard, NCLR and Minter sought out this funding and made the decision themselves to work on this issue.

Building a window

At this point, in the view of the cause lawyers, there were no visible paths to significant political and legal success. The legal environment was described by Minter as follows:

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

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

> What's your claim? You could make claims. You could do a 14th amendment claim, lack of equal protection. You could make some constitutional claims, but you wouldn't ultimately be successful because the answer the person brings is, 'Well, I'm not doing anything wrong…' (Kendell, 2017)

The lack of legal opportunities was tied up in the foreclosure of political opportunities. Both Minter and Kendell explained that at that time, and into the late 1990s, the public accepted the argument that sexual orientation can be changed. That was a major challenge in the social and political sphere. The other challenge was that "the LGBT community did not see this as a problem and did not believe it was widespread" (Kendell, 2017). "We recognized that we were in a climate" Kendell noted, "where not only was there not political support for banning or ending conversion therapy, but there was also a lot of ignorance in the community about the existence of conversion therapy" (Kendell, 2017).

In a conversation with Karen Ocamb of the Bilerico Project (an LGBTQ news and opinion blog), Minter laid out some of the challenges both legally and politically:

> "Trying to litigate this issue is really hard … They [young people] are usually not in any kind of position to bring a lawsuit. There's a very short statute of limitations, it's usually only one year… And they're often not in touch with us until after that. Some of them would be homeless and just call me occasionally but I had no way of really tracking them down enough to bring a lawsuit. They were just too transient.
>
> And we had a problem until recently: we couldn't get the mainstream mental health organizations to take strong positions on these practices. They were just going through their own internal process. Looking at this issue, there were still plenty of practitioners who were defending it" (Ocamb, 2012)

As a result, the first task of the Youth Project was to use advocacy work and education to alert the LGBTQ community to the threat of this practice and convince professional associations and

doctors to reject it. Minter's problem for years "was trying to get anyone to pay attention or care or even believe it was happening" (Minter, 2017). He spoke to people who worked at homeless shelters for LGBTQ youth and they would tell him "No, I don't think this happens" (Minter, 2017).

Slowly but surely, Minter and collaborators were able to turn the spotlight on this practice. They built a survivors' network, a toll-free hotline for youth to call, and conducted education efforts. For example, funded through a grant from the Ben and Jerry's Foundation, the Youth Project published a newsletter called "24:7: Notes from the Inside" which was a bi-monthly publication "by and for young people in psychiatric facilities and other group care settings" (Minter, 1994).

They also continually reached out to associations, talking to doctors, talking to public officials. But most of this work, as Kendell put it, was "behind the scenes" (Kendell, 2017). Minter met with federal Department of Health and Human Services representatives to draft guidelines for general and mental health care providers who work with lesbian and gay youth (Minter, 1995). Finally, in 1997 the American Psychological Association adopted a policy that discouraged these practices among its members and the next year, the American Psychiatric Association followed. Other organized medical and mental professionals soon fell in line.

Alongside these advocacy efforts, NCLR took on more individual cases like Duff's. Kendell recalls they "weren't pursuing specific funding" for this work (Kendell, 2017). Instead, they utilized general operating funding. They became involved in cases as they received calls (Kendell, 2017). While this resembles direct legal services, Minter did not see it as such. These cases were important individually *and* in making a broader influence in the legal system. When I noted to Minter: "This [the Duff case] does not sound like an impact litigation case", Minter replied:

> Well, I mean, yes and no. I'm very dubious about this distinction between impact litigation and direct services. I think it's often misleading. Sometimes people mean by impact litigation, appellate litigation that actually changes a legal rule or standard. It clearly wasn't that, but I also think trial court cases can have impact in other ways… That case has become the template for us for dealing with other subsequent situations, where over the years we've been able to help private attorneys in other similar cases to take a similar approach. It kind of did provide a template or a blueprint for that. That's another kind of broader impact. (Minter, 2017)

In sum, Minter and Kendell recognized a problem. There were not the necessary allies, laws, legal precedent, and other resources to make immediate change. There were no open windows of opportunity. They had to construct their own window. So, they began taking individual cases when they could but focused most of their energy into advocacy: building networks of allies among policy makers and professionals as well as increasing awareness in the LGBTQ community. The multidimensional nature of their tactics was bound up in their agenda setting. They believed in this cause and were not willing to let foreclosed opportunities in the typical lawyer-friendly venues stop them.

An opening in California

Through the 1990s and early 2000s NCLR continued to use education and professional advocacy tactics to build support and allies among professional agencies. Meanwhile, the marriage equality campaign supplied assistance with resources (pecuniary) and public attention to LGBTQ issues. Public attitudes, in eyes of these interviewees, shifted positively toward supporting LGBTQ people and in favor of expanding rights.

It was then, in the mid-2000s, that NCLR "recognized we're at that moment…to actually try to end this" (Kendell, 2017). In 2010, Kendell and others met for breakfast and began talking about what ideas they had. Some at the gathering pitched the idea of a legislative ban in California. They

also believed they could get the professional associations on board. Kendell recalls that this was "in the middle of the marriage conversation" and they calculated that the "visibility, the acceptance, the understanding of sexual orientation variance and spectrum" was on their side and California would be the be place to start (Kendell, 2017).

Around this time, Geoff Kors came to NCLR from Equality California (Equality CA). Equality CA (a policy advocacy organization) was working with legislators on a bill to end conversion therapy with NCLR's involvement. Together they "helped draft, co-sponsor, and push California's Senate Bill 1172" through the California state legislature (Kendell, 2012). The bill banned state-licensed therapists from practicing conversion therapy on minors (Kendell, 2012).

In that piece of legislation, NCLR and others "made a compromise" (Kendell, 2017). Kendell pointed out that the bill did not go as far as they would have liked (a complete ban on the practice regardless of age). Kors explained that part of the bill drafting process involved anticipating responses to the bill if it were to become law. Kors recalled that "a lot of the work was drafting it in a way that would withstand a First Amendment challenge" (Kors, 2016). Indeed, there was litigation brought by providers who practiced conversion therapy, which NCLR won.

Second, Kors noted that the law was drafted in a way "that would avoid the mental health community opposing it and actually supporting it" (Kors, 2016). He pointed out that restrictions on professional groups are often met with skepticism from those groups. Furthermore, lawyers felt they would need these professional groups in potential future litigation, to write amici in support of the law. Thus, work went into coalition building with mental health groups over drafting the legislation. In 2012, Governor Jerry Brown of California signed that bill into law, making California the first state to ban conversion therapy.

Creating #BornPerfect

Then, the momentum behind the cause intensified. Kendell: "Once we got a ban in California (and of course they challenged, and we defended it and we won), that was the moment where we thought, 'We could do this in other states'" (Kendell, 2017). It was the moment that NCLR had been building toward. "We didn't know the opportunity for a project [#BornPerfect] would emerge" Kendell noted, but they were "very opportunistic, so you do what you can, and then boom, all of a sudden something opens up and you [think] "Okay, now let's launch a project" (Kendell, 2017).

They conceived a three-pronged project. First, advance legislative bans on conversion therapy for minors across the states. Here, they worked closely with the policy-centric Equality CA on SB 1172 which became law in 2012. Kors, who worked for both organizations on this issue, recalls: "Equality California reached out to NCLR to work on the bill…There was a partnership on that bill going forward that was really close throughout that process" (Kors, 2016). Second, use litigation to sue practitioners either under consumer fraud or constitutional theories. Third, engage in public education targeted at parents. On this point Kendell noted:

> We wanted to change the Google search results. When you as a parent, five years ago, six years ago, entered conversion therapy, you would get pages of people who practice conversion therapy and you'd get NARTH [National Association for Research & Therapy of Homosexuality] … We wanted the first four pages of search results to be article after article about how dangerous and failed conversion therapy was… (Kendell, 2017)[7]

In the last few years, there has been tremendous success in ending conversion therapy. Immediately following California's legislative ban, New Jersey also banned the practice on minors (2013). Since then, similar bans have been erected in Washington D.C. (2014), Oregon (2014), Illinois (2015), Vermont (2016), Nevada (2017), New Mexico (2017), Rhode Island (2017), and Connecticut (2017). Thirty-four local ordinances banning the practice have also been created since 2015, the

same year that the White House and the U.S. Surgeon General issued statements opposing conversion therapy (NCLR Staff, 2017).

In this case study, lawyers seized a window of opportunity which they helped construct through the use of multiple tactics. First, through their advocacy and collaboration with professional organizations, they drafted a bill to win support in the legislature and to survive a judicial challenge. Second, they witnessed their work around marriage change the social and political landscape around LGBTQ issues. Combined with the network of allies they created around the conversion therapy cause, they chose that moment to push legislation. Then, once they saw they could win after California, they launched a broader campaign in other states. Today, NCLR continues to pursue a strategy of legislation and voter initiatives in states across the country. They also pursue litigation but largely in a defensive role, protecting their legislative achievements, as was the case in California and New Jersey.

CONCLUSION: AGENDAS, ACCOUNTABILITY, AND AUTONOMY

This article has described why cause lawyers use policy tactics and how policy agendas are determined. In doing so, it engages with the canonical question of "what do cause lawyers do *to* and *for* movements" (Sarat & Scheingold, 2006, p. 12)? The observations of LGBTQ cause lawyering organizations support the literature demonstrating that cause lawyers recognize limits to litigation and use nonlitigation tools as a way around those limitations. Furthermore, observations demonstrate that policy work is a significant part of a multidimensional strategy that expands the scope of conflict on which both organizations and movements can advance their goals (Cummings & NeJaime, 2010). Below, I discuss three other lessons that expand or refine our understanding of cause lawyering tactics and agenda setting.

The first lesson is that the choice to deploy or to avoid policy tactics is a balancing act between perceptions of opportunity, perceptions of need, and the availability of resources. This balancing act resembles theories of public agenda setting (Cohen et al., 1972; Kingdon, 1984). There is not just one element and quite often the decision to act is based on a confluence of factors. As Gonen of NCLR explained: "One of the things that's sort of nice about NCLR is that we don't have a rigid plan that says, 'in X time period we will work on these issues and only these issues and so you must adhere strictly to this plan" (Gonen, 2017). None of the organizations expressed such a rigid plan. However, while some lawyers prefer a legislative path to change over litigation because of durability, the route of policy reform may be just as difficult, if not more, than litigation. There are issues of backlash, resource allocation, and even the durability of rules due to agency capture. Thus, while a legislative change is a preferred goal, it is not always judged as the right pathway. These findings extend and refine our understanding of when cause lawyers act by moving beyond litigation (Arrington, 2014; Barclay & Chomsky, 2014) and into when they might act to utilize nonlitigation tactics (Hilson, 2002).

The second lesson relates to another factor of agenda setting: collaboration. It is not a surprise that cause lawyers collaborate and speak with state and local groups (Levitsky, 2006; Zuber, 2017), but it is significant that collaboration is often credited with shaping policy agendas, both when policy is deployed and on what issues. These collaborations on policy may also bring a degree of accountability to agenda setting within legal organizations. Staff hear from a range of voices including activists working at the grassroots level, state-focused lawyers and lobbyists, and bureaucrats. This broadens the possibility of what gets on an organization's radar. It also brings issues to the fore that are not ripe for litigation and vice-versa. This is not necessarily what we would expect given the literature on cause lawyering cooption of movement goals (Bell, 1976; Kessler, 1990), including by LGBTQ legal organizations (Carpenter, 2014; Leachman, 2014; Levitsky, 2006). But here, the very nature of a legal organization's multidimensional strategy, intended to bring in more opportunities to reach certain goals, may very well be shaping those very goals. The related implication is that

while this project did not specifically measure the degree of representation (i.e., how well organizations are listening to communities), we have learned that if scholars want to assess a cause lawyering organization's work as it relates to community need and representation, we need to look beyond litigation and the case docket.

The third lesson is that by using policy tactics to expand the scope of conflict and provide legal organizations more options, these organizations may be structuring their own opportunities. This lesson further develops what some have already observed regarding movement activists and LOS (Vanhala, 2012) and indicates that cause lawyers may gain autonomy by expanding their tactical repertoire, or in other words, shifting to multidimensional advocacy (Cummings & NeJaime, 2010). However, not every legal organization has the ability and resources to expand their tactics.

To that point, we should ask if the lessons on agendas, accountability, and autonomy are generalizable to all cause lawyers. For various reasons, the organizations here do not fit neatly into theorized cause lawyering-types (Hilbink, 2006; McEvoy, 2019). However, we can surmise that there may be distinctions between organizations that have different amounts of resources and staff. Legal organizations with more resources and staff will have a greater ability to do more than litigate. This maps onto the differences between impact/reform groups and direct legal service providers because they are differently situated in resources and staff. Thus, without policy work at their disposable, one might expect providers to have less autonomy. However, the mission of service providers focuses on the underserved and they are often working in conjunction with nonlegal groups as part of community service and education efforts. Moreover, some smaller providers are doing policy work.

It is also important to ask if these multidimensional tactics are working. While impact analysis is outside the scope of this study, this project does demonstrate that lawyers *believe* in policy work. They believe that policy in triangulation with litigation and education provides flexibility and opportunity to bridge the gap between litigious success and realized rights. However, there is an important limitation in relying purely on interviewees' beliefs because there is a potential disjuncture between what the lawyers *perceive* and what is actually taking place. Thus, legal organizations may be investing in a strategy that reinforces their own perception of what works. Anecdotally, looking at the many achievements over the last two decades expanding LGBTQ rights, there is plenty for these organizations to point to. That said, determining the direct causality between those achievements to the multidimensional advocacy of these specific organizations is challenging and beyond the scope of this study.

There are two final points worth exploring in the future. First, given the weight interviewees put on community need as a factor in agenda setting, we should explore the sites and pathways that organizations use to determine what community need is. We should not assume that the lawyers' sense of need, even after working with diverse groups, is the same sense that other organizations have. Second, there should be greater exploration of the mechanisms behind how LOS and POS interact, as well as how that interaction might provide cause lawyers the ability to construct their own opportunities. Doing so may reveal more of what cause lawyering can do for social movements, and potential pathways toward social change.

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ORCID

David L. Trowbridge https://orcid.org/0000-0003-2548-2002

ENDNOTES

[1] These organizations also often advocate for the protection and rights of people with HIV/AIDS.

[2] With less need for certain services, EAP may have adjusted their work to keep the organization open. Ultimately, EAP transferred their legal services to the Mazzoni Center and EAP became Equality Pennsylvania, a 501(c)(4) that focuses on policy. However, the two explanations are not mutually exclusive.

[3] The case was *Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003).

[4] The organization does some policy work. The difference is that PCYP is more focused on a client service orientation of policy work. For example, they interact with agencies in training, as they did with New York City's Administration for Children's Services on LGBTQ non-discrimination policies (Strock, 2016).

[5] Lyn was admitted into the facility by her family. Duff's treatment included "isolation rooms, powerful psychiatric drugs, behavior therapy that linked 'sex' with 'the pits of hell', and punishment that included scrubbing floors with a toothbrush" (NCLR Staff, 1993).

[6] NCLR and the Legal Services for Children, through a Superior Court ruling, were able to help Lyn start a new life with a lesbian couple in San Francisco who became Duff's legal guardian. See: Duff, Lyn. "I Was a Teenage Test Case." California Lawyer 16, no. 5 (May 2001): 46.

[7] The National Association for Research & Therapy of Homosexuality (NARTH) is a non-profit organization that advocates conversion therapy practices.

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AUTHOR BIOGRAPHY

David L. Trowbridge is an assistant professor of Political Science at Middle Tennessee State University where he teaches courses in American politics and legal studies. His research resides at the intersection of law and social movements, particularly in the area of cause lawyering. David received his doctorate in political science from the University at Albany, SUNY in 2018.

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