GETTING QUEER PRIORITIES STRAIGHT: HOW DIRECT LEGAL SERVICES CAN DEMOCRATIZE ISSUE PRIORITIZATION IN THE LGBT RIGHTS MOVEMENT

LEONORE F. CARPENTER*

INTRODUCTION

Why does the LGBT community fight over the litigation priorities set by impact litigation groups? Is there something about how those groups arrive at them that is fostering discontent? And if so, is there anything that LGBT impact litigation groups can do differently?

In the last two decades, there has been a remarkable shift in the United States, both in terms of popular attitudes toward lesbian, gay, bisexual and transgender (LGBT) individuals, and also in terms of the formal equality gains achieved by national LGBT-rights impact-litigation agencies. Those agencies have challenged and overturned once-common bans on sodomy, and have steadily chipped away at the once-universal failure of federal and states government to extend the right to marry to same-sex couples. In the process, the popular discourse on LGBT rights has seemed to shift away from a focus on marches, protests, the AIDS crisis, and visibility campaigns to successful impact cases like *Lawrence v. Texas*,[1] *Goodridge v. Department of Public Health*,[2] and most recently, *United States v. Windsor*.[3] It is not overstatement to suggest that impact litigators and the cases they bring have begun to be thought of less as a component of a movement, and more synonymous with the LGBT movement itself.[4]

An outside observer might expect that, with such forward progress, near-universal approval for high-profile LGBT-rights impact litigation would come from within the LGBT community. But while many in the community may be satisfied, there remains a stubborn and long-standing undercurrent of discord. LGBT activists from within and without the legal community have criticized both the methods by which LGBT impact litigators select issues to prioritize, and the priorities themselves. Critics have characterized impact litigators' prioritization methods as exclusionary and elitist, and the priorities themselves as assimilationist, retrogressive, and unresponsive to the needs of people of color, transgender people, and the poor.

This Article will attempt to connect the genesis of those critiques to the priority-setting

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*Assistant Professor of Law, Temple University Beasley School of Law. The author wishes to thank all participants in the 2011 Lavender Law Junior Scholars' Forum, as well as Jane Baron, Katie Eyer, Gwendolyn Leachman, and Doug NeJaime for invaluable comments on this piece. The author also wishes to thank Kae Greenberg, Eve Keller, and Joel Zelkowitz for excellent research assistance. The author also thanks her spouse, Tiffany Palmer, Esq., for reading and commenting on this piece, for tolerating the author during bouts of fretting, and for general fabulousness.

[1] 123 S.Ct. 2472 (2003).

[2] 798 N.E.2d 941 (Mass. 2003).

[3] 133 S.Ct. 2675 (2013).

[4] See the New York Times' profile of *Goodridge* lead counsel Mary Bonauto, in which the author asserts that Bonauto is, "some say . . . almost single-handedly responsible for the same-sex marriage cases now pending before the Supreme Court." Sheryl Gay Stolberg, *In Fight For Marriage Rights, 'She's Our Thurgood Marshall'*, N.Y. TIMES, Mar. 28, 2013, at A19.

methods of the large LGBT-rights impact litigation groups.[5] It will then discuss why LGBT impact litigators ought to give serious consideration to how to address these critiques, and will suggest that an answer may lie in the creation of more meaningful connections between impact litigation organizations and LGBT-focused direct legal service projects.

Part II of this Article introduces a helpful taxonomy of impact litigation decision-making models; this model was originally suggested by William Rubenstein in his 1997 article *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns.*[6] Rubenstein describes three models of decision-making: an "individualist" model (in which individual litigants' preferences drive litigation); an "expertise" model (in which impact litigators themselves determine the goals and/or the means of litigation); and a "democratic" model (in which marginalized groups collectively guide the decision-making process). Part II then demonstrates that the available evidence suggests that the process by which litigation priorities are set by LGBT impact groups relies heavily upon the individualist and expertise models, but does not systematically or transparently incorporate democratic decision-making processes into issue prioritization rubrics.[7]

Part III examines some of the most frequently articulated critiques of LGBT impact litigation efforts, and observes that many of these critiques are deeply connected to impact litigators' prioritization of certain legal issues over others. Those critiques of LGBT-rights litigators' priorities frequently fall into one of the following categories: 1) disagreement with the litigation priority itself (a "substantive" critique);[8] or 2) disagreement with the way in which members of the LGBT community who are not impact litigators are included in or excluded from the process of priority-setting (a "procedural" critique).[9]

This Article argues that both procedural and substantive critiques can be traced, at least in part, to perceptions about the goal-setting methodology of impact groups. On the procedural front, the lack of an evident conduit for community buy-in alienates many within the movement (even relatively empowered activists) and causes those people to feel sidelined or left out of the process, thus undermining political solidarity and discouraging a sense of universal ownership of the formal equality gains made in litigation campaigns.[10]

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[5] For the purposes of this Article, "large impact litigation groups" will refer specifically to the following organizations: the National Center for Lesbian Rights, Lambda Legal, Gay and Lesbian Advocates and Defenders, and the American Civil Liberties Union's LGBT Project.

[6] William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997).

[7] *See* Mary L. Bonauto, Goodridge *in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 21-23 (2005) (providing an example of the partially expertise-driven priority-setting mechanism used by impact agencies from an insider perspective); Gabriel Arkles, Pooja Gehi & Elana Redfield, *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. SOC. JUST. 579, 581-82 (2010) (describing the expertise-driven priority-setting mechanism from an outsider perspective); Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1309-10 (2010) (illustrating how sometimes, the expertise model gives way to an individualist model when individual plaintiffs choose to bring suits without regard for the orthodoxy of movement strategy).

[8] *See, e.g.*, Dean Spade & Craig Willse, *Freedom in a Regulatory State?:* Lawrence, *Marriage and Biopolitics*, 11 WIDENER L. REV. 309, 311 (2005) (arguing that the focus of the LGBT movement is too limited and "primarily benefits white and wealthy gay men and lesbians").

[9] *See, e.g.*, Arkles et al., *supra* note 7, at 583-84 (describing "lawyer-only spaces" that reinforce the idea that only the opinions of judges, legislators, and lawyers are important to consider in making legal decisions, and not the opinions of those who would be most affected by the issues).

[10] *See id.*; *see also* Sandra R. Levitsky, *To Lead with Law: Reassessing the Influence of Legal Advocacy*

Although the substantive critique is less obviously connected to impact litigators' prioritization processes than the procedural critique, this Article argues that substantive criticism of litigation priorities is also, at least partly, tied to lack of an evident democratic component in impact litigators' prioritization processes. Specifically, decision-making that is perceived as being grounded entirely on the preferences of individual litigants or small groups of expert attorneys reinforces a sense that the priority preferences of a small group of elite lawyers or determined litigants may appropriately dictate the direction of the entire movement. Where issue priorities are seen (accurately or inaccurately) as already based on individual politics, the debate on issue prioritization becomes fixed along ideological lines, with some community members arguing with others about whether a given litigation priority does or does not serve a given ideological goal.[11] The mechanism of issue selection used by LGBT rights litigators has, I believe, encouraged the persistence of such ideologically-driven debates about priority-setting that have, quite literally, continued without resolution for decades.[12]

This Part also addresses the question of why LGBT-rights litigators, given their successes, should worry about these critiques. Part III argues that if impact litigators fail to take seriously critiques about their priorities, they miss important strategic opportunities to curtail ideological infighting and strengthen movement solidarity.

Part IV suggests that strengthening the connections between large impact litigation groups and already-existing but little-known direct legal service programs targeting LGBT communities could help the movement construct a method for setting litigation priorities that would finally incorporate a transparently democratic component. The Article explains that LGBT-rights-focused direct service programs do exist and, unlike impact litigation programs, are part of a broader direct services culture that is committed to prioritizing issue areas based largely upon the collection and analysis of intake data and the redistribution of legal resources around identified areas of greatest need. Literature on direct legal services commonly focuses on priority-setting issues,[13] and the expectation among funders of direct legal service programs is often that those programs will use a transparent and need-based approach to priority-setting. Furthermore, funders of direct legal services programs routinely calculate outcomes based upon how many clients are successfully served in areas of identified greatest need. In sum, the entire enterprise of direct legal services is driven by the principle of finding the greatest area of unmet need and meeting that need as completely as possible.

Thus, a strengthened connection between LGBT impact litigators and their direct service counterparts could help to address the procedural critiques of the impact litigation prioritization process by providing an effective "voice" for the community, through the use of an intake system

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Organizations in Social Movements, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 145-63 (Austin Sarat & Stuart A. Scheingold eds., 2006).

[11] *See, e.g.*, Spade & Willse, *supra* note 8; *see also* Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle The Legal Structure of Gender in Every Marriage*,*"* 79 VA. L. REV. 1535 (1993) (describing how activists in the LGBT field vigorously argue with one another about whether marriage serves the goals of the LGBT movement).

[12] *See, e.g.*, Tom B. Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, Fall 1989, at 9; Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 9 (illustrating how the debate on whether marriage is an appropriate goal for the LGBT community has been ongoing since the 1980s).

[13] *Compare* Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients,* 67 FORDHAM L. REV. 2475, 2479 (1999) (addressing and answering the question of "who decides" the priorities in the poverty law setting), *with* Justine A. Dunlap, *I Don't Want to Play God – A Response to Professor Tremblay*, 67 FORDHAM L. REV. 2601, 2602 (1999) (laying out an argument against Professor Tremblay's answers to "who decides").

that does not solely screen for clean cases in a preselected issue area, but carefully considers how to help each person who calls, writes, or walks in for assistance, and prioritizes issues based on the number of people seeking help in a given area of law. The suggestion is relatively simple: direct legal service providers would agree to provide their aggregated data on need to LGBT impact litigators. Those litigators would in turn agree to devote a certain percentage of their time, money, and publicity to those identified areas of greatest need. Such a system would not require a vast undertaking. It would, however, help impact litigators move into closer alignment with the majoritarian ideal of Rubenstein's elusive democratic model of decision-making while generating priorities that reflect the pluralistic nature of LGBT reality.

In addition to providing a more democratic prioritization procedure, better connection between agencies employing a direct service model and those employing an impact model could also fundamentally reframe the debate regarding substantive issue selection. A move toward a prioritization scheme that centers around, or at least significantly incorporates, quantification of community need, diminishes the primacy of personal ideological considerations in issue selection. Thus, while debates will certainly persist over, for example, whether a marriage agenda is "too assimilationist," such debates might become more peripheral to the central business of the LGBT rights movement.

I. INDIVIDUALIST, EXPERTISE AND DEMOCRATIC MODELS FOR PRIORITY-SETTING IN THE LGBT CONTEXT

Before engaging in an exploration of how LGBT impact organizations prioritize issues, I consider it worthwhile to briefly explain what I mean by "issue prioritization," a seemingly simple concept but one that can actually be quite layered. The purpose of this explanation is not to create the foundation for any attempt to actually create an objective hierarchy of each organization's issue priorities. Instead, the following definition is offered merely to give the reader a general sense of what I mean when I say "issue priorities." For the purposes of this Article, "issue prioritization" will refer to the degree to which a particular legal issue (e.g., same-sex marriage, anti-discrimination litigation, parenting rights) is afforded *time*, *publicity* and *money* by a given impact organization.

If I were pressed to objectively determine what an impact agency's priorities were, I would first examine the structure of the organization itself to determine how much *time* the organization spends on a given legal issue. Is there an entire project devoted to that issue? Is there dedicated staff expected to work only on that issue? For example, as of this writing, Lambda Legal's website reveals that the agency currently houses a "Fair Courts Project," the purpose of which is to "provide[] tools and information to counter harmful attacks on the courts that threaten LGBT and HIV-related civil rights and jeopardize the ability of our courts to make decisions based on constitutional and legal principles—not politics or popular opinion."[14] Lambda has a dedicated staffer working on this project.[15] Thus, we might fairly say that based upon the metric of *time*, securing a fair court system is an issue priority of Lambda Legal.

One might also use *publicity* as a metric to determine impact litigation priorities, but one would have to be very careful in so doing. It would be all too easy to confuse the publicity

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[14] *Fair Courts Project*, LAMBDA LEGAL, http://www.lambdalegal.org/issues/fair-courts-project (last visited Feb. 1, 2014).

[15] *Staff*, LAMBDA LEGAL, http://www.lambdalegal.org/about-us/staff (last visited Feb. 1, 2014) ("Fair Courts Project Manager").

generated by a given piece of litigation with *self-generated* publicity. Impact organizations have as little control as the rest of us in shaping, moderating, or amplifying a story once it reaches either traditional or internet-based media. Thus, I would suggest that the fairest way to use publicity to measure an impact organization's prioritization of an issue would be to focus on self-generated publicity. One might measure the number of press releases put out by a given organization on a particular legal issue, or count the number of times a staffer agreed to be interviewed by news media about a given case.

Additionally, one could use *money* to measure prioritization if one could access information about what an organization receives donations for and what it spends its money on. Annual reports and tax information for impact litigation organizations are usually available online, but provide at best a general view of budgeting at the program or project level. If one could access sufficiently detailed financial information, such a metric would help to provide an overall picture of what specific issues receive the most money.

With this definition as a backdrop, we may ask ourselves – what makes an LGBT rights impact organization decide that any given legal issue is worth spending significant time, publicity, and money to address? In *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, William Rubenstein explores different paradigms for group decision-making in civil rights campaigns and considers how procedural and ethical rules might be modified to better accommodate certain types of group decision-making.[16] In so doing, Rubenstein creates a sort of taxonomy of group litigation decision-making methods that provides a useful grounding for my own examination of the ways in which LGBT impact litigators seem to make decisions regarding issue prioritization.[17]

Rubenstein identifies three specific models of decision-making across two dimensions: the dimension of litigation goals (the specific substantive issues that litigators wish to address) and the dimension of litigation means (the specific strategic choices made to achieve those goals).[18] I will focus on Rubenstein's analysis of "litigation goals," which most closely aligns to this Article's construction of "issue prioritization."

Rubenstein calls the first decision-making model the "individualist" model. Rubenstein's individualist model aligns with American law's conception of litigation as an expression of, and avenue for the vindication of, individual rights.[19] According to this model, each individual plaintiff has the unrestricted right to bring whatever cause of action he or she sees fit, and that plaintiff's attorney might justify the litigation, whatever its externalities, by asserting that a core value of the American legal system has been upheld by his or her representation.[20] The second such method, termed the "expertise" model by Rubenstein, cedes decision-making power to people with expertise in, either or both, the selection of goals or the means needed to achieve them.[21] Rubenstein acknowledges that the idea of privileging experts is considerably more foreign, and likely more problematic, in the selection of goals rather than means.[22]

Finally, the third such method, which Rubenstein calls the "democratic" model, values

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16 Rubenstein, *supra* note 6.

17 *Id.* at 1625-1626.

18 *Id.*

19 *Id.* at 1644.

20 *Id.* at 1651-1652.

21 *Id.* at 1662.

22 *Id.* at 1663-65.

group decision-making above the private autonomy of individual litigants.[23] It reimagines disagreement about priorities as "discourse" and seeks to engage all group members in hashing out the difficult questions of issue prioritization instead of simply steamrolling over disagreements with individual litigation.[24] The democratic model, as Rubenstein describes it, imagines decision-making taking place after a process of a "formal vote or according to a more informal democratic process."[25] Rubenstein also imagines an expansion of standing doctrine to entitle groups to bring suits in the interests of their members.[26]

Rubenstein's article uses this taxonomy in the context of considering how procedural rules might be set up to encourage more democratic forms of group decision-making. He uses the example of LGBT rights litigation but does so in the service of his broader point about the effects of procedural rules on group decisions. I will borrow these three models of decision-making for narrower purposes: to demonstrate that LGBT impact litigation agencies have no clear conduit for the democratic model of decision-making in the context of prioritizing certain issues over others, and to further consider how more effective connection to direct legal services might address this gap in the movement's strategic arsenal.

A. The Expertise Model of Decision-Making in LGBT Impact Litigation

As in other social justice movements, the expertise of lawyers has been given a position of special prominence in the LGBT rights movement and has contributed heavily to the shaping of litigation priorities within and across agencies. Although Rubenstein points out that accession to lawyer expertise is the norm in terms of making decisions about litigation strategy, one could argue that in the LGBT context, lawyer expertise also plays a large part in guiding the prioritization of certain issues over others.

Impact litigators in the LGBT context almost certainly do not develop litigation as vanity projects. Rather, they are informed by a wide variety of sources as to which general issues are most pressing; those sources include the voices of activists and anecdotal, individualized evidence of community need. However, the process by which this cacophony of voices is filtered and transformed into a litigation agenda is frequently almost entirely lawyer-driven. In her 2005 article, Goodridge *in Context*, Mary Bonauto, Civil Rights Project Director at Gay & Lesbian Advocates & Defenders (GLAD) and lead attorney in *Goodridge*, discusses the process undertaken by GLAD in deciding to fully commit to marriage equality as a litigation priority.[27] In so doing, she provides a rich and fascinating case study of a litigation campaign catalyzed by a broad combination of factors, including cultural shifts, politics, the expressed needs of certain individuals within the community, changes in the legal landscape, and events such as the AIDS crisis. It is clear, however, that although many factors led to *Goodridge*, it was ultimately the judgment of the GLAD lawyers themselves that led to two important decisions: 1) the decision regarding the triggering of marriage litigation; and 2) the rejection of civil unions as a goal. According to Bonauto:

At GLAD, we had assumed that some day we would have to litigate the denial of marriage. My own experience with GLAD's intake calls demonstrated over and over again that

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[23] *Id.* at 1654-56.

[24] *Id.*

[25] *Id.* at 1655.

[26] *Id.* at n. 147.

[27] Bonauto, *supra* note 7.

many of the people who called us with legal problems could trace their problems to nonrecognition of their relationships. I had turned down requests for representation in such cases several times. The real question was when would LGBT people denied marriage rights get a fair hearing in court, in the legislature, and in public opinion in Massachusetts.[28]

When discussing the decision of whether to advocate for civil unions, Bonauto adds that, "we [meaning the attorneys at GLAD] considered and rejected the idea of litigating for civil unions as opposed to marriage."[29]

Thus, Bonauto demonstrates the interplay between the community's expressed needs and the expertise of GLAD's lawyers. Community need as directly expressed to GLAD seems to have combined with a number of other cultural phenomena to create an awareness among GLAD's attorneys that a problem existed that could only be ameliorated through impact litigation. Ultimately, however, GLAD's expertise controlled two critical prioritization questions: the decision to elevate marriage to a top priority; and the question of whether the priority was to be marriage equality, as opposed to a different relationship recognition scheme.

The movement's reliance on lawyer expertise in setting litigation priorities is probably most clearly demonstrated through the existence and continued importance of the LGBT Civil Rights Litigators' Roundtable, a twice-yearly meeting of LGBT rights movement lawyers organized by the four major impact organizations. The purpose of the Roundtable, which first began meeting in the early 1980s, is to coordinate litigation campaigns around LGBT rights, and to collaborate with other LGBT impact litigators regarding litigation strategy and issue prioritization.[30] It is a critical mechanism for agenda-setting within the LGBT rights movement.

Nancy Polikoff describes the way in which the Roundtable facilitated the early decision to prioritize same-sex marriage. According to Polikoff:

> Roundtable participants were not satisfied with the rift represented by the [same-sex marriage] divide. They sought common ground in a position paper designed to capture both the importance of opening marriage to same sex couples and the need to value all families without carving out special status for married couples. Evan Wolfson, then a new Lambda Legal staff attorney, drafted a blueprint for a just policy, entitled Family Bill of Rights.[31]

Polikoff's description of that action demonstrates both the way in which the Roundtable serves as a vital idea exchange and the insular, lawyer-driven manner in which such idea exchanges take place in that space.

As I will describe *infra*, my own experiences as a participant in the Roundtable taught me that, to a degree greater than I had expected, some major issue prioritization decisions are made with very heavy reliance on Rubenstein's "expertise" model, both at individual impact litigation organizations and among the four major impact organizations. As I will relate, I also learned that the deference to expertise is sometimes further stratified, with impact litigators sometimes rejecting collaboration even when it originates with other so-called "expert" lawyers.

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[28] *Id.* at 21.

[29] *Id.* at 24.

[30] Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529, 535 (2009).

[31] *Id.* at 536.

B. The Individualist Model of Decision-Making in LGBT Impact Litigation

LGBT impact litigators surely sometimes exercise a great deal of control over the prioritization of certain legal issues over others. However, on many occasions these groups represent clients whose cases they neither constructed nor necessarily imagined even wanting to take. Sometimes these cases have already made their way through the trial process before the impact group agrees to join as counsel during the appeal, and sometimes the impact group agrees to take control of the case while it is still at the trial level. And in fact, impact organizations sometimes join cases reluctantly, only after it has become clear that the client intends to continue on with or without the impact group's involvement.

The Hawaii marriage litigation that culminated with the Hawaii Supreme Court's decision in *Baehr v. Lewin*[32] provides us with proof that the individualist model of decision-making has shaped the movement and generated consensus regarding issue prioritization since at least the early 1990s. Rubenstein recounts:

> The internal community debate [regarding whether marriage litigation should proceed] largely subsided after lesbians and gay men, without support from the legal experts, proceeded with their own legal actions. In late 1990, Craig Dean, a gay lawyer, filed his own case challenging the District of Columbia's marriage law on behalf of himself and his lover. In May 1991, three lesbian and gay male couples in Hawaii filed an action in Hawaii state court without the support of the ACLU; they were represented by a former staff attorney at the ACLU of Hawaii. After the cases were filed, the community legal organizations ultimately provided support for them, thus quelling the internal community drama.
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> [W]hat seems clear is that the legal capacity of any individual, or group of individuals, within the community to end the debate *about* litigation by resorting *to* litigation proved to be an important factor in concluding the community's marriage debate.[33]

The litigation to strike down California's Proposition 8 in federal court provides us with a much more current example of an individual, or in this case, a group of exceptionally well-heeled individuals, whose insistence upon an aggressive pro-marriage litigation strategy directly challenged the strategy of the four impact groups.[34] That case, which was recently decided by the United States Supreme Court in favor of invalidating Proposition 8, was initiated, over the objections of the impact groups, by a group of wealthy Californians who hired former Solicitor General Ted Olson and his *Bush v. Gore* opposing counsel David Boies to litigate the case.[35] The impact groups, effectively outgunned by Olson, Boies, and the wealthy litigation funders, were

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[32] 852 P.2d 44 (Haw. 1993).

[33] Rubenstein, *supra* note 6, at 1637-39.

[34] Hollingsworth v. Perry, 133 S.Ct. 2652 (2013).

[35] *See* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1299 (2010).

ultimately forced into the position of either lending their assistance to litigation many of their staff thought was a terrible idea, or risking being ignored entirely.[36] Faced with this dilemma, the impact groups lent support and expertise to the litigation.[37]

Even *Windsor*,[38] which was a centerpiece of the American Civil Liberty Union's (ACLU) litigation docket by the time it made it to the Supreme Court, did not have its genesis in an ACLU litigator's office. Instead, the case was formulated in consultation between plaintiff, Edith Windsor, and her private counsel, Roberta Kaplan of Paul, Weiss, Rifkind, Wharton & Garrison.[39] According to Windsor, when she first conceived of challenging the federal Defense of Marriage Act, she and her friends and supporters approached unnamed LGBT-rights organizations, but "were disappointed because the gay organizations we contacted said it was too soon for the movement."[40] Instead, she was given Kaplan's contact information, and Kaplan agreed to take the case, also bringing the ACLU on board as a result of her pre-existing connections to ACLU LGBT Rights Project litigators.[41]

The Hawaii, Proposition 8, and *Windsor* litigation all provide clear examples of the power of the individualist model of priority-setting. Sometimes, the LGBT impact litigation groups simply cannot control the actions of individual members of the LGBT community who wish to vindicate their rights in ways that impact litigators may initially consider unwise or unfeasible; however, in those instances, the litigation groups are generally forced to participate, since the alternative is to be left entirely out of litigation and have it proceed without the benefit of the groups' expertise.

C. The Democratic Model of Decision-Making in LGBT Impact Litigation

Rubenstein seems to consider the inclusion of democratic decision-making models in civil rights litigation as beneficial to social movements. The article observes:

> Democratic decisionmaking quickly cures the downsides of the individualist and expertise models; rather than one, indeed any, individual or elite group of experts deciding for the entire group when and how to proceed in the litigation arena, democracy ensures that the litigations undertaken for groups have the assent of those whose rights are at issue. Those individuals governed by the outcome of the case each possess an opportunity to participate in the

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[36] *Id.* at 1299-00.

[37] *Id.* Interestingly, although the case was conceived of as a direct attack on the constitutionality of state same-sex marriage bans, its ultimate outcome did not create the kind of decisive, national resolution of the same-sex marriage question that so much time, expense, and political capital had been spent to produce. Rather, the Supreme Court in *Hollingsworth v. Perry* resolved the matter by finding that the proponents of Proposition 8, who had been allowed to intervene as defendants at the trial level, did not possess the requisite standing to appeal the trial court's invalidation of Prop 8 when the State of California declined to do so. 133 S.Ct. 2652 (2013). Thus, the suit ultimately created a rather strange result with quite circumscribed utility.

[38] United States v. Windsor, 133 S.Ct. 2675 (2013).

[39] Profile for Roberta A. Kaplan, http://www.paulweiss.com/professionals/partners-and-counsel/roberta-a-kaplan.aspx (last visited Feb. 1, 2014).

[40] Mark Hamblett, Windsor*'s Lawyer Saw DOMA Challenge as a "Simple Case,"* N.Y. L.J., June 27, 2013, at 2.

[41] *Id.*

> decisionmaking that sets the community's goals. Litigants representing groups thereby have a stronger claim to legitimacy.[42]

And yet, the article struggles with the concept, both in terms of locating real examples of democratic litigation decision-making, and in terms of suggesting workable ways to include the democratic model in an imagined future.

As examples of the democratic model in action, Rubenstein offers two anecdotes, neither of which seem to precisely align with the model that he envisions. First, Rubenstein recounts the efforts made by LGBT rights litigators (particularly Lambda Legal and the ACLU) in the late 1980s and early 1990s to obtain some sort of community consensus on the question of whether marriage ought to be a primary litigation goal of the LGBT rights movement.[43] Specifically, in 1990 the ACLU's Hawaii affiliate attempted to gauge whether marriage was actually what the community wanted by sending out a letter to its constituents, asking what they thought of the matter – an action that invited the ire of those who believed that individual rights ought never be subject to popular opinion.[44] Next, Rubenstein directs the reader's attention to the now-iconic 1989 debate between Paula Ettelbrick (then Lambda's Legal Director) and Tom Stoddard (then Lambda's Executive Director); he casts their debate (discussed further *infra*) as a quasi-democratic issue prioritization attempt, suggesting that the disagreement's public nature was meant to somehow bring "the community" into the debate and to obtain resolution as to whether marriage was a substantive goal worth fighting for.[45]

Rubenstein considers how future impact litigators could better incorporate democratic values into their litigation prioritization schemes. He imagines an attempt to take the pulse of the non-legal LGBT community by putting priorities up to a vote, somewhat along the same lines as the ACLU's attempt to poll its members in Hawaii.[46] Under such a "voting" scheme, Rubenstein suggests the community itself would struggle with, and ultimately resolve, the question of issue prioritization, and impact litigators would agree to be bound by those decisions.[47]

Rubenstein himself identifies that such a proposition carries with it obvious practical problems due to the mind-boggling difficulty inherent in determining who would actually get to vote.[48] In the LGBT context, the questions are numerous and obvious: Who is "gay enough" to be a voting member? How do you reach those people even if you know who "those people" are? How many gay people does it take to reach a quorum (never mind screw in a light bulb)?[49]

Douglas NeJaime notes a different but equally troublesome problem with attempting to organize priorities around a democratic process that relies on polling, voting, or some variant

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[42] Rubenstein, *supra* note 6, at 1655.

[43] *Id.* at 1635-37.

[44] *Id.* at 1637.

[45] *Id.* at 1635-37.

[46] *Id.* at 1637.

[47] *Id.* at 1655-56.

[48] *Id.* at 1657 n.156.

[49] Derrick Bell noted that the NAACP struggled with the same dilemma while charting its course through enforcement of *Brown v. Board of Education*'s desegregation mandate; in a letter to Bell, NAACP General Counsel Nathaniel Jones asserted that, "It would be absurd to expect that each and every black person should be polled before a lawsuit is filed, or a plan of desegregation is proposed." Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 492, n. 64 (1976).

thereof.[50] NeJaime observes that communities exist (such as men who have sex with men but do not claim a gay identity) who may have legal needs closely aligned with the priorities of the LGBT rights movement, but who would never publicly participate in the kinds of priority-setting exercises Rubenstein seems to contemplate.[51] NeJaime, in short, seems to worry that movement toward a pure majoritarian model of issue prioritization does no better a job than the current system of contemplating the legal needs of the entirety of the community. Rubenstein's piece suggests some procedural workarounds via class action litigation, and a suggestion for a "community derivative suit,"[52] but never really seems to get to a practicable way to effectively weave a "democratic" principle into the fabric of impact litigation.

The question is begged by Rubenstein's article: have the impact organizations come up with a functional way to work democratic principles into their issue prioritization methods? If we are looking for democracy, we might expect to find it in the conduits that the impact groups use to communicate directly with their constituents. It is certainly possible that these groups are listening to their constituencies through phone hotlines and Internet-based communications and prioritizing issues based on what they hear. However, when we examine what the impact groups themselves *say* about the purpose of this kind of constituent communication method, we hear a more complicated story.

All four major LGBT impact organizations employ the device of some kind of telephone or internet-based communications center that allows members of the public to contact the agency with questions, requests for information, or requests for legal assistance. It is apparent that, at least for some of the impact groups, these requests for assistance are aggregated into data regarding areas of greatest community concern. However, it is very difficult to ascertain the precise role that either the individual communications or the aggregated data play in setting litigation priorities. Below, I describe the mechanisms that each impact agency uses to communicate with people in need, and will document what the agencies *publicly* assert about the purpose of those communication mechanisms.[53]

Lambda Legal's "Help Desk" incorporates the use of a toll-free telephone hotline, online fillable forms, and traditional mail.[54] According to Lambda's website,

> Lambda Legal's Help Desk provides information and assistance regarding discrimination related to sexual orientation, gender identity and expression, and HIV status.
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> . . .
>
> Lambda Legal selects cases that will have the greatest impact in protecting and advancing the rights of LGBT people and those with HIV. While we are not

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[50] Douglas NeJaime, *Marriage, Cruising and Life In Between: Clarifying Organizational Positionalities in Pursuit of Polyvocal Gay-Based Advocacy*, 38 HARV. C.R.-C.L. L. REV. 511, 520 (2003).

[51] *Id.*

[52] Rubenstein, *supra* note 6, at 1669-70.

[53] I concentrate here on publicly available information as opposed to "insider" knowledge that could only be ascertained by accessing internal agency documents, or speaking directly with knowledgeable staff. I do so because this article posits that in part, it is *non-transparency* in movement priority setting, which engenders critique. Information that is available only to experts or those who are expert-adjacent does not, in my view, contribute to transparency.

[54] *Lambda Legal Help Desk*, LAMBDA LEGAL, http://www.lambdalegal.org/help (last visited Feb. 1, 2014).

> able to take every case, the Help Desk will discuss your legal issue with you, and will provide useful information. This assistance may include contact information for an attorney in your area or for other organizations that may directly assist you.[55]

In 2011, Lambda Legal reported that it received 7,238 calls to its Help Desk.[56] Lambda's Annual Report breaks down the calls by issue area; the supplied graphic indicates that relationship recognition and employment matters were the most frequently asked-about areas – 17% of calls to its Help Desk related to "relationships," 16% were general questions regarding LGBT rights, and 15% related to the workplace.[57]

In *To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements*, Sandra Levitsky explores the relationship between grassroots LGBT-rights organizations in Chicago and Lambda and the ACLU, relying heavily on in-person interviews with current and former staff of the organizations to try to determine how, and how well, those organizations interface with one another.[58] In so doing, Levitsky is told (it is unclear by whom) that "one important gauge of community concerns at Lambda . . . is the number of intake calls they receive on any given issue . . . . [A]ttorneys use those calls to identify the recurring problems in the community."[59] Thus, Lambda's Help Desk may serve four primary purposes: 1) to act as a referral and information clearinghouse; 2) to help Lambda's litigators screen for appropriate plaintiffs in already-planned impact cases; 3) to locate cases that, while not previously planned, fit within the already-determined priorities of the organization; and possibly 4) (according to Levitsky's interviewee), to determine what the most pressing needs of the community are.

The National Center for Lesbian Rights (NCLR) likewise hosts a "Helpline," which, according to its 2012 Annual Report (the most recent available as of this writing), "fields thousands of phone calls each year."[60] NCLR's website states:

> NCLR provides this Legal Information Helpline as a service to all members of the LGBT community and our allies. The Legal Information Helpline provides basic information about laws that affect LGBT people, including family law, and about resources available for people who are facing discrimination or other civil rights issues. The Legal Information Helpline is not a client intake line. We do not provide any legal advice, legal representation or take on cases through the Legal Information Helpline.[61]

As with Lambda Legal, NCLR's Annual Report breaks down calls to its Helpline by

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[55] *Id.*

[56] LAMBDA LEGAL, MAKING THE CASE FOR EQUALITY, LAMBDA LEGAL ANNUAL REPORT 16 (2011), *available at* http://lambdalegal.org/sites/default/files/publications/downloads/ar_2011_making-the-case-for-equality_0.pdf.

[57] *Id.*

[58] Levitsky, *supra* note 10.

[59] *Id.* at 154.

[60] NAT'L CTR. FOR LESBIAN RIGHTS, 2012 ANNUAL REPORT 3 (2012), http://www.nclrights.org/wp-content/uploads/2013/09/NCLR_2012_Annual_Report.pdf.

[61] NAT'L CTR. FOR LESBIAN RIGHTS, http://www.nclrights.dreamhosters.com/legal-help-resources/what-nclrs-legal-information-helpline-can-do (last visited Feb. 1, 2014).

issue area; the supplied graphic indicates family law and immigration matters were the most frequently asked-about areas – 47% of calls to its Helpline related to "Family Law," 19% were questions related to "Immigration and Asylum," and 9% related to a combination of "Employment and Housing."[62] Again, as with Lambda Legal, it is not clear from its website what NCLR does with these statistics or whether, or to what degree, they inform NCLR's agenda. Rather, it seems as though NLCR's Helpline is considered an informational service to the LGBT community, and neither a screening tool for impact cases nor a means for selecting priorities.

GLAD also hosts a legal rights resource called "GLAD Answers," whereby correspondents from New England can contact GLAD via phone, online chat, or an online fillable form for "information, assistance, and referrals."[63] GLAD's website suggests that the purpose of "GLAD Answers" is to provide legal information and attorney and other resource referrals.[64] GLAD does not seem to offer statistics on the areas of assistance that are most frequently called about, nor does it make a public statement regarding the degree to which aggregated statistics from "GLAD Answers" are used to set litigation priorities.

As a program of a much larger organization, the ACLU's LGBT Rights Project's method of communicating with its constituents is understandably a bit more layered than the other LGBT impact groups. The ACLU has an office in every state, as well as Puerto Rico.[65] Thus, a person seeking assistance with an LGBT-related legal problem might well choose to contact a regional affiliate rather than the LGBT Rights Project, which is located at the ACLU's headquarters in New York.[66] Should the person seeking assistance choose to contact the LGBT Rights Project, she or he could fill out an online form specifically designed to capture complaints regarding LGBT and HIV-related discrimination.[67] Probably as a result of this multi-layered intake system, there is no single, readily-available set of aggregated statistics that breaks down exactly how many people contact the ACLU for assistance with LGBT-related matters.

The ACLU's website makes a couple of statements regarding the connection between requests for assistance and prioritization. Its LGBT discrimination complaint form states:

> If you've been mistreated or harassed based on sexual orientation, gender identity, or HIV status, the ACLU wants to hear about it—we might be able to help. Please tell us by filling out the form below. We get a lot of requests for help, so please bear with us as we try to get to your request. We'll let you know whether we can give you legal assistance. If we can't, we'll try to find another organization that may be better equipped to help.[68]

Some ACLU affiliates' websites contain additional information that further illuminates the organization's reasons for taking or not taking a case. For example, the ACLU's Northern California affiliate website contains the following information:

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[62] NAT'L CTR. FOR LESBIAN RIGHTS, *supra* note 60, at 3.

[63] *Know Your Rights*, GAY & LESBIAN ADVOCATES & DEFENDERS, http://www.glad.org/rights (last visited Feb. 1, 2014).

[64] *Id.*

[65] *Local ACLU Affiliates*, ACLU, http://www.aclu.org/affiliates (last visited Feb. 1, 2014).

[66] *Id.*

[67] *Report LGBT/HIV Discrimination*, ACLU, https://www.aclu.org/secure/report-lgbthiv-discrimination (last visited Feb. 1, 2014).

[68] *Id.*

> Each complaint is reviewed by staff to determine whether it constitutes a civil liberties problem the ACLU-NC may be able to help. There are many factors that go into determining whether we may be of assistance at any given time, including availability of staff, resources and timing.
>
> . . .
>
> When we review a case, we are looking not only for legal merit, but for other things that would make a case a worthwhile investment for our limited resources. We do not take cases that are primarily factual disputes, have little bearing on the rights of others, or do not involve a civil rights or civil liberties issue. Our failure to take a case does not necessarily mean we think it lacks legal merit.[69]

The Northern California ACLU affiliate also answers the question, "How does the ACLU decide to offer assistance to those requesting it?" as follows:

> Generally, we can offer assistance to only a small fraction of those who request it. Our affiliate receives hundreds of requests for assistance per year and, unfortunately, we do not have the resources available to assist everyone. We look for situations taking place in Northern California involving civil rights and civil liberties issues, in which our assistance may have a strong chance of making positive changes for a potentially significant number of people with the same, or similar, issue.[70]

From the information above, one can deduce that the ACLU's telephone and e-mail communications with the public are meant as more than simply a conduit for legal information and advice. Instead, ACLU affiliates and the LGBT Rights Project seem to be inviting the public to seek out the organization's help in redressing instances in which LGBT people are treated differently under the law. However, as the above wording demonstrates, there is a significant level of opacity to the ACLU's decision-making process with regard to issue selection. Specifically, it is unclear how the ACLU defines "civil rights and civil liberties issues" or how many people must be affected by an issue to cause the ACLU to determine that litigation might affect "a significant number of people." It is also made clear that the ACLU (or its local affiliate, in the above example) does not have the capacity to accept every meritorious claim – but the reasons for selecting one meritorious, potentially impactful, civil-liberties based claim while rejecting another are not explicated.

Thus, all four major LGBT impact organizations offer the public some variety of conduit to present a legal problem. Two of these conduits (specifically NCLR's and GLAD's) explicitly present themselves as providing legal information and acting as a referral clearinghouse. The other two (Lambda's and the ACLU's) seem to be designed at least in part as a screening tool for potential impact cases. However, neither the ACLU nor Lambda makes it clear what the precise relationship is between the number of people complaining about a given legal issue and the time, money, and publicity expended upon that issue. For all four agencies, the connection between

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69 *Get Help*, ACLU, https://www.aclunc.org/our-work/get-help (last visited Feb. 1, 2014).

70 *Id.*

individual contacts or aggregated statistics indicating community need and the agency's issue prioritization scheme is opaque. Perhaps there is a connection, but the extent of that connection is not made manifest. In sum, the mechanism through which impact organizations set litigation priorities is complex and often not transparent. Clearly, internal debate and a reliance on lawyer expertise drives a good deal of the decision-making process, but it is unclear to what degree such internal debate dominates the process at any given time. Demands by individual litigants or small groups of litigants also influence these agencies, but again, it is difficult to ascertain how much.

The role of individual contact and aggregated data regarding the frequency of telephone or e-mailed complaints about a given issue *may* play a role. However, it is unclear to what extent the impact organizations rely upon that data for agenda-setting purposes, and none of the impact groups make any public commitment to do so. It is also unclear whether such data, even if relied upon, would be particularly useful since, given the organizations' own explanations of what their communication conduits are *for*, community members might well think that they should not call unless they already think they have an impact-worthy case or need simple information. Thus, the priority-setting schemes of LGBT impact litigators seem skewed toward reliance on lawyer expertise, with individual demand acting as a sort of counterweight. A democratic component, workable examples of which seemed largely to elude Rubenstein, still appears either absent or far less influential than the other two components.

It is worth noting that the lack of a robust and demonstrable democratic component in impact litigation issue prioritization is apparently not unique to the LGBT rights context. In recent years, Deborah Rhode conducted a survey of the "nation's largest and well-recognized public interest legal organizations,"[71] which included public interest organizations working across a variety of issue areas.[72] The survey asked, among other things, about the nature of the priority-setting process at each agency.[73] Rhode concluded:

> For the vast majority of organizations, the priority-setting process was largely staff-driven. All but 5% of organizations reported extensive . . . or moderate . . . involvement of their legal staff. Most leaders felt that lawyers deserved deference because they had the greatest expertise and closest contact with the problems that needed addressing. Only about a quarter of organizations made extensive (14%) or moderate (14%) efforts to include other stakeholders (such as members, clients, or community groups) in the priority-setting process.[74]

Thus, reliance on an individualist or an expertise model of issue prioritization appears to be the current norm among impact litigators across issue areas.

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[71] Deborah Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2029 (2008).

[72] *Id.* at 2082.

[73] *Id.*

[74] *Id.* at 2050-51. Rhode goes further to suggest that at least some organizations may make conscious choices to exclude community input from decision-making about priorities. She notes that, "No organization with members reported that they had significant influence over priorities. 'It sounds harsh to say that they're not involved,' acknowledged one leader, 'but their unhappiness with a particular position doesn't affect our decision.' Members might occasionally be convened or consulted on surveys, but their views were not binding. They voted with their feet (and dollars); they didn't determine policy." *Id.* at 2051.

II. HOW LGBT LITIGATORS' PRIORITY-SETTING METHODS ENGENDER CRITIQUE

It is fair to ask why, if we are interested in LGBT rights, we ought to be concerned about how impact litigators go about picking the issues that they prioritize. After all, they are privately funded entities, and they have achieved enormous gains for LGBT people in relatively short time. Is some reliance on democratic principles in issue prioritization even necessary? Who, if anyone, does it hurt if these entities are simply not democratic in nature?

The next sections of this Article will demonstrate how LGBT impact organizations' lack of a visible democratic issue prioritization scheme actually does matter. I argue that this absence is connected to two different types of critiques of the LGBT movement that come from LGBT activists themselves. This Article will then argue that these critiques are not simply signs of "healthy debate" or "differences of opinion." Instead, they amount to real, longstanding and pervasive questions about the very legitimacy of the LGBT rights movement as it has been constructed over the last several decades. If we want a movement that all or most of its constituents can feel that they own, I will argue that we need to consider some adjustments to the ways in which litigators make decisions about whose legal issues will have primacy.

As noted earlier, I conceptualize the critiques of LGBT rights issue prioritization as divided roughly into "procedural" critiques and "substantive" critiques. The "procedural" critique calls into question the means by which priorities are constituted while the "substantive" critique questions the priorities themselves. The first form of critique that I will discuss, the "procedural" critique, is the most clearly connected to the lack of a democratic component in issue prioritization. A procedural critique frontally challenges the mechanism by which issues are elevated to priorities within the movement. Procedurally-based critiques of the LGBT movement's issue prioritization schemes tend to come from activists who favor a more collectivist, and less hierarchical, approach to decision-making. They call into question the impact groups' apparent reliance on Rubenstein's "expertise" and "individualist" models of goal selection.

Levitsky's study of Chicago grassroots groups' relationships with the ACLU and Lambda revealed a strong current of procedural critique of impact litigation priorities among the organizers on the ground in Chicago. Levitsky observed "considerable resentment over the tendency of legal advocacy organizations to set the agenda for the rest of the movement without grassroots participation."[75] According to Levitsky, "[m]any of the activists in the study . . . mentioned they thought that the agendas of legal advocacy organizations were formulated in an insular, exclusionary way, without consultation with other organizations in the movement."[76] Levitsky characterizes the relationship between the impact groups and the grassroots as functionally "unidirectional," in that the impact groups regularly assisted non-legal organizations, but "[t]here was little evidence that law organizations in turn relied on the expertise of, or input from nonlegal GLBT organizations."[77]

Interestingly, this sense is not confined to the non-lawyer activists; other lawyers within the LGBT movement who are affiliated with entities other than the large impact groups also report the "unidirectional" dynamic Levitsky discusses. In *Transgender Issues and the Law: The Role of Lawyers in Trans Liberation*, transgender rights advocates Gabriel Arkles, Pooja Gehi, and Elana Redfield critique the prominence of "lawyer-only spaces" in the LGBT rights

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[75] Levitsky, *supra* note 10, at 155.

[76] *Id.* at 153.

[77] *Id.* at 150.

movement and the influence of the perceived expertise of those lawyers in setting priorities for the entire movement.[78] The authors of this piece were, at the time the article was written, all affiliated with the Sylvia Rivera Law Project (SRLP), a legal service organization based in New York City that primarily serves low-income gender-variant people.[79] SRLP's political perspective differs significantly from that of the traditional impact litigation groups; consequently, their article utilizes a distinctly "outsider" perspective and is reflective of SRLP's concentration on the intersectionality of oppression and a preference for the privileging of the voices of the most marginalized community members.

In their article, Arkles, Gehi, and Redfield [hereinafter "the SRLP authors"] present the LGBT Litigators' Roundtable as a prime example of a space in which discussions are considered private and the perspective of non-lawyers is not solicited.[80] The SRLP authors, as recent participants in the Roundtable, critique its dynamics, calling into question not only the narrow and exclusive focus on lawyering, but also the authors' sense that the lawyers present thought their appropriate role to be the dictation of priorities and control of the movement.[81]

The SRLP authors specifically critique the Roundtable on a few different aspects of its process. First, the authors critique the lack of diversity within the participant group itself, noting that not only is the entire event lawyer-driven, but also, "[t]o our knowledge, very few participants have lived in poverty and very few have been openly HIV-positive or disabled. Valuing only privileged voices in planning legal strategy exacerbates the hierarchies and societal power imbalances that we believe movements must dismantle in order to achieve meaningful social change."[82] The SRLP authors also observed a proprietary attitude toward agenda-setting among Roundtable participants, as well as a tendency to avoid or ignore issues that involved intersectional analyses that would have forced consideration of linked issues such as poverty, race, and transphobia.[83] The SRLP authors characterize these dynamics as leading to a "potential for an overly narrow focus and lack of accountability."[84]

Because the SRLP authors speak from subjective personal experience, I feel obligated to corroborate the anecdotal evidence they present, as I am also a former participant in the Roundtable. As first a staff attorney and then the legal director at Equality Advocates Pennsylvania (a small, state-specific LGBT legal organization that focused on the provision of direct legal services), I also had the opportunity to attend several of the Litigators' Roundtable meetings discussed in the SRLP authors' article, and I experienced the event similarly.

At the Roundtable, there were usually scores of people in attendance from the four major impact litigation groups, including executive directors, high-ranking project directors, and junior attorneys. In addition, other organizations were invited to send attorneys, so there were generally attorneys in attendance from various other legal advocacy groups. Law professors affiliated with the organizing groups also attended. Despite the invitation having been extended to those not employed by one of the four major impact groups, the agenda was clearly controlled by the

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[78] Arkles et al., *supra* note 7.

[79] *Id.* at 579. SRLP is "founded on the understanding that gender self-determination is inextricably intertwined with racial, social, and economic justice," and "is a collectively run organization with no hierarchical positions and with majority trans people and majority people of color in leadership positions." *Id.* at 628 n. 3.

[80] *Id.* at 587-88.

[81] *Id.*

[82] *Id.* at 587.

[83] *Id.* at 587-88.

[84] *Id.* at 588.

organizers. All invitees were solicited for suggestions as to items that ought to be included in the agenda, but the organizers were free to accept or reject any suggestions and to give greater or lesser prominence to suggested topics.[85]

At the Roundtable, the most time for discussion was devoted to the work being done by the impact organizations, with the most senior attorneys from those groups leading the discussion. And often, the "discussion" felt more like a presentation, in which the senior attorneys from the impact organizations informed the group about the work being done and the issues being prioritized, and then solicited questions. There was little sense that the impact organizations were actually seeking input into the prioritization of certain issues over others.

One episode from the Roundtable serves to illustrate my point. At one particular Roundtable, a few of the most senior attorneys present led a discussion regarding an ambitious litigation strategy that they had decided upon.[86] As we listened, many of us became concerned that the strategy would expend more political capital than was wise and would fan the flames of serious backlash in more conservative states (including my home state of Pennsylvania), potentially undermining hard-fought gains and reinforcing formal inequality in those jurisdictions. A few of us began to voice concerns about the impact that the strategy would have on our LGBT community members living in more conservative states, who might see their own lives significantly impacted in very negative ways.

The reaction of one of the presenting attorneys served to verify my sense that I had been invited more so that I would understand what had already been decided, and less to solicit my opinion on an as-yet-unformed set of issue priorities. He acknowledged that there was a real possibility that life might become temporarily worse for LGBT people in so-called "red" states as a result of the described strategy. But, he said, the calculation had already been made that those losses would likely be temporary, and would be, in the grand scheme, offset by the rights gained by other LGBT citizens in other jurisdictions. It became quite clear that the presenters had already decided, *prior to the Roundtable*, that one particular issue was a priority of such importance that its achievement was worth the sacrifices in other areas.

The procedural critique portrays LGBT impact litigators' priority-setting methods as inordinately proprietary and lacking in necessary input from a diverse group of affected people. The connection between the current priority-setting scheme and the critique is obvious and direct. When LGBT litigators give the impression (whether that impression is accurate, inaccurate as a result of opacity in priority-setting, or inaccurate as a result of misunderstanding) that priorities are set without regard to the expressed needs of the disenfranchised, or even the concerns of other movement lawyers, outsiders will assume that there is no space in the current scheme for a democratic component in the setting of litigation priorities, and further, that there is no desire to locate such a component. Under the current system, outsider critiques of the process, like the ones articulated by the activists in Chicago and the SRLP authors, are practically inevitable.

"Substantive" critiques of movement priorities focus on the priorities themselves, rather than the manner in which the prioritization occurred. Scholars and activists have launched substantive critiques of the LGBT movement's priorities for decades. Some are quite straightforward, and obviously tied to the question of how priorities are set, while other critiques do not appear to be as clearly linked to priority-setting procedure (although I will argue later that, in fact, they are linked).

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[85] *Id*.

[86] I will keep my description of this discussion intentionally vague as the substance of Roundtable discussions is meant to remain confidential. More detailed memories remain on file with the author.

Levitsky's Chicago study provides an example of a substantive critique of priorities that is obviously connected to prioritization procedures. Many of the Chicago activists Levitsky interviewed objected not only to the insular way in which priorities were set by Lambda and the ACLU, but also to the substantive priorities that resulted.[87] Levitsky reports that some activists felt "that the priorities of their constituencies were not reflected in the litigation agendas of advocacy organizations," and quotes some activists who were convinced that marriage was not a high priority for their constituents, who instead needed legal assistance with employment, housing, and other basic survival issues not directly tied to relationship recognition.[88] The Chicago activists directly attributed this state of affairs to the impact groups' failure to provide a mechanism through which they could articulate their needs.[89] Thus, in some instances, substantive critiques of movement priorities flow naturally and directly from procedural critiques.

However, not all substantive critiques follow this pattern. In fact, the most vociferous and long-standing debates on movement priorities do not necessarily arise from constituent groups who need legal services but feel that they have not been asked what legal services they need most. Many of these debates instead stem from critiques offered by scholars and lawyers, their voices amplified by their privilege, and from cultural critics. These critiques have served to highlight deep philosophical tensions between the prioritization of sexual freedom and the prioritization of LGBT inclusion in the institution of traditional marriage. I highlight the marriage debate here, but countless other disagreements within the movement might serve my purpose equally well.[90]

The debate regarding the primacy of marriage as a movement priority began decades ago, and has continued to play out, unresolved, ever since. In 1989, Lambda's then-Legal Director Paula Ettelbrick and its then-Executive Director Tom Stoddard engaged in this debate in a highly public manner. They wrote a set of companion essays in the magazine Out/Look, in which Stoddard argued in favor of a marriage priority and Ettelbrick argued against.[91] Their views, expressed on the pages of Out/Look, have become archetypes of the dueling viewpoints of marriage. Stoddard took a pragmatic view, supporting marriage as a priority because it provides a way of accessing otherwise-unreachable legal rights and responsibilities.[92] Ettelbrick, on the other hand, in an essay titled *Since When is Marriage a Path to Liberation?*, argued that centralizing marriage as a priority would fundamentally alter the nature of an LGBT-rights movement that had previously focused on relationship pluralism and liberation from old, limiting ideas about family structure.[93]

In 1993, four years after the Stoddard and Ettelbrick essays were published, Nancy Polikoff built upon Paula Ettelbrick's line of criticism in *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every*

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[87] Levitsky, *supra* note 10, at 154.

[88] *Id.* at 154-56.

[89] *Id.* at 154.

[90] For a concise overview of many of these conflicts, see NeJaime, *supra* note 50, at 524 ("Additional areas of dispute include, but are not limited to: whether gays should be imagined as dignified and respectable or as sex-positive and queer; whether representation and connection should be expanded to other communities affected by HIV or limited to HIV + individuals who are gay; and whether gays should be conceived and presented as sodomites or homosexuals, i.e., as sex actors or as status and identity holders.").

[91] Stoddard, *supra* note 12, at 9; Ettelbrick, *supra* note 12, at 9.

[92] Stoddard, *supra* note 12.

[93] Ettelbrick, *supra* note 12.

Marriage, arguing:

> Advocating lesbian and gay marriage will detract from, even contradict, efforts to unhook economic benefits from marriage and make basic health care and other necessities available to all. It will also require a rhetorical strategy that emphasizes similarities between our relationships and heterosexual marriages, values long-term monogamous coupling above all other relationships, and denies the potential of lesbian and gay marriage to transform the gendered nature of marriage for all people.[94]

In 1997, eight years after the Stoddard and Ettelbrick essays were published, New Yorkers were treated to the appearance of a poster that very publicly announced to the world at large that the LGBT community, and not just the lawyers, had still not come anywhere closer to resolving the question of whether marriage ought to be a priority. The satirical poster, wheat-pasted onto public spaces by two lesbian guerilla artists known collectively as Dyke Action Machine! (DAM!),[95] depicted two traditionally-dressed lesbian brides cavorting through a dreamscape of enormous wedding giftware. One bride appeared blissful. The other, however, looked a bit appalled; a thought bubble hung ominously over her head, which read, "Not what I had in mind!" The caption of the poster read:

"*Is it worth being Boring for a Blender?*
GAY MARRIAGE
You might as well be straight."[96]

In the years since the Out/Look article and the DAM! poster, there has been little resolution of this fundamental, internal ideological tension within the movement – so little that it is not a stretch to say that the Stoddard and Ettelbrick essays may as well have been written yesterday, last week, or any time between their original publication dates and today.[97]

Katherine Franke's *The Domesticated Liberty of Lawrence v. Texas* connects the Supreme Court's rhetoric in *Lawrence* to the development of a seemingly more assimilationist and conservative view of LGBT rights; in so doing, she eloquently evokes the painful sense among many activists that someone else's agenda is driving a train upon which they have become unwilling passengers.[98] Franke asserts that she

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[94] Polikoff, *supra* note 11, at 1549.

[95] DYKE ACTION MACHINE, http://www.dykeactionmachine.com/about/page7.html (last visited Feb. 1, 2014).

[96] Poster *available at* http://www.dykeactionmachine.com/steal_this/steal_this/assets/1997_Gay_Marriage_poster.jpg (last visited Feb. 1, 2014).

[97] See NeJaime, *supra* note 50, at 512, for a succinct accounting of the ongoing debate between "centrist" and more leftward-leaning LGBT community members regarding the desirability of marriage as a focal point of the movement.

[98] Katherine Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399 (2004); *see also* Spade & Willse, *supra* note 8, at 327-28 ("In our view, the individual rights perspective has been chosen as the LGBT agenda, and redistributionist liberation struggles have been undermined or cast aside . . . . It is the choice to bring individual law suits for rich queers denied the rights to pass on apartments to their partners, but to take no stand in the struggle for affordable housing . . . . It is the choice to virtually ignore the most vulnerable members of our 'community,'

> fear[s] that Lawrence and the gay rights organizing that has taken place in and around it have created a path dependency that privileges privatized and domesticated rights and legal liabilities, while rendering less viable projects that advance nonnormative notions of kinship, intimacy and sexuality.
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> . . .
>
> [T]he gay and lesbian movement has become captive to leaders who advance the view that there "is no other way for gay people to be fully equal to non-gay people–both in the eyes of the law, and in the eyes of the larger community–than to participate in the same legal institution using the same language."[99]

As the small sampling of material above illustrates, there exists a robust and long-standing thread of dissent from the prioritization of assimilationist goals generally, and marriage specifically. However, the connection between criticisms of the *priorities themselves* and the *mechanism* by which those priorities are developed is not patently obvious. These are people who had a voice – some literally had a seat at the table when prioritization decisions were made. Surely, whether those priorities came about as a result of fiat or plebiscite, the ideological underpinnings of the objections to them would remain unchanged, and the vociferousness with which they are voiced would similarly remain unchanged. Surely, changing the method of prioritization could not touch these objections – right? Perhaps not.

I propose that if we read the marriage critiques carefully, we can unearth ways in which the missing democratic component in LGBT rights litigators' prioritization scheme actually encourages substantive as well as procedural criticism. Note how each of the above marriage critiques, whether originating with lawyers or non-lawyer activists, builds from a foundational premise – a rule of the game, if you will – that assumes that *someone's* ideology and politics will inevitably govern the direction the movement takes. The contest, then, centers on the question of *whose* ideology and politics will control movement priorities. Much of the discussion of what is important engages in a highly personalized discourse and has become firmly fixed along ideological lines. We argue about whether we want to alter marriage, to eradicate marriage, to be seen as monogamous, to *be* monogamous, to use our existence to radically alter gender dynamics in the marriage institution itself, and of course, whether getting married is so fundamentally *boring* that you might as well be straight.

I posit that the impact groups' approach to priority-setting has helped to foster a culture in which LGBT community members consider it essentially inevitable for individual or small-group ideological preferences to dictate the direction of the movement as a whole. As I have shown, litigation groups, whether they consider themselves democratically inclined or not, do not use *transparently* democratic methods of issue prioritization. It is simply not clear the extent to which demonstrable community need drives prioritization. The lack of a visible, robust democratic component in priority-setting leverages the considerable constitutive power of these organizations *against* the relevance and legitimacy of democratic principles in priority-setting. In short, the democratic component's apparent absence projects a subjective sense of its

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including immigrants and prisoners.").

[99] Franke, *supra* note 98, at 1414-15 (quoting MARRIAGE EQUALITY CALIFORNIA & LAMBDA LEGAL DEFENSE AND EDUCATION FUND, ROADMAP TO EQUALITY: A FREEDOM TO MARRY EDUCATIONAL GUIDE 15 (2002), *available at* http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/122.pdf).

unimportance.

To the extent that these groups rely upon Rubenstein's expertise model of priority-setting, they are instead communicating that it is most appropriate for a subgroup with specialized knowledge to make decisions for the community at large. And to the extent that impact litigators take up cases initially commenced by individual citizens, they are communicating a complementary principle, that it is appropriate for individuals to shape the movement based upon their own ideological preferences. What they are *not* saying, at least not out loud, is that it is urgently important to determine and give primacy to the most pressing legal needs of the community, irrespective of how those needs might correspond to ideology or politics. And this silence speaks volumes.

One might well ask why LGBT impact litigators ought to care about whether their priorities are criticized, or why those of us who have benefitted from formal equality gains should look that particular gift horse in the mouth. Given the impressive litigation successes enjoyed by those groups, shouldn't we all just shrug, note that "haters gon' hate"[100] and leave it at that? I suggest that it is not enough to ignore these critiques, even if we disagree with their validity or the accuracy of the factual presumptions upon which they are based. I argue that both the substantive and procedural critique actually have something to tell us about the ways in which the movement is weakened as a result of the missing democratic component in impact litigators' issue selection. We ignore them at our collective peril.

First, by failing to frontally address procedural critiques about priorities, LGBT impact litigation groups miss important strategic opportunities to shore up solidarity within the movement and answer criticisms of their work that actually undermine perceptions of movement success. Procedural critics speak of feeling excluded by movement lawyers in decision-making processes that they consider central to their very survival.[101] At heart, those critiques bespeak a lack of ownership of movement goals among a highly politically active subset of the community. In this way, LGBT rights litigators lose the energy, time, and vocal support of those who are clearly motivated toward achieving rights gains for the community and whose participation would otherwise be highly valuable. They simultaneously, as Levitsky's study suggests, gain critics who are well respected in the community and can make accusations (such as accusations of racism, classism, and transphobia) against impact groups that damage their credibility.

Second, I suggest that, while some substantive critique is both useful and inevitable, not all of it can simply be met with the response that debate is healthy. In particular, critiques about movement priorities that suggest that impact litigators are missing the needs of the most vulnerable are truly troubling. Such critiques, like the ones made by the Chicago activists, bring up foundational ethical issues about the moral duty of organizations that purport to speak for marginalized groups.

Ideologically based substantive critiques may also have limits to their utility when they cannot ever be resolved. For example, the critiques that have been leveraged against the marriage movement seem to me to be ultimately irreconcilable while we operate under the current rules of intellectual engagement, which seem to presuppose the inevitable dominance of one individual or small-group ideology over others. The beliefs held by LGBT people about the appropriate goals of the movement are political, but simultaneously intensely personal, and deeply linked to each LGBT person's sense of him or herself as a sexual person, as a person with a particular gender identity or a person who considers themselves genderless, and as a person with a particular

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[100] 3LW, PLAYAS GON' PLAY (Epic Records 2000).

[101] *See* Arkles et al, *supra* note 7, at 587; *see also*, Levitsky, *supra* note 10, at 156.

viewpoint shaped by race, by class, by ability, by citizenship status, by region, and by status as a parent or as a non-parent. As such, I believe that there is a limit to the utility of this debate as it connects to the pragmatic necessity of setting priorities in a universe of limited resources. I suggest that, by telegraphing the propriety of small-group or individualized priority-setting, impact groups have propagated an endless feedback loop of controversy about "who we are," when in fact, that question is unanswerable, because "we" are many things simultaneously.

But is there a way out?

III. HOW CLOSER CONNECTION TO DIRECT LEGAL SERVICES CAN DEMOCRATIZE ISSUE PRIORITIZATION

Scholars and activists have proposed various alternatives to the current reality, in terms of both the procedure and the substance of issue prioritization. On the procedural front, the suggestions tend to center around the idea of opening the process up to more voices, particularly to the opinions of non-lawyers. The SRLP authors, for example, suggest that movement lawyers ought to enter into more meaningful strategic dialogue with, in particular, non-lawyer community activists.[102] I agree that more collaboration with grassroots organizers, particularly those who themselves come from marginalized communities, contributes immeasurably to impact litigators' understanding of the communities they seek to serve. However, one ought not confuse the injection of *some* measure of viewpoint diversity with a truly democratic process. The suggestion of adding non-lawyer activists is not actually democratic – it still privileges a certain group of people's opinions over others, without regard to the question of whether that group is representative of a larger constituency. Although it moves the circle out from the realm of "just lawyers," the addition of activists to the circle still only allows people who are politically connected or have the means, personal empowerment, or temperament towards activism to be heard.[103] Thus, the addition of some non-lawyer voices may get us a little bit closer to democratic process, but certainly not all the way.

In terms of substance, Dean Spade and Craig Willse suggest an alternative to the current substantive issue agenda, stating:

> We envision a broader framework for queer and trans rights, one that makes redistribution a central goal.
>
> . . .
>
> The most just approach to opposing gender and sexual orientation oppression would be to devote resources first to the struggles of those who experience the greatest impact of that discrimination: people surviving in prisons, people in foster care and juvenile justice, people accessing health care through Medicaid, people working in low-wage jobs or surviving on benefits, people struggling against immigration policies, people experiencing the intersections of racism and sexual or gender coercion.[104]

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[102] Arkles et al, *supra* note 7, at 590.

[103] Note that not all critics necessarily aspire toward a democratic ideal.

[104] Spade & Willse, *supra* note 8, at 329.

Note that, while Willse and Spade's suggestion appears egalitarian in its prioritization scheme, it consciously links those priorities with an overarching political goal that is just as likely not to be shared with the entire community as the system it seeks to replace. Thus, a substantive issue prioritization system that seeks to serve a predetermined political goal does not move us in the direction of democratic goal-setting either.

We are left to wonder whether, assuming that we wish to achieve such a goal, we can somehow derive a system of litigation priorities that: 1) is unconstrained in the scope of who is consulted; and 2) does not rely upon an assimilationist, liberationist, or anti-capitalist ideology as its guiding principle. Douglas NeJaime takes the position that any monolithic approach to priority-setting in the LGBT rights movement is both unhealthy and fundamentally non-representative of a broadly diverse community.[105] He further posits that, given the immense diversity of the LGBT community, it is impossible for any single organization to somehow reflect the entire spectrum of legal needs and ideological positions.[106] Thus, NeJaime advocates for a "polyvocal gay-based advocacy," essentially a pluralistic approach to priority-setting in which different ideological positions are represented by different organizations, some centrist and some more radical.[107] He imagines a playing field on which large impact groups work alongside smaller organizations with different political commitments, and all are respected and able to thrive.[108]

As articulated earlier, I sympathize with NeJaime's plea for a movement that does not follow the ideological leanings of one particular group and provides representation that spans the demographic and ideological diversity of the LGBT community. However, from a pragmatic standpoint, I have come to believe that pluralistic advocacy cannot be attained without putting in place a mindful, disciplined structure *within impact groups* to promote such a scheme. I take my lesson from my observations on the marriage issue.

In 2003, when NeJaime's piece was published, no state had yet decided the issue of same-sex marriage.[109] The question of whether the movement would begin to fixate on marriage was a growing worry, but not quite a reality.[110] Since the decision in *Goodridge*, however, all four impact groups have taken on marriage litigation, both at the state and federal level.[111] As each case has been litigated, the marriage issue has become the central focus of public discourse around the place of LGBT citizens in American society. By 2013, as I write this, it feels as though the marriage issue has gone supernova, its immense gravity sucking sexual freedom, anti-discrimination, parenting, the rights of transgender citizens, and pretty much everything else into a kind of black hole out of which no non-marriage issue can seem to escape.

So what happened? Some of Levitsky's Chicago activists characterized the all-marriage-

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[105] NeJaime, *supra* note 50, at 560.

[106] *Id.*

[107] *Id.* at 561-62.

[108] *Id.*

[109] In *Baker v. State*, Vermont had already decided that marital benefits could not be withheld from same-sex couples, but allowed its legislature to resolve the issue by creating the first civil union scheme. 744 A.2d 864 (Vt. 1999). *Goodridge v. Dep't of Pub. Health* would not be decided until November of 2003. 798 N.E.2d 941 (Mass. 2003).

[110] NeJaime's piece locates the greatest threat of goal homogenization mainly with the Human Rights Campaign (which focuses mainly on federal policy advocacy), and not at the four impact organizations. NeJaime, *supra* note 50, at 531.

[111] *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008); Lewis v. Harris, 908 A.2d 196 (N.J. 2006); *Goodridge*, 798 N.E.2d 941; United States v. Windsor, 133 S.Ct. 2675 (2013); Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012).

all-the-time phenomenon as a "hijacking" of the movement by impact litigators; others expressed the perception that the marriage issue was "forced" on the community.[112] This choice of language suggests that impact organizations executed a kind of hostile takeover of movement priorities – but is that the case? Have impact litigators deliberately seized the controls while the rest of us huddle in the cargo hold? I suggest that something different is at work.

If the LGBT community was actually being hijacked, we could reasonably expect that eventually, the community would become disenchanted, take its support elsewhere, and fund other organizations with different priorities. Those organizations would ultimately grow in strength, and those organizations' priorities would gain primacy. NeJaime's cross-organizational polyvocal advocacy model would thus act as an effective counterweight to a small group of organizations whose priorities were truly out of sync with the needs and desires of the communities they were meant to serve.

My observations suggest that something a bit different has happened. As a direct legal services staff attorney in 2003 and 2004, I experienced a jarring shift in public attitudes about the marriage question in the immediate wake of *Goodridge*. Almost as soon as that case was decided, I found myself fielding a growing chorus of demands from enthusiastic Pennsylvania activists who, emboldened by the victory in Massachusetts, wanted my office to litigate marriage in Pennsylvania, and to do so immediately. Oddly, the calls started flowing in despite the fact that marriage had not been either a pragmatic possibility or even a much-discussed aspiration among Pennsylvania's LGBT activists in the years prior. That experience leads me to conclude that issue prioritization can have an echo-chamber-like effect, where impact litigation groups articulate a goal, and articulate it loudly and forcefully, using the kind of "rights" language that carries great moral weight. Rather than feeling coerced, a large contingent of LGBT people instead adopt that goal as their own. Perhaps instead of a hijacking, the best analogy would be to the protest tactic of the "mic-check," wherein a lead protester makes a speech that is amplified using only the power of human voices.[113] Levitsky might agree with this conclusion, as her article connects the *perception* of "hijacking" to "the *structural* fact that legal advocacy organizations . . . have considerably more resources than the grassroots organizations that make up the bulk of the movement" and that "the legal advocacy organizations in this study were able to achieve a high degree of visibility for their actions relative to other organizations in the movement."[114] Gwendolyn Leachman's recent empirical study of mainstream press coverage of LGBT issues suggests that it is in fact objectively true that LGBT-rights litigation has historically received far more press coverage than non-litigation movement tactics.[115]

So what does this mean? I draw the conclusion that we cannot democratize issue prioritization simply by doing so *across* groups. The impact organizations' influence has simply become too great to be easily resisted by many smaller agencies who, while they might wish to

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[112] Levitsky, *supra* note 10, at 156-57.

[113] *See generally* Carrie Kahn, *Battle Cry: Occupy's Messaging Tactics Catch On*, NPR (Dec. 6, 2011, 5:11PM), http://www.npr.org/2011/12/06/142999617/battle-cry-occupys-messaging-tactics-catch-on.

[114] Levitsky, *supra* note 10, at 157.

[115] Gwendolyn M. Leachman, *From Protest to* Perry*: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. (forthcoming 2014). Leachman engages in a quantitative analysis of mainstream newspaper articles reporting on the LGBT movement from 1985 to 2008. Her work investigates whether LGBT-rights litigation received more coverage than other sorts of social movement tactics during the selected time period. Her findings demonstrate that litigation in fact received far more coverage in the mainstream press than tactics such as organized protests. *Id.*

pursue different priorities, may find themselves pressured to either join the bandwagon or risk irrelevance. To continue the analogy of the mic-check, we can, at this point in the movement's development, no more expect effective polyvocal advocacy across organizations than we can expect an audience member to suddenly turn away from a speech that is being mic-checked simply because the person next to her has started saying something else. We must instead ask the impact groups to consider altering their own internal means of selecting priorities to carefully ensure that multiple voices are heard and multiple ideologies represented.

I suggest that doing so will not be impossible. We can, I believe, locate the missing democratic component in impact litigation priority-setting by directly linking impact litigation organizations with already-existing LGBT-focused direct legal service programs. The direct service programs' aggregated intake data can be used as a factor in impact litigation priority-setting. Impact organizations could commit themselves to seeking out this data, and to seriously, transparently, and systematically incorporating it when deciding which issues to prioritize.

The reader might immediately wonder why I would suggest that impact groups ought to rely on the data supplied by a separate organization, rather than simply being more transparent in relying on the data they collect themselves through the various hotlines and helpdesks described *supra*. There are two reasons why the data those organizations internally collect may not be the best, most accurate data available. First, impact organizations may not have name recognition in sectors of the LGBT population where legal needs may actually be the most acute. Levitsky's article illustrates the problem, noting:

> [I]nterviews with other attorneys and activists in the community suggested that Lambda has poor name-recognition and visibility in communities of color in Chicago. As a consequence, the intake calls received by Lambda are unlikely to represent the concerns of the nonwhite, nonmiddle class GLBT community. As one staff member at Lambda tellingly noted, "Our community is so diverse, there are certainly areas of concern that we might not be attacking and might not be tackling, that people think well, you guys are behind. And I can't tell you what those are."[116]

Second, impact litigation groups may, on a structural level, simply not be as well-equipped to collect accurate data on community need as their counterparts working in direct services. Unlike impact litigation programs, direct legal service programs are usually created, at least in part, to serve the goal of providing access to justice for those who could not otherwise afford an attorney. As such, direct service lawyers, even those working for specialized agencies as opposed to general legal aid offices, inevitably face the problem of how to allocate limited resources in an unlimited pool of need.[117] The very nature of direct legal service work, therefore, requires lawyers and funders to repeatedly and mindfully confront the central question of who will be served, and who must, by necessity, be turned away.[118] Discerning community need is central to the enterprise of direct service work.

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[116] Levitsky, *supra* note 10, at 154.

[117] *See* Tremblay, *supra* note 13, at 2481 (describing how a "small cadre of lawyers . . . must provide for an ocean of legal needs").

[118] In fact, an entire body of scholarship has sprung up around the ethics of how to make this seemingly impossible decision. For a helpful overview, *see generally* Tremblay, *supra* note 13; Troy E. Elder, *Poor Clients, Informed Consent, and the Ethics of Rejection*, 20 GEO. J. LEGAL ETHICS 989 (2007).

The pressure to set priorities mindfully comes both from the ethical commitments of direct service lawyers themselves, and also derives from the requirements of legal service funders. Direct legal service funders, especially stewards of public money like IOLTA, usually require that direct service programs actually demonstrate the need for a project before it can be funded, and will further calculate outcomes based upon success in identified priority areas.[119] In addition, the ABA pressures direct service providers to carefully and systematically assess need. Standard 2.1 of The American Bar Association's [ABA] Standards for the Provision of Civil Legal Aid states that "[a] provider should interact with low income individuals and groups serving low income communities to identify compelling legal needs and should implement plans to address those needs most effectively."[120] The Comments to that Standard add that "[m]ore formal assessments can also establish a baseline regarding the relative importance attached by individuals in the low income community to recurring legal problems."[121]

Legal services organizations are thus already motivated to engage in two activities that impact litigators are not as motivated to engage in, specifically: 1) direct contact with disadvantaged client populations, primarily for the purpose of providing legal services, and secondarily for the purpose of ascertaining community need; and 2) systematic aggregation of data, both for the purpose of demonstrating need to funders, and also for the purpose of demonstrating positive outcomes for individuals and communities.[122] In effect, by linking services to demonstrated need, and by seeking to serve as many people as possible, direct service providers provide a method for community members to "vote" for the issues that affect them most. Prospective clients call, and those whose problems fit into an existing service receive immediate assistance. The requests of prospective clients whose problems do *not* fit into an existing service are added to the requests of others who present similar problems. When the aggregate number of requests for such a service reaches a tipping point, a direct service provider will often then attempt to obtain funding for a new project that does provide assistance to that group. Legal needs assessments and other mindful community contact can be added to the mix. This helps the agency avoid a closed loop of client contact, in which the only callers are those presenting problems that the agency is already known to handle.

I suggest that LGBT impact litigation organizations can add the missing democratic component to their prioritization schemes by partnering with LGBT direct legal service providers, analyzing those providers' aggregated data for demonstrated community needs, and adjusting their resource allocation to address those demonstrated needs. Unlike other "democratizing" suggestions, an individual's ability to have his or her "vote" counted in such a scheme is

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[119] For example, a major funder of public interest activity in Pennsylvania is the Pennsylvania Interest on Lawyers' Trust Account (PA-IOLTA) Board, which annually disseminates several million dollars in funds. PA-IOLTA has specific requirements for reporting both volumes and outcome, reflected in its annual report. PENNSYLVANIA INTEREST ON LAWYERS' TRUST ACCOUNTS, RESULTS OF THE PENNSYLVANIA ACCESS TO JUSTICE ACT: EXECUTIVE SUMMARY OF THE FIVE-YEAR REPORT ON THE FILING-FEE SURCHARGE LAW, FY 2004–2008, (Feb. 2009), http://www.paiolta.org/AJAReport/summary.pdf.

[120] AM. BAR ASS'N, STANDARDS FOR THE PROVISION OF CIVIL LEGAL AID, Standard 2.1 (2006), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/downloads/civillegalaidstds2006.authcheckdam.pdf.

[121] *Id*. at Standard 2.1 cmt.

[122] Rhode's survey supports this contention. According to Rhode, "[s]ome [public interest organizations] with the most inclusive [priority-setting] structures were organizations that received federal Legal Services Corporation funding and were therefore subject to detailed requirements of client and community outreach." Rhode, *supra* note 71, at 2051.

dependent solely on his or her ability to locate contact information for a direct service provider and articulate a problem. It is almost completely detached from the community member's access to power or privilege, and does not require that the community member be an activist, an expert, think of themselves as a potential "model" plaintiff, or be a person of means. It also does not lead us into the thicket of a majoritarian "voting" model that would be both silencing of pluralism and impracticable or downright impossible to execute.

Perhaps the ability to tally up need has been something that impact litigators have actually looked for in the past but could not find. Interestingly, it appears relatively clear from the Rubenstein narrative that the Hawaii ACLU affiliate was engaged precisely in that sort of search for a numbers-based justification when it struggled with the prioritization of marriage, but at the time, it had no available data that would have demonstrated in a more objective manner whether LGBT Hawaiians actually struggled in great numbers with the legal disadvantages brought on by a lack of recognition of their relationships.[123]

Oddly, though, neither Rubenstein's article nor most of the literature about the LGBT rights movement seem to acknowledge the potential for a better-coordinated direct legal services effort to inform the priorities of the movement. It is as though the people thinking about the LGBT rights movement and the people thinking about direct legal services amount to two mutually exclusive groups who pass through legal theory like ships in the night, failing to acknowledge the many ways in which the two groups might inform one another.

But on the ground, outside the world of legal theory, LGBT-focused direct legal services do exist – and have existed for quite some time. NCLR has taken some commendable initial steps in connecting its impact work with direct legal services organizations. Its Family Protection Project links NCLR's considerable resources with direct legal service providers to create greater access to legally and culturally competent representation for low-income LGBT families, especially families of color.[124] As part of that project, NCLR has developed a list of legal service providers that provide services targeted at low-income LGBT people. As it happens, twelve states and the District of Columbia already have some sort of LGBT-focused legal clinic.[125] Furthermore, between 2000 and 2011, at least fifteen post-JD law fellowships have been awarded to young attorneys launching LGBT-focused direct service projects at agencies other than the four impact groups; some of these attorneys' projects have been housed at LGBT-specific legal service providers, while others have been housed at mainstream service providers who wished to launch LGBT-specific projects.[126]

Some existing LGBT-specific direct legal service providers are located within a larger LGBT-focused healthcare provider or community center, such as the legal departments housed at Philadelphia's Mazzoni Center,[127] Washington, D.C.'s Whitman-Walker Clinic,[128] or the L.A. Gay and Lesbian Center.[129] Existing services also take the form of information-only services such

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[123] Rubenstein, *supra* note 6, at 1637.

[124] *Family Protection Project*, NAT'L CTR. FOR LESBIAN RIGHTS, http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Flyer_v3.pdf (last visited Feb. 1, 2014).

[125] Information on file with author.

[126] Information on file with author.

[127] *Legal Services*, MAZZONI CENTER, http://mazzonicenter.org/programs/legal-services (last visited Feb. 1, 2014).

[128] *Legal Services*, WHITMAN-WALKER HEALTH, http://www.whitman-walker.org/page.aspx?pid=377 (last visited Feb. 1, 2014).

[129] *Legal Services*, L.A. GAY AND LESBIAN CENTER, http://laglc.convio.net/site/PageServer?pagename=

as the legal department at Chicago's Center on Halstead.[130] Stand-alone legal service nonprofits also exist, such as Maryland's FreeState Legal Project.[131] Organizations such as the Sylvia Rivera Law Project in New York City seek to provide legal assistance for low-income gender variant individuals.[132]

Connecting LGBT direct legal services to impact litigation could be accomplished on a small scale, with little need for infrastructure building, or on a larger scale that would require a fundamental shift of community resources. A small-scale plan would require only that impact litigation organizations regularly review aggregated intake statistics of already-existent direct legal service providers, and that direct service providers agree to provide those statistics. Impact organizations would agree that they would prioritize issues at least in part according to the greatest area of community need, as expressed through these statistics. Such a scheme would require something of a mental paradigm shift on the part of impact litigators, requiring them to re-interpret their priorities as being informed *by* organizations closer to the communities they serve, rather than *informing* those organizations of priorities already set internally. Otherwise, such a scheme would require neither a major resource re-allocation nor a significant overhaul in the structure of the impact organizations.

A larger-scale plan would require that *each state* have a dedicated direct service provider with a small staff. That service provider would maintain a hotline through which it would collect information on need. The organization would attempt to address all callers' legal needs, either through pro bono referral networks, referrals to for-profit law firms, or through the work of staff attorneys. The aggregated data collected by each provider would be shared with an existing impact organization partner that works in that region. As part of a large-scale plan, impact organizations would consider the kinds of impact litigation or policy advocacy that might assist their direct service partners' client populations within the areas of greatest need as demonstrated through intake statistics. Where impact litigation would not be an appropriate service in a particular area of need (e.g., name changes for transgender people, or estate planning for low-income LGBT couples), the impact organization would leverage its resources to assist its state direct service partner in obtaining greater access to assistance in those areas through pro bono projects, the production of pro se kits, and partnered fundraising.

The benefits of such partnerships, whether as part of a small-scale or large-scale plan, would accrue to both the direct service provider and the impact group. Direct service providers would provide the missing democratic aspect to impact litigators' priority-setting schemes, thus lending greater credibility both to those organizations' priority-setting procedures and to the substantive priorities themselves. Direct service providers might also be able to help locate able local counsel for impact cases, since direct service providers are often able to maintain broader and deeper relationships with the local bar than an impact organization can. Impact litigation organizations could provide assistance to direct service providers by offering targeted impact litigation in areas of expressed need, thus attacking problems on the kind of scale that direct service providers are often insufficiently resourced to manage.

If such a scheme were instituted, either on a small or large scale, it is not by any means a foregone conclusion that priorities would change radically. In fact, it is entirely possible that

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YW_Legal_Services (last visited Feb. 1, 2014).

130 *Legal Program*, CENTER ON HALSTEAD, http://www.centeronhalsted.org/legal.html (last visited Feb. 1, 2014).

131 FREESTATE LEGAL PROJECT, http://freestatelegal.org/ (last visited Feb. 1, 2014).

132 SYLVIA RIVERA LAW PROJECT, http://srlp.org/ (last visited Feb. 1, 2014).

marriage and other relationship recognition issues would remain the centerpiece of LGBT-rights litigation. This suggestion is not intended to create a substantive shift in priorities, assuming that existent priorities prove to be aligned with areas of most acute need. However, what might change would be the discourse *about* those priorities, in ways that we might not be able to fully predict. Instead of asking one another if we really want to be boring for a blender, we might instead spend more time talking about the very real economic justice issues that marriage inequality creates – and not necessarily from the rather posh perspective of Edie Windsor's lost $350,000. What if instead, we obtained documentation that hundreds or thousands of low-income LGBT people had sought to transfer real property to one another upon the death of one partner, but the surviving partner could not afford to pay the crushing taxes owed by a legal "stranger" and had lost the communal home as a result? What if that had been the message of the marriage campaign?

In addition to shifting the discussion on marriage away from ideological debate or the sanitized tales of a few model plaintiffs, we might find that the secondary narratives about LGBT life would change dramatically. For example, as the Legal Director of a small Pennsylvania LGBT-rights direct legal services nonprofit, I found that one of the greatest areas of need was name and gender changes for transgender community members. This fact was initially a surprise to my agency, but as we began to systematically provide the service, calls for assistance only continued to grow. What would an impact litigation campaign that was predicated on that recurrent need look like? We might spend a little less time talking and litigating about marriage, and a little more time talking and litigating about the right of each person to determine gender for themselves, and the problems of a system that presupposes a medicalized model of gender and imagines policing of gender as an appropriate activity of the state.

My agency also received large numbers of letters from incarcerated transgender women who had been subjected to harassment and sexual assault in prison. What might a national litigation campaign built around that horrendously tragic pile of mail look like? What new coalitions might be formed as a result? What if we aimed for greater geographic diversity, and set up direct service organizations in every state? We might give primacy to the needs of rural same-sex couples[133] instead of sacrificing their legal security in the service of an agenda that serves LGBT people living in states most friendly to immediate forward advances in the law.

A democratized prioritization system might provide us with nothing more than the ability to sleep more soundly and explain our choices more confidently, reassured that our impact resources were really being directed toward goals that brought greater protections to the most vulnerable. Or it might radically transform the LGBT movement, prompting a total refocus on issues that barely get a mention in our current scheme. In either case, greater transparency and greater collaboration in the determination of priorities can only strengthen the movement. We stand to lose very little and gain a great deal by working towards this goal.

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[133] A recent survey by the Williams Institute demonstrates that same-sex couples in conservative Southern states are actually more likely to raise children in their households than same-sex couples on the West Coast, New England, or New York. Gary J. Gates, *LGBT Parenting in the United States*, THE WILLIAMS INSTITUTE, (Feb. 2013), http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/lgbt-parenting-in-the-united-states/ (last visited Feb. 1, 2014). Thus, the national litigation strategy that was presented to me and the other attendees at the Litigators' Roundtable actually could have created a huge amount of collateral damage if it had provoked backlash in the states apparently considered dispensable by its proponents.