

1999

Marriage: Winning and Keeping the Freedom to Marry Nationally and in New York

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QUEER LAW 1999
**CURRENT ISSUES IN LESBIAN, GAY,
BISexual AND TRANSGENDERED LAW**

THIS CONFERENCE IS A JOINT EFFORT OF:
**THE LESBIAN AND GAY LAW ASSOCIATION
FOUNDATION OF GREATER NEW YORK
(LEGAL FOUNDATION)**
**AND THE GAY AND LESBIAN LAW ASSOCIATION
(GALLA) OF FORDHAM UNIVERSITY
SCHOOL OF LAW**

QUEER LAW 1999

CURRENT ISSUES IN LESBIAN, GAY, BISEXUAL AND TRANSGENDERED LAW

This Conference is a Joint Effort of The Lesbian and Gay Law Association Foundation of Greater New York (LeGaL Foundation) and the Gay and Lesbian Law Association (GALLA) of Fordham University School of Law

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INTRODUCTION

With this conference entitled "Queer Law 1999: Current Issues in Lesbian, Gay, Bisexual and Transgendered Law," the *Fordham Urban Law Journal* has undertaken an important responsibility and met a critical need in both the academy and bar. There are few areas of law that are as dynamic and fast-changing as that concerning the rights of sexual minorities. As I have observed elsewhere,¹ we stand at a critical moment of field formation, alternatively called "Sexual Orientation and the Law," "Lesbian and Gay Law," "Sexuality and the Law" or "Queer Law."

Why might the proceedings contained in this issue comfortably fit under the moniker "Queer Law," rather than one of the other flags under which this legal movement has marched from time to time? The answer is revealed in a perusal of not only the impressive participants in this symposium, but of the categories into which their remarks are organized. Ten, or even five, years ago, a conference such as this would have been constructed around topics such as "lesbian and gay adoption," "gays in the military," "discrimination against lesbians and gay men in the workplace," and similar sites in which "our" constituency has encountered bias and structural stigma.

The Queer turn that this conference reflects is one that rejects the building of a social movement or legal strategies around static identities such as lesbian, gay, bisexual or heterosexual, but rather regards the interrogation of those categories of identity themselves as one of its equality commitments. Framed in this way, a Queer legal movement wants to keep alive a set of questions with respect to the ways in which certain identities, like straight, gay or lesbian, are shaped by the homophobic and heteronormative world in which we live. It is for this reason that a Queer legal conference sets its focus on the places where and means by which homophobic and/or heteronormative power is at work in the service of normalizing heterosexuality and objectifying homosexuality, bisexuality and transgenderism.

Thus, you do not see "Lesbian" or "Gay" figure in the title of any of the panels that these papers were part of, although the panelists may at times speak in terms of the rights of gays, lesbians,

1. Katherine M. Franke, *Homosexuals, Torts, and Dangerous Things*, 106 YALE L.J. 2661 (1997) (reviewing WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* (1997); WILLIAM B. RUBENSTEIN, *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* (2d ed. 1997)).

bisexuals or transgendered people. This is the narrow line queer theorists must nimbly traverse: to at once recognize the ways in which people experience their own identities and are discriminated against as lesbians and gay men, etc., while leaving open a route by which we can renegotiate the meanings and experiences of those identities as a significant part of our struggles to greater freedom and equality.

The contributions that follow represent a rich array of expertise that has been brought to bear on this vital and difficult project.

**ROUNDTABLE DISCUSSION:
WHERE DO WE GO FROM HERE?
LESBIAN, GAY, BISEXUAL AND
TRANSGENDERED CIVIL RIGHTS
INTO THE NEXT MILLENNIUM**

MR. HARMAN: Judge Batts is a District Court Judge in the Southern District of New York and is the first openly lesbian member of the federal judiciary. She was appointed in 1994 by President Clinton. Formerly a full-time professor at Fordham University where she taught Domestic Relations, Pretrial Federal Practice and Family Law, Judge Batts is now an adjunct professor at Fordham and teaches Trial Advocacy and Domestic Relations. Judge Batts is a tireless contributor to the University, to GALLA (Fordham's Gay and Lesbian Law Association) and to the gay and lesbian community in general.

JUDGE BATTS: Thank you very much. Look at this panel. If we only had one of these people on this panel, this would be a panel rich in experience, knowledge and information. When I first looked at the list of panelists, my first reaction was, "Are you kidding me? How can we possibly let each one of these people give to the attendees of this conference what they have to give? There are too many. Cut them in half." They did not say anything until I got over that little hissy-fit. So I said, "Alright, we are gonna do this." And so, my role here is to be referee so that I can make sure that everybody has an equal opportunity to weigh in with their knowledge and expertise.

I am going to give very brief introductions of the panelists before I start with a lead off question, and I am going to invite the panelists, if they wish, to enlarge on what I say about them, as they respond to the first question.

Matt Coles, director of the ACLU Lesbian and Gay Rights Project, and a long time advocate and litigate on behalf of the lesbian, gay, bisexual and transgendered ("L/G/B/T") communities.

Paula Ettelbrick, legislative counsel at the Empire State Pride Agenda and national coordinator of Equality Begins At Home, a project of the National Gay and Lesbian Task Force.

Professor Nan Hunter, professor at Brooklyn Law School, author of a case book on law and sexuality and a founding director of the ACLU Lesbian and Gay Rights Project.

Evan Wolfson, director of the Marriage Project at Lambda Legal Defense and Education Fund, and one of our community's main proponents of lesbian and gay marriage.

I will begin with Matt Coles. What do you think our priorities ought to be as a community, and who should identify our goals and determine how they are best achieved?

MR. COLES: Thinking about what our priorities are raises two very different questions. The first is: Where do we think lesbians and gay men are getting hurt most in society? That is a qualitative and quantitative inquiry that might lead us to different places. The second question is: Which of these problems are such that lawyers might have something useful to contribute (I use the word "lawyers" instead of "litigators" particularly because I do not think the only useful thing lawyers can do is litigate)?

The problem that occurs when answering these questions is that we, as lawyers, often focus in on answering the second question before adequately dealing with the first question. Far too often our sense of where people are getting hurt is driven by what we think we can do well as lawyers and by our own experience of where the problems lie.

Having said that, I would like to introduce some of the more important areas that need to be addressed. The first problem area is relationships. In defining "relationships," I refer to parents and children because that is an area where people are hurt terribly and where lawyers, particularly in litigation, are uniquely equipped to assist the problem because much family and parenting law is made in the courts.

Additionally, schools are places where people get hurt and where lawyers can have some of the greatest impact. I think it is the place in the post-*Romer*² world where it is actually possible for lawyers to do things. Further, getting rid of sodomy laws would be a benefit because they hurt the lesbian and gay community in non-obvious ways. It is a cliché among lawyers to say that the harm these laws inflict is not necessarily through direct enforcement, but through the role they play collaterally in proceedings like custody. I actually think, however, that greater harm comes from the use of these laws as a means of political dis-empowerment. In debates over civil rights and domestic partnership laws that recognized relationships, sodomy laws are consistently and somewhat effectively invoked as a way of ignoring our voices. These laws suggest that

2. *Romer v. Evans*, 517 U.S. 620 (1996).

our claims and aspirations are not legitimate; and fighting these laws is something that lawyers are capable of doing.

JUDGE BATTS: Thank you, Matt. Paula, do you have a different perspective on what our priorities ought to be as a community, and would you identify our goals and determine how they are best achieved?

MS. ETTELBRICK: I tend to think of priorities in a different way, not so much substantive, but in terms of the process we use to achieve those goals. Having been at the Pride Agenda for the last four-plus years doing legislative work, and at Lambda Legal Defense for the seven years prior to that doing impact litigation, my perspective has changed a bit. I believe that we need to ratchet up our resources in the legislative arena, which includes efforts to get lawyers to work with state legislative advocacy and political organizations to draft better laws. I am the only person in this country who was hired by a state political advocacy organization as a lawyer to do legislative advocacy and drafting. I would like to see a world in which every state has a lawyer on staff, or at least a committee of lawyers who volunteer their time to work with legislators at the state level. The state level is the heart and soul of the issues that we are facing.

Matt mentioned sodomy laws and relationships. These are quintessential state law matters. If legislators do not have the resources to help them, we are working against the trend with them. What I find, working with the state legislature in New York, is that there are very few lawyers on staff. This requires legislators to rely on central staff persons to draft laws. The result is the passage of laws that we would never want to litigate under, and that make no sense to us. Consequently, I work with those people to clean up some of those statutes that do get drafted, and also look politically at how to get some things passed.

As a strategy, I do not think we should put all our eggs in the "we have to get a hate crimes bill or a non-discrimination bill" basket. While those are very important endeavors, there are hundreds of bills that I think could get drafted, particularly in the family definition area, passed in the most conservative state legislatures, and signed by even moderately conservative governors, that would be beneficial. I do not want to overstate the case, but in that part of the process we could make some headway in significant ways. Our legislators are only as good as we are in getting involved in the political process, and getting them elected or de-elected. And so, I look at reality, in conjunction with the incredible work that my col-

leagues on this panel have done at the ACLU and at Lambda, of really trying to move forward in how can we address the concerns at the place where we really live most, at the state legislative level.

JUDGE BATTS: Thank you, Paula. Now, one of the things that Matt mentioned is relationships — he mentioned parent-child relationships, school relationships and sodomy laws. Evan, I want to ask you, are there any other relationships that you might be able to think of that perhaps might and should deserve our attention?

MR. WOLFSON: I think we are at a breakthrough opportunity with regard to winning the freedom to marry, and I think that is really important on two levels. I think to some extent we have lost sight of what, in a way, is the most important level. On the one hand, our fight for the freedom to marry is important because winning marriage as a choice for gay people would be extraordinarily important in concrete and real ways in people's lives and as a transformative statement of our position in society. I do not think there is any single thing we could achieve legally that would so substantially transform our position in society as to win that choice and cultural position. I also think the battle for the freedom to marry is important because the process of the battle — what it will take to win it — gives us unparalleled opportunities to engage non-gay Americans and people around the world in a discussion about who we are, what our lives are and what the possibilities are for us and for other non-gay people in a vocabulary that is rich, sustained, important and different from the stereotypes that have held us down. So it is both the achievement itself and what it would take to achieve it that gives us the extraordinary opportunities that I think we must seize in order to maximize our opportunities to really move ourselves forward in the way that I think all of us on this panel want.

I actually think we have two goals or priorities, if you want to call them that. One, I think, is to eliminate barriers that impede individual choices about how individuals want to live their lives and how they want to build their relationships with their families and loved ones. Particularly with regard to sex and sexual orientation, I think it is the mission of those of us who have chosen this path in life, but I think generally we are all committed to eliminating those barriers.

The second thing that we also want to achieve is to enlarge the sense of possibilities that all people, gay and non-gay, and people who define themselves with other labels, have in life. I think all of us are probably very committed to both equality and freedom and

we want to make a world where we can achieve both. To me, the great opportunity we have in our community and in our movement right now, something we have labored for decades to achieve is to get the attention of the majority, to get the attention of non-gay people and engage them in dialogue to find them where they are and move them.

To me, therefore, the single biggest priority of those of us who are working on these issues full-time or part-time, is to both make extraordinary contributions, and to engage non-gay people. Find them, talk with them. Do not just talk amongst ourselves. Do not just say things in which we believe that make us feel good in the rhetoric or language we are familiar or enjoy, but find where they are, engage them and bring them along, because that is how social change occurs in a democracy spurred by the kinds of prods we as litigators or as legislative tacticians use.

That is the opportunity we have right now, and marriage gives us a powerful bridge into that challenge because nothing captures their attention, changes the dialogue and gives us a renewed vocabulary like fighting over the freedom to marry, not that that is the only thing we care about, but that gets their attention and gives us the biggest batch of opportunities and challenges.

JUDGE BATTS: I want to take these issues of the parent-child relationship and marriage and put a more focused question to the panelists as a basis for bridging into another general area that is important. Frequently, marriage is inexorably linked to the issue of having children.³ The question is, should it be this way, and if not, how do we go about altering this association? Let me ask this of Matt and Evan before we open it up for the entire panel.

MR. COLES: I think there is one sense in which the link between marriage and parenting (in a superficial way) is a construct usually used by the opponents of opening marriage to try to keep us out of it. Having constructed an institution that at least, on its face, has not had much to do with raising children (in the sense that it has not been thought to be a requirement for it in any sense for a long time), to suddenly say that is the essential nature of it, that is what defines it, I think in some ways is kind of a dodge.

By the same token, I think nothing brings lesbian and gay relationships to the forefront of public consciousness better than the relationships of lesbian and gay couples with children. Thinking

3. *See, e.g.,* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding that the Hawaii Constitution does not give rise to a fundamental right of persons of same-sex to marry).

about it not in the way our opponents have used it, as a defense in marriage cases, but in a way that we have been, such as the dialogue with America Evan was talking about regarding lesbian and gay relationships. And while I think Evan and I do not totally agree on the terms on which we ought to be having that dialogue, I think we both agree very much that it is got to be going on.

One of the best ways to do it is to think about ways that present lesbian and gay families to the rest of America so that they can begin recognizing that we are here, that the families are here and thinking about what we are really like. The best way to do that is in terms of relationships with children. I love adoption cases, and I love adoption as an issue. I like it because it brings lesbian and gay relationships to the fore in a great way. In these situations, most typically, there are two people working very hard to do something for somebody else, and frequently, for somebody who nobody else cares about. It brings the relationship to the fore in a way in which it does not simply focus on the two individuals in the relationship, what they want and what their sense of entitlement is. I do not necessarily think that is inexorably linked in any legal way, but in terms of that dialogue, I do think it ought to be at the core of it.

JUDGE BATTS: Evan?

MR. WOLFSON: I, as always, totally agree with Matt. I think the distinction between legal and cultural is very important for us to understand. The fact of the matter is we live in a culture where most people talk culturally, not legally. When people hear the word "marriage," when people hear the word "family," when people think of children, they think of them all together and go about talking about them. This is our opportunity to raise all of these issues including the larger issue of equality and respect for families, which is what we are fighting for. I do not think we need to put a huge amount of energy into trying to figure out how to disentangle it.

I do think that putting forth stories of lesbian and gay people with kids in any manner, without kids, having commitment ceremonies, living alone, are all important.

One of the things that I think is really critical that we need to get over and move into the next phase of, is not giving ourselves false choices. We do not have to sit here in our movement and in our organizations and decide, "do we work on adoption or marriage," or "do we work on domestic partnership advances or fight for the whole full range of equality under marriage and other opportunities?" We do not have to make those choices. We have to be tacti-

cally smart, patient and persistent, keep using the word marriage, keep engaging the dialogue, even while we take the components along the way, and never accept any single thing as a substitute for full equality.

JUDGE BATTS: Nan, I have a question then in terms of what we have talked about so far. Obviously there is one consideration here that is either a wet blanket or a limiting consideration, and that is money. As a professor who is very good at theorizing, let me ask you, if an organization that you supported won the lottery, what would you do with the money?

PROF. HUNTER: One of the things that I would use the money for, in terms of building an infrastructure or structuring an organization, would be to think about the process by which we come to these decisions. Even if we understand that we do not have to pick the magic bullet issue and that we have to be flexible enough to adjust to the time, the question arises as to how we do that. What is our obligation as lawyers to have a better and broader perspective? It is very important for us as lawyers to try and navigate this tension. We are not doctors, and we are not activists, or social workers, or whatever. We are lawyers who bring a certain set of skills to this enterprise, which is what we ought to bring. We should not be blinded by those skills. We need to figure out better ways to structure in the broader perspectives and not just say, "since I am a lawyer, I think this way, so this is what the organization is going to do."

I would like to see lesbian and gay organizations consciously and consistently build up links with client organizations. By that, I mean with the kinds of organizing or community groups that do not do law, but do direct organizing. I think that social change lawyers are most effective when they have organized client constituencies that themselves do political work and grass roots organizing.

Let me give you a little example that is fresh in my mind because I just heard him speak. A young man named David Pumo, who graduated from Brooklyn Law School in 1997, went to work at the Urban Justice Center. David now does a combination of legal and organizing work there with gay youth, particularly homeless gay youth. Arising from that work is a lawsuit against the City of New York in which David is representing L/G/B/T youth in foster care, which is where kids on the street go. That lawsuit is a really good concrete example of litigation growing out of grass roots community work — of seeing a problem on the street, a very crucial prob-

lem to a very disadvantaged portion of the L/G/B/T community, and translating that into a lawsuit.

That is what we as social change lawyers ought to do: translate into lawsuits the injustices in our community. Sometimes the injustices are obvious and we can trust ourselves to see them. We would do a better job, however, if we more consistently developed relationships with those kinds of organized constituency groups.

JUDGE BATTIS: Thank you. Let me ask some of the representatives of the wonderful organizations we have here that same kind of question: if the organization won the lottery, what would you do with the funds? Paula?

MS. ETTELBRICK: I appreciate what Nan said about that because I think it is the engine of social change work for us as lawyers. We are informed by the events that happen within our community, to different segments of our community. I think it is very easy to define the generic approach to our work. The reality of our community is really different and much more than it used to be. When younger people come out at younger ages, it represents a whole new range of social reaction to them, a whole new reality for their lives, a whole new thing that we need to address more notably.

The lottery question is always a good one, because it forces a person to set priorities and look at some of these things. I would really look at stepping up our approaches and our work. What I would love to do is hire a couple of lawyers in every state to work on state legislative work, from and L/G/B/T community perspective: coalition building, working with state legislators, working to craft legislation that can benefit our community because there is a natural way in which litigation can occur with only a limited context.

If we do not have statutes supporting our positions or entitling us to certain kinds of rights in society, then there are always going to be limitations on our rights. I think building more of the connection between our national and state groups in particular is important.

Some of that started already through a group called the Federation of L/G/B/T Statewide Political Organizations where the state groups have come together. Part of what we are building and working with includes better connections and relationships with national groups. Each state operates in a very different way, and the broad base approach to where the law is or where it stands is no longer going to work for us. In arguing some of these cases,

even the family cases, we see a rush of anti-gay foster care and adoption bills in almost a dozen states this legislative term. What has come to the forefront is that people really need to know how to fight those off. The language of rights does not work in the adoption or parenting context as we as lawyers know. We do not go into court and argue for the rights of lesbian and gay parents, we argue for the interests of children. That is the legal standard, and part of what the educational process of the activist community is: to really understand the difference in dealing with family issues at and in the legislative arena, in the legislative area, as opposed to other kinds of issues. Therefore, I would really like to see those connections drawn much more tightly and resources built up at the state level.

JUDGE BATTS: Matt?

MR. COLES: If I actually won the lottery, I would first take the money and try to figure out how to make the kind of connections Nan talks about in a meaningful way. The problem with Washington D.C. is that people down there think having a meeting is an accomplishment. Too often, the way we try to do what Nan was talking about is talk to ourselves in our own organizations. I am skeptical about how far that takes you.

I guess the first thing I would do with the money is hire some smart people to help me figure out how to deal with that. The other thing that I would say is that I would want to be attentive to the other end of it as well. When you do public interest work for a while, whether it be litigation or legislation, you realize quickly that court orders and court decisions do not change society, and neither does legislation. Just because the Supreme Court says we are going to desegregate the schools with all deliberate speed, does not mean it happens the next day. Just because Congress says we are not going to have any sex discrimination in the workplace does not mean it happens the next day.

In very practical terms, one of the limitations of the kind of work that we all do is not only not getting the information up front, but crafting and delivering the goods at the end. Too often we stop at the level of getting a court decision or a piece of legislation and saying, "We are there. We got it." We really are not there, we are at best half way there and how you take and deliver the message and make it reality seems to me to be not quite as big a problem Nan was raising, but also one onto which I'd get my consultants and say, "how do I take this now and deliver it and bring it home

and make it work to the end?" Far too often legal organizations just stop too short.

I actually think that organized constituencies can do that. I can appreciate that there is a lot of talk and a lot of meetings, but I think there are some organizations — service organizations, other organizations — that are really out there. When I was doing abortion rights work, we had repeat clients because we represented abortion clinics. Having repeat clients is very helpful because it keeps you very much in tune with certain segments of the community.

MR. COLES: I do think there is a huge difference between service organizations that are doing things directly and service organizations that are not making that direct connection. I think that is very well taken.

MS. ETTELBRICK: Well, part of it is the process. I agree that we cannot just win a lawsuit or pass a single law and think that is the end of the job. The legislative process is quintessentially an educational process as well. There is no bill that supports the lesbian and gay community that is ever going to get passed unless the legislator and the legislator's constituency are educated.

So there is a way that the legislative process relies on education. If we get a law passed, it demonstrates that we have brought people along, and gotten them to understand some basic element of our lives. Litigation does that as well. I think litigation can be very educational. Lambda and the ACLU have made an art of filing lawsuits and doing the educational work by getting the press attention on the issue, so that people can see a story in a context and begin to talk about it and make up their minds about it. Therefore, I think all of this is so much a part of a process, and keeping focused on what some of the ultimate goals are and making sure we are reaching out in the broader processes will ultimately result in a societal change.

JUDGE BATTIS: Evan, I want to know what you would do if your organization won the lottery?

MR. WOLFSON: If Lambda, as opposed to myself, won the money, I think we would keep doing more of the work that Lambda does, perhaps by opening one, two or three more regional offices to closer serve the regions and to spark the kind of political and public education mix that goes along with litigation. We would launch more projects like my colleague, Doni Gewirtzman has launched. Doni was specifically brought on to do an outreach to older lesbians and gay men.

We would also work on trying to do the kinds of things Nan is talking about, namely finding other areas of our community and working to reach out to them. That is the kind of work I think that Lambda and the ACLU have actually done very well, and will continue to do more of and would be willing to put money into.

If I won the lottery, and could actually decide how Lambda would spend its money, of course I would do exactly what Lambda suggested by funding more of Lambda, the ACLU and the other organizations.

I would also put a large chunk of the money in a different direction than has been discussed here. I would use it to seed or spur state and local groups to create more hands-on, small, local infrastructures with the mission of doing outreach and engagement of non-gay people.

The most exciting example of activism that I have seen in the last couple of months took place about three weeks ago in Sacramento, where two lesbians held a commitment ceremony. More than ninety ministers from around the country flew in. These ministers were not gay ministers. Rather, they were there to make a civil rights statement by blessing the celebration, and by defying church law, if necessary, in order to support their freedom to marry culturally and legally. Non-gay ministers made that statement. That is what I would use the money to do to engage non-gay people in dramatic dialogue. The good news about the lottery question is that this type of activism does not cost a lot of money. Volunteers can do it. Anyone can get up and engage non-gay people and find something that will generate this kind of discussion. That is how I would use the money and the energy, trying to focus people's attention.

JUDGE BATTS: Matt, you wanted to say something before?

MR. COLES: It was a small point, but I wanted to actually register a small disagreement with Paula on the educational value of the legislative process because I think it is declining, although not in every circumstance. I think legislatures across the country, like Congress in the last thirty years, have gotten districted more and more into safe seats. I think legislators are less and less worried about their constituents. People got elected year after year, in the era in which you had to educate constituents to make change regarding lesbian and gay rights. I am not sure whether that is necessarily true anymore of many issues and legislatures.

If you look at those astonishing Gallop Polls, eighty-six percent of the American public thinks there ought to be employment dis-

crimination laws, but we cannot get past ten legislatures across the country. I think one of the reasons we cannot get past those ten legislatures is because many legislatures have become polarized along safe seats, allowing them to be less responsive to constituents. There is still a lot that you can do with the legislative process, but I think it has less of that great inherent, built-in educational value that it did before that kind of districting took over.

MS. ETTLEBRICK: I think that is a good point, Matt. I think the other side of it, however, is that they do begin to listen when you organize against them in their districts over some of the issues, and part of the gap that I see, and that the Pride Agenda has been working for years on developing, is exactly what Evan is saying — building up the infrastructure at the local level; getting people involved in political campaigns; getting them in there.

I have seen some legislators in New York who, because the last ten out of the twelve people who worked on their last campaigns came from the gay and lesbian community, have had to hold the line on issues that I know they were not happy upholding. I think people have been dis-empowered from even working in political campaigns for the reasons Matt mentioned. New York has one of the highest incumbency rates of any state legislature in the country. It is disgusting. These people are not accountable to anyone, and part of the process is getting people fired up and working strategically on this, which is part of what we do . . . I mean, we know that the civil rights bill has the votes in the state senate here in New York to pass. We cannot get the senate majority leader, however, to allow a vote on the bill. This year is the twenty-ninth year that New York State has tried to pass a civil rights bill banning sexual orientation-based discrimination. The Assembly passes that bill every year. The Senate majority leader, Joe Bruno, refuses to allow it to pass because he is in a rural district outside of Albany and it is hard to capture his attention. He just hates us. But we have slowly and methodically gone through and dragged some of these people along by getting very involved in their re-election campaigns.

In the midst of the international response to Matthew Shepard's death,⁴ the Wyoming legislature killed the hate crimes bills this past week. So did Utah and Montana. People are not accountable

4. Matthew Shepard was a gay college student who was killed in a hate crime. See James Brooke, *Gay Man Dies From Attack, Fanning Outrage and Debate*, N.Y. TIMES, Oct. 13, 1998, at 1. He was kidnapped, robbed, pistol-whipped and left tied to a fence for 18 hours in near-freezing temperatures. See *id.*

because they do not believe there's really a political price to pay for going up against the gay community. We have not really focused, and I think Evan is right on the mark when he says that we really do need to get beyond ourselves. We need to strategize about this. We need to get beyond our own community. We need to talk to our supporters. They are out there. We know that they are, and we need to use that polling data that says eighty-six percent of the public believes non-discrimination laws pass, or should be passed. Make this real to these people by taking a few of them out of their jobs. That begins to send a message at the state level. It is pure politics.

JUDGE BATTS: Evan?

MR. WOLFSON: I think the way to do that is by going and asking them for support. We are pretty good at demanding in our community. We have organizations that do a great job of demanding our rights in court, as we should. That work is very important and valid. That kind of activism has a long and noble history, and it is an important methodology, but demanding is not the same thing as asking. Asking for support is critical. Saying the words: marriage, equality, lesbian, gay, bisexual and transgender. Saying the words, over and over, and giving people a chance to move and to be fair. If we do not go and ask them, how do we expect them to just do the right thing?

What I actually raised my hand to say was something different, and it concerns another arena that we have left out because it has been a very unsuccessful arena for us generally. I think, however, it is one that we have to take seriously and deal with, and that is the ballot measure — the initiatives. More and more there are efforts to put our rights up to a vote. We have all seen this and we have seen precious, important, heroic victories deferred or snatched from our grasp when people get an opportunity to short circuit them through the electoral process. We have to engage that. We have to deal with it. We cannot ignore it, and the only way to seriously engage it is with two important ingredients. One is to mount intelligent, careful campaigns. The other ingredient is to continue laying the groundwork by engaging more and more people in that cultural dialogue. We must do this over time, because it is a long process and every month that we do not do it is a month we have not put ourselves in a position for the battle that is inevitably going to come. In March 2000, there will be an anti-marriage, anti-gay initiative on the in California ballot. People in California know that. People nationally now know that. What are we doing?

How many months are we going to wait before we engage in the fight?

JUDGE BATTS: When you talk about the ballot initiative, you are not talking about the ballot initiative as our friend, you are talking about the ballot initiative as our enemy. How can we go up against it?

MR. WOLFSON: I think historically it has rarely been our friend, and I am uncomfortable with the notion that people's rights should be put up to a vote in an affirmative way. Indeed, the danger is that it is used as an opportunity to tear holes in constitutions, to polarize and to divide and attack. If we do not successfully fight back, not only do we not have a chance of not winning, we do not even move forward. When you move forward, you do not necessarily win every battle. By engaging, reaching hearts and minds and having discussions, however, you put yourself in a better position to fight the inevitable next battle.

JUDGE BATTS: That brings me to the next question I wanted to put forth, which is obviously sort of a continuum of what we have been talking about. We have the Lesbian and Gay Lawyers Association of Greater New York ("LeGaL"), which is obviously one of the sponsors of this conference and for which we are eternally grateful. By its name, we know that it is an association of lawyers. A lot of the panelists have been discussing that "we as lawyers" need to do things and reach out. I guess one of the questions is how should we, being primarily law-based organizations, accomplish the interaction with and reach out to other organizations? If they are a professional organization, for instance ballot initiative fighting, is there an organization of L/G/B/T advertising executives that we could try and get together with and do some sort of educational campaign in a way that catches the eye of the community when we know of these issues? How do we know of other organized groups that we can reach out to, and even if it is not bringing a lawsuit but working in the policy area, how do we actually go about doing this?

MR. WOLFSON: For the last several years, we have reached out. By we, I mean Lambda and other groups who have seen what the consequences of the 1993 Hawaii Supreme Court ruling⁵ were. After this, the world changed and we had to get involved and deal with it. For the first time, we have reached out to every national lesbian and gay organization to try to bring them together to meet

5. See *Baehr*, 852 P.2d at 44.

regularly and to work on this change. We have reached beyond the national organizations to state and local groups for the first time. That had never happened before in a sustained way, and I think it occurred in large part to the sustained effort that the Task Force is exerting with regard to the Federation. We have reached out to non-gay allied groups and tried to bring them into regular meetings to actually move this forward. Anyone who has been within the sound of my voice has heard tirelessly the need to do various things. This message has been directed indiscriminately at everyone. So, that is what we have done.

The results have been mixed. I think more has been achieved in these ways than had ever been done before. The national dialogue about the freedom to marry obviously has taken off. The fact of the matter is people cannot only hear my voice, people cannot only hear Lambda or these groups' voices, we need to enlarge that. In an ironic way, we find ourselves at this juncture where non-gay people, by and large, better understand the urgency and meaning of this more than many lesbians and gay men do, because they live in the world of marriage. Non-gay people understand why this is important. They take that vocabulary seriously. Rather than trying to find every last lesbian or gay person or try to break people into working on something they do not want to work on, I think it is important that those people who do understand the urgency of the moment, and who care about this go out and find those non-gay allies and the gay people who do understand and who do care either affirmatively or because they understand the perils of losing, and there are many of those as well. We do not have to attack each other over this. This is not something people need to be forced to do. It is something they want to do. There are plenty of people out there who are reachable who have not been asked. Those are the ones I would focus on.

JUDGE BATTS: It seems to me that there are issues that we are talking about that individuals have very strong feelings about one way or another. There are individuals who feel that being a parent is something that the straight community does and that one of the reasons that we revel in the freedom and individuality of our sexual orientation is that we are away from that world where children are included.

Another area of course is marriage; whether or not we should marry. We do not want to marry because we eschew that whole heterosexual way of doing things and we revel in our freedom and individuality and do not want to get married. Once we say that

there are individuals within our community who do want to have children, who do want to get married, does this result in an inevitable tension so that we cannot work together for things that one individual or group of individuals may want and others do not? Do we have to look for something that everybody agrees on as such a basic a common denominator and those are the only things we work on? What do we do when we feel strongly and differently on issues upon which, if you will excuse a term from the judicial arena, reasonable people can differ? How do you work still as a community even when one member does not want to get married and does not want to devote his or her resources to that, yet another member of the community absolutely does want to get married and wants to devote community resources to that? How do we arbitrate, mediate and adjust? How do we continue to work? What do we do here?

MR. COLES: I am going to give you a very inadequate answer, but it seems to me that you do not wait for something that everybody can agree on because we will wait until hell freezes. You do not need to do that, and in any sensible movement people not only find lots of different ways to get to shared goals. I remember in a ballot initiative in 1978, when a huge fight occurred about how to fight California Proposition 6.⁶ Do we fight Proposition 6 by doing mass advertising, do we fight by going through conventional political party routes, or do we fight by going to the streets? What we wound up doing was all three things. We had an organization called the Coalition Against the Briggs Initiative that went through the streets; we had the "No On 6 Organization" that went through conventional politics; and we had another organization called "SORE," that tried to go the advertising route, and it worked pretty well.

I think you have to find ways to accommodate both people's differences and goals and their different senses of how to get there. However, at the very same time you have to recognize that there are consequences to things that people do, both in terms of routes they choose and in terms of issues that they choose for everybody else. You know that when you wind up with a ballot initiative, for instance on the ballot in California in 2000, that has enormous consequences in terms of almost whatever you do about it; where resources are going to go, what the law in a very important state is

6. CAL. PROPOSITION 6, § 3(b)(2) (1978). The Briggs initiative would have amended the California Education Code to permit the state to refuse to hire/fire a teacher who engaged in public homosexual activity or conduct.

going to look like and what the debate is going to look like. I think that what is critical to make that work is not to try to get everybody on the same page either on methodology or on issues. People have to pay attention to the consequences of what they do, what people's different views are, and try at least to reach some level of dialogue of how these different views are going to affect each other. We cannot assume that the fight is going to be about this or has to be about that or we are going to make it about this.

Like I said, an inadequate answer.

JUDGE BATTS: I do not agree with your characterization of your answer. Evan?

MR. WOLFSON: Oh, I do not agree with that characterization either. I think that it is a very good answer. I guess there are a couple of things that it invokes in me. One is that Matt and the other people who heroically fought against the Briggs Initiative successfully, which was a California measure about twenty years ago saying that gay people should not be allowed to work for schools. Obviously, an incredibly hot button – a difficult, challenging issue twenty years ago. At the time, many gay people as well as non-gay people said “you are out of your mind, you cannot defeat it.”

Of course, you went on to win. Those are important lessons and I agree with Matt about the three kinds of campaigns we need to be considering. I think the right answer is all three and we must start now. Do not spend another six months discussing that because it will be too late and all you are left with is the opportunity to do a crash course, rather than the kind of sustained, slow, patient, persistent engagement that we need to do in conjunction with a media campaign and the fund raising that needs to be done.

So, I think those lessons that Matt evokes are very important and real, particularly the lesson of: Do not listen to the people who always say we cannot win. A second important lesson that I think Matt mentioned in his answer is that the process of battling, ideally will result in a victory. Hopefully, you will win that battle. If you fight the battle, whether you win or lose that particular battle, you have advanced your ability to win the war because you have at least gone forward. If you do not fight, if you pretend that you cannot, and instead want to change the subject, then all of the non-gays will talk about us and say that through that battle, we lost. I think that is unacceptable and I think that it is also one of the lessons of the Briggs Initiative fight.

Going to Matt's point about consequences, I think that it is absolutely true that people have, as I said earlier, a right to choose what they want to work on and what they care about. I would correct one thing in how you framed the question, Judge Batts. I have never seen that what either we at Lambda, myself or others are fighting for as "marriage" so much as it is the "freedom to marry." I am not fighting for mandatory marriage. I think I would be a bad apostle for the cause of telling every gay person they should get married. However, I think what we are fighting for is the freedom to marry and all that it signifies: choice, equality, opportunity to make your own decisions about how to protect your family and not be shut out of a central social and legal institution simply because of your sex or sexual orientation. That is what I believe we are fighting for, and those who chose not to put their energies into that are entitled to make those choices and they have in many cases from their own lights very good reasons to do so.

There are consequences, however, and to me the important thing is not that people have to believe that marriage itself is so important or that even the freedom to marry is the most important thing. What people should pay attention to, in my view, is: what is the opportunity at hand?; where are the break-through opportunities at hand?; tactically, what if we do this now, will it put us in a better position later? People should not simply think that we have the luxury of historically changing the channel to having a dialogue about something we want to talk about in our own language, when society is reachable and engageable though engaged somewhere else. That is an imperative that an activist must take seriously. An activist must figure out how to achieve something because you just do not like something or even avowedly have ideological concerns about it. To make a real strategic choice based on the real opportunities you are giving up if you do not engage here and choose instead to hold out for this or that.

PROF. HUNTER: I would like to just jump in because I think Debbie you have touched a nerve. I think the nerve you touched in framing your question is the range of views within the L/G/B/T community about sexual politics. I think there are two things at work here; one is very obvious, one is a little bit less obvious.

The obvious point is that we are a very diverse community ideologically, and there is a tension built into a L/G/B/T group or any group organized along identity terms, because you are by definition representing a community that is very ideologically diverse. Not only is it ideologically diverse on an issue like NAFTA, but it is

ideologically diverse on the issues that pertain to our rights and the strategies to achieve those rights. Some of that is like the tensions that will never go away about different modes of organizing, or legislation v. litigation or whatever, but some of it really goes to the heart of questions that we not only have strong political beliefs about, but we experience very strongly in our own lives. People are very deeply engaged with questions about whether the right to marry really represents them in some kind of cultural sense, or represents what they think of being gay or lesbian is all about, and we simply have no choice but to respect that. I am someone who feels very strongly identified with what has traditionally been lesbian/gay culture with its urban focus and its orientation toward being an outpost for sexual agency and freedom. That is something that is very important to me. I also realize that the old phrase "we are everywhere" is quite literally true and as more and more people come out, which is wonderful, more and more people come out in lots of places that I find surprising. I, for example, have to grapple with the fact that gay republicans are as gay as I am.

I used to be in a position at the ACLU of representing the community and I no longer am. My life is easier; but my colleagues are in the position of having to speak for a community that is diverse in many ways, and that is no easy task. Particular battles, like the California referendum battle, will force us to deal with this and negotiate, hopefully in good faith, and come up with strategies that take advantage of the differing skills that we bring to the table. I think that we ought to try to be positive about this diversity in presenting it to the outside world.

One thing that troubles me is the battle over what authentic gayness is, because, of course, I do not think there is such a thing. The question of framing this position or that position as not being sufficiently gay is deeply problematic. I think we just have to face the fact that the ideology and the identity are very different, and tell the world that and not try to persuade the world that either what we really represent is sexual freedom, or what we really represent is wanting to be married like everyone else is.

The second point is somewhat less obvious, and that is that the non-gay world is significantly more diverse and less monolithic than we give it credit for. It is true that a huge proportion of non-gay people are married at some point in their lives, but marriage has served as a mask for a lot of very untraditional behaviors. The unraveling of that that has accelerated over the last couple of decades, presenting us with an opportunity that I think we should not

pass up. In bringing our own very different traditions about relationships and sexuality to the broader cultural table, we should point out the ways in which the mainstream is more like us than is usually acknowledged.

One of the things for which we should call upon the non-gay world is not simply tolerance of us as L/G/B/T people, but also more honesty about themselves. Honesty about one's sexual life — I do not mean in a personal sense, I do not want the Lewinski issue to go on forever. That is not what I am calling for, but I am calling for thinking about ways to take more of the hypocrisy and dishonesty out of the presentation of non-gay life. I think there is more of a meeting ground there than we sometimes think there is. I think that an enormous part of the struggle of the right against us is also a struggle to try and maintain what is increasingly a kind of myth about what their lives are like. I think we ought to recognize that and try and use that to our advantage.

JUDGE BATTIS: I am going to open this up now to questions from the audience.

AUDIENCE: Thank you for a very interesting morning touching on things that I have not thought of. Along those lines, in the last year I formed a friendship at work with a straight woman and one day she was particularly tickled when I said that in the gay community there is a derogatory term sometimes used for people that have children. They are called "breeders." She was enchanted by that because she and her husband, although married, have decided that they do not want to raise children. We have discussed that theme a number of times, and at the same time I became aware that there is prejudice in our society against women who choose not to raise children, and yet who choose to get married. I suppose it applies to men, although it probably affects women more. The issue of selfishness just occurred to me. The prejudice that that small segment of the straight community may suffer is one little aspect that we may want to take into this consideration of how we reach out to the straight community.

PROF. HUNTER: Your story reminds me of something I saw when I was watching the 1996 Republican convention on television. This was when Elizabeth Dole was walking through the audience and there was a color commentary about her. Someone mentioned, and I must say it absolutely stunned me that this could be said about a woman in 1996, that she had never had a child. She is not a mother. Robert Dole has a child and she is a step mother

to his child, but she never had a child. The newscaster thought that was relevant.

Your comment reminds me that it may be very interesting now that she has semi-announced a candidacy for the presidency, to watch how that issue develops, whether it becomes an issue, which it should not. Given that she is a Republican I predict it will, within the party if not more broadly. I think your point goes to the fact that although we often think in an easy or loose way about the family lives of non-gay people being synonymous with parenting, in fact they are not.

AUDIENCE: I wonder if you could comment on the role of the church in the debate.

MR. COLES: In the early 1990s I actually went around the country talking to people who had passed local gay rights ordinances to find out how they did it. Something that occurred to me early on is that when you get off the two coasts, religion is a much more important part of politics in America than it is anywhere else if you are going to have a cultural dialogue about who we are, and you are going to have a cultural dialogue about relationships to let the Church go is to give up what too much of the country is the most important and the most influential institution. That would just be completely suicidal and it ignores the fact that lots of people in our own community are people of faith who go to churches and take religion very seriously, and you have got to make religion part of the dialogue and part of the dialogue on our side.

MS. ETTTELBRICK: Also, the Catholic Conference takes positions on pieces of legislation, both federally and in state government, and here in New York. We have worked very closely with Dignity chapters in talking with Cardinal O'Connor and other members of the Catholic Conference about moving them at least into a neutral position on things like the Hate Crimes Bill and the Sexual Orientation Non-Discrimination Bill, so there is a very pragmatic political reason that we need to hook up with those organizations like Dignity that can advocate from within.

JUDGE BATTS: Evan?

MR. WOLFSON: Well I agree with those comments and I think I will just add a couple others. One is that, in Hawaii and in Alaska, particularly in Hawaii, in the anti-marriage, anti-gay campaigns we just had to fight, the Mormon church and fundamentalist Christian groups threw more than \$2 million into that campaign. They were by far the largest single contributors. They are our organized opponents, not the public at large. The public at large may

not yet support us, they may still be in need of being reached, but they are not the ones who are taking to the barricades, funding huge campaigns against us. It is these organized opponents who wrap themselves in the name of religion and to whom we cannot concede that name of religion. They should not be the voice of religion in America any more than any other single entity should be.

The second thing I would say is that affirmatively we should not concede that title. Many of us are religious. Many of us are moral. Certainly our cause is moral. What we are fighting for is moral. We are fighting for equality and the fulfillment of the American commitment to individual liberty, the pursuit of happiness and respect for all people. We are the moral ones and we should hold that. I mentioned the Sacramento ceremony in which more than ninety non-gay clergy made that civil rights statement. We should be holding, inviting and engaging those people in dialogue all across the country. Indeed, next week is the second annual National Freedom to Marry Day, on which we have called on people, gay and non-gay, in every community, school and entity to do something to celebrate, denote and redouble our outreach to non-gay people and, as of today, there are going to be more than seventy events all across the country, many of which involve things such as, inter-faith prayer breakfasts, statements by clergy, sermons in congregations, and so on. We should not, cannot and need not cede that arena, it is our arena, and what we are fighting for is right.

AUDIENCE: As I was listening to the panel's discussion, I was trying to figure out where the lessons were from the gays in the military. I am wondering, since marriage seems to be a similar kind of cultural issue, whether we are running against some mind sets. Could the panel talk about that and how are we dealing with the lessons?

MR. WOLFSON: Actually that is a question that a number of us have taken very seriously. There have been deliberate efforts to do this in a way to benefit from the experiences we had and the successes and weakness we had in our work. I do not really have time to go through all of them, but I will give you a few. One is that it is very clear that we are not going to win our civil rights, we are not going to win something as momentous as full equality — whether betokened by inclusion in the military — which is a hallmark of citizenship and also the large single federal discrimination — through one legislative “quick fix” or through delivery of our

rights by the courts alone. It is a sustained long term effort and we will not win if we do not sustain our energy and keep the momentum going, keep fighting and not get bored, tired or overwhelmed or decide we need to focus on a million other things. Unless we commit to serious long term fight for these issues, we cannot win.

Furthermore, contrary to the mythology that Clinton “created” these issues, we had been talking about these issues and bringing them into the courts for some time already. It became a matter of political and intense discussion. We went through this process with a good deal of division and uncertainty, and there was no clarity on exactly how the process should be handled. It was a good faith effort in many cases, but we were overwhelmed. It was a very short-term framework to do a lot of work, and in the end it could not be done. Virtually all the organizations, with the exception of the legal groups, were having problems, and it really failed at that juncture.

There was no follow through, however, no continued discussion, no effort to capitalize even on that failure. No one tried to leverage for people who had said, “well, the military is different,” and turn it around and make a sustained, intelligent, persuasive argument about, “well, then what about civilians.” We just did not do it right in that sense, and we cannot afford to repeat this with regard to the engagement that has broken out and with regard to the freedom to marry.

Another important lesson, I think, is that you can use that kind of political battle to engage public discussion and to reach people and educate them, but if you stop after just a few months, you will not get the “full bang for your buck,” so to speak. We took this lesson seriously with regard to marriage. Long before it broke out politically and legally, we were doing a lot of work on the political front to try to shape the public dialogues, train the vocabulary and engage spokespeople and have it register, so that when the public began talking about gay people and marriage — something they had not talked about even a few years ago — they were talking about it largely on our terms, and when the backlash campaign, vicious and vigorous as it has been, busted out, we were more prepared to deal with it in advance than we usually have been. So those are, I think, two important ways in which we tried to benefit from the experience and move it forward.

MR. COLES: Let me suggest two others quickly. One from a narrow, parochial, legal approach. At the time the “Don’t Ask,

Don't Tell" legislation⁷ passed, Lambda and the ACLU tried very hard to think about this problem: in all previous military litigation we had seemed incapable of getting the courts to agree that the question was not about the inability of lesbians and gay men to be good soldiers and sailors, but it was really about other people's attitudes.

We went to great efforts to structure a couple of pieces of litigation to this end, which I think we did successfully in the *Able*⁸ case and little bit less so in the *Phillips*⁹ case on the west coast. The lesson out of those cases, as I read the way they came to their final circuit opinions, is that while we did succeed in getting rid of the ways courts had used to grapple with that basic question, what we got was essentially a stunning admission from the circuit courts that they do not really review constitutional questions when they come up in the military. Read Judge Noonan's opinion in *Phillips* or Judge Walker's final opinion in the *Able* case, and I think you will agree with me that this is what they come down to.

The lesson I take from these cases is that this was a necessary fight and I am glad we did it, but you cannot reasonably expect legal institutions, in most situations, to make social change way out in front of where the political institutions are. I think we need to remember this again and again in what is essentially a political movement. What arises from the military cases in federal courts is that when the courts are forced to look at these issues, they will take a bye on them.

MS. ETTELBRICK: Matt, would you distinguish the pre-"Don't Ask, Don't Tell" arena of military litigation from the past, because that is where the political structures had been decided through Congress? Do you think that it put courts in a different position in looking at this, because I seem to remember the feeling in the pre-"Don't Ask, Don't Tell" era was that through the slow whittling away of time, the courts would begin to come around to recognizing this policy as being discriminatory and the government's arguments upholding it were being chipped away very dramatically.

MR. COLES: That was not my sense during that time. The only thing that I suppose would give me that feeling would have been

7. See 10 U.S.C. § 654 (1999) (codifying policy concerning homosexuality in the armed forces).

8. *Able v. United States*, 88 F.3d 1280 (2d Cir. 1996).

9. *Phillips v. Perry*, 106 F.3d 1420 (9th Cir. 1996).

the *Meinhold*¹⁰ case, but I thought the cases went better in the early 1970s than they did later into the 1980s and toward the end of "Don't Ask, Don't Tell" with the *Steffan*¹¹ case. No, I did not see great progress beforehand.

PROF. HUNTER: Well, I think there was. I am not sure that I would draw that time line distinction quite that way, but I do think that the cultural impact of the litigation was growing. I think that the *Watkins*¹² case had an enormous impact. It was a stunning moment when the Ninth Circuit panel ruled in favor of *Watkins* on equal protection grounds.¹³ Although that did not last as a matter of law, it remains a stunning moment, a sign that something profound had shifted. I think that the *Steffan* case, although it produced nothing in terms of legal victory, was an enormously useful and powerful educational tool. I think that when Clinton was elected and announced his intention to lift the ban, our community basically ended up trying to surf a tidal wave. We were just overwhelmed by a whole convergence of factors in a situation that was pretty unique. I think that we collectively did the best we could.

One of the things that has interested me since then has been looking at the impact of that debate and the "Don't Ask, Don't Tell" statute on military policies covering non-gay members of the military. Over the last couple of years, there have been many controversies over adultery; often by high-ranking officers. These situations have caused a lot of grief in the military. Part of what has driven those situations has been their sense that prosecutions have to be fair. The services have been accused of applying a different standard for prosecution when the officer being accused is a woman or is African American. The military does not want to be seen as so flagrantly discriminatory in how they treat sexual conduct. They want to be able to say that they are going to apply sexual rules across the board. What happens when they do try and apply them across the board is that straight people find them ridiculous and insane. I think that the issue of military policy about sexuality is still completely up in the air and very much in flux, despite the demise of gay challenges.

MR. COLES: If you stand back and think about the hearings and look at this, even one step back away from military policy in general, the hearings were an enormous cultural step forward. We

10. *Meinhold v. United States Dep't of Defense*, 123 F.3d 1275 (9th Cir. 1997).

11. *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994).

12. *United States v. Watkins*, 875 F.2d 699 (9th Cir. 1989).

13. *See id.* at 711.

moved from an era of talking about lesbians and gay men as being incapable, being criminals or being mentally disabled. I think the hearings cut through all that with the entire country watching and essentially came down to saying, "Now the real problem is that you make us very nervous, so nervous that we really cannot do our jobs when you are around." That was ten years of political progress and I actually think that viewing "Don't Ask, Don't Tell" as a failure is a great mistake. I think it was a great cultural success.

We are still working out the details with policy, and I think that is going to take a while, but I honestly think that once you gain some perspective, the lesson we ought to take out of this is that this was a huge success from a cultural standpoint. Ultimately this is a battle to change the way people think about us and our relationships more than anything else.

MR. WOLFSON: I just want to say I agree with that and that was an example of advancement because we engaged in the battle. Where I think we dropped the ball was actually afterwards. We could have done things better but now we have learned and hopefully in the next battles we will do better. Where we have dropped the ball in the military question is we have not engaged in the continuing public discussion. Here we are now, in 1999, in Nan's famous formulation, where the breakthrough win of the freedom to marry, as she put it, either shimmers or lurks on the horizon.

We could still win that breakthrough within the next few months. The lesson that we should be taking from 1993 and the battle in the military is that we cannot just wait for these things to come to us through the "deus ex machina" of President Clinton or the state supreme courts or some cultural shifts. We should be out there mounting the barricades, building the bridges, engaging people and being prepared to withstand the battles in legislatures every day. If we are committed to seizing the most out of every single one of these breakthrough opportunities, be it the "Don't Ask, Don't Tell" hearings, the breakthrough win of the freedom to marry or horrible tragedies that nevertheless give us opportunities, like Matthew Shepard's death,¹⁴ it is not enough to wait for them to fall from the sky. Every one of us, week by week, needs to be preparing to put ourselves in a good position to seize that luck and the challenge of doing that is directly presented around our freedom to marry.

14. See *supra* note 4.

JUDGE BATTS: Does anyone have a final question to put to the panel?

AUDIENCE: I work at the Asian American Legal Defense and Education Fund, and we do the traditional race-based civil rights litigation, and I personally do voting rights. I think we have done a lot of good work in the community on looking at coalition projects on legislation and public policy issues. What I have not really seen is the co-litigation that traditional civil rights organizations can do with L/G/B/T civil rights organizations through a litigation strategy. Now I know the body of law is radically different, and there is much more federal legislation that protects racial and ethnic minorities than there obviously are of the L/G/B/T communities. There have to be ways in which we can do more than just amicus briefs for the U.S. Supreme Court in support of each other's positions. I would like to know what your thoughts are on some co-litigation strategies between the different racial and ethnic civil rights organizations.

MS. ETTLEBRICK: It does not happen very often, because that is where I first went in my thought. Years ago, I remember, there was a case of two women who were assaulted on a subway here in New York. They were a lesbian couple. They were latinas. It was very difficult to form a coalition in terms of different priorities that PRLDEF and Lambda had. Ten or twelve years ago, we had not yet begun to work together. You just cannot put people together over a piece of litigation if they have not tried to work out some of the issues beforehand. And most litigation does come up spontaneously or in response to something immediate that has happened to somebody. I think to work out some of the different perspectives in the course of representing a client or clients is often very difficult. I actually think the amicus brief approach is a very good approach as well, and I would be curious as to what thoughts you had of how it would enhance the litigation to do it jointly. Is it better to present to the court an intersection, or is it alliance building that can enrich each of the institutions later on to take on a new area of the law?

JUDGE BATTS: Anyone else want to respond to that?

MR. WOLFSON: I will just say that I think there has been increased resource and research sharing, and the amicus sharing that does go on is not just in the U.S. Supreme Court. There has been and there could still be more very important amici briefs that various combinations of groups have done with each other and I would not dismiss them as just amicus. I think that amicus briefs are an

appropriate use of the resources that the groups have. I would actually like to see us figure out ways that we can work together on the public education and outreach work around our respective legal work. I think our constituencies ought to better understand the intersection, whether through joint forums, letters or work. I do not know that it is so much what we can do as lawyers in court as what we can do as lawyers out of court together that would really benefit the shared commitments we have.

SEXUAL/GENDER IDENTITY IN THE CRIMINAL COURTS

MS. BADEN-MAYER: My name is Alexis Baden-Mayer. I am a third-year at City University of New York School of Law. Last summer, I was the Dr. M.L. "Hank" Henry, Jr. Judicial Intern. The "Hank" Henry Judicial Internship is a paid ten-week summer internship under the auspices of the Lesbian and Gay Law Association Foundation of Greater New York ("LeGaL"). The program is designed to give a student committed to lesbian and gay rights exposure to a variety of courts and tribunals through placements with openly gay and lesbian judges. The "Hank" Henry Fund for Judicial Internships was established in memory of Dr. Henry whose ground breaking work encouraged openly lesbian and gay lawyers to seek and achieve judicial office.

I would like to introduce the panelists. Judge Paul G. Feinman was elected to the Civil Court of the City of New York in the First Municipal Court District in November 1996, after winning a contested primary race. His election marked the first time that an openly gay male succeeded in being directly elected to the civil court. Since taking the bench in January 1997, he has been assigned directly to the Criminal Court of the City of New York for Manhattan.

Before his election, Judge Feinman served for eight years as the principal law clerk to the Honorable Angela M. Mazzarelli, Associate Justice of the Appellate Division, First Department, of New York's Supreme Court. During his tenure as Justice Mazzarelli's law clerk, he worked in the Appellate Division, both in civil and criminal trial terms in the Supreme Court and in the narcotics court, all in New York County.

Prior to working in the court system, Judge Feinman was a staff attorney for the Criminal Defense Division of the Legal Aid Society in New York County, and there he briefly shared an office with co-panelist Lori Cohen.

He began his legal career as a staff attorney for the Appeals Bureau of the Legal Aid Society in Nassau County, Long Island.

Judge Feinman is a former president and board member of LeGaL. He is a member of many bar associations and organizations and currently serves on the Criminal Courts Committee of the Association of the Bar of the City of New York and the Committee on Lesbians and Gay Men in the Law of the New York County Lawyers Association.

Judge Feinman received his law degree from the University of Minnesota in 1985. He was a research assistant in the area of comparative criminal procedure, a legal writing instructor and co-founder and past president of the Gay and Lesbian Law Students Association ("GALLA"). One of the legacies of his involvement as GALLA's president of the University of Minnesota was the barring of the military and other employers who discriminate on the basis of sexual orientation from conducting on-campus interviews in the Law School.

He graduated from Columbia College in Manhattan in 1981 with an AB degree in French literature and language served as a chair of what was then known as GPC — Gay People at Columbia.

Next, Judge Michael H. Sonberg graduated in 1968 from Queens College and from Harvard Law School in 1971. He worked for twenty years as a corporate attorney doing commercial litigation in practice in Manhattan. He was appointed to fill an interim vacancy on the Civil Court by Mayor Dinkins in August 1991, and re-appointed to fill interim vacancies by Mayor Dinkins and Mayor Giuliani. Appointed by Mayor Giuliani to the Criminal Court in April 1995 for a term ending in December 2001, he is the only openly gay or lesbian judicial appointee of Mayor Giuliani.

He has been in the Bronx Criminal Court since his appointment. He has been involved in the "Hank" Henry internship, and I had the pleasure of spending a week with him last summer doing arraignments. He has been nominated to serve a third one-year term as the Secretary of the Association of the Bar of the City of New York, and he is its first openly lesbian or gay officer. He has previously served as the Chair of the Committee on State Courts of Superior Jurisdiction and Co-Chair of the Council on Judicial Administration.

He is President of the Association of Lesbian and Gay Judges, a New York-based group, and Secretary of the International Association of Lesbian and Gay Judges. He is on the Executive Committee of the Harvard Law School Association and on the Board of the Association's Gay and Lesbian and Bisexual Alumnae Committee.

Next, Lori Cohen graduated from law school from the University of Buffalo in May 1986. She went to work at the Legal Aid Society, Criminal Defense Division, where she stayed for three years. Then she worked for a midsize firm, Mount Cotton & Wilten. While there, she says she was "outed" inadvertently by the

New York Times in an article about a demonstration. They were discussing lesbian and gay attorneys and quoted her.

She said it was really not a big deal, as she had been out to everyone but the partners, and they were okay about it, she says, but not enthusiastic.

She left Mount Cotton in August 1989. At the time, she was representing the Safe Sex Six, the folks who had entered St. Patrick's Cathedral and engaged in an act of civil disobedience. Their trial was held in the winter of 1989, and although they were ultimately convicted, it was one of the first cases televised on "Court TV." Additionally, the defendants were sentenced to a lesser punishment than they had been offered prior to trial.

During the late 1980s and early 1990s, she represented over 5000 demonstrators from AIDS groups, lesbian and gay rights groups and reproductive freedom groups. In 1990, she started her own law firm with Karen Funk. They sought to start a practice that middle-income families, gay and straight, could afford. In that sense, they wanted to become the 1990s version of the small-town lawyer, the lawyer you went to when you bought your house, when you wrote your will, when your children got arrested, when your small business needed a contract to be looked at, got divorced, et cetera, and they have accomplished that goal. She specializes in criminal defense work and handles primarily pattern robberies and homicides.

This morning, at the roundtable discussion, Judge Deborah A. Batts asked the panelists how we, the queer community, choose our issues. Matt Coles responded by saying that first we look at where the harm is. I would like to ask our panelists, where are queer people being harmed by the criminal courts? In the processes of the criminal justice system? In discriminatory law enforcement? What are the harms that we can identify and how do we eliminate them?

MS. COHEN: I think the greatest harm, or really injustice, done to lesbians, gays, bisexuals and transgendered ("L/G/B/T") folks in the criminal justice system is that a lot of these alternative programs that are available to offenders are not available in any realm that would deal with issues that specifically affect gays and lesbians. For instance, same-sex domestic violence; there is a very popular batterers program where people who are convicted or accused of battering their spouses can go into the program, get treatment, and then usually have their cases dismissed or reduced. Those programs specifically do not accept gay or lesbian folks.

JUDGE SONBERG: And you would not want to send a gay or lesbian batterer to that program, because they would not come out in one piece.

MS. COHEN: There are several programs like that, which do not really deal with the issues of the gay and lesbian community. I think that is really where the biggest disservice to gays and lesbians are.

JUDGE FEINMAN: I agree with what Lori just said, but that is sort of a very specific issue in our time and place in New York City.

I think that if you broaden the question, you have to actually go and look at the very nature of consensual sodomy laws. While consensual sodomy laws have been falling state by state, slowly and surely, across the nation, the fact remains that there are consensual sodomy laws on the books in various jurisdictions. That is absolutely, in my mind, the greatest harm to our community, because it goes to the very essence of who we are, and it goes to the very essence of our most intimate relationships and it criminalizes them and it brands us as deviants, it brands us as non-persons, not entitled to any sort of equal protection under the law.

So to the extent that those laws still exist, they are extremely harmful, because it is then used as the underpinning for all sorts of other laws and unlawful discrimination.

JUDGE SONBERG: The statute is still on the books in New York, and I have actually seen it charged on a misdemeanor complaint. After they peeled me off the ceiling, it was not there much longer. I said, "Excuse me, do you know about *People v. Onofre*?"¹⁵ The look was, "What?" I said, "Okay, it is before your time. It is 1980. The Court of Appeals declared this statute unconstitutional. It was dismissed." Surprisingly, I did not get an "Over the People's objection," because they figured they really better go read the case before they objected.

I think that in New York today the primary place where the criminal law intersects with L/G/B/T people because of who they are is in the domestic violence setting. I think that, to some extent, part to the problem is invisibility, because I have a sense that we do not always find out about the cases that are truly domestic disputes as opposed to disputes between people who know each other. You know, I will ask the question if I am doing an arraignment and I am told these are roommates or they are something — sometimes gaydar picks up — and the district attorney will say —

15. 405 N.E.2d 243 (N.Y. 1980).

JUDGE FEINMAN: "How did you know, Judge?"

JUDGE SONBERG: No, the district attorney will say "no." I say, "Is this a romantic relationship," and the assistant district attorney will say "no," and the defense attorney will say, "Well, can we approach" or "that is not my understanding" — because frequently, particularly with people of color, they do not want to give that up, even if they are the victim, to the police. They are not sure what the reaction will be if they have been assaulted and they tell the police that the person who assaulted them is in a romantic relationship with them, and they are not going to share that with the assistant district attorney who interviews them over a video hookup, because they are not going to think to ask the question.

And unless the defendant says "that is my lover" and the police happen to write it down and it is told to you, they will give notice of it as the statement they intend to use in their case in chief, you are not going to know about it when you are doing an arraignment.

I think we probably miss some number of cases, which makes the disposition a lot easier, because you do not have to worry about the absence of appropriate programs, because they are not pegged as a domestic violence dispute and, therefore, no one is looking to put the batterer in an alternatives-to-violence program. But it also means you are not addressing the problem.

MS. COHEN: That goes back to Paul's point. Members of our community are afraid of police in some way and afraid to identify themselves as L/G/B/T folks, because they are afraid of the reaction of the police. I think until we get that underlying fear or discrimination because of how we have been treated by the police out of society at large, we are going to always be faced with that problem.

MS. BADEN-MAYER: So how does it come down differently when the situation is not treated as a domestic violence dispute and it is just plain violence? Is there an advantage sometimes to the victim in those circumstances?

JUDGE SONBERG: Victim, no. For the defendant, yes.

MS. BADEN-MAYER: There is an advantage to the defendant?

JUDGE SONBERG: Absolutely, because if the injury is not serious — we are talking about soft tissue injury in all likelihood — they will be permitted to plead to a violation, get a conditional discharge, maybe a couple of days of community service.

JUDGE FEINMAN: Some of us do not generally give community service on assault charges.

MS. COHEN: Well, it is mostly viewed as a fight, a fight between people over some type of thing, as opposed to what domestic violence really is, which is a power situation between people who have intimacy, who are intimately involved. So it is treated much differently in the criminal justice system, because there is no feeling that there is an underlying need for treatment.

JUDGE FEINMAN: Very often, whether it is the district attorney trying to convince the judge to go along with the disposition so he can get his or her case out of the drawer and into the closed file, or whether it is a defense attorney, it will be pitched as, "Oh, it was just a bar fight," or "it is just a catfight between girls." You know, men and women suddenly become "boys" and "girls," even though they are adults in criminal court.

If it is pitched that way, it is going to be treated very differently than if it is pitched that this is about an intimate relationship where there are all sorts of complicated issues regarding economic power, control, access to the home, property issues and things like that.

JUDGE SONBERG: The converse, of course, is that when the police come, outing the other person can be part of the power play between people in an intimate relationship, and it all gets fairly complex. I know from a colleague of mine in Boston who is the President of the International Association of Lesbian and Gay Judges, Boston has wonderful protocols and training in terms of teaching law enforcement and district attorneys how to try to spot same-sex domestic violence. And I know that Anti-Violence Project ("AVP") certainly has done a lot here in working with the police department. But I do not have a sense that we have come to the same place.

JUDGE FEINMAN: It is not enough to just point the finger at the police. I think we have to also look at ourselves and the responsibility that we as a community have to create and demand awareness and training of the police, judges, prosecutors, defense attorneys and various counselors and providers. We as a community have to recognize that this exists and that we have an obligation to address it. It is very easy to just point a finger at the police and say, "Well, the police do not arrest or do not treat this the same." But, you know, we have a responsibility to demand it and to create a space in which people can actually address these issues without having to layer on the whole issue of homophobia.

One of the programs that Michael was talking about very specifically was this violence recovery program that is conducted in Boston by the Fenway Community Health Center. It is just a model

program, and we should be seeking to create things like that here in New York.

JUDGE SONBERG: One other thought that Paul provoked: The one place that victims do become disadvantaged is that where you have a woman who is battered so severely that she is at the point where she is prepared to move into a shelter. The shelters are for straight woman, so then you are talking about forcing someone to go into the closet if they want that relief, because they are just not going to be comfortable in most cases going into a shelter situation with other battered women who are going to talk about the man who beats them, where their situation is that they are being abused by their girlfriend.

And there are no shelters for men. There is no place for a man who is battered in a relationship to go to be safe.

MS. COHEN: A shelter probably is not the safest place for a gay man anyway.

JUDGE SONBERG: Right, unless there were beds for gay men. This is where you started to get beds for gay youth who were abused by their families. It is an analogous problem, with adults rather than teenagers and children.

MS. BADEN-MAYER: Is this the responsibility of the state, or are we, the queer community, going to have to create these programs and shelters ourselves?

MS. COHEN: I personally think it is the responsibility of the state, but I do not see this state under this administration doing that. I think the community would have to do it, just as they did in Boston.

MS. BADEN-MAYER: Could we use litigation to make the state responsible?

MS. COHEN: Well, the litigation is always a long process that deals with an answer in the future. I think we need an answer now, and I think it has to come from the community.

MS. BADEN-MAYER: Can you tell us a little about the violence recovery program in Boston at the Fenway Community Health Center and how it might be copied here in New York?

JUDGE FEINMAN: Well, I think that what you primarily need to do is you need to get a provider — and whether that is through the center or through something like AVP or Callen-Lorde, in essence, you need to get somebody who is going to administrate this, and they tend to involve training, education and counseling sessions, whether that is done in the form of group or individual therapy.

My only point in bringing that up was not so much to talk specifically about that program, but to sort of put out there that we as a community need to demand from the state — whether it is demanding from your legislators or demanding from your police department or your criminal justice system — that these issues be addressed.

It is a very real issue. Because I reside in New York County, if I am in an all-purpose part, where you see, let's say, an average of 100 to 150 cases a day in the course of one week, I will see at least one same-sex domestic case a week, and that is not an insignificant amount of cases, because I am only one of six all-purpose judges.

Essentially, what you are saying is in at least six cases a week, there is nothing out there to deal with these issues. I think you need to create a groundswell, whether that be by demanding from your local elected officials or through other agencies. That was my point only in referring to the Fenway program, that I think that it is something that came from the community.

MS. BADEN-MAYER: Are there any questions from the audience on this?

AUDIENCE: Yes, I have a question. I did an internship at the Legal Aid Society Criminal Defense in Manhattan, so the discussion comes out of that experience. It is, I think, a lot easier to talk about services in the intimate violence context than when the defendant has something else and I wondered what sort of things you have thought about or done for criminal defendants who were arrested on drug charges or something like that.

I am interested in transgendered people getting arrested, do they get their hormones while they are in jail; or if they have HIV, do they get their medications while they are locked up in the back and all that. Are there any protocols for that?

JUDGE FEINMAN: When I was at the Legal Aid Society Criminal Defense Division years ago in Manhattan, I remember a colleague of mine bringing a writ, heard by Judge Berkman when HIV sprang upon the scene in such a large way in the early-to-mid-1980s, and defendants were shackled to beds in the hospital wards and not getting any treatment whatsoever.

It has come a long way since those days. That does not mean that we are in a situation where it is ideal. The reality is that in a lot of the population that you see in criminal court, particularly with the substance abuse issue, you have people who are going in and out of the system constantly, and so you get to the whole issue

of being denied your access to protease inhibitors or other kinds of medications.

Then, you get into the whole concern about developing resistance, and I know that, as a judge, I am reluctant to give any sort of a jail sentence where you feel that there is going to be an inhibition of the person to get appropriate medical treatment.

On the other hand, we are assured by the Department of Correction that, in fact, if people have prescriptions or can make them aware of prescriptions, they will be given appropriate medical attention.

JUDGE SONBERG: You cannot say that everyone who has ever been a junkie and shared a dirty needle and has gotten HIV is allowed to go out and commit crimes and not be punished. That is the other side of it.

Within the last month I was arraigning a case, one I probably would have looked for a short period of jail given the defendant's fairly recent repetitive criminal history for the same offense, and the lawyers said, "He is HIV-positive," and I said, "So?"

They said, "Well, medication is an issue." I asked what the meds were. It helps to know — I do not think any of my non-gay colleagues would have had a clue — and the person was taking a cocktail. I was not prepared on a case that I probably would have been looking for ten days in jail, to take a risk on him getting an inappropriate medical regimen. In this case, I decided I would give this person a straight conditional discharge rather than the jail that I had pretty much decided was appropriate, given the offense and the record.

When it comes to more serious things, it is a situation where advocates from the community, rather than the court, really have to go and make sure that medical treatment on Riker's is appropriate, because there is a real public health issue; you do not want to be creating drug-resistant HIV. Because the chances are, particularly to the extent that we are talking about people who become HIV-positive through IV drug use there is going to be a dirty needle in his or her arm within days after release. That is just reality.

MS. COHEN: I think there are a couple of different issues.

One is the general health care issue of anybody who becomes incarcerated. I think we can all agree that health care to inmates across the country is at a woeful existence.

I get probably five to ten calls a week from colleagues who represent mostly teenagers at this point, who are involved in drugs or robbery — or whatever it is, shoplifting, grand larceny cases — and

they are gay and lesbian. The judges want to give them some type of alternative-to-incarceration program, and they want to know if there are programs out there that can deal with some of these issues.

Just this week, I had a gentleman call me. He had a young man who was very effeminate and was having a very difficult time in high school and had gone out and started shoplifting, and he had gotten arrested about five times in five weeks, and now he was looking at going to jail. The judge basically told him, "If you can find me some type of program that can address some of his issues, I will consider it."

There is not one specific program out there, but if you are willing to look and you can piece together your own program — we had him transferred to one of the gay and lesbian high schools. We had him start working with Hetrick Martin. There are ways and resources out there, but there are very few programs that deal with gay and lesbian issues.

There are, for instance, residential drug treatment programs that deal specifically with gays and lesbians. There are probably three beds available. If you take the time to find them and if you get the right judge — I have to say in New York County, you probably convince most of them — you can especially try to help a kid, somebody fifteen, sixteen, seventeen.

JUDGE FEINMAN: Every judge wants to believe that at that young age you can still make a difference in turning a person around and hopefully avoid a recidivism problem.

But there is a broader issue, which is that you do not have drug and alcohol treatment on demand, you do not have the ability to say, "Okay, what is going on here is a broader dysfunction in the family unit and I need to send the whole family to counseling to deal with the fact that they have a gay teenager."

Within the context of the way the criminal justice system has it set up and the limits on resources and the powers of the judge, there is only so much that you can do. I think that that is very hard to begin to accept when you start dealing with criminal justice issues for the first time.

There are only a finite amount of ranges of sentences. You have certain restrictions on what you can do and what your powers are. There is the ability to be creative, but part of it is what the legislature allows you to do or does not allow you to do.

JUDGE SONBERG: The other thing is that, other than same-sex domestic violence and transgendered, or incredibly effeminate

men, or someone with an HIV issue which the lawyers disclose to you — at which point I generally say to them, “Did your client authorize you to tell me this, or are you committing a Class E felony under the Public Health Law?”¹⁶ — which makes a lot of jaws drop. After they have it in open court, I call them up and say, “I sure hope your client said it was okay for you to.”

But other than those classes, I do not know who in front of me is lesbian, gay, bisexual, and in some cases I do not know if they are transgender.

That someone is L/G/B/T really does not have an impact on how I deal with the case unless it is relevant to the case, and certainly that is one of the issues that people first had when gays first came up through the appointive system before we started getting elected to the bench. One of the questions I am constantly asking myself over seven years, which I have not come to an answer, is what does it mean to be an openly gay judge?

I know that Dick Failla talked about his first interview at the City Bar Judiciary Committee when he was appointed. Dick Failla was the first openly gay man appointed to the Criminal Court in New York City. Someone named Bill Thom, who was one of the founders of Lambda Legal, had been appointed to a number of interim civil court vacancies, had run a couple of times and never gotten elected. Dick was appointed to Criminal Court and was the first openly gay person on Criminal Court, and then he was the first openly gay person elected to the Supreme Court. He died in 1993.

But when he first went through the process, you know, he got the same insulting, ignorant questions that I am sure that the early African Americans who were appointed to the bench got, and probably the first Asian Americans and Latinos, which is, “Well, how would you deal with a case if the parties in front of you are queer?”

JUDGE FEINMAN: I am sure they did not use that word.

JUDGE SONBERG: I am sure they did not. And the response is, “What in the world are you talking about? You take an oath to do equal justice, and the fact that you share a sexual orientation with a victim, a defendant, a plaintiff, a lawyer, is of no more relevance than if you share an ethnic heritage or a religious heritage or gender, you just try to be a little more perceptive on the criminal side in terms of a disposition if that is relevant to the disposition.”

16. N.Y. PUBLIC HEALTH LAW § 2782 (McKinney 1999).

MS. COHEN: There are two stories, I think, that really show how far — I mean, we are sort of in Doomsday here now, but I think the criminal justice system has come so far even in the past twelve years that I have been involved with it.

The first is a story I heard at Judge Vela's memorial about how it was that he came out. He was a very prominent district attorney in New York County, and he was handling a homicide case, and the defense attorney said to him — and, of course, I have no idea if this is really true, but this is the story that goes around — "Listen, if you do not do this for my client, I am going to tell everybody that you are gay." You know, in this day and age, I do not see that happening. I do not see the Manhattan District Attorney's Office having that big a view on whether their assistants are gay or not — and in fact, they openly recruit gay assistants. So I think the attitudes towards the participants themselves have changed in the criminal justice system.

JUDGE SONBERG: In the Bronx there are either two or three openly gay assistants out of 400.

MS. COHEN: The other story is about a judge who was sitting in criminal court right when AIDS became a very big subject, and court officers would put on masks and gloves if they had to deal with anybody who they thought might have HIV or AIDS. The court officers approached the judge on the bench and they said to the judge, "Judge, we have this person coming in, he has AIDS, you know, we have the gloves, we have the masks; you know, what do you want us to do?" Court lore has it that she said to the court officers, "I want to arraign him, not fuck him; just bring him in."

JUDGE SONBERG: I did a jury trial the beginning of this year where one of the exhibits was a pair of bloodstained pants that the complainant was wearing when he was allegedly stabbed, and he was HIV-positive, and the assistant always put on gloves —

MS. COHEN: Well, I have seen that in trials where people are not HIV-positive. I mean, I think if I had to touch an exhibit that involved blood, I would wear gloves.

JUDGE SONBERG: Well except that, as a medical matter, the fact is that viruses do not live on fabric for weeks on end. I was not going to tell people they should not. But when I told the jury they could look at the pants in the jury room, I said, "We will give you gloves to wear if you want to handle this and you feel it is necessary," but I said, "My understanding of the science is that any bacteria or virus on the pants would not be an issue at this point." A little AIDS education, but it is a touchy issue.

AUDIENCE: Can you talk a little about whether you think the prosecution of public lewdness laws against gay men is just or unjust? I am not talking about illegal entrapment by the police or perjury or them lying about what they saw. I am just talking about the enforcement of the laws that are on the books in a way that does not involve misconduct on the part of law enforcement.

MS. COHEN: Well, let's be clear. The statute is the arresting of anybody. I mean, I think that gay men are proportionately higher.

JUDGE SONBERG: Depends where. In the Bronx, the bulk of the people I have seen on public lewdness charges are men who appear to be acting in front of women and in front of children, and not with other men.

MS. COHEN: Right. I was going to go on to say that there are large sections of the city that there are prosecution of public lewdness cases that clearly do not involve gay men.

MS. BADEN-MAYER: Could you make a distinction between a sort of "consensual" public lewdness and —

JUDGE FEINMAN: There is no such thing as consensual public lewdness.

AUDIENCE: I am talking about consensual public lewdness.

MS. COHEN: I do not think you can discuss it like that. I think it goes back to Paul's initial point, the criminalization in this society of consensual sex — whether it is consensual sex between a prostitute and her john, or whether it is consensual sex between two adults in a car, in a bathroom or wherever they may be.

AUDIENCE: Well, let's make it easier. What about sex in public restrooms?

MS. COHEN: Between two consenting adults?

AUDIENCE: Two consenting men, yes.

MS. COHEN: I think it is a waste of time. I think it is a waste of time to prosecute those people. But that is my own personal view, and I do not think either of these two gentlemen, since they sit on the bench, are either able under the law to comment on that or would like to comment on that, given that they may have to be reappointed some day.

JUDGE SONBERG: What happens if you are with your six-year-old nephew and you walk into the public john and there is what is sometimes referred to as a "weenie whacker" at the urinal. What message does that send to the child, and is not that something that society has the right to question?

MS. COHEN: I do not think the child notices.

AUDIENCE: Well, see, that is where I am coming from. I do not know what the statistics are or how disproportionate they are. And certainly, if it is a problem in public restrooms and society wants to stop that from happening for some of the very reasons that you mentioned, short of illegal conduct on the part of the police, I do not have all that much of a problem with that.

JUDGE FEINMAN: Built into the statute is the notion that it is actually public. In other words, if you are not doing this in a way that is exposed to the public, the case law is clear: if somebody is in a closed booth or something that is not public, then it is not public lewdness. So the whole nature of the offense, the way it is defined under the law, is that it is going to be in a way that is open to public view.

There is the famous case involving a heterosexual couple that went to the Court of Appeals —

JUDGE SONBERG: *People v. McNamara*.¹⁷

JUDGE FEINMAN: I remember cases by their facts.

JUDGE SONBERG: I cited it in a decision I wrote last year. So I remember the case.

MS. COHEN: They should just get rid of urinals.

I take my six-year-old nephew into the women's room, so I do not have that problem. But it seems to me that if we did not have urinals, there would be no one standing in a place where people can see them doing what they are doing.

JUDGE FEINMAN: That said, I just want to finish the point, which is that I think that where the judge plays the role in this is sort of, as in any case for any offense, reminding the parties of the role of proportional punishment. I am often put in the situation of having to remind young assistants, one of whom recently gave me a lecture about the moral outrage of public lewdness, that there has to be proportionality in sentencing and that very often, for a lot of gentlemen that I see, particularly gay gentlemen who come in on these kinds of offenses, is that the stigma of the initial arrest is sufficient punishment and that you will not see them as repeat offenders.

So you try to work out a disposition that will result in a non-criminal disposition. Perhaps it is adjourned in contemplation of dismissal or something of that nature. What I find offensive sometimes is that they will ask for a punishment that is actually more severe than what they recommend in some first-arrest assault

17. 585 N.E.2d 788 (N.Y. 1991).

cases. That is part of the judge's role, to make sure that there is proportionality and that there is balance in how offenses are treated.

JUDGE SONBERG: Yes, and one of the other pieces of it is that there is literature that suggests that men who masturbate in front of women is someone who has a high risk of going on to commit other sex offenses. What are you going to say: "If you can prove you are gay, it is one offense, and if you are not gay that it is something else?" One of the nice things about the criminal law is that things that seem easy on their face, when you start probing, frequently end up being far more complex.

AUDIENCE: I was going to mention that I think it is a great opportunity for parents when they take their children into public restrooms to begin teaching them that when you go in a public restroom, you mind your own business and you do not involve yourself with what other people are doing.

Also, they should ignore what is going on in closed booths, because there are a lot of activities that go on in public restrooms and parks — drug use, dealing, that sort of thing, various other unsanitary conditions — that children should learn to go into a restroom, do their business, and leave.

Secondly, I was going to mention that most of these cases are — they are the perfect case to be adjourned contemplating dismissal. Most prosecutors, community officers, do not follow up on these cases.

JUDGE FEINMAN: Well, they definitely follow through in New York County. Do not think otherwise. It does take the involvement of the judge to get an adjournment in contemplation of dismissal. The standard offer of the New York County District Attorney's Office on a first arrest for public lewdness is disorderly conduct, which is still a conviction for a violation, and a sentence of a conditional discharge with some community service. It often requires going to a bureau chief. It requires going over the line assistant's head, because it is a so-called departure from the guidelines. But it can be done, and it is done fairly regularly. It just takes a little pushing.

That said, you know, I have had occasion to have people who — I had one gentleman who was arrested four times in the same restroom, and my position was "I am not going to bat for you; you did not get the message the first time. Sorry."

AUDIENCE: I am interested in the issue of people who have been victims of assailants as the result of their gender identity.

Where I am from, in El Paso, Texas, that happens a lot. Pretty little boys get picked up by people who appear to be gay-friendly, and then they wind up in the hospital for two weeks with two broken legs and a broken arm, and nine months later their assailant walks. So I am just interested in what is going on here in this court system in those sorts of circumstances.

JUDGE SONBERG: We have a hate crimes law that does not address sexual orientation. My experience — and I have only sat in the Bronx — is that if the case as it comes in clearly has a bias basis, and it does not have to necessarily be a statutorily-recognized bias basis, that the District Attorney's Office deals with it differently than they would deal with another stranger-on-stranger assault. If there is language used — you know, if you have a case where there is no language that is used, if there is nothing on the case that says this is a bias-based attack, if you do not have the basis for it, you cannot talk about it.

But on the ones where there is language or there is something in terms of the conduct, the nature of the assault is such that it is clear that there is a sexual undercurrent to the crime, that they deal with it that way and treat it more seriously than they would.

JUDGE FEINMAN: That being said, I think it is important not to underestimate the importance of victim advocates in this situation. It would be dishonest of any judge to tell you that they do not notice when their courtroom is full at sentencing.

JUDGE SONBERG: Victim advocates do not come to the Bronx.

JUDGE FEINMAN: Or that if the AVP has submitted a memo on behalf of the victim — by statute in New York State, every victim is entitled to make a victim impact statement.¹⁸ What you often see, on felony, but even on the misdemeanors, the probation department — if you are talking about a situation where there has been a probation report, it will always include a so-called victim impact statement, and what it usually says is “complainant not reached.”

MS. COHEN: Or the DA does not allow.

JUDGE FEINMAN: DA may not also allow, or whatever, the file or the information as to how to reach the complainant. I can think of at least two situations where I ordered an updated probation report because I wanted to know what the victim had to say. In particular, in one situation, the reason I was alerted to the whole

18. See N.Y. CRIM. PROC. LAW §§ 390.20, 390.30, 440.50 (McKinney 1994).

issue is because there was a letter in the file from the Anti-Violence Project. So those kinds of organizations play a crucial role in at least flagging the case to the judge, identifying that that is an issue that has gone on.

Defense lawyers are not going to tell you that. They should not tell you that. That is not necessarily their role. The prosecutor should tell you that. That is their job.

So I cannot underscore enough the importance of groups like AVP and other victim advocates groups, whether it is based on gender or on sexual orientation.

On the whole issue of gay-bashing cases, I would have to say, quite honestly, in my experience in New York County, that I have never personally encountered a situation where a defense of homosexual panic or anything like that that was successful. I mean, I do not know if that is part of what you are asking.

MS. COHEN: We have not seen many of those. I cannot recall any.

JUDGE FEINMAN: But that does not mean that it does not happen or that it is not an issue.

MS. BADEN-MAYER: Is it technically possible under the law of New York State to offer —

MS. COHEN: Anything is technically possible under the law.

When you are representing a defendant, you could try to make any argument that you think the jury will buy. I have, in twelve years, never seen that defense used and certainly never seen it used successfully.

JUDGE FEINMAN: In yesterday's *Law Journal*, somebody made the argument in a prostitution case that there can be no prostitution in same-sex relationships, because there is no sexual intercourse, as defined in the law.¹⁹

MS. COHEN: It is the "Bill Clinton theory."

JUDGE FEINMAN: There the defense attorney is basically relying on this concept of deviant sexual intercourse. In yesterday's *Law Journal* this judge wrote a decision which basically said "that is an outdated concept; we are not going to have any of that."²⁰

But the point is that it is up to the judiciary to sort of put the brakes on those kinds of arguments and move us along.

JUDGE SONBERG: See, we could try to get the State Legislature to amend the statute and change the term from deviant sexual intercourse to alternate sexual intercourse.

19. See *People v. Medina*, N.Y. L.J., Feb. 5, 1999.

20. See *id.*

AUDIENCE: I was just curious what effects you see sexism and homophobia having on defendants who are either queer or perceived as queer in their sentencing.

JUDGE FEINMAN: One of the myths about domestic violence in L/G/B/T communities is that the batterer is always bigger, stronger or more butch; victims will always be smaller, weaker and more feminine. The reality is experience with heterosexual battering and attitudes about traditional sex roles lead many to fall into stereotypes of how batterers and victims respectively should look now.

Unfortunately, such stereotypes are of little actual use in helping us to identify who the batterer is in a same-sex relationship. A person who is small but prone to violence and rage can do a lot of damage to someone who may be taller, heavier, stronger, and non-violent. Size, weight, masculinity, femininity or any other physical attribute or role is not a good indicator of whether a person will be a victim or a batterer. A batterer does not need to be 6'1" and built like a rugby player to use a weapon against you, smash your compact disc, cut up your clothing or tell everyone at work that you really are queer.

Sometimes you need to as the judge or the prosecutor or the defense attorney, say, "Wait a minute. You know, let's not just go based on what gut reactions and stereotypes might suggest."

JUDGE SONBERG: And you are just seeing — generally, you are just seeing the defendant, you are not seeing the complainant. And sometimes you may think that you have the most butch lesbian you have ever seen in front of you as the defendant, and for some reason the complainant will come in the next day, and she is not only as butch, but she is six inches taller and 100 pounds heavier.

MS. COHEN: You mean on any kind of case where — I mean, I have seen enough butch women, some of whom are gay and some of whom are not gay, that it really does not — I do not think it has that great of an impact, what a person looks like.

JUDGE SONBERG: I think judges have learned, certainly in New York City, that people come in all shapes, sizes, colors and permutations. I think there is a lot less giggling and discomfort with transgendered people than there was five years ago, although that is probably still the one place that there is the largest problem of homophobia in its broadest sense. I think people have pretty much figured out that you cannot tell a book by its cover.

MS. COHEN: That is not to say that sexism is not alive and well and flourishing in the criminal justice system, because it is. I think in that way it almost helps female defendants, whether they are butch or not. I think they are almost always treated more lenient than male defendants. I think sexism also affects the way female lawyers are treated. I mean, I think sexism is very alive and well.

AUDIENCE: It seems like — maybe not necessarily in New York, but overall — that in a lot of the more violent types of crimes that women are sentenced heavier, though, to teach them a lesson.

MS. COHEN: I have not experienced that. I have not experienced that in New York nor in most of my readings.

MS. BADEN-MAYER: I will ask the panelists if they do not mind taking one more question.

AUDIENCE: What is your opinion — for example, I know a lot of cases where a straight family woman married with two, three or four kids comes before a judge, and she has a favorable probation, pre-sentence report. She has a husband present in the courtroom. She gets a lesser sentence, and she is more likely to get less bail and to get only parole and to be treated very leniently, as opposed to a butch woman who has no friends in the courtroom but a bunch of gay people — she is less likely to —

MS. COHEN: Absolutely. I think that is absolutely true. I think that evolves out of society's own bias about families. "Families equal stability, stability equals the fact that you are going to come back to court." I do not agree with it. I think that you can have —

AUDIENCE: What can we do about that?

MS. COHEN: We can change the way society views our relationships, the way society views our families, the way society views our community.

**MARRIAGE: WINNING AND KEEPING THE FREEDOM TO MARRY
NATIONALLY AND IN NEW YORK**

MR. WOLFSON: I am Evan Wolfson, Director of the Marriage Project for Lambda Legal Defense and Education Fund. What we are doing in this panel today is trying to go beyond the general discussion we had in the earlier panel and talk specifically about how we — “we” meaning you — can win the freedom to marry, both nationally and in New York. You have heard me say things like this “freedom is within reach.” The breakthrough is possible. We can see the opportunities come within a matter of months. There is obviously no guarantee in law or civil rights or history, but this breakthrough possibility is real, it is urgent, and it is imminent, and the opportunities for engagement are real, present and compelling.

Given that, what can each one of us do to really make this happen, not just in our lifetime, which a few years ago seemed like it would not even happen, but within the next few months and years? How do we do that? How do we do that in New York? How do we do it nationally?

To begin answering those questions and to engage you on how to get involved, we have an incredibly distinguished group of people here. I will just identify them very briefly. Tim Sweeney is Deputy Executive Director of the Empire State Pride Agenda, and Tim is also a very long-term activist. He began when he was eight and has been working for this community and this set of communities ever since, in a range of very important positions across the board, with regard to the concerns and civil rights of lesbians, gay men, people with HIV and AIDS, and others.

Patty Penelosa is the chair of Marriage Equality, which is New York’s grassroots marriage, education/marriage, outreach/marriage, organizing organization, eagerly awaiting your involvement.

Peter Sherwin is an associate at Proskauer, Rose, Goetz & Mendelson, and, in addition, is chair of the City Bar Committee on Lesbians and Gay Men in the Legal Profession. Peter is also the author of the Bar Association’s Report²¹ taking a position in favor of gay people’s freedom to marry, declaring what the law in New York is and that it ought to be in our favor with regard to equality on the freedom to marry, and he is leading the committee in efforts to move it forward.

21. *Same-Sex Marriage in New York*, 52 REC. ASS’N B. N.Y.C. 343 (April 1997) [hereafter Bar Ass’n Report].

Peter, can you very quickly tell us what is the state of the law today in New York State with regard to the freedom to marry?

MR. SHERWIN: Well, the state of the law is actually pretty good. There is a very nice foundation that is somewhat unique to New York.

Let's first mention the statute. A lot of states have statutes that expressly require a marriage to be between a man and a woman. New York does not have such a requirement.²² It talks about parties; it talks about individuals. It is more of a regulatory framework, rather than one that sets out and defines marriage.

So if you look at the domestic relations law in Article 3, we have a gender-neutral statute from which to work.²³ That is a great foundation, because we can argue to the court that it needs to apply the statute in a gender-neutral way in order to avoid constitutional infirmities, which it may never have to reach.

What else do we have to support us? We have some pretty good public policy pronouncements by the New York Court of Appeals. We have *Braschi v. Stahl Associates*,²⁴ which came down in 1989 and recognized that, for the definition of family, we were going to include same-sex domestic partners. That was a great step forward. We have *In re Jacob*,²⁵ that says we are going to allow second-parent adoption, whether that is by two parents of the same sex or opposite sex, when it is in the best interest of the child, without having to — as was a requirement before — cut off the parental responsibilities of the maternal parent.²⁶ So that was great.

We also have something that was not that wonderful: *Alison D. v. Virginia M.*,²⁷ which predates *In re Jacob*. There, the court of appeals considered visitation rights in the context of a lesbian couple who had broken up. They had had the child together, but the court's problem was basically that, because there was no formal family tie between the couple, it was not going to award visitation to a "third person."²⁸

So all in all we have good public policy in New York.

Evan mentioned the Report that was published by the City Bar.²⁹ If anybody wants one of those, you can certainly get it

22. See generally N.Y. DOM. REL. LAW (McKinney 1988).

23. See *id.* § 10.

24. 54 N.E.2d 49 (N.Y. 1989).

25. 660 N.E.2d 397 (N.Y. 1995).

26. See *id.*

27. 572 N.E.2d 27 (N.Y. 1991).

28. *Id.* at 656.

29. See Bar Ass'n Report, *supra* note 21.

through your law library. I do not know if it is available online, but you can always call me at Proskauer, and I will send you a copy.

We also have some good law in New York for the recognition of sister-state, same-sex marriages. If this happens in Vermont, we are well poised in New York for recognition of a New York couple who had gone to Vermont, gotten married legally in Vermont, and now want to have it recognized in New York. Basically, New York has only voided a marriage as contrary to New York public policy when it was polygamous.³⁰ All the other types of marriage that New York itself does not recognize if you try to engage in within New York, New York courts nonetheless will recognize if they occur outside of New York and were lawfully entered into in that other state. We are talking about consanguinity, proxy marriages, common law marriages and all sorts of other things that New York itself does not allow but nonetheless will recognize. So that gives us heart.

What is going on right now? Where are we today? There was one challenge in New York to an overtly same-sex marriage. That was up in Ithaca, Tompkins County, and it is a case called *Storrs v. Holcomb*.³¹ The court held that it did not violate the Constitution for this statute to apply only to opposite sex-couples. It went up to the Third Department, and the Third Department — on a procedural issue — dismissed the case, saying that you cannot just sue the County Clerk of Ithaca; you have to include the State; you have to include the Department of Health, which is basically the State.³² That case has not yet been re-filed, but who knows, it may be tomorrow.

Also, we have anti-same-sex marriage legislation that is pending. There are bills in the Assembly, and in the Senate, and they could be passed. Such legislation has been there in previous years, and so far it has been successfully avoided. But who knows what will happen this year.

That is basically what is going on.

MR. WOLFSON: Okay, let me just question you on just a couple of points. You gave the positive version, how we will argue as advocates when we are litigating, either an affirmative challenge to allow people to get married in New York or — and I think it is important, as you point out, to remember these are two separate and important arenas — once we achieve the breakthrough some-

30. *See id.* at 355.

31. 666 N.Y.S.2d 835 (App. Div. 1997).

32. *See id.* at 837-38.

where to defend people's lawful marriages against discrimination or non-recognition by New York when they come back home or travel through or go to school or whatever.

It is also true that there have been cases in which courts at lower levels have opined in other settings that gay people do not have the freedom to marry in New York or that same-sex couples do not have the freedom?

MR. SHERWIN: That is true, and the two cases that come to mind immediately are from the 1970s. I actually think that they are relatively easy to distinguish, although on their face they say that New York does not recognize, and the current law does not allow, same-sex couples to get married.³³

But the distinguishing factor there is that it was a mistake. One woman went out and thought she was marrying a man and it turns out, after they were married, that her husband was actually a woman. The opposite thing happened as well: A man went out, got married to this woman, and got her home and found out that she was a man. The courts say we are not going to recognize this marriage, and they do not just go on the mistake premise; they also say as a matter of law this cannot be recognized.

Those cases are from the 1970s. Things are changing on the court of appeals. Granted, we have to deal with those cases, and they are out there. Also, because the statute itself only talks in terms of regulating rather than defining, there are obvious arguments that could be made for construction about what the Founding Fathers were thinking at the time they were drafting the statute. And there are one or two sections where they do talk about what the bride and what the groom have to do.³⁴ We can try to overcome them, but they do exist.

MR. WOLFSON: On the statutory silence point, you correctly said that New York's law is silent. I often get calls with people asking, "Well, if it does not say we cannot get married, why can't we just walk into court and do it?" Although that is an appealing argument, and one that will obviously be made in litigation down the road again, what has been the fate of that argument in courts that have looked at it in New York and elsewhere? Have the courts accepted the argument that the statute does not specifically say a man and a woman; therefore, go ahead?

33. *Frances B. v. Mark B.*, 355 N.Y.S.2d 712 (Sup. Ct. 1974); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (Sup. Ct. 1971).

34. *See, e.g.*, N.Y. DOM. REL. LAW § 15 (1)(a).

MR. SHERWIN: I do not know if I am the best person to speak to that, because I do not know a lot about what is happening outside of New York State. In *Starrs v. Holcomb*, the court basically glossed over the plain language of the statute and went directly to the constitutional argument. It found that this is subject to rational basis scrutiny and found *sua sponte*, that there is a rational basis for not permitting same-sex marriages.³⁵

One of the things that the court in Ithaca based its decision on, and we can expect to see in the next challenge that comes in New York, is the Department of Health's pronouncement. Previously, Ithaca's City Council had said "we don't see any reason why this marriage should not be allowed, so why do not you [the County Clerk] let them get married?"

The county clerk, to find out whether or not she is allowed to do this, wrote to the Department of Health, which is basically her employer. The Department of Health wrote back a very simple, one-and-a-half page opinion and did not talk about the statutory language at all. I focused only on *In re Cooper*,³⁶ which was an appellate decision and it was in the context of not whether or not the marriage statute is gender-neutral, not whether or not same-sex individuals can get married, but it was for the definition of spouse in — what was the context, Evan?

MR. WOLFSON: In the Department of Health?

MR. SHERWIN: No, in *In re Cooper*.

MR. WOLFSON: Oh, it was in spousal share. It was a spousal share question. It was an estate question.

MR. SHERWIN: An estate question. So it is not very well premised, and not well reasoned. And one of the things that we can go out and do, and we are in fact now trying to do, is to get the Attorney General to overrule the Department of Health's pronouncement and give us a better foundation for litigation, or at least to knock that foundation out.

MR. WOLFSON: Okay, that is the litigation side.

Peter acknowledged that there is an anti-marriage bill pending.³⁷ The Pride Agenda has, for several years, worked hard within the Legislature to block New York's version of the anti-marriage bill, a version of bills that we have seen launched in all but one state over the last three to four years.

Tim, what is happening with the anti-marriage bill in New York?

35. See *Starrs*, 666 N.Y.S.2d at 837.

36. 592 N.Y.S.2d 797 (App. Div. 1993).

37. S. 5228, 222d Legis. Sess. (N.Y. 1999).

MR. SWEENEY: It is back. The bills up in Albany have a two-year shelf life. So they have been reintroduced. This is what is called the new legislative session. There is a copy of the bill over here on the table, and the Assembly version has been put out.³⁸ It has been introduced by our dear friend, Assembly Member Tony Seminerio, a Democrat from Queens, which is all of two miles from here, I would like to point out. So this is not beyond our reach, folks.

Let me tell you what has happened with the legislation over the last four years. It really has not gone anywhere. There is a companion bill to this in the Senate, which is by Senator Serphin Maltese from Queens. These do not have a lot of sponsorship.

This issue has not taken off in the legislature because the political clout of the gay and lesbian community and our allies is such that people see this as a real problem. Even if they are not sure about whether gay and lesbian people should get married, they do not particularly want to anger a very well-organized community. That depends on whether we in fact are well organized and get out and vote, whether we do what we need to do to make our presence known.

What I am going to try to get you to do is to think like you are in Albany and you are a legislator. We have a legislature up there that is far more conservative than people understand. If you have never been up there, you would be shocked at how conservative these people can be, and the relative clout of New York City has diminished over the last decade up there.

Where before we might have been able to look at a legislature that would just say "bills like this are dead on arrival," that is not the case any more. If any of you have followed, for instance, HIV legislation and watched what happened with the partner notification bill this last year, they used to be able to say to us, "Do not worry, it is dead on arrival, it is never going to go anywhere." But last year they crumbled, and that thing went through, in spite of the fact that there was a huge number of people in the Assembly who were opposed to that bill.

What does that mean we need to do? Over here on our right-hand side, there is something called an in-district lobby form. There is one way we can stop this bill if it starts to move in Albany. The first thing to remember is everything in Albany is controlled by the leadership. The governor, Speaker Silver in the Assembly

38. A. 594, 222d Legis. Sess. (N.Y. 1999).

and Senate Majority Leader Joe Bruno control the entire game. This is not an open democratic process up there. They literally can open and close the process at whim. That makes those three players very critical. So let's analyze what we have with each one.

Let's start with the governor. We need to send a very clear message to this governor, who thinks he is running for Vice President or President, that if he should see this bill move, we will cause such a firestorm and embarrass him nationally as much as we possibly can, just when he is out doing the chicken circuit, giving speeches out in South Carolina to Republican primary voters. We are going to have people hounding the hell out of him back home, embarrassing him, pulling him back, and what we need to do is make very simple commonsensical arguments.

What we find when we do polling on this issue is that Americans are deeply divided over this issue. We need to exploit that division. What politicians do is wet their finger, put it up in the air and try to decide which way the wind is blowing. I am telling you right now, what the polls are going to say — “do you think gay people should have the right to get married?” — the wind is going to blow in the wrong direction.

Let's reframe that question. The minute you reframe the question, we can give a lot of pause to legislators who might want to jump the wrong way. If you talk about Social Security, inheritance, taxation, health benefits, sick leave, funeral leave, real concrete things that we need in our lives, whether it is economic benefits or relationship benefits when we have a partner, you see that support for those can go as high as eighty percent of Americans who think that gay partners should have the right to Social Security and health benefits. We have very strong support.

What we need to do is reframe the issue, getting away from any sort of religious context, getting away from any comparison — “are we trying to be morally equivalent to heterosexual marriage” — and all those things that people get all wrapped up about which are really to our detriment most of the time. Instead we really need to focus on some of the economic consequences of the discrimination that we face.

When that happens, we see numbers of legislators say: “I think this antigay marriage bill is mean, it is intolerant, it will promote violence, it is not necessary; just leave it alone.”

What we found right now is in the Assembly — which is going to be the key battleground for us; the Assembly is where we are going to stop this thing cold — Joe Bruno, in the Senate, has the votes to

pass the antigay marriage bill, and believe me, he will ram that thing through if he needs to. He is very good at that.

But, thank God, this year we have the first openly gay State Senator, Tom Duane, and a number of very good allies in Senator Dan Hevesi and Eric Schneiderman, who I think are going to cause a real problem, rather than just roll over and let Joe Bruno do what he is going to do. We are going to exploit the opportunity and have a big education campaign around marriage, because that is the only thing we can do in a crisis — try to make an opportunity.

What do I mean by an “education campaign?” The vast majority of people, when asked, think that gay people can get married. They do not know. They watched an episode of “Friends,” saw two people get married, and conclude that gay people can get married. They do not have a clue about our lives. We need to bring down to reality these sort of questions, and we have someone, our legal intern, here. We have done a series of Q&A things — and Patty is going to talk about this in a minute — that literally start at the beginning with people, because they do not have a clue.

They do not know we do not have any civil rights in New York, civil rights protections in employment, housing and public accommodations. They have no idea we do not have a hate-related bias and violence bill. They do not have a clue about where gay and lesbian people are at. They get everything that they know about us from television. You can go there if you want to, but it is a little frightening. You know what I mean?

So what we need to do is walk them through the reality of our lives and the reality of where the law is with us. I think that we have a chance, if we put up a storm in the Senate, to try to drag the bill, to make Joe Bruno pay a price, to educate the public, and basically have sort of a nucleus of the State Senate say, “Look, this is a wrong, mean, intolerant thing to do.” Then it will slow down the vote and perhaps give us the opportunity to stop it in the Assembly.

Now we have about forty-five votes in the Assembly as it exists right now. We need a solid ninety. The Pride Agenda is organizing these in-district visits. We are doing more than one hundred of them in the next eight weeks. We have already started with people all over the state. I cannot stress to you enough that going to see your legislator in their home district and looking them in the face and saying “do you really want to make me a second-class citizen; do you really want to do this mean and intolerant thing?” — and describe very concretely and emotionally, if you need to, what this

bill means to you — will stick with them. It will give them the guts to do the right thing. Most of them want to vote against this bill, but they need a collective group to go into their speaker and say “do the right thing; keep the backbone; we are not going to pay the price at the polls.”

The Pride Agenda’s strategy on this all along is to be very involved in what is called “marginal Democratic seats in the Assembly.” We go with a woman like Debra Mazzarelli out on Long Island. She switched from being a Republican to a Democrat. She is this amazing woman. She quit the Republican Party because they were homophobic and sexist, and she told them that, and you can imagine how that went over in the Republican Party.

Well, we went there and stood with her out on Long Island. She got reelected by a huge margin. They put tons of money against her and did not touch her. That is the kind of person that Sheldon Silver is worried about, that if in fact we defeat the antigay marriage bill, the Republicans are going to pour tons of money — and believe me, they outspend us in this state about six-to-one in elections — and will take out anywhere from twelve to twenty-four of these marginal Democrats; they will go Republican, and for the first time they will in fact control the Assembly.

That is the worse-case scenario, and that is the mindset of Speaker Sheldon Silver that we have to change and say, “Do not worry about it. We, as people meeting and working in those districts, will make sure that the people that stand with us will not be defeated at the polls in the year 2000.”

It is a good year in 1999 to have this vote, because there is no election in November. For politicians, their worst nightmare is, “Oh my God, I am going to have to deal with this vote in six more months.” At least they do not have to deal with this vote until November 2000. But we really, really need your help to do these in-district visits. I am telling you, we can win this fight. New York has a shot to help stop this avalanche of legislation that is going state by state. The fact that it has not moved is good.

So we need to do three things:

(1) We need to make this a big problem for George Pataki’s national ambitions — and, believe me, the last thing that man wants is this battle going on in his state. If we just make that real clear to him, I will bet he will say to Joe Bruno “just bury the damn thing; I do not want to talk about it,” which would be fine by us.

(2) We need to cause a stink and do a big education campaign and make our state senators, who are going to have to vote against

this thing in probably a losing vote in the State Senate, do a good education campaign and help stiffen the spine of Sheldon Silver.

(3) Last, we need to get the progressive majority of people that are in that State Assembly to say to Sheldon Silver: "Do the right thing. Be a leader. Defeat this bad bill."

MR. WOLFSON: Okay, Tim, let me just ask you, quickly and specifically, if people in this room call you up on Monday morning in your office and say, "I want to volunteer a little time; I am a law student and I do not have a lot of time, but I have a little time. I want to work with the Pride Agenda to stop this bill, but I live in a district that is represented by Tom Duane and Deborah Glick, so I do not know that I need to do the in-district visit" and you say, "Well, go visit that person, but that is an easy sell; we are pretty comfortable with her or him" — what else can they do? How would you put people in this room to work?

MR. SWEENEY: There are two things. Never forget there is no such thing as an easy sell. I do not even care if you call Deborah Glick six times and remind her that her job is to go to Shelly Silver and say "for my community, stop this thing, you owe this to me. Not housing, not development, not whatever other issue I had — this is the top priority. Stick with this."

What often happens is we get caught in all the trading that goes on. Well, this cannot be a trade. We cannot go down the tubes because someone decided there is some other issue that is more important. Never assume that Dick Gottfried, Deborah Glick and all the rest of the liberals on the West Side do not need to be reminded about this. Every one of them needs to be reminded.

Make the call and make it clear. Be clear that we vote and we can vote them out if they do the wrong thing. And, believe me, they heard that in the Chuck Schumer/Alfonse D'Amato race. They see us as the sleeping giant who has woken up. They are a little nervous about us, and that is exactly where you want a politician.

Secondly, we can use you to do phone banking and visits to other politicians. This last year, we did about 15,000 calls on the sexual orientation nondiscrimination bill. What we need to do is if Vermont comes down and Serp Maltese and Joe Bruno stand up in the Senate and start their little heterosexual swagger about, you know, "Let's put this marriage thing to bed, we need to get 10,000 calls into Governor Pataki the next day."

We can do it, and I know that is boring scut work, but that is what organizing work is. That means you pull out your little black

book where you keep all your addresses, and you call every one of your friends, and you say to them: "Make this call. It takes exactly one minute of your time." What they do in Albany is literally keep a little checklist, and what they did on the sexual orientation non-discrimination bill when we were bothering the hell out of D'Amato last year is pretty soon we had the lines tied up for days at a time. They would answer the phone and they would say, "Hello, Governor's Office. Are you calling about the sexual orientation nondiscrimination bill?"

That is exactly where you want them. That is our grassroots version of a poll and a vote. If they think there is such a storm around this, they will want it to go away. They want to be nice to you. They want to give you money and make you feel good and make you vote for them. But if you are screaming at them through the phone lines, which is what we need you to do — and I am talking e-mail networks, any way you get word out to the people and the people get a word up to Albany or back to their in-district offices — I am telling you, we can stop this thing. But it is going to require a real strong and persistent presence.

We did it this last year on the money. We got historic funding for lesbian and gay health and human services. The Governor vetoed the damn thing twice, and we beat him back until he gave us \$1 million — \$1 million for gay and lesbian youth out of a Republican Governor running for President. That is change, but we did it because we hammered the hell out of the guy. So that is the message.

MR. WOLFSON: Okay, so there are at least two assignments, ways the Pride Agenda can put you to work in your copious free time.

But what Tim has mostly talked about is holding the line, holding against, playing defense and blocking the bad bill in the Legislature.

Tim also mentioned, however, the importance of education, outreach and firestorm. And, frankly, even if every gay person gets on the phone, we still need some non-gay people helping us there. How do we do that? How do we enlarge? How do we bring in more non-gay people?

Patty?

MS. PENELOSA: Well, at Marriage Equality, that is exactly our job. He talked about getting the wind to change, and I like to think of our organization as the wind machine. How we do this is step-by-step, person-by-person, organization-by-organization. We start

very small. I started with a couple of doctors of mine. I hounded them. I left the press kit on their desk when I left the examination room. I just got a letter in the mail where they signed the Marriage Resolution, with a little note that said "good luck."

So the way we are going to build this is by starting with you — you going to your friend and telling them about this movement, telling them a story, a personal story of how you have been discriminated against, because you have. You do not know it, but if you are in a partnership, you have been discriminated against when you go into the hospital, when you go to do your taxes. My partner and I live together, of course, and we each pay two separate sets of taxes. We are getting double taxed to get half the service. So we are being discriminated against.

What we do is we started with our mothers, our fathers. I told my father, "Do you want me to be treated like this?" My father fought in Vietnam, so I used that on him. I said, "Why did you fight in Vietnam if I am just going to be a second-class citizen, or people like me?"

The first thing is to start at home — and when I say "home," I mean home: your brothers, your sisters, your friends, your family, next-door neighbor, et cetera. This is a very deep personal commitment that you have to have to take to do this, but people respond. I have received no negative responses thus far. That is the first place.

The second place is organizations. Start with Fordham. I do not know if they have signed the Marriage Resolution or they are in support, but that is another place. Look to the professors here, the professional organizations that surround the university and Lincoln Center. If everyone in here would think of one organization and bring the name up to me, I will make sure that they get a press kit from Marriage Equality. That is how we are doing our outreach. It is very simple; it is very basic. But you have to do it. You have to start at home and then build.

The third thing is once you start building with the organizations, you move next to bigger state organizations, and that is where we are working with ESPA and legislators. At Marriage Equality, we have a legislative branch of the organization that sends out letters, where we also do the phone banking. We did work hand-in-hand with ESPA and Lambda and other organizations to make sure that we are all kind of following each other. So this shadowing has been really effective for us, because people are starting to perk up.

Mark Green keeps saying "Yes, yes," like Tim said, but I finally want him to just sign it, say it, do it.

You can get people to do this on every level, but if you start small, those are the biggest victories, in my mind, because this is a mind-changing movement.

Now you are not going to go out and change the mind of some clergy, but you can get others, and those are just as valuable. Look at what is happening in California where the Episcopalians married a lesbian couple, and now they are going to go — and that sends a message to the rest of the people. So it started with one. It ended up with thirty, now there are sixty, now there are ninety — we are going to keep doubling.

Panels like these are also part of our outreach. We also want to work with schools, elementary schools, perhaps making sure they have textbooks available, and have sensitivity training. We want to cover all of New York the best that we can, step by step, individual by individual. It is very easy, but the work is grunt work. So if you have a grunt persona, we invite you to join Marriage Equality. If you do not want to be discriminated against, if you do not want to be a second-class citizen, and if you are just plain sick and tired, join us. This fight is for you.

Now I have a personal story to tell you. I had a miscarriage in October, and my partner and I went into NYU Hospital. When we walked into the emergency room, the intake nurse tells Linda, my partner, that she cannot come in with me because she is not my immediate family. Now, I am sitting there completely stressed out. It was one of the saddest days of my life, and to have Linda not be able to come there with me or just stand there by my side — I could not believe it was happening. But you know what? I had no fight in me that day; I had nothing. So I went into the emergency room, and I heard some screeching down the hall. I peeked over and then I see Linda arguing with the nurse, walking down. She is coming in, she is going to stand there; it is just too damn bad.

By the time we left there, she had made nice with the nurse in such a way that the nurse said, "You know, I just did not know; I am really sorry." Something really terribly bad turned okay in the end, because one person, one nurse, understood. If I had had the presence of mind, I would have handed her a Marriage Resolution and said, "Please sign and thank you for your support."

That is what is needed here. That is the type of grassroots we do at Marriage Equality. You tell your personal story and you win the hearts and the minds one by one.

MR. WOLFSON: Okay, briefly and specifically, Monday morning people in this room call up and say, "I have a little free time. I can think of my mother, who belongs to such and such a group, and maybe I can have her contact so-and-so." They call you and tell you that. What do you do? How do people get involved?

MS. PENELOSA: Okay, first of all, I want to challenge everyone in this room before you leave to leave me a name of an organization or somebody who you think will endorse the Marriage Resolution or support Marriage Equality. That is number one.

The second thing is that if you call me, there are ways that you can come in — literally, this is run out of my apartment and other people's apartments — to stuff envelopes, to get marriage resolutions. I will hand you ten and you can approach people and say, "Oh, by the way, would you sign this Marriage Resolution? Yeah, it is this organization I belong to, and we are trying to get the freedom to marry." People will sign. How can they not? You look so good.

Finally, the little things really matter. Even if you just had an hour, a half-hour, to put a label on a packet or collate the media kit, all those things, you do not have to be the brainchild. Really, if you can just come in and dedicate or volunteer a half-an-hour to your personal freedom in the United States, it would really help this organization, the state and yourself.

MR. WOLFSON: Okay, Peter, one example from you. You wrote the Bar Association Report two years ago;³⁹ the City Bar took a position in our support. What are you doing now?

MR. SHERWIN: What are we doing now? We are not just sitting on the Report. The Report is nice, but it is really an educational tool. It is something to hand out. It is something to say, "Look, you know, the fight is worth fighting because the law is not that bad, and in fact, it is pretty good."

What are we doing now? We are talking to other bar associations. We are in that process right now. We are writing letters to the Queens Bar Association and to the Asian-American Law Coalition. We are writing letters to the Philadelphia Bar and to the San Francisco Bar. We are writing letters to the ABA. We are writing letters to the New York State Bar Association.

We are following up with calls. We are saying, "Look, do you have a lesbian and gay aspect to your organization? Do you have a committee? Do you have a task force? What are they doing?" We

39. See Bar Ass'n Report, *supra* note 21 and accompanying text.

already got calls back when the report first came out from places such as Utah and Arizona, saying "We want to do a report like this; send us your materials." That is what we want to hear. That is what we are encouraging people to do.

The most important thing that lights a fire is the beginning of that letter to the other bar associations, which tells them that we are on the cusp, just as Evan and everybody was talking about earlier this morning. Vermont can come down in March. Hawaii could come down any day. As soon as that happens, we are going to have — again to steal from this morning — a tidal wave engulfing us, and we need to be prepared. You guys are already in the process of being prepared, because you are educating yourselves. You are here today.

So what I am doing through the City Bar Association? My committee is trying to go out to other similar organizations and educate them and get them to agree on that level that this is something, as a matter of law, as a matter of what is just plain morally right, that they should sign on to. But you can do that as well. I do not know if you are all law students, but you are going to look for jobs, if you have not already found them. You can go to your employers and find out what they are up to.

I am sitting here listening, and I just realized that Proskauer has not signed that resolution. I am going to go on Monday, and we are going to get that resolution signed.

MR. WOLFSON: And then once Proskauer signs it, Proskauer is going to do what?

MR. SHERWIN: Proskauer is going to go to Paul Weiss and say, "Hey, guys, you are behind us on this one," which is exactly what I like to say to Paul Weiss, and many other firms. And Cravath — has Cravath signed on?

MS. PENELOSA: I am working on it. I had them update their forms, because I had to sign — you know, with the domestic partnership, and sign all of that. I wrote to the head of the firm and I said, "You know, domestic partnership is recognized in New York City, and you are not in compliance, and toward fairness and inclusivity, can you please add domestic partners? On there next to single, married, divorced, widowed, you know, I want domestic partner."

So they wrote back within two or three hours. They e-mailed me and said, "Thank you for bringing that to our attention," and about three weeks later, the head of benefits stopped me in the elevator and said, "Thanks a lot, you just increased my work."

So that is a step in the right direction. And I know that there are a few lesbian partners and a few gay partners in that law firm. So, hopefully, I will start working them over and start winning everybody else over.

MR. WOLFSON: The dirty little secret of this form of activism is that asking people to sign the Marriage Resolution, beginning to engage them in that discussion, may result in them signing, and then they become part of the list and we snowball that list. We have a select illustrated example over there of the kinds of people and groups that have signed, and that is great. That is the growing coalition of fair-minded Americans that are increasingly supporting our freedom to marry.

But the secret is that whether they say "yes" or not, the fact of asking them is what we need to be doing. Even if they say, "Well, you know, Proskauer does not sign resolutions; thank you, Peter, but we really appreciate the opportunity to have discussed it," that is an important gain. We have moved people to start thinking.

When Vermont happens, when Hawaii happens, when the breakthrough happens, when the Legislature starts to move, when we need people to start acting on our behalf, that is not the time to begin talking with them. In advance is the time to begin talking with them, and even if they do not say "yes" the first time, your asking them again and again, patiently and persistently, is what is moving this in our favor. That is the secret of the Marriage Resolution. It is the process, not just the results, that matters.

**IS SEXUAL ORIENTATION IMMUTABLE?:
PRESENTING SCIENTIFIC EVIDENCE IN LITIGATION TO GAIN
STRICT SCRUTINY**

DR. BROOK: The idea of having a session about this topic of immutability came to me because I am a physician, and I have been in practice for fifteen years, and one of the reasons I am in law school is I think there is a great need for communication between doctors, lawyers and scientists, and this seemed to be a perfect topic for such a collaboration.

Our first panelist is Suzanne Goldberg, who is a senior staff attorney for Lambda Legal Defense, and, as an expert on anti-gay initiative issues throughout the country, she is part of the legal team that successfully challenged the Colorado Anti-Gay Amendment 2⁴⁰ and served as counsel for numerous other anti-gay measures, including the Cincinnati Anti-Gay Initiative 3.⁴¹ Suzanne leads Lambda's challenge to criminal laws in Arkansas and Texas banning same-sex sexual contact and also has been involved with challenges to sodomy laws in Tennessee and Montana. She also litigates and advises on issues involving lesbian and gay families, including domestic partnerships and equal employment benefits. She has just recently published a book, *Strangers to the Law: Gay People on Trial*,⁴² about the Colorado Amendment 2 trial. I am also pleased to say that she is adjunct professor here at Fordham and teaches a seminar of law on sexuality and the law.

Please welcome Suzanne Goldberg.

MS. GOLDBERG: To me, this is a fascinating topic. I will be talking this afternoon about the law and setting up the legal framework to identify where immutability issues even fit in litigation. Dan is going to discuss the science. Kate will present a social political critique of some of these issues, which you will also get a bit through my presentation. We are planning to leave a lot of time for questions and discussion, and we look forward to that.

What I want to do here are three things: first, lay out the legal landscape; second, talk about the use of scientific evidence related

40. COLO. CONST. art. II, § 30b (1993) (permanently enjoined by *Evans v. Romer*, 882 P.2d 1335 (D. Colo. 1993), *aff'd*, 517 U.S. 620 (1996)).

41. CINCINNATI CITY CHARTER art. XII (1993) (constitutionally upheld by *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 365 (1998)).

42. LISA KEEN & SUZANNE B. GOLDBERG, *STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL* (1998).

to immutability at trial, in particular the *Romer v. Evans* case;⁴³ and, third, offer a critique of the use of science-based immutability evidence in litigation in light of my experience as co-counsel in *Romer*.

For those of you who do not exactly remember everything you learned in Constitutional Law in the most clear fashion, let me just remind you that, the Supreme Court and lower courts occasionally employ closer scrutiny of governmental classifications. Where a law classifies or distinguishes between groups based upon a particular characteristic that has been deemed suspect or quasi-suspect, the courts will employ closer review, known as strict or intermediate scrutiny.

Through various cases, the Supreme Court has announced that there are a couple of factors that are taken into consideration in making a determination about whether a classification is suspect or quasi-suspect: whether the classification has been the basis for a history of discrimination; whether the burdened group is relatively politically powerless vis-à-vis the majoritarian political process; and, whether a characteristic is obvious, immutable or distinguishing. That last inquiry is obviously the one we are going to focus on here.

Courts sometimes also ask the question — which I think is actually the most appropriate and important question — of whether the characteristic bears any relationship to an individual's ability to perform in or contribute to society. However, there is nothing in any of the Supreme Court's decisions that says that these three or four prongs, however you want to lay them out, are supposed to be applied mechanically.

Instead, these prongs are supposed to be used as guideposts. And so, if they are supposed to be used as guideposts and not absolute requirements, why are we even talking about engaging in litigation specifically to satisfy the immutability prong? What has the court said about immutability? What is the significance of whether a characteristic is immutable?

The Supreme Court has characterized in various ways its concern with the nature of a characteristic that serves as the basis for government line-drawing. For example, in *Frontiero v. Richardson*⁴⁴ sex discrimination case, the Court was centrally concerned with whether the characteristic was an "accident of birth." In *Plyler v.*

43. 517 U.S. 620 (1996).

44. 411 U.S. 677 (1973).

Doe,⁴⁵ a case about whether the children of undocumented immigrants could attend public schools, the Court talked about whether the characteristic was outside of an individual's control. So clearly, there is some concern with whether a characteristic is entirely volitional or not, but there is nothing in these cases that talks about whether the characteristic has to be genetically immutable. Obviously, being the child of an undocumented immigrant is not a genetically immutable characteristic. There are some questions, as well, about whether sex is biologically immutable or not.

So why would we even be talking about introducing scientific evidence in litigation when the legal test does not seem to require this sort of showing? Unfortunately, a number of lower courts have taken these Supreme Court guideposts as mechanical rules. In particular, several courts that have addressed the question of whether sexual orientation-based classifications should be suspect have said, "Well, homosexuality is behavioral; therefore, it is not immutable, and the classification based on sexual orientation cannot be suspect."

So the instinct on the part of some lawyers is to try to prove scientifically that homosexuality is not behavioral, that it is in fact a physically immutable characteristic. In light of the lower court cases reinforcing this point, it is an understandable instinct. But, again, I do not think it is the correct instinct for reasons I will describe as we are talking here.

This clash between the Supreme Court's test and lower courts' application of the test brings me to our next question, which is what does the trial look like if litigators decide to use scientific evidence to try to satisfy the "immutability" test.

This fact was pursued in *Romer*, the case challenging a Colorado amendment that banned state and local government entities from ever prohibiting discrimination against lesbians, gays and bisexuals. The Supreme Court ultimately struck down the amendment in 1996 as lacking a rational basis and therefore violating the U.S. Constitution's equal protection guarantee.

In its earlier phases, the plaintiffs also urged that the court should apply a heightened scrutiny to the classification on another basis on the theory that sexual orientation classifications, like the one embodied in Amendment 2, were suspect or quasi-suspect.⁴⁶

45. 458 U.S. 1131 (1982).

46. See *Evans v. Romer*, No. CIV.A. 92-CV-7223, 1993 WL 518586, at *5 (Colo. Ct. App. 1993).

There were very different views on the plaintiffs' legal team about how we should go about proving this point— whether we needed to prove facts related to our argument that heightened scrutiny should be applied; and, if we did need to provide factual evidence, how we should do so. Some of the lawyers on the team wanted to make sure that the record was as complete as possible to support any of our arguments on appeal — and, to be fair, that was a reasonable and, I think, a conservative approach in some respects.

Others of us, myself included, believed that it would be a big, expensive and confusing mistake to try to scientifically prove the immutability of sexual orientation to satisfy that obvious, immutable or distinguishing prong. Here are the reasons why:

(1) Expense. Whenever you try to prove this sort of scientific theory in court, you have to have expert witnesses, and we did. We had several. We had Richard Green, a psychiatrist who has been studying these issues for a number of years; Judd Marmor, former President of the American Psychiatric Association, who had completed extensive research, studies and writings on these issues; and Dean Hamer, who at the time was a molecular biologist, and the Chief of the Gene Structure and Regulation Section of the Laboratory of Biochemistry at the National Cancer Institute and has done tremendous research in DNA and other things that Dan will explain.

(2) Confusion. Why? How many people in the room have at least a college-level background in any sort of science?

A fifth maybe. For most lawyers, the science is pretty confusing. Consequently, both the direct and the cross examinations of the scientists are being done by lawyers who do not really understand the depths of the scientific issues, so the presentation of testimony is not always the clearest, to say the least.

More significantly, introducing scientific evidence was also theoretically confusing. At the same time as we were telling the court that the law did not require physical immutability and instead required only a showing that the characteristic at issue was obvious, immutable or distinguishing, we were still offering a full-scale scientific study of sexual orientation. We were, in a sense, undercutting our argument that we did not have to prove physical immutability by putting in a large body of testimony and scores of exhibits, suggesting that we thought we did have to prove immutability as a matter of fact.

(3) Setting Priorities. The third problem in introducing all of the scientific evidence regarding immutability is that it took a huge amount of trial time – more than twenty percent of the trial was spent with experts on these issues. The heavy level of attention suggests that immutability and, more generally, suspect classification was a very, very important issue to our winning the case, and it was not. As at any trial, you have to weigh the question of “How important is what you are trying to prove?” versus “How does the presentation of information reflect the priorities of your overall trial strategy?”

That having been said, what did this all look like at trial? Richard Green reported on a number of studies that Dan is going to discuss, including his own work showing that a biological marker exists for sexual orientation, including Simon Levay’s brain studies showing that the hypothalamus of gay men was a different size from the hypothalamus of straight men and women (who were not identified by sexual orientation). Very interesting material.

Judd Marmor, the former President of the American Psychiatric Association, talked less about the science and more about the American Psychiatric Association’s decision in 1973 to declassify homosexuality as a psychiatric disorder, which caused a major shift in our ability to pursue equality in legal forums for lesbians and gay men.

Dean Hamer, a molecular biologist, really gave us the most extensive discussion about science. He talked about the DNA studies that he had done, and attempted to explain to a room full of lawyers his finding of a genetic marker for sexual orientation on the Xq28 region of the X chromosome in men. He managed to do a terrific job of explaining this clearly, analogizing DNA to a long sausage with the Xq28 as a little band on the sausage.

One of the difficulties with all of these studies — which the cross-examiner failed to bring out — is that none of them prove conclusively that sexual orientation is genetically immutable. Moreover, the studies at the time of trial were limited in the population they addressed, with virtually no research having been done on women.

Despite these weaknesses, the scientific experts managed, overall, to convey their points strongly. The following excerpt from the state’s cross examination of Dean Hamer captures the challenges faced by the cross-examination as well as the humor, perhaps unintentional, that these examinations brought to the courtroom.

In this excerpt, the cross-examining lawyer appeared to be attempting to show that the scientific DNA research was not meaningful and did not prove that being gay was an immutable characteristic:

The cross examiner opened this line of questioning: "The percent of DNA shared by human beings, in other words, the DNA similarities between human beings, is how much?"

Dean Hamer's answer: "On average, each person shares about 99.9 percent of their DNA with other human beings, with each other human being."

The cross-examiner: "So my DNA is almost exactly like your DNA?"

Hamer responds: "Your DNA is on average about 0.1 percent different from my DNA, and it is about 1 percent different from a chimpanzee's DNA."

So the questioner asks: "All the difference between the two of us is accounted for by 0.1 percent?"

Hamer: "All the inherited differences of DNA are accounted for by that 0.1 percent, and all the inherited differences between you and a chimpanzee are accounted for by 1 percent. The rest is identical."

The questioner: "Knowing you and me, because I do not know any chimpanzees —"

"— I am short, a short balding guy, and you are taller. That is accounted for by 0.1 percent of the DNA?"

Hamer: "It would actually require much less than 0.1 percent of the DNA. It is within 0.1 percent, that is right."

"You have hair, as you notice; I do not. That is accounted for by that same 0.1 percent?"

Hamer: "Predominantly, and possibly some differences in our age and other factors."

The questioner, a heavysset man, then asked "My bone structure appears to be a little bigger in places than your bone structure; that is accounted for by that difference?"

Hamer: "It is probably accounted for somewhere in the three million differences that you and I have."

And it went on from there. Although entertaining, it was hard to imagine how this discussion, even with Hamer's skillful responses, would assist the court in resolving the question of whether sexual orientation was a suspect classification and it did not. After many hours of testimony accompanied by a plethora of exhibits, the trial court simply concluded that "the preponderance of credi-

ble evidence suggests that there is a biologic or genetic 'component' of sexual orientation, but even Dr. Hamer, the witness who testified that he is 99.5% sure that there is some genetic influence in forming sexual orientation admits that sexual orientation is not completely genetic. The ultimate decision on 'nature' versus 'nurture' is a decision for another court, not this court, and the court makes no determination on this issue."⁴⁷

Not all that surprising, but that is in hindsight. On appeal, neither the Colorado Supreme Court nor the U.S. Supreme Court ever mentioned any of this testimony.

I am going to turn this over to Dan now to talk about all the science that I have just glossed over. I wanted to leave you with one last quote that I think offers another important perspective on these issues — both as they arise in litigation and more broadly in the social debate.

In 1984, Ginny Apuzzo, who at the time, headed up what was then the National Gay Task Force, was asked to comment on the significance of a finding that a biological marker for homosexuality had been reported in gay men. Addressing the broader discussion about the roots of sexual orientation, she said: "I do not think it is an argument worthy of our energy. The problem is not what we are; it is what they are. If people stopped asking why we are homosexual and would ask why they are homophobic, that would be a step forward."

With that, I will turn it over to Dan.

DR. BROOK: Thanks, Suzanne. It is interesting that I was planning to get into less scientific detail than Suzanne, because from my perception, as a physician and scientist, much of the stuff that was discussed in this trial does not sound like it had very much relevance to the question of immutability, and there are other things that may actually be more relevant.

As Suzanne said, the debate between nature and nurture in the etiology of homosexuality is unresolved. Most scientists and clinicians agree that sexual orientation is fixed at an early age, certainly before age five or six, and that probably combinations of biological (or genetic) and environmental factors are at work.

One type of study has been designed to attempt to separate genetic factors from environmental factors and involves comparing pairs of identical twins and comparing them with pairs of fraternal twins. Identical twins have identical genetics. Fraternal twins are

47. *Id.* at *11.

genetically no more similar than any two siblings in a family, similar but not the same, but do share very similar environments in their upbringing. Therefore, when identical twins share a trait to a greater degree than fraternal twins, it is assumed that that trait is more likely to have been influenced on a genetic basis.

In men, if one twin in a set of twins is homosexual, between fifty percent and one hundred percent of the other in the pair of identical twins (depending on the study) will also be homosexual. By comparison, only fifteen to twenty percent of male (or female) fraternal twins will be concordant for homosexuality. In female identical twins, studies show about a fifty percent concordance rate for homosexuality. The greater concordance rate in identical twins compared to fraternal twins is thought to be attributable to a genetic influence on the trait of homosexuality.

Suzanne mentioned the Levay study. In his neuroanatomical study, Dr. Levay examined anatomical structure in the hypothalamus, a very important structure in the brain that is known to be involved with functions such as hunger and thirst, and, at least as demonstrated in animals, with sexual arousal and sexual behavior. When he looked at the structure in women, versus heterosexual men, the hypothalamic structure in heterosexual men was consistently larger, whereas the same hypothalamic nodule in homosexual men was about the same size as that found in the women. However, even though this finding sounds very provocative and suggestive that sexuality may be determined by this hypothalamic structure, in fact, the correlation does not prove a cause and effect relationship between the size of the hypothalamic structure and the sexuality of the individual. For all we know, it could be that the correlation demonstrates a "use it or lose it" effect.

Another type of study in the etiology of homosexuality has been gene studies, exemplified by Dean Hamer's work. Hamer selected families in which there were at least two brothers who were both gay. By doing that, he was looking for an unusual phenomenon, that is, a grouping of homosexuals within a family, suggesting that there might be some kind of genetic relationship. When he compared the DNA from the two gay brothers and the DNA in another brother in that family who was not gay, he found that in ninety-nine percent of these cases, the gay brothers shared the same gene or specific gene region, a very, very tiny part of the DNA, whereas the gay brothers and non-gay brother did not share that gene. If one is able to repeat that finding in enough people and find that it is consistent, realizing that ordinarily there is a fifty-fifty chance

that any sibling is going to share the particular gene, that is statistically good evidence that the gene correlated with the trait. In fact, there is only one out of 100,000 chances that these kinds of results would be attained by chance alone. Thus, this is relatively convincing evidence of correlation between sexuality and the gene. However, it is important to note that this finding does not suggest that all homosexuality is related to that or any other single gene. Nor does it explain how the gene might actually be involved in the etiology of homosexuality.

Having said all that, while the evidence of biological etiologies as the cause of homosexuality may be important, and inborn or genetic characteristics probably tend to be less easy to change, in fact, inborn behavior may still be changeable. For example, consider left-handedness. If one takes a person born genetically left-handed, one can train her to write with her right hand. Furthermore, learned behavior is not *necessarily* changeable. So even if it turned out that homosexuality is caused by an early environmental influence rather than an inborn genetic influence, it would not necessarily mean that it was mutable.

So how does one determine immutability scientifically? If ethically feasible, the best approach scientifically may actually be studies that seek to determine if, and how easily, sexuality can be changed. One of the stumbling blocks and sources of confusion has been the concept of the definition of "homosexuality," and what it is that one is trying to change if one is to try to change sexuality.

One way to define homosexuality is purely on behavioral terms. A person is homosexual if he is a male who has sex with other males, or she is a female who has sex with other females. Any time one can demonstrate in a study that one can prevent or alter that activity, if you define homosexuality by that activity, theoretically you would be demonstrating that that activity may be chosen or avoided, and in that sense it could be argued that it is mutable.

There are quite a number of techniques intending as a goal to change homosexuals to heterosexuals. Some of the more famous ones are those used by psychoanalysts and psychotherapists, particularly those — some of whom still are very active — who believe that homosexuality is a disease, in spite of the removal of homosexuality from the list of psychiatric disorders by the American Psychiatric Association over twenty-five years ago.

One large study, performed by Bieber et al. in 1962, examined 100 homosexually-behaving patients. All of the homosexually-be-

having subjects in the study were voluntarily participating in psychoanalysis with the purpose of having their homosexuality altered. All of the participating psychiatrists were attempting to do the same. Twenty-seven percent of these people were “successfully changed” from engaging in homosexual behavior to not participating in homosexual behavior and, in many cases, engaging in heterosexual behavior. Notably, many of these men had in the past had some heterosexual experience.

This conversion was only measured at the end of the study, and in many cases there was no follow-up at all. No effort was made to determine whether these individuals were having any homosexual fantasies or had any feelings of unexpressed homosexual attraction, but they were considered “cured.” Seventy-three percent of these highly motivated individuals undergoing 150–350 hours of intense therapy had not been changed. Do these findings prove mutability or immutability?

Similar sorts of outcomes have been seen with a type of behavioral therapy, aversion therapy. This is therapy where the experimenter will show the subject a picture of a nude male or female and determine physiological response by measuring either a penile or a vaginal wall. When the subject has the “wrong” response (i.e. a physiological response to someone of the same gender), the experimenter gives the subject an electric shock, or gives the subject an injection of a drug that makes him severely nauseated. The goal of this therapy was to change homosexual behavior, and sometimes replace it with heterosexual behavior, and in some studies the therapy was reported to be effective.

Using this physiological arousal as a definition, another psychotherapist, Dr. Freund, after “curing” (changing the sexual behavior from homosexual to heterosexual) a number of his patients, decided that he wanted to see if he had really converted these homosexual patients to heterosexuality. He tested them using penile and vaginal physiological measuring devices and found that just about all of his supposedly heterosexual male patients were still responding to male photographs, and not to the female photographs. Some of these patients remained convinced that they had been converted to heterosexuality, and continued to behave heterosexually, even though they continued to have this homosexual physiological response. Mutable or immutable?

Another way of defining homosexuality takes into account fantasy and attraction as well as behavior. Kinsey took fantasy and attraction, and not just overt behavior, into account when he per-

formed his famous studies in which he developed his sexuality scale, the Kinsey scale, which defines individuals as being anywhere from one end of the scale (zero), in which the individual has no homosexual fantasy, behavior, or attraction, to the other end (six), where the individual is homosexual in his/her attractions, behaviors and fantasies.

In some studies, experimenters using Kinsey's definition were able to interview some of the subjects who had been studied and "cured" of their homosexuality in some of the psychotherapeutic and behavioral studies. Consistently, they found that these people had fantasies and attractions for people of the same sex and in many cases were actually having some behavior with the same sex, as well, having followed them out over time. Thus, if one defines homosexuality to include fantasy and attraction as well as behavior, even if there is no overt homosexual behavior, the bulk of the evidence suggests that homosexuality is immutable.

Which of, and how, these different definitions are used and how homosexuality is understood will have a crucial effect on how one frames the question of immutability. Ultimately, it is how the question is framed that may be determinative as to the adjudication of immutability.

It is now my pleasure to introduce Kate Diaz. Kate is a gay rights activist for over twelve years. She was a national organizer of the 1997 civil disobedience action on the steps of the U.S. Supreme Court. She was previously on the Board of Directors for the Gay Community News in Boston, and she is currently on the Board of Directors of the Center for Lesbian and Gay Studies in New York. She has been an attorney in practice both in the public and the private sectors and is currently associated with Walker, Morgan & Finnegan. She is a freelance writer who has done a great deal of thinking and writing on the issue of immutability and sexual orientation for gay and progressive publications.

Let's welcome Kate Diaz.

MS. DIAZ: I am missing part of Suzanne's comments. I think that my sense, Suzanne, is that to some extent the issue was left unresolved — and I think this is what Dan spoke to — but I believe the issue has been resolved in the sense of the dominant ideology.

Justice is supposedly derived from rationality, and rational justice depends primarily on the properties and types of liberty. But "liberty for having," the pie being only so big, which invokes dis-

tributive justice, and “liberty for being,” or dignity, are not necessarily the same thing.

As Professor Klome has noted, protection against core existential “unfreedoms” is necessary for the very existence of persons as social agents, and thus a condition for justice rather than one of its solutions. It, therefore, has to have priority. In classical liberal theory, there should be no rivalry in basic needs. The basic existential liberties are conditions of dignity, not just the means of achieving dignity.

Still, economic justice is critical to a larger justice in society. When we fight for the right not to be discriminated against in housing, not to be fired for being gay, to have access to services, to have access to the political process, to have political asylum, to have privacy, we are fighting for our wants, the allocation of which is a topic of economics converging with politics and ideology, ethics, philosophy, psychology and, I suppose, science, too. What better example than the right wing’s twisting of equal rights into special rights and feeding on the economic insecurities of straight voters?

But the subtopic I want to discuss today for this panel is the political economy of theories of homosexuality. Whose wants and needs are met? Well, this is the political currency of the meaning of homosexuality. To address these issues I want to describe and use three examples: the political economy and ideology of science, of the media and of gay activism in defining what it means to be gay and what it does not mean.

These three areas converge in the law. As lawyers — and I know some of you are lawyers in training — our only tools are words, and in litigating every case there is one essential strategy: tell a story. Developing the story is a key bonding experience between the lawyer and the client. The lawyer is giving words, a voice to the client who has been silenced, wronged or shut out. The story empowers the client. The story develops as you compare the case, but you better have the story together when you go to trial and present your court papers. You better have the issues framed in such a way that the story makes the answers to the issues self-evident so that the judge or jury murmurs, “Of course, justice requires X.”

But what do you do when your story lacks a unified theme in one area? What would you do if you were trying a class action with the most unruly of classes, like trying to herd kittens scurrying every which way and their theories, wants and desires? What do you do when you as a lawyer are to some extent dis-empowered by legal

precedents, the prejudices of the day, the exigencies of trying to win, while crafting the story? What if you must present a story you are not so sure of yourself? Are you compromising the ideal of the very justice you seek? What if the story was already written for you before you have a chance to use those words as weapons? How have scientists, the media and activists written the story with their own agendas in mind?

Science. Science has written a story that heterosexuality is the norm and homosexuality the problem, the puzzling deviation, the defect in the genes and/or the hormonal makeup that it is located in the body. This is not new. The innocent quest of a Simon Levay and his hypothalamus studies or a Dean Hamer and his gene studies, really self-quests of why they turned out gay and hence lost some of the privileges attendant to white men in society that they expected to enjoy, have their roots in the late nineteenth century.

The great German sex researcher, Magnus Hirshfeld, set out to show scientifically that homosexuals were essentially different, with the hope that social and legal benevolence would follow. In 1908, Hirshfeld and the Scientific Humanitarian Committee developed a questionnaire to investigate homosexuality to determine how, not if, homosexuals were different in their minds or bodies. Thousands of people answered, because they wanted to decriminalize homosexuality. They thought that if homosexuality was biological they would not be morally culpable for their desires. When the Nazis came to power, they burned Hirshfeld's institute, but they picked up on his theories of biological difference, how the Jewish body, in addition to the homosexual body, was different and degenerate.

So the latest studies provide a back-to-the-future glimpse of the culture and politics that make theorizing homosexuality based on biological causation attractive at particular moments in history. In pre-war Germany, homosexuals were becoming more visible. So too now we are becoming more visible. While homosexuality has repulsed or revoked curiosity in many straight people, scientists enchant and allure.

Science has become our secular religion. Scientist gods unlock the mysteries of our very being, but despite over one hundred years of trying to unlock the biological basis of homosexuality, the results are inconclusive. Turning to science for an unassailable answer to social questions, questions about homosexuality, what social rights, what freedoms we are entitled to.

Moreover, a key to understanding in the scientific study of human sexuality is elided, that human sexual behaviors are com-

plex expressions of the interactions of genes, environment, opportunity and culture, factors that cannot be isolated. The desire for definitive answers about the cause of homosexuality will persist, but the impossibility of achieving certainty means that the subject will remain a marker of our cultural anxieties about sexuality in general, the most meaning attempts of human activities, as Professor Sedgwick has noted.

Science gets bracketed with a status of purity and detachment that advocacy never does, although judging does. Richard Piller, author of many twin studies, is preoccupied with the fact that his daughter is a lesbian, his sister is a lesbian, he and his brother are gay, and he has reason to think that his father was gay. Could it be something about his family other than genetics?

Nor is there purity or detachment in the money associated with scientific research. Scientists need to promote their own work. They need research money. They need to make a name for themselves to enhance the control of their own work and research interests. The Human Genome Project is a multibillion-dollar endeavor to map and sequence all the DNA of the human prototype. The mapping and sequencing are valuable intellectual property. The sequence will define what it is to be human. In the 1990s, homosexual and heterosexual alike turned to science as the final arbiter of the most natural sexuality of all human beings.

Let's look at the media. In the media, homosexuality sells. You remember the headlines from 1991 when Simon Levay's study of a region in the hypothalamus of allegedly homosexual men was released. *New York Times*: "Zone of Brain Linked to Men's Sexual Orientation";⁴⁸ *Washington Times*: "Scientist Link Brain Anomaly Homosexuality."⁴⁹ *The New York Times*, in particular, has had a steady drumbeat on this issue, the biology of what it means to be gay. In an interesting confusion of gender roles with sexual preference, *The Times* did a tie-in article to the Levay study entitled, "In Fish, Social Status Goes Right to the Brain."⁵⁰

Lesbians have generally been absent from these studies and media coverage, although last year we were treated to headlines, including this one from the *Washington Post*: "Lesbians' Hearing

48. Natalie Angier, *Zone of Brain Linked to Men's Sexual Orientation*, N.Y. TIMES, Aug. 30, 1991, at A2.

49. Joyce Price, *Scientist Link Brain Anomaly, Homosexuality*, WASH. TIMES, Aug. 30, 1991, at A3.

50. Natalie Angier, *In Fish, Social Status Goes Right to the Brain*, N.Y. TIMES, Nov. 12, 1991, at C5.

Resembles Males, A New Study Suggests.”⁵¹ You know that was straight males, as opposed to female. Lesbians are somehow not “real” women.

So the political economy at play here is whose voices crowd out others in the media. Science journalism is very much boosterism. Science journals often have a “you scratch my back I will scratch your back” relationship with their subjects. Of course, this exists with political journalism and punditry, but I suggest that journalists tend to be less skeptical of the scientists they cover than other public figures. They often take studies at face value and credit them without even presenting critiques of such studies; or, worse, deriding those who do critique such studies as people who want to rain on the parade or have an ax to grind.

I do think that scientists and the media aid and abet each other to sensationalize and trivialize the complexities of human sexuality. Journalists are on deadlines and can be lazy, so they do not do the legwork of historical analysis of past studies, contextualizing the studies, or noting their inconsistencies. Sometimes they seem just like scribes rewriting press releases.

But ideology is also at play, as I alluded to before, on the anxieties of the people who control media outlets, outlets that are becoming increasingly integrated — “synergy” in the marketers’ words. So despite an increase in channels, as it were, there appears to be a decrease in viewpoints, which brings me to my final example: gay activists.

As our movement grows, our voices have become somewhat unified over the ragtag group of gay liberationists of the late 1960s and 1970s. Interestingly, it was these early liberationists, many of whom, I am sure, always felt this way, who argued for choice, that challenged heterosexuals to examine their own bisexual or homosexual potentials that might be realized in a more liberated world.

Today, discussions of whether homosexuality is biologically determined are chockfull of emotion and tension. It is the subject of fractious debate. If nothing else, the controversy proves that disparate experiences, whether conscious or unconscious, cannot be conflated into scattered cells in one region of the hypothalamus or a genetic sequence.

I do not think you build a movement on “I cannot help myself; I was born this way.” It is not particularly empowering. While many gay people who feel they had no choice in their sexuality are

51. *Lesbians’ Hearing Resembles Males, New Study Suggests*, ARIZ. REP., Mar. 3, 1998, at A4 (taken from the *Washington Post News Service*).

threatened by those who are bisexual or believe they have some choice in the matter, even suggesting that the latter group is more privileged and accepted by straights, I do not think one can deny which side has had greater exposure and social currency as of late. Whose story is winning out? I say this despite the right wing's emphasis on choice as a moral failing, but this is where we come back to protection against core existential unfreedoms, what I began my talk with.

It is an irony, is not it, that the story of those who feel that their empowerment as social agents is to act on their wants, desires and needs as a matter of dignity and agency, our supposed liberal foundation in the United States, like freedom of religion, are elided to a degree. As Nan Hunter has noted, expressing that you are gay is what makes you gay. Is the status conduct distinction a compromise to one's duty of candor to the court, to one's duty to all gays? You never really had a choice in your religion of birth, did you?

On that note, I will close with a topic you might think I should have started with, but it goes to the power of language and whose voice is heard, the currency of speech by activists. Recently, I attended a media training workshop led by the Gay and Lesbian Alliance Against Defamation, and in their kit they instruct you that you are to use the phrase "sexual orientation"; you are not to use the phrase "sexual preference." So I thought I would close with reading definitions from the *Webster's Third Edition*, just some of them.

"Orientation: the act of determining one's bearings or setting one's sense of direction."⁵² An allusion to the birds and the bees: witness the bee's momentary pause for orientation before it headed back to the hive.

"The settling of a sense of direction or relationship in moral or social concerns or in thought or art; choice or adjustment of associations, connections, or dispositions."⁵³ One that I think is particularly apropos is definition five: "the change of position exhibited by some protoplasmic bodies within the cell in relation to external influences and the relative positions of atoms or groups in a chemical compound."⁵⁴

Now, "Preference": "The act of preferring or the state of being preferred, choice or estimation about another, a high evaluation or

52. WEBSTER'S DICTIONARY 1591 (3d ed. 1986).

53. *Id.*

54. *Id.*

desirability; the power or opportunity of choosing”⁵⁵ — and this is what I think we are talking about, to have the opportunity to act on your different desires, whatever origin you think they may have — “someone or something that is preferred, an object of choice, a favorite”⁵⁶ — which is your favorite ice-cream.

In the precise language that is necessitated by the law, “preference” seems more accurate, but the prevailing gay ideology has expunged it.

Thank you.

55. *Id.* at 1787.

56. *Id.*

**GENDER THEORY AND LESBIAN, GAY, BISEXUAL AND
TRANSGENDERED EMPOWERMENT**

MS. KERN: I am Cynthia R. Kern, not to be confused with the eminent Cynthia S. Kern, who is also here. I am a third-year student at CUNY Law School, and I am going to be moderating the panel today, which has the very short title of "How Does the Struggle for Transgender Liberation Inform the Legal Strategy of the Lesbian and Gay Civil Rights Movement?"

To my immediate left is Paisley Currah, Professor at Brooklyn College, teaching political science, and Dana Turner is right beside her; Dana is a Director on the Board of the International Conference on Transgender Law and Employment Policy (ICTLEP). Then we have Professor Katherine Franke, who teaches here at Fordham. Everyone is going to give their own personal spin on this very important issue.

MS. TURNER: Let me introduce myself. I am a 1991 graduate of Georgetown University Law Center, and, after 39 years of life as David Turner, I re-constructed myself as only a critical legal theorist could do, and, since 1993, I have changed my gender and have been living as a person of the transsexual persuasion. Now, for the first time in my life I feel "normal." Well, as normal as a Jesuit-educated, self avowed socialist/feminist/anarchist, African American transsexual could ever hope to feel. Therefore, that makes me what the literature describes as a "normative transsexual." Since 1997, I have served on the International Conference on Transgender Law and Employment Policy, and I have been a civil rights activist for more than thirty years. I feel honored to have been selected for this panel today and to be here representing the viewpoint of a practicing transsexual.

So with that introduction, I would point out that, here, on the eve of the twenty-first century, people of a transgender experience — like lesbians, gay males, bisexuals, people living with AIDS and HIV disease, bisexuals, individuals who identify as queer, and all sexual minorities generally, have become an integral part of our society at every imaginable level of human activity and interaction. Whereas a half-century ago, or even a couple of decades ago, transsexuals were not a commonly recognized entity. Now, more and more, we see them everywhere, and our growth in numbers gives no indication of subsiding.

I have a few news items, and I will read them as quickly as I can. I think it will give you an overview of the landscape of the law and societal conditions faced by transgender people.

January 26, 1999; Louisville, Kentucky: By a vote of seven-to-five, the Louisville Board of Aldermen passed the first city ordinance in Kentucky protecting citizens against employment or workplace discrimination on the basis of their sexual orientation or gender identity. Several amendments ultimately affecting transgenders had been made to the original bill. The passed bill narrowed the definition of gender identity to include only those who have completed a sex-change operation. Cross-dressers and pre-operative transsexuals undergoing hormonal sexual reassignment therapy are not protected by this bill.

Employers, gender-specific dress codes, public restrooms, changing facilities and religious institutions are also exempted from the bill.

February 23; Annapolis, Maryland: A state transgender rights group, called "It's Time, Maryland," announced its opposition to the Maryland Antidiscrimination Act of 1998,⁵⁷ prohibiting discrimination based on sexual orientation. Even though the Maryland gay rights bill came within one vote of being passed the year before, the "It's Time, America" transgender group refused to endorse this year's bill.

The Maryland General Assembly members sponsoring the bill refused to amend it with language expanding the definition of sexual orientation to encompass those having or being perceived as having an identity expression or physical characteristics not traditionally associated with one's physical sex or one's biological sex at birth. Due to this political slight, the chairperson of "It's Time, Maryland" abruptly resigned from the board of directors of the Free State Justice Campaign, a statewide coalition of gay groups that drafted the original bill.

Similarly, a group called the Gulf Gender Alliance in New Orleans picketed the premiere fund-raising event of the Human Rights Commission ("HRC") in 1994. They picketed HRC tables and Gay Pride booths across the country during the summer of 1995 because HRC refused to endorse an employment nondiscrimination act that would include transgendered people. HRC had expressed, as has the major sponsor of the group, Representative

57. H.R. 315, Reg. Sess. (Md. 1999).

Barney Frank, the idea that any amendment that included transgendered people was doomed to failure.

These examples really illustrate part of the debate that goes on in the transgender community today. Many people, as I said, feel that a bill or law that protect people on the basis of sexual orientation, meaning lesbians and gays, but do not protect transgendered people should be struck down completely. Other organizations, like the International Foundation for Gender Identity, say that any bill is better than no bill.

November 26; Bronx, NY: The mother, brothers, cousin and neighbor of a twenty-seven-year-old transgendered Puerto Rican woman named Jalea Lamont were assaulted by New York City police officers, verbally abused, maced, arrested and charged with sundry misdemeanors and felony offenses after Nancy Lamont, Jalea's mother, called 911 when she could not awaken her child from a cold-and-flu-medicine-induced sleep. Paramedics that responded to the call found that Jalea was not in need of medical assistance, but when police officers unknowingly passed Jalea Lamont in the hallway, they held the door for her and referred to her as "ma'am." When they discovered that Jalea Lamont was transgender, one police officer followed her into the bathroom of her family's apartment where she was attempting to hide after he began verbally abusing her. He beat her with his fists and a nightstick, even as she begged him to stop because she had recently undergone silicon implant surgery.

He called her a "he/she," an "it," and a "fucking trans-testicle." When relatives and neighbors tried to intervene, the officers allegedly beat and maced them, too, including two young children, and claimed that the family had attacked them. Jalea was treated at Bronx Lebanon Hospital, and the officers also reported injuries.

December 31, 1993; Falls City, Nebraska: A lesbian, a gay man and a female-to-male non-operative transsexual were murdered execution-style with gunshots to the head on New Year's Eve. Brandon Tina, the female-to-male transsexual, was twenty-one years old and had lived as a man for three years before being beaten and raped at a Christmas party the week before by the same two men who killed him. Lisa Lambert was twenty-four and Philip Devy was twenty-two.

Police in Falls City, Nebraska, did not charge the pair when the original crime was reported, and, in fact, publicly identified the trans-man as a female-male impersonator. The harassment continued, culminating in the triple slaying, while an eight-year-old child

cried in a nearby crib. The shooter in the case was sentenced to death for the three murders.

August 25; Greenwich Village, New York City: Police reported a dispute between two groups of men believed to include transsexuals and transvestites all involved in prostitution in the Lower West Side meat packing district, led to the fatal shooting of an eighteen-year-old Patterson, New Jersey man on the corner of Sixth Avenue and 14th Street in Manhattan. Four men, two of whom wore women's attire, attacked Rivera with a baseball bat, knives and a 45-caliber handgun, shooting him once through the chest. They fled in a dark Lincoln Town Car and were arrested later in the day in Jersey City. Rivera was pronounced dead at St. Vincent's Hospital.

Exactly one week before, thirty-six-year-old Fitzroy Green, a well-known transvestite prostitute, hustler, S&M dungeon master and freelance process server, was murdered in his apartment near Greenwich and Charles Streets in the West Village, allegedly by a twenty-one-year-old Bronx man who told the police that he killed Green, known affectionately as Jamaica, because after accompanying him to his apartment for a sexual encounter, he discovered the victim to be a male instead of female. He stabbed Jamaica eighteen times, once in the chest and seventeen in the back. The suspect met the victim in front of a popular bar on Christopher Street, called Two Potato, which features performances by female impersonators. He is using the famous homosexual panic defense.

January 8; Austin, TX: In a case eerily reminiscent of Matthew Shepard's murder,⁵⁸ the body of a gay gender-questioning eighteen-year-old teen-ager was found. His name was Donald Scott Fuller. He was also known as Lauren Page. He was found in a wooded area along South Congress Avenue of Houston with a nine-inch gash across the throat and several stab wounds to the head and torso.

Five days later, a twenty-eight-year-old, Gamalio Korea, was arrested for the murder. He and his brother-in-law both admitted to having met Lauren and another transgendered kid on the notorious "Austin whore stroll" and paid to have sex with them. Although Austin City Police said they were leaning toward not classifying the murder as a bias crime, Travis County, Texas district attorneys have announced their intention to process the case as a hate crime. The suspect faces a very real possibility of execution by lethal injection, considering the liberal voting record of Travis

58. See *supra* note 4.

County, Texas residents, who elected an openly lesbian county sheriff last November.

November 29; Quedlindorf, Germany: Residents of that tiny East German village of 1048 persons voted to dismiss their mayor, Norbert Lindner, age forty, after he began wearing women's clothing and calling himself Michaela. The divorced father of two children and member of the former East German Reformed Communist Party said that if she lost the vote of confidence from the villagers she would leave Germany for her sex reassignment surgery. Although Michaela's mayoral term was not to end until 2003, she herself called for the referendum while appealing for tolerance and understanding from the townspeople of Quedlindorf, who were shocked when hundreds of transsexuals from across Germany, France and Western Europe converged on the hamlet to demonstrate their support for Mayor Lindner.

In Trinidad, Colorado, a small town twenty miles over the New Mexico border, in a clinic that was once originally operated by the United Mine Workers of America union, a seventy-five-year-old general practitioner, Dr. Stanley Biber, has performed 3800 sex reassignment surgeries there in his seventy-bed hospital since his first penectomy (penis removal) in 1969. Where once, as one of only a few American doctors willing to perform this surgery, he performed three sex change operations a week, now he does only one, while other doctors have developed specialty practices in the field. Dr. Biber also reports that he now does — where at the beginning he did almost entirely sex reassignment surgeries for males to females, he says about half of his clients are female to male. That is from the *New York Times* of Sunday, November 8.⁵⁹

These vignettes represent the legal situation that transgenders, transsexuals, transvestites, cross-dressers and gender-benders of every persuasion find themselves in, and to varying degrees they find that they are compelled to express themselves and manifest their personhood in the clothing, attire or visage of the gender opposite their biological sex.

People who transcend the established norms and boundaries of sexual identity are born both male and female, as well as inter-sex and as hermaphrodites. Although most of my examples given here involve male-to-female transgender pioneers, as I stated, the percentage tends to be about equal between male-to-female and female-to-male sex reassignment surgeries.

59. See James Brooke, *Sex-Change Industry a Boon to Small City*, N.Y. TIMES, Nov. 8, 1998, at A1.

A cursory examination of a simple area of personal identification documentation illustrates the obstacles that transgender and gender-variant individuals must navigate. Whereas medical technology has made surgery possible for more and more persons than ever before in history, the legal predicament that transgender people find themselves in is very precarious and unsettled.

Under the present legal system, even postoperative transsexuals are enjoined from any number of official societal institutions and social activities, such as marriage, just as lesbians and gays are, although interestingly, with transsexuals — and there are many postoperative transsexuals in the country today who, having been in legal heterosexual marriages before their sex reassignment surgery, are now in legal same-sex marriages. So some same-sex marriages do indeed exist in this country.

Whereas common law name change is widely recognized as something that anyone could do, through usage and by order of a court, having one's birth registration materials changed is something entirely different. New York will change the sex designation on one's driver's license, although most window counter clerks in the DMV offices know nothing of the policy. It is called Procedure 435, and it was just a letter ruling by the Commissioner of the Department of Motor Vehicles.⁶⁰

The Social Security Administration readily reissues Social Security cards with a new name, although not a new Social Security number, to facilitate the full employment of people who use professional pseudonyms, like actors and authors. Therefore, transsexual people, preoperative or postoperative, are able to take advantage of the name being able to change there.

Some states do allow a court order to change the actual birth certificate, while other states do not. Roberta Achtenberg's *Sexual Orientation in the Law*⁶¹ gives a list of those states. The State Department will also issue a passport with a sex designation change upon presentation of a letter from a medical professional.

For transsexuals the prospects are not entirely bleak, although they find themselves in about the same position that lesbians and gays find themselves in.

Last, I would say that I like the title. I think that it should probably be the other way around. I think that it is probably the lesbian and gay civil rights movement, that informs the struggle for trans-

60. Commissioner of Dep't of Motor Vehicles, Ltr. Rul. Proc. 435.

61. LESBIAN, GAY, BISEXUAL RIGHTS COMM., NAT'L LAWYERS GUILD, *SEXUAL ORIENTATION AND THE LAW* (Roberta Achtenberg & Karen B. Moulding eds., 1998).

gender liberation, as the transgender movement has in a lot of ways — the organized political transgender movement has modeled itself after the lesbian and gay civil rights movement. Although we recognize that transsexuals have been leaders in the gay civil rights movement since before Stonewall, and particularly at the 1969 Stonewall rebellion, their role in leading the movement toward expanded sexual liberty is changing and growing every day.

MS. KERN: Thank you, Dana.

MS. TURNER: I will end with one saying of Confucius: “One of the great pleasures in life is in doing the things that people say cannot be done.”

MS. KERN: Thank you. I think it is very important to realize what is going on out there in the world right now and that much of the violence that we hear about and much of the problems that transgender people deal with every day are problems we are dealing with, too, but they are problems that transgender people have always been dealing with, and in a very, very violent and very immediate way.

Would you like to go next, Paisley?

PROFESSOR CURRAH: Before I get started, I also want to get a plug in for my other affiliation, and Dana Turner’s too. There is a new group in New York State called the New York Association for Gender Rights Advocacy (“NYAGRA”), and Dana and I are members. NYAGRA is a membership organization that advocates at the state and local level for self-determination in gender expression and identity, which means that it is a transgender political rights group. I also have to handout a publication that I co-authored with Shannon Minter, an activist handbook on how to get a transsexual/transgender civil rights bill passed based on what has happened in other places.⁶²

My talk today is actually going to be a series of stories, four stories with a few larger points, “grandiloquent points” that I will intersperse between the stories.

The first story — and this will hopefully speak to the larger goals of the Lesbian, Gay, Bisexual and Transgendered (“L/G/B/T”) movements — is about Katherine McIntyre’s name change and the Catch-22 situation that this transsexual woman found herself in when she tried to negotiate her life as a woman.⁶³ Katherine McIn-

62. PAISLEY CURRAH & SHANNON MINTER, *SECURING CIVIL RIGHTS PROTECTIONS FOR TRANSGENDERED AND TRANSEXUAL PEOPLE: AN OVERVIEW OF EXISTING STATUTES AND LEGISLATIVE STRATEGIES* (1998).

63. See *In re McIntyre*, 715 A.2d 400 (Pa. Sup. Ct. 1998).

tyre works for the city of Harrisburg, Pennsylvania. She represents herself as a woman in every area of her life — her bank information, credit cards, voluntary participation in organizations — but she has to go to work as a man, as Henry McIntyre. The reason she has to go to work as a man is because she has not had a legal name change, and her employer says if you do not change your name, you cannot go to work as a woman.

When she went to the court to ask for a legal name change, the court said, “No, you have not passed the real-life test, which means living for at least a year in all aspects of your new gender.” The catch, of course, is that her employer will not recognize “him” as a female and allow her to come to work as a woman until she has her name legally changed, but she cannot get her name legally changed until she passes the real-life test. It took three years of litigation for her to be able to go to work as a woman, as Katherine Marie McIntyre. This story demonstrates how different authorities rely on different proofs of gender: For the psychiatric establishment, one’s gender identity is proved by passing the real-life test, for the male-to-female transsexual, is really a “high fem” test. Can you be Betty Davis for a year? For her employer, it is the legal name change that is necessary to change her gender identity at work. Finally, the state-sanctioned legal name change relies on the real-life test. This Catch-22 situation reveals the arbitrariness of gender definition but the state’s authority to police these definitions remains in place.

The first grandiloquent idea I want to put out here today is this: In the United States, we do not have an established church, so the state obviously does not support — wink wink — any one particular religion or denomination, but we still have a country which is one of the most religious in the world. There are hundreds of thousands of religious communities who think everybody else is completely wacko and they are the true believers. What we have, though, in this country officially is religious pluralism, and it is the separation of church and state that guarantees this pluralism. My point today is that the most fundamental goal of the transgender and of L/G/B/T politics needs to be the dis-establishment of the current gender regime. If sexual minorities, including transsexuals, transpeoples, queers, gays, lesbians and bisexuals, can agree on nothing else, we should agree on that. So regardless of our own personal views about the truth of gender, we need to work to disestablish the state’s ability to define and regulate the relations between biological birth sex, which if you investigate you realize is a

completely messy concept; gender identity, one's sense of being male or female; gender expression; and sexual orientation. So far, a lot of the L/G/B/T movement is working only on sexual orientation — for example, preventing openly gay men and lesbians from being fired. But the movement thus far has not really focused on what goes into the construction of sexual orientation: sexual orientation, defined in terms of same or opposite sex or gender object choice, is coherent as a concept only if sex and gender remain uncontested categories.⁶⁴

Once we take away the state's authority to define sex and gender, we can spend all our time working on building our own disparate gender communities, getting into shouting matches with people whose views we do not like, working on them to convince them how wrong they are, converting them to our view. You know how that is, right? For example, I am exaggerating here a little, the butch/fem lesbians think the androgynous lesbians are weirdoes, and the androgynous lesbians think the butch/fem people are patriarchal throwbacks, and the butches think that FTMs are completely out of line in changing their bodies. Everybody just thinks the other person is wrong. That is what gender pluralism within the longer L/G/B/T movement is.

So in a gender pluralistic society, one that respects the official doctrine of separation of gender and state, the stakes in terms of the distribution of resources would not be so high. No one would lose custody of a child, be denied medical treatment, be denied access to education, public accommodations, et cetera, be left especially vulnerable to hate crimes, because something about their gender was a little or a lot nonconforming to an official gender regime.

Obviously, I am preaching to the converted here, and obviously this thought experiment is not exactly right around the corner. No one is going to just discover a lost amendment — you know, part of the Bill of Rights — “Oh, we just found it in a trunk.” I wanted to lay out this vision of the separation of state and gender in order to emphasize one fundamental principle, and that is that we, as members of diverse and endlessly proliferating communities of L/G/B/T people, do not have to agree on any one truth or any one narrative about gender before we start working together to dismantle the state's gender regime. We do not have to come to any agreement on which gender theorist will be our standard bearer, whether it be

64. See Paisley Currah, *Queer Theory, Lesbian and Gay Rights, and Transsexual Marriages*, in *IDENTITY/SPACE/POWER* (forthcoming) (discussing the point further).

Judith Butler or Harry Benjamin, or even, God forbid, Janice Raymond. So that is my whole take on gender theory.

Story two is about a bathroom. Utah officials chose to designate the women's room of the county courthouse of Tooele County as a unisex/single sex toilet.⁶⁵ That is breaking news obviously. But what was going on here was that there was a transsexual woman who was working in the courthouse, and the county officials were trying to accommodate this woman because her co-workers objected to using the same restroom as someone they perceived as male. They had a woman and a men's room. So officials then decided to designate the restroom as a "unisex" restroom. It was the kind of bathroom where you go in, lock the door, and no one else can come in. But the result of this whole situation was that the genetic women in the workplace claimed that this restroom arrangement created a hostile work environment and decided to sue. I like this particular story because it is a very American story. If you have any doubts about gender, just sue.

Now, for time reasons, I will spare you the next grandiloquent point I was going to make, except to point out that the bathroom issue actually stands in for transsexual and transgender employment issues more generally. When it is the case of a current employee who decides to transition, most of the anxieties about gender boundaries get articulated as bathroom issues. There is a lot more going on there but all these anxieties are condensed into the bathroom question – issues of privacy, and labor issues more generally.

The third story is about a transsexual marriage. There are lots of stories these days about transsexual marriages, but what I really like about this particular one is the right-wing response to it. I will just read you a little bit of the news story. This is Utah again.

"A transsexual midway through operations to become female was granted a marriage license in Salt Lake County last month and married fiancée Marlene Smith." Nicole Cline, formerly Neal Cline, married Smith on January 17 at the — which church? — the Metropolitan Community Church, of course. Now a spokesman for Focus on the Family in Colorado Springs — remember, that city was ground zero of Colorado's anti-gay Amendment 2 — said he was skeptical about this marriage. Quote: "I do not know that I would even think of it as a marriage. The design of marriage is the coming together of differences, not sameness. It escapes me what

65. See Michael Vigh, *Women Ban Transsexual From Restroom*, SALT LAKE TRIB., Aug. 22, 1998, at B1.

makes this arrangement so great.” Here we see a problem in the homophobic and transphobic logic of the right wing. They do not like transsexuality; they do not like same-sex marriage. This spokesman could just see it as an opposite-sex marriage, the way the state does, but he decided to come down against same-sex marriage instead. The consequence of seeing this marriage as a same-sex marriage is that he is forced to recognize the phenomenon of transsexuality.

Cline was listed as a male on the application form. According to the clerk, “We had him sign an affidavit that he swore under oath that he was the person he represented himself to be. There were no court papers that said he changed his sex, only that he changed his name.” Cline was named the groom on the marriage license. after being told that “somebody needed to be.”⁶⁶

The funny thing about this story is that Nicole Cline is the same woman who had the bathroom problem in the Tooele County courthouse. So she has had quite a legal year. She is just trying to live her life, but she had quite a year, coming up against legal gender barriers more than once.

The ontological chaos hiding just underneath the surface of the state’s laws on marriage, sex and gender identity, is revealed by the Christian Right’s response to these kinds of marriages. Here is another similar marriage, exact same situation. Someone had not transitioned, so was recognized by the state (Oregon) as a male, and was marrying someone the state recognized as female. So the leader of the Oregon Citizens Alliance, Lon Mabon, when he heard about this transsexual marriage, announced he would immediately begin organizing a voter referendum that would define marriage as a strictly heterosexual institution and gender as something determined at conception — “It stops this playing around with Mother Nature,” according to Mabon.⁶⁷

The Christian Right’s attempt to defend traditional notions about the relation between chromosomes — because it has to be at conception that would be the only way to find out — and gender identity by possibly resorting to a statewide referendum exposes the futility of such a senseless gesture. I mean, when you have to

66. Michael Vigh, *Transsexual Woman Weds Woman in Legally Recognized Union*, SALT LAKE TRIB., Feb. 5, 1999, at C1.

67. See Paissly Currah, *Defending Genders: Sex and Gender Non-conformity in the Civil Rights Strategies of Sexual Minorities*, 48 HASTINGS L.J. 1363 (1997) (discussing these cases in detail).

put this supposedly natural thing up to a vote, there is a problem going on here.

Finally, this last story gets us more directly back to the idea of disestablishing gender. On March 19, 1998, Bill Maher, the host of "Politically Incorrect," delivered an extended riff on a transgender man, and here is some of what he said throughout the show.

There is a person I am going to say "person," because I am not so sure what this person is. It is a woman, a person with female genitalia born Alice Myers. She is at Harvard, declared herself a man. Now, she has not gone through any operation, any hormone, anything when people — you know, there are such things as transsexuals, transvestites. She looks like Yentl. She just has a short haircut and wears men's clothing and glasses, and you know, in a crowd you might not say, "Oh, that is a woman," but this is a woman dressed — but she says "I am a man," because she just wants to be a man. The question is, can you just declare yourself to be something that nature did not make you?

It says, he says, "I am a man. Everything I do in life I do as a man." Say this person is on the Titanic, hits an iceberg, women and children first; do not you think they would be the first one to get into an evening dress, pumps, and a matching handbag?"⁶⁸ So that is the punch line to the joke.

Now, at this point in the show, Sally Jesse Raphael, one of the guests, jumps in and says — and you know it is not good when Sally Jesse is your champion — "You are unfair to these transgendered." Bill Maher interrupts, saying, "What do you mean 'these?' There is one. This is it."⁶⁹

Obviously this is an example of rabid nasty transphobia, but let's try to be a little more specific about what is going on here. Does it represent some kind of fear on Bill Maher's part about gender fluidity where the relation between sex and gender is very much unmoored, that one can simply change their gender by starting to look like Yentl? Well, yes, obviously it is about this fear. Is it about the fear that non-genetic men will usurp genetic male privilege? (I have a friend who calls genetic men "accidental men," but I will use the politically correct though still not completely scientifically sound term "genetic men.")

According to Maher, Alex has a girlfriend and Maher seems both concerned and jealous about this whole girlfriend idea. So it

68. *Politically Incorrect with Bill Maher* (ABC television broadcast, Mar. 19, 1998).

69. *Id.*

is clearly a little bit about that. But the kicker to his extended riff on Alex Myers, one that he saves until the end of the segment, is that this guy would change back to being a woman, a high-fem woman no less, in a second, to get a space on a lifeboat on the Titanic.

This brings me to my last “grandiloquent point.” This transphobic story transitions into a slightly different kind of story. It is questioning the permeability of the boundaries of the sex/gender classification system. And those boundaries are so contested because this gender system that we have now is one of the key mechanisms through which scarce resources — boats, in the case of the Titanic, Social Security and other state benefits in the case of legal marriage — are distributed or not distributed. A regime that does not adhere to the doctrine of the separation of gender and state is going to produce a lot of anxieties and clashes about its rules of gender classification. Conversely, if one’s beliefs and practices about gender played as little a role in determining one’s position vis-à-vis the legal opportunity structures as the way one’s religious beliefs and practices now do, the myriad of conflicts about gender — from gays in the military to transsexuality — would continue no doubt, but would be emptied of the considerable force of state sanction.

Thank you.

MS. KERN: Thank you very much.

Professor Franke?

PROFESSOR FRANKE: I hope you do not mind if I come over here. I teach torts in this room. So on behalf of both my torts class and Fordham Law School, I want to welcome you all here.

It is exciting to me to have so many lesbian and gay people and friends here at Fordham, which is not to say that we do not have friends here the rest of the week.

There has been sort of a nice thread where we have each picked up where the other one left off. I want to try to do that, as well, and ask a question that I think is lurking where Paisley ended, which is: What is transgender-based discrimination a question of? Why should we, as lesbian and gay, bisexual or heterosexual people, care about transgender-based discrimination? We tend to bundle groups of identity-based concepts into civil rights categories. Why do we add transgendered people and issues affecting transgendered into the lesbian, gay and bisexual movement as opposed to say, the women’s movement? I do not profess to have a complete answer to this question, but I am going to begin by making the question more complex and then suggest some answers.

Just as any adequate account of the nature of discrimination against black people, for instance, must go beyond the mere status of a person's race to questions of white supremacy in order to provide an adequate account of race discrimination, or any adequate account of discrimination against women must go beyond biological facts of people to an adequate account of patriarchy, I think that in order to provide an adequate description of discrimination against transgendered people, we have to include the cultural norms that compel in subtle and, as we have heard from these stories, not so subtle ways a set of compulsory gender identities and norms.

In the short time that I have today, I am going to cut through the niceties and suggest what I think are two fundamental strategic errors that have been made — not by everyone but by some — in advocating on behalf of the rights of transgendered people, and then elaborate a little bit on why I think those are mistakes. Then if you are interested, we can talk about them a little more during the questions.

First, is that I think it is a significant mistake for us to advocate to add transgendered people to the laundry list of protected statuses that appear in most antidiscrimination laws: sex; race; national origin; religion; and, if you are lucky, sexual orientation. I do not think we should add another semicolon and add transgendered people.

Second, explaining in part, why I hold the just expressed view, I think it is an even graver mistake to see the discrimination faced by transgendered people as to be problems in which only transgendered people have a stake. All of us have a stake, whether we are transgendered or not, in the kinds of discrimination that people who are believed to be transgendered experience.

Now let me, as my two prior panelists have done, begin by giving you some examples, and I think there is a particular importance to our telling stories and giving examples in this area, because these are parts of life that so often are ignored and silenced. It is extremely important for us to work from real-life experiences and the types of problems and violence that people experience day-to-day who are transgendered.

First, Big Boy restaurant refused to hire a preoperative transgendered woman as a hostess because she was transgender. When she brought an action for sex discrimination, the court dismissed the complaint and held that the law does not protect males dressed or acting as females, or vice versa. According to the court, that is

not what sex discrimination laws were intended to or should be interpreted to apply to — not surprising, for any of you who have looked at this area at all.

Secondly, a preoperative transgendered woman who worked at Boeing, the big airplane manufacturer out in Washington, was told by her employer that they had a policy regarding the employment of transgendered persons; apparently, in Washington there are a number of transgendered employees that had worked there — and that as long as she was pre-op, she could not use the women's bathroom and could only wear either male or unisex clothing. Curiously, though, unisex clothing was defined by Boeing to include blouses, sweaters, slacks, flat shoes, and — then this is the great part — nylon stockings, earrings, lipstick, foundation, and clear nail polish, no colors.

She was, however, instructed in addition not to wear clothing that was excessively feminine, such as dresses, skirts and frilly blouses. Blouses are okay; frilly blouses are not.

Now, remember, as a preoperative transsexual she has to live in the gender role that she is choosing to officially occupy. So she has to thread a needle between unisex on the one hand and overly feminine on the other, and in order to do so, this poor woman's supervisor was instructed to tell her each day whether or not her attire was acceptable. The test that the supervisor was instructed to apply was whether her dress would be likely to cause a complaint were she to use a men's room at the Boeing facility. This is the "transgendered woman in the men's room at Boeing" test.

One day she comes to work wearing an outfit that had been previously approved by her supervisor but decided that day to accessorize it with pink pearls and was fired immediately for wearing clothing that was excessively feminine. She brings an action in state court in Washington and ultimately loses in the Washington Supreme Court.⁷⁰

Finally, a masculine woman worked as a teacher in a juvenile detention center where her supervisor, a female judge, described the unwritten dress code as that which was "appropriately feminine" — because, after all, they were role models for the young girls in their charge — and this woman was ultimately fired for wearing the "Brooks Brothers look," the look that all of you who are either lawyers working in firms or will be some day know well.

70. *Doe v. Boeing Co.*, 846 P.2d 531 (Wash. 1993).

She would not wear skirts; she wore pants and was fired for that reason, that she was a bad female role model.

Now only the first two examples here involve transgendered people, but the principle at stake in all three, I believe, is the same. This is about coerced enforcement of gender orthodoxies through workplace rules, and we could come up with other examples in other parts of life. This orthodoxy reflects a collapsing of gender, which is a set of cultural norms and biological sex in such a way that femininity is understood as the natural and authentic expression of female agency, and masculinity is understood as the natural and authentic expression of male agency. So just as you cannot mix and match sex and gender, masculinity and maleness, femininity and femaleness, so too you cannot switch sides. Men do not become women. Males do not become females.

These qualities, sex and gender, are regarded as being normatively immutable. In that sense, it is naturally impossible to change, and we should not want to in the first place. So it is wrong of us to want to pull something off that is not possible to do anyway.

There is a Supreme Court case from 1989 which I am sure many of you are familiar with *Price Waterhouse v. Hopkins*,⁷¹ that should have resolved all of these cases. There, Ann Hopkins, who had been a very well-performing woman at one of the top accounting firms, applied for partnership. She was denied partnership because — and if you are a litigator, this is just the greatest thing that they actually put this in writing — she was “too macho.” She should enroll in a course at charm school to learn how to walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, wear jewelry and learn how to accessorize like the poor woman at Boeing did.

So Ann Hopkins did not wear the pearls and lost the job. Now she won her sex discrimination suit in the U.S. Supreme Court, because the Court interpreted the sex discrimination provisions in Title VII to include the imposition of gender-based norms on men and women.⁷² To punish a woman because she acts aggressively or to hold a view that women should not act aggressively or cannot is gender-based discrimination, according to the Supreme Court in 1989.⁷³ An incredibly important decision, an incredibly important victory. We were all excited. I was very excited when this case was

71. 490 U.S. 228 (1989).

72. *See id.* at 229.

73. *See id.*

decided, and we thought, “Well, this is really going to change the landscape of Title VII sex-based discrimination to include gender norms.”

Well, sad to say, it has not. You would have thought that this ruling would have invalidated the three examples of the types of workplace rules that I gave you before, but it just has not been the case. You continue to see courts uphold the idea of clothing rules that enforce the idea that certain clothes belong to men and other clothes belong to women and that you cannot switch sides. So people who are born male wear women’s clothes as part of a transsexual process continue to be discriminated against in the workplace, on the theory that Title VII or workplace antidiscrimination laws do not reach transgendered people, without understanding that this is not about some hybrid special situation; this is about gender norms.

To my mind, both our legislative and litigation strategies on behalf of transgendered people should not be to add transgendered people or transgenderism — or whatever the word is in your jurisdiction — into the laundry list of identity groups or statuses that are protected by human rights laws, but instead to robustly interpret what our sex- and gender-based discrimination laws prohibit, which includes the idea that real men do not sleep with men, real women are not masculine, real men do not want to be women. They all stem from a central similar notion about who men and women are and how we should behave in the world to perform our gender identities.

MS. KERN: Thank you, Katherine.

**STICKS AND STONES: THE NEXUS BETWEEN HATE SPEECH
AND VIOLENCE**

MR. CHEN: Welcome. My name is Jack Chen. I am a member of Fordham Law School's class of 1996. I first approached James about organizing this panel, partially because of the media's response to the Matthew Shepard incident,⁷⁴ and also because of Reverend Phelps's "www.godhatesfags.com" Web site that serves as a very clear example of hate speech.

What I was hoping to do today was try to put our arms around the bigger issues, some of the grayer aspects of what really constitutes hate speech and how it may be related to bias crimes and what we can do to begin thinking about trying to address this in society.

To my immediate left is Laura Edidin, managing attorney of the New York City Gay and Lesbian Antiviolence Project; then we have Professor Brian Levin, director of the Center on Hate and Extremism and a Criminal Justice Professor at California State University, San Bernardino; and lastly, Professor Jack Battaglia from Touro Law School.

First, we will start with Laura, who will give us some examples of hate speech that are experienced by people of lesbian, gay, bisexual, transgendered and HIV status ("L/G/B/T/H").

MS. EDIDIN: The Anti-Violence Project serves L/G/B/T/H crime victims. The areas of crime in which we do counseling, advocacy and legal services include domestic violence, bias crime, rape and sexual assault, pickup crimes and police misconduct, and I will also add HIV-related violence, because that is also a program that I coordinate. We define HIV-related violence as anytime someone is victimized because of their actual or perceived HIV status.

Part of the work that we do is bearing witness to the pain and trauma that are suffered by L/G/B/T/H crime victims, and it is in that role that I am here today. I want to talk about violence in the nexus with hate speech. I am studiously avoiding defining hate speech at this point because I want to just have all of us hear what it sounds like, give you a sense of what it feels like, and what it looks like. When I initially sat down to think about it, my first instinct was to intellectualize what hate speech is. I wanted to back off a step and talk about what we probably all agree is hate speech just by listening to it, and then draw some examples in the end of

74. See *supra* note 4 (describing the Shepard hate crime).

speech that I would like to see what people's opinion is on whether it is what your visceral reaction would categorize as hate speech.

I am just going to start by giving some examples of narratives about victims of crime, and then wrap up with some thoughts and some ideas.

I am going to start in the area of domestic violence and tell you some stories. The first one is about a woman. She and her partner lived together with their two children, and this woman's mother had mental illness and substance abuse issues. She wanted to come live with this couple, and they said, "We do not really think this is a good idea for our kids to have you in the home."

She was not happy with that, so one of the ways in which she dealt with that was by standing on the corner near their apartment, yelling all day long, "See that woman over there? She is a pussy-eating dyke. She is a fucking lesbian."

It escalated from there to her moving across the street to the stoop and telling the kids, "You want to know what your mom is doing? I will tell you what she is doing. She is eating that woman's pussy."

Then it escalated from there into her approaching their front door and pounding on it until she broke in, insisting on sleeping there for the night.

Another example is of a woman who resides in this country illegally. She was dating a man for a long time, and he said, "Why don't we just get married? It would make things easier with immigration, and we have been together a long time and have generally been thinking about it." She says, "Okay, let's do it."

About a month after they were married, she tested positive for HIV, and when she sat down to tell her husband, he was initially very supportive and said, "Well, let's go get another test and double-check, and I will get one, too." When the test confirmed that she was positive and that he was negative, he turned very abusive, told her that she was dirty, that she was a carrier, that no one else would have her now that she was soiled by having HIV, threatened to reveal her HIV status in order to jeopardize her immigration proceedings and used it as an excuse to have sex outside their marriage.

The impact of this kind of language is really complicated, but what these examples bring out is the shame that is involved on the part of the victim when they are on the receiving end of abuse like that. For example, in the instance of the woman whose mother was harassing her, she started to pull away from her partner. There

started to be tension in their relationship. A lot of it came out of internalized homophobia and the shame around the fact that she was in love with a woman.

As for the woman who has HIV, she started to see an effect in her health. I think that is true generally of people who are victims of crime, but when someone already has a compromised immune system, they feel that physical impact of the abuse even stronger.

To give you another example of domestic violence, a transgender woman entered into a traditional marriage. At the time, he lived his life as a man and his wife knew that his gender identity was as a woman, but at the time he did not present as a woman to the world. They married, had two children, and at a certain point he decided that he wanted to live his life as a woman and started dressing as a woman.

His wife became very abusive. She would sit at the breakfast table and tell this transgender woman that she was ugly, that she was disgusting, that she repulsed her, and it escalated to the point where she threw a skillet full of eggs in the woman's face.

Moving into the area of bias crime, a very recent example that we encountered was a case where two African American women were driving a car in Manhattan and the light turned yellow, and they decided to stop for the light. The taxicab driver who was behind them was not happy about that and started honking his horn, stuck his head out the window to see what they looked like, and noticed a rainbow bumper sticker on their car. He started calling them "black bitches," "nigger dikes" and other sundry names. When that did not get the response he was looking for or did not satisfy him, he started ramming his taxi into their car in the hopes of pushing it into the oncoming traffic in the intersection. I will tell you that, thanks to the work of one of our victim advocates, Momie Moran, the taxi driver's license was revoked and there was a fine.

Another example of HIV-related bias crime is a composite of a couple of different stories that we have heard — there was a gay man who lived with his adopted son in an apartment building where one of the neighbors started to harass him on the basis of his sexual orientation and HIV status, and that ranged everything from yelling "Die, AIDS faggot," to putting burning garbage on his doorstep, to scrawling on food delivery menus that were stuck on the door, "these men are gay, they are spreading AIDS, they are child molesters." It escalated to the point where an order of protection was issued on behalf of the father and his adopted son, thanks to the good work of another legal intern.

I want to talk about the impact of those crimes. Victims of crimes where hate language is used, where it is motivated by bias, may try to change their behavior as a way of avoiding being victims of another crime. For example, the women may have wanted to take the rainbow sticker off their car. Victims may avoid gay-identified establishments; for example, victims of crimes outside of a gay bar or a gay bookstore or an AIDS service organization may avoid those places.

There was an instance in Brooklyn recently where a woman with short hair was walking down the street and a man approached her and said, "You want to know what it is like to be a man? I will show you what it is like to be a man." He took her, pulled her by the hair and pulled her head down and beat her head until she was incapacitated. The impulse may be for her to grow her hair out, since that is what seemed to be what made her a target.

Another impact on victims of crime, particularly crime where hate speech is used, is the tendency to blame themselves for what happened — "I should not have been out so late; I should not have gone home with someone I did not know." That has a lot of consequences, not the least of which is failure to seek medical attention, for example.

I spoke with one man who was the victim of a bias attack, and I said, "Are you injured?" He said, "No, no, just a couple of little things." I said, "Okay, well, what is bothering you?" He said, "Well, you know, my ear." I said, "Why don't you tell me more about that?" He said, "I don't have any hearing in one of my ears."

To him, that was not a serious injury, and I think part of that dynamic is not only a bit of self-denial; it is easier to believe that you are not injured, because it is easier to believe that what happened to you was not so serious. But part of that dynamic is also self-blame — "Well, it is my own fault. What was I doing on the subway that late at night where no one else was?"

Giving some examples from rape and sexual assault, a transgender woman was volunteering for a while at a nursing home. She knew a lot of people there very well. When a rumor got started that she was not really a woman, she ignored it. She thought, "These are people I know, they are my friends, and if they have a question, they are going to come and ask me."

What ended up happening was she was lured into a storage room. Her supervisor said, "There is something here I want to show you; come on in." When she got there, there was a gang of

employees who sexually assaulted her, pulling at her clothes, grabbing at her crotch, grabbing her breasts, and yelling things like, “What do you have down there? What are you? Are you a man? Are you a woman?” — calling her “an anti-man, a faggot, a cock-sucker, a she-man.”

There was another recent example of a man who went to a bar, met someone he found attractive and invited him back to his apartment, hoping to have a drink. The two of them had a conversation. The other man apparently had slipped some knockout drugs in his drink, and he awoke to find that he had been raped, and the perpetrator was taking his wallet off the table as he was awaking, calling him a “stupid faggot.”

For victims of crimes like these, in addition to other crimes, there are often flashbacks to the incident. It may also trigger flashbacks to other incidents of violence that they have experienced. It makes very spotty memories. They may actually physically recall the violence that was perpetrated against them. They can feel the hands of their coworker grabbing at their crotch or clawing at their breasts.

Moving to an example of police misconduct, another area that we do work in, a transgender woman lives at home with the family, and her mother was concerned that she was not well and called EMS. They showed up and determined that the woman was fine. She had apparently taken some cold medicine. She left the apartment, and after EMS left, some housing police showed up. The police said, “We are looking for John Doe.” In this transgender woman’s family, they still referred to her by her male name, which is John Doe. Her family replied, “Oh, John Doe went out, everything is fine, we are sorry, it was a mistake.”

As the police were leaving, they walked by a very attractive woman, and they acknowledged her — perhaps held the door for her — and she went over and knocked on the door of the apartment from where they just left. When the door opened, the person who answered the door said, “Oh,” and called to the police and said, “This is the person you were looking for.” They came back and said, “We were looking for John Doe. This is clearly not a John Doe. Look at her, she is gorgeous.”

Allegedly — and I say allegedly as a good lawyer would, because there is a civil suit in the works — the police forced their way into the apartment, started calling her names like “trans-testicle, he-she, what-is-it.” One officer allegedly followed her into a bathroom in the apartment and started assaulting her. She said, “Please do not

hit me in my chest and face; I had silicone implants and I have had plastic surgery." Of course, that is exactly what they went for.

People who have been victims of crimes like that may see changes in their sleeping and eating patterns. They may have nightmares. I know of people who are on dream suppressants to help them sleep through the night. Some are unable to function at work or focus on anything in particular.

I hope that gives you some sense of what these crimes look, sound and feel like. What I want to do now is throw out some ideas about the relationship between speech and violence, how they are linked, how they work together to oppress people, and then at the very end return to hate speech.

What do we mean in terms of hate speech? First, hate speech and violence are alike in the sense that they both hurt, and there is evidence that the aftereffects of hate speech are, in fact, more dramatic and traumatic than the physical violence of a victim of a non-bias crime. For example, people who are victims of a bias crime may take more than twice as long to recover psychologically than victims of similar crimes not motivated by bias. It is such a cliché, but we hear clients say all the time that the bruises heal, but the psychological scar from the words remains. Every time they hear the same hateful words, it reopens that scar.

The other way in which I think they are similar is that what we see in a lot of crimes motivated by bias is the idea of overkill. They are not stabbed once, twice or three times, but rather stabbed ten, fifteen or twenty times. It is this idea of overkill, doing more than is necessary to mortally wound a person.

There is some sense that the phenomenon of overkill comes from this idea that the perpetrator is literally trying to rub out the very existence of that person, and in some way, hate speech has that same dynamic. It is not enough to say "Is that a he-she, what is that?" The perpetrator will say, "You are a fucking trans-testicle. What is that?" They may repeat over and over the same language: "faggot, fucking faggot." Most of this stuff is not very original. You hear it over and over again. "Die, AIDS faggot." That kind of repetitive and overkill quality serves the same kind of purpose. It refuses to allow that person autonomy in how they identify.

Now I want to talk about how speech and violence work together. The way in which language and violence work together is if someone kicks you in the head and calls you a faggot, the next time someone calls you a faggot, you know what that means. You do not need someone to tell you that you are going to get kicked in

the head or if that person wanted to they could kick you in the head. The word alone carries the threat.

They work together in the sense that when speech is used and the perpetrator is very clear that they have targeted this person because of their identity, whether sexual orientation, gender identity or their HIV status.

When a perpetrator uses speech and makes it very clear why he or she is committing the crime, he or she are making it clear not only to that individual, but to the community. To give you an example, if I am mugged at the J Street subway station in Brooklyn, I am going to take a different train and get off at Clark Street instead. I am attacked and told that it is because I am an AIDS-infected loser, what am I going to do to avoid that happening again? What is any person who has HIV or AIDS going to do? That sense of security and control over your life, that you are able to change your behavior or something about yourself to make sure you are not victimized again, is a loss because, in a sense, it is a whole community that is being targeted.

Finally, I want to talk a little bit about another way in which violence and speech work together. The use of hate speech during a crime, particularly L/G/B/T/H hate speech, may alienate people from access service. For example, if I am mugged, I will go to the police station and say, "I was mugged. Here is what happened: I was walking down the street, the guy pulled a handbag off my shoulder, and I want to report it. In the process, I broke a finger, and I am going to see a doctor."

If I go to a gay bar and I meet someone and I bring them home and the minute they get in the door, they turn on me and they pull out a knife and they say, "you stupid bitch, or you dumb faggot, I am not here because I am interested in you; I am here because I want your wallet," and then they cut me on the way out the door, I am going to have to go to the police station and explain what this person was doing in my apartment. What am I going to say? "Well, officer, I am a gay man and I went to a gay bar, I picked someone up and brought him home." The officer will say, "Why did you bring them home?" I will have to reply, "I was interested in having sex with him."

If you are not out, that is not something that you are going to do. You would probably think that the police are not interested in serving you as a member of that community.

For a clearer example, let's say you are coming out of a gay bar by yourself. Suppose someone follows you and attacks you. The

fact that the speech was used may prevent you from reporting what happened.

For people of transgender experience, who are already alienated from services, particularly medical services, it is not very likely that they are going to seek medical attention. If they do not have access to regular health care and a doctor who knows them and their story, they are going to have to walk into an emergency room and explain to someone they have never met before why they appear to be a woman but anatomically are a male. Similarly, if the police generally target people of transgender experience and harass them, they are not likely to report such incidents.

Finally, I want to talk about the definition of hate speech, and I will give you a couple of examples, rather than cite a definition myself. Focusing on the transgender woman again whose wife became abusive when she decided to start acting on feelings of being a woman by dressing and living as a woman. When she decided to start living her life as a woman, she went to her employer and asked a couple of things. She said, "I would like to wear the woman's uniform rather than the man's uniform, and rather than you calling me John Doe, I would like you to call me Jane Doe."

Her employer started the conversation by saying, "I do not understand what you mean. Do you have a penis?"

The client said, "Yes, I do."

"Well, do you want the penis?"

The client said, "Well, I am considering sex reassignment surgery."

"Well, when you have the operation, how does it work? What do they do to your penis? Are you going to have breasts? How does that work?"

Then the client said, "Now that you asked me all those questions, how do you feel about my requests?"

The employer, much to my amazement, said, "Well, you can wear the woman's uniform. We cannot call you Jane Doe because your union card says John Doe, and in order to get your union card changed, you have to change a whole bunch of other identification — which, by the by, is not very easy to do. So we are not going to call you Jane Doe. We are going to call you John Doe." And they continued to do that.

This same woman shopped regularly at a grocery store in her neighborhood, and after she started dressing as a woman and living as a woman, the bag boy at the grocery store continued to call her "sir." As many times as she corrected him and said, "I am a wo-

man, please call me ma'am," he continued to call her "sir." Those examples of calling someone "John Doe" instead of "Jane Doe," asking questions or making statements like "I have never heard of someone who has a penis who is a woman," or "do you have a penis," or "are you going to get rid of your penis," calling her "sir" instead of "ma'am" — I think those things push the edge of the envelope and may have sharpened our focus of what hate speech is, even though we know it when we feel it, to try to put it into words, in the same way that the experience of transgender people in general inform the work that we do every day, making connections between discrimination based upon sex, on sexual orientation, on gender and parsing those things out and thinking carefully, thoughtfully and thoroughly about all those different areas.

Finally, the other thing I want to throw out there is the fact that a lot of times speech involves multiple forms of behavior. One of the things I would encourage us to talk about today is making connections. When someone calls you a "homo-ass nigger," what did that get them? How is that different than if they just called you "a homo" or "a nigger," and why layer those things? Why pile them up? What implications does that have for us as service providers, for us as theorists, for us as litigators, in terms of thinking about the ways in which different forms of oppression work together, the way in which language can tell us something about those connections?

MR. CHEN: Thank you, Laura. Brian Levin has worked on a number of cases that have touched on hate speech and bias crimes and has also testified in front of Congress once or twice.

I have asked him here to give us a broader view of the legislative scenery and discuss what is happening for different states, how hate crime legislation works, and also talk a little bit about the current bill that is in front of Congress that would include sexual orientation.

MR. LEVIN: Thank you. What I am going to try to do is actually frame that discussion in the last part of my talk. What I want to do first, though, is get to the nexus issue, the title of this conversation. I think that hate crime is a vitally important issue for our society and one that really warrants a national conversation.

As someone who has been very involved in public policy, and particularly with hate crimes, since 1986, I can really sense how our discussion of this issue has significantly degenerated. I have a palpable sense that we are no longer talking to each other; but rather at each other, and in some ways I think the media and the general level of discourse has oftentimes succumbed to incivility and sensa-

tionalism. That is something I am not going to dwell on here, but I do think it is important to discuss because homophobia is something that takes place not only in discreet singular events, but also in a larger context where many take advantage of using hurtful and negative stereotypes to achieve a particular political agenda.

Table 1. Hate Crime Incidents in the United States by Year⁷⁵

YEAR	INCIDENTS	% OF TOTAL POLICE DEPTS. SUBMITTING REPORTS
1991	4558	17%
1992	6623	39%
1993	7587	41%
1994	5932	46%
1995	7947	60%
1996	8759	71%
1997	8049	70%
	TOTAL INCIDENTS	ANTI GAY, LESBIAN OR BISexual (NUMBER/%)
1995	7947	1002/12.6%
1996	8759	1001/11.4%
1997	8049	1090/13.5%

I will talk specifically, though, about the intersection of hate speech and hate crime. One of the things I have always felt is that you can evaluate a society in part by how it treats two different things. The first is the level of tolerance that society has for discourse, including the kind of uncivil discourse that I just railed against. Secondly — and in no particular order of importance — is how a society reacts to diversity and to those who, by virtue of those differences, are sometimes cast in a position of being the most vulnerable in that society. At times, those interests conflict. What we have in our discussion today, I think, is the intersection of these important values.

Let me try to wear two hats here. On the one hand, I am an attorney. On the other hand, I am a professor and criminologist. I recognize that many of you will leave here saying, “Jack, why did you invite that guy,” because the world is not divided up into these artificial boundaries that lawyers make, nor is it divided up into the artificial boundaries that criminologists make. With that small dis-

75. See FBI Uniform Crime Reports, Hate Crime Statistics Annual Report. The majority of agencies submit reports counting zero hate crime in their jurisdiction.

claimer, let me go into what I think are two of the many issues that exist with regard to this nexus.

The first thing is how far should criminal laws go to punish bigoted or discriminatory behaviors, if they should at all? Let me say in the beginning that I think there can be a non-bigoted and non-prejudiced argument that laws should not cover so-called hate crimes, and I will try to define them in a bit. I happen to be on the opposite end of that debate, but I do think one can make a principled argument on the opposite side.

Unfortunately, the last several times I have taken part in any public discourse on the topic, I did not have the benefit of principled discussion. A lot of it just devolved into a presentation of stereotypes, homophobia and a substantive misstatement as to the purposes of the criminal law.

We do punish discrimination in our society, both on the civil and criminal side of the law.⁷⁶ Now, the definition of discrimination sometimes does not get you very far. Discrimination is treating similarly situated people differently without a legal or sufficient basis. Now, if you do not think there are loopholes in that definition, there certainly are.

In addition, there are many immoral things in this society, many hurtful things, many horrible things, that we simply do not punish by the force of law. That does not mean that we as a society necessarily condone those things. The law is a very strong instrument, and I think we must be selective as to what it addresses.

The second issue, which has caused me considerable distress for a very long time is if you embrace civil and criminal anti-discrimination laws, what kind of classifications do you protect? On what basis in law? Is there any kind of fixed or definitional reason that we include race, religion or national origin in some states, but not sexual orientation, disability or gender in others? Forty-one states have hate crime laws, but only twenty-two cover sexual orientation. Those are important issues, as well, that we are going to try to get to.

76. See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

**Table 2. 1999: Jurisdictions With Criminal Hate Crime Statutes
Covering Sexual Orientation – 22 States⁷⁷**

AZ	LA	OR
CA	ME	RI
CT	MA	TX
DC	MN	VT
DE	MO	WA
FL	NE	WI
IA	NH	
IL	NJ	

The next issue regards speech: what constitutes speech, and how far should we allow speech to go? As a general rule, speech or communicative expression that does not fall into certain unprotected categories is, in fact, insulated from punishment based on its content. In fact, since *R.A.V. v. St. Paul*,⁷⁸ even unprotected areas of speech have a minimal level of protection based on content.

The crux of this issue is that mere offensiveness of speech alone is not a basis for a proscription.⁷⁹ Interestingly, in many other parts of the world — Canada, the U.K. and Germany for instance — incitement to racial hatred or so-called group defamation laws are on the books. They are very rarely used in part because it is so hard to prosecute them. In England, for example, very few cases come up under that law.

In fact, we had laws like this in the United States during the first half of the 20th Century. At that time, laws punishing group defamation were on the books. In fact, a challenge went up to the Supreme Court in *Beauharnais v. Illinois*.⁸⁰ The Supreme Court validated the law. Since then, however, the primary legal foundations upon which the *Beauharnais* decision was based upon have been cut down, although technically *Beauharnais* has never been overruled. Since then, though, it is important to recognize that offensiveness is not a basis for punishing or preventing speech by force of law.

77. See National Gay & Lesbian Task Force: Hate Crime Laws in the United States, Center on Hate & Extremism <<http://www.nglhf.org>>. Texas hate crime law covers bias or prejudice against groups without identifying the actual groups protected.

78. 505 U.S. 377 (1992).

79. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989).

80. 343 U.S. 250 (1952).

Nevertheless, there are certain communications that are crimes in and of themselves. Conspiracy — an agreement with another person to commit a crime, is not insulated by the First Amendment from criminal prosecution.⁸¹ Threats are certainly punishable — nasty letters to the President about his policies are protected, but do not threaten him.⁸² That is, I think, an important area of delineation. Criminal solicitation where someone requests or encourages another person to commit a crime is another example of a form of communication.⁸³

In addition, speech can be used as evidence to prove intent or motive in a crime. Now, intent is the “what” of the crime, the desired purpose or the knowledge in committing the crime. Motive generally is not an element of a crime, although it certainly can be. For instance, why you break into a house can determine whether or not you get convicted of criminal trespass or burglary. If you enter the home to commit a crime inside and that is your motive, if you will, that is the heightened offense of burglary, and motive actually becomes an element to the offense.⁸⁴ So in order to make it more confusing, sometimes motive becomes a material element of an offense, depending upon how the elements of the crime are written. In any event, even if it is not an element of the crime, motive can certainly be used to determine upon conviction the severity of one’s sentence.

Well, that being said, what do you do about hurtful offenses being targeted at group members, the kind that Laura spoke so eloquently about, that do not fit into these existing niches? The first thing I will admit to you is that hate speech has consequences. Hate speech, particularly about historically oppressed minorities, has an effect. It changes people’s behavior. It harms them in ways that they relate to others, something particularly harmful to a democratic and pluralistic society.⁸⁵ However, the majority view on the First Amendment says we must tolerate a certain amount of bad discourse in a free society and the way to beat bigoted speech is with enlightened discourse, which leads us next to hate crime laws.

The Supreme Court decided two cases involving hate crime laws, including one that involved a cross burning by a teenaged

81. See MODEL PENAL CODE § 5.03.

82. *Watts v. United States*, 394 U.S. 705 (1969); see also 18 U.S.C. § 871(a) (1994).

83. MODEL PENAL CODE § 5.02.

84. See MODEL PENAL CODE § 221.1-2.

85. See, e.g., Charles Lawrence, *Is There Ever a Good Reason to Restrict Free Speech on a College Campus? Yes.*, THE STAN. LAW. (Fall 1990).

skinhead, the *R.A.V. v. St. Paul*.⁸⁶ In that case, the cross burning law at issue punished only certain types of cross burning that were used to express certain views. It did not punish all cross burnings that were used to terrorize people, but only those cross burnings that communicated certain types of bigotry deemed unacceptable by the city. The Supreme Court in essence said, "You cannot do that. If you burn a cross on a black family's lawn to express racial hatred, that would be a crime, but if you are burning a cross at a home for mentally ill people, a category of the law left out, that would not be punished. No, we are not going to allow that, because the criminality hinges on the bigotry, hinges on the prejudice, rather than the underlying terrorist act and we do not want to punish people for their prejudice."

The next year, the Supreme Court was asked to rule on a different type of law that was better drafted. The law at issue in *Wisconsin v. Mitchell*⁸⁷ punished the intentional selection of a crime victim based on a particular group category, such as race or sexual orientation. This kind of discriminatory selection resulted in an enhanced penalty to be added on to the punishment for an underlying crime.

Well, the first difference between *R.A.V.* and *Mitchell* is that you had to commit a crime first with Wisconsin's law in order to be punished. So that was one thing. The second thing is the prejudice was not the primary target of the Wisconsin law; but rather the discriminatory selection of a crime victim. Interestingly, if there was a gay offender that went around beating up gay people, wore a mask, and said homophobic things to promote gay solidarity in the city, he would be a hate offender, and his actions would be punishable, irrespective of the fact that he did not have the kind of animus that we usually think of with violent homophobes.

Therefore, discrimination is an act that can be punished.⁸⁸ It is treating someone differently. While the prejudice that leads to it cannot be punished, the act of discrimination itself can be.

Well, let's look at the kind of laws we have on the books, so I can close with that. There is no one type of hate crime law. However, the most broadly applicable laws fall into two categories.

The first type is the intentional selection style statute I just spoke of, where intentionally selecting a crime victim based on their group status is punished. That is one type.

86. 505 U.S. 377 (1992).

87. 508 U.S. 476 (1993).

88. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

Another type is the stand alone civil rights type statute, which punish the interference with someone's civil rights through force or threat. Some also add protected group categories such as race, religion, sexual orientation — that is another of the most broadly applicable kind.⁸⁹ This type of law does not require the charging of an additional offense.

But there are many other types of state laws, which unfortunately time does not give me the ability to go over right now.

Unfortunately, there is no broadly applicable federal hate crime law. There is the Sentencing Enhancement Act of 1994 of the Violent Crime Control and Law Enforcement Act of 1994,⁹⁰ which does cover sexual orientation, but you have to commit an underlying federal offense first, of which there are a limited number. So if you "gaybash" in a post office or a maritime vessel, the crime is covered. But not on a military base, apparently, since the Uniform Code of Military Justice does not have a hate crime provision.

There are also separate federal criminal civil rights laws that cover various things, such as conspiracies⁹¹ and housing.⁹² There is a thirty-one year-old law that covers race in certain civil rights deprivations.⁹³ It covers religion and national origin with a smaller number of violent deprivations. These protected rights are crisscrossed to certain protected groups. So if you attack someone because of their race because they want to vote, or because they were going to serve on a jury or something like that it would be covered, but not if you were gay. It is very convoluted and quite stark as to what gets covered and what does not.

The latest bill, the Hate Crime Prevention Act of 1999,⁹⁴ changes existing deficiencies by amending section 245 of title 18 of the United States Code 245 to protect on the basis of gender, sexual orientation and disability. It also includes a requirement involving a nexus to interstate commerce in order to fully establish federal jurisdiction over criminal civil rights offenses involving those added categories.⁹⁵ The Supreme Court consistently relied upon a showing of Congress' constitutional authority in upholding antidiscrimination laws and it is usually hooked into the Thirteenth

89. See, e.g., CAL. PENAL CODE 422.6 (West 1999).

90. Pub. L. No. 103-322 § 280003 (1994).

91. See 18 U.S.C. 241 (1994).

92. See 42 U.S.C. 3631 (1994).

93. See 18 U.S.C. 245 (1994).

94. S. 622, 106th Cong. (1999); H.R. 1082, 106th Cong. (1999).

95. See *United States v. Lopez*, 514 U.S. 549 (1995); *Bronkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 772 (W.D. Va. 1996).

Amendment and the Commerce Clause. So presumably the Commerce Clause can be construed to empower Congressional action because if you beat up a gay person, that would stop that gay person from coming to that state or that city to engage in commerce. This proposal was a just defeated on Capitol Hill.

New York State does not have an adequate hate crime law.⁹⁶ It has a provision called aggravated harassment, which is, again, probably the most ineffective hate crime law in the United States, if you call it a hate crime law at all.

New York State does not have a hate crime law that covers sexual orientation. About twenty states do. Interestingly enough, this year Colorado,⁹⁷ Wyoming,⁹⁸ Idaho⁹⁹ and Utah,¹⁰⁰ have all failed to enact new hate crime laws or amend existing laws to cover gays. The debate has been degraded by, I think, two things: homophobia on the one hand and, on the other hand, a misrepresentation of the actual severity of hate crime.

Hate crimes are more likely to involve assault; these assaults are more likely to involve injury; they are more likely to involve copy-cat offenses, retaliatory crimes; they are more likely to involve strangers, imprecise weapons of opportunity, multiple assailants — all objective measures of severity.¹⁰¹ When you inject the homophobia into things, however, it becomes a debate or a referendum on the theology of how it relates to gay rights.

In closing, I think it is important to recognize that this is not simply a gay, lesbian or transgendered issue. It is a human rights and civil rights issue. This is an issue that I have been working on for more than fourteen years to try to get these important laws passed, and to show how these crimes are more severe. But, again, I think we are losing something if we say we merely want these laws because they involve more assailants and because they involve imprecise dangerous weapons of opportunity. I think it is also an attack of moral violence on a pluralistic democracy, because if there is one thing that the United States, and hopefully the Fourteenth Amendment, should stand for is the notion that no matter

96. N.Y. PENAL LAW § 240.30-31.

97. See H.R. 1074, 62nd Leg., 1st Reg. Sess. (Colo. 1999).

98. See S. 84, 55th Leg.; H.R. 117, 55th Leg. (Wyo. 1999).

99. See H.R. 36, 55th Leg; 1st Reg. Sess. (Idaho 1999).

100. See S. 34, 54th Leg., Gen. Sess. (Utah 1999).

101. See J. LEVIN, J. McDEVITT, *THE RISING TIDE OF BIGOTRY AND BLOODSHED: HATE CRIMES* (1993); B. Levin, *Hate Crimes: Worse by Definition*, 15 J. CONTEMP. CRIM. JUST., Feb. 6, 1999.

what group you are in, you are entitled to the basic dignity and civility of life in a free society.

That is why a hate crime is different. In the same way, as when a witness is attacked in a mob criminal trial, it is not just an attack on that particular individual, or when a police officer is attacked or when the President is assassinated. There is a symbolic significance to these crimes which makes these crimes acts of terrorism, and in that way, even if they were no more serious from a criminological standpoint, I think that heightened punishment would be warranted, because I believe that it shakes the very basis and foundations of a pluralistic society.

I want to give you a Web site, www.hatemonitor.org, and thank you so much for giving me the privilege to come here and hopefully rekindle the kind of national conversation that we need so that people of goodwill can make sure that these kinds of statutes are passed and enforced to protect all those who reside within our society. Thank you.

MR. CHEN: Thank you, Brian. Lastly, I have asked Jack Battaglia to come and speak, because one of the things I noticed after the Matthew Shepard incident¹⁰² was the discussion in the media about the types of hate speech that happens on college campuses, as well as in high schools. We have the infamous "scarecrow incident" on the float of the college fraternity, just to name one of the more highly publicized incidents.¹⁰³ I have asked Jack to come talk about what is going on right now in the legal field with respect to students who face hate speech, who suffer such incidents in schools, and who is responsible and what are the remedies.

MR. BATTAGLIA: When I realized I was going to be the last speaker on the last panel for the day, two things occurred to me: the first, that I had better not speak too long and, secondly, that maybe this was a special responsibility. Then I realized that my topic, which is antigay harassment in schools, provides a very convenient opportunity to close the circle on some of the things that were talked about during the plenary session this morning.

The answer that Matt Coles, for example, gave to the question that was put to him about his priorities for our movement — of the three he mentioned, one was schools. As the discussion progressed, there was a focus on the relation between law and culture and, in particular, the limitations of law to make changes in

102. See *supra* note 4 (discussing the incident).

103. See *CSU Students Protest Anti-Gay Incident on Campus*, ASSOCIATED PRESS NEWSWIRE, Oct. 19, 1999.

culture; how, instead, sometimes the changes in culture have to come first; If there is any institution in our country in which cultural battles take place, it is the schools.

In fact, certainly at the lower educational levels (elementary school through high school) the educational mission includes transmitting values to students — cultural values — that represent civic virtue. There is always significant vying among people in the community about just what those values will be and how they will be transmitted.

Another theme of the plenary session was how, as lawyers, we have to follow our community in terms of the needs and interests that we pursue in what we do, whether it is in litigation or legislation, or other arenas of advocacy. It is quite clear that in the area of antigay harassment, there is a reluctance to litigate on the part of parents of students who have been harassed. There are a number of reasons for this reluctance, most of which I bet you can suspect and would understand.

So a possibility for reaching the result a different way, perhaps, is something that should be at least part of the goal, and part of that is a recognition that what we are trying to do, what advocates are trying to do, is not only to provide compensation or other remedies for the particular individual in the particular circumstance, but to make the offensive behavior stop, and to make it stop not only at the institution at which this particular individual has been harassed, but to make it stop throughout the system.

With that, my focus is going to be on a couple of avenues of available redress that are directed to school districts and schools as opposed to the individuals who are the actors in antigay harassment. For example, I am not going to talk about generally applicable criminal laws or hate crime laws that might be available to punish the particular offender; nor will I talk about state tort remedies that may be available to provide some redress.

Instead, I am going to talk briefly about two federal remedies: the possibility of action under Section 1983 of the federal civil rights laws¹⁰⁴, and under Title IX of the Education Amendments of 1972.¹⁰⁵ Then, I am going to talk a little bit about how the First Amendment might limit the ability of schools and school districts to restrict the harassment that we would like to see eliminated from the school system.

104. 42 U.S.C. § 1983 (1994).

105. 20 U.S.C. § 1681 (1994).

There was extensive discussion during that session about the *Nabozny*¹⁰⁶ case, which was a Seventh Circuit decision rendered under Section 1983, in which a young man who had been subject to years of harassment through both middle school and high school was able, after a jury verdict of liability, to negotiate a settlement of slightly under \$1 million, for the harm that was done to him when the school authorities literally ignored his and his parents' complaints about the harassment.

Very briefly, that case was based on Section 1983 for the deprivation of constitutional rights under the color of state law. Only public schools are subject to suit under Section 1983 to the extent that the basis for the violation is a federal constitutional right, because, as you know, only governmental actors can violate the Constitution.

The claims that were asserted in *Nabozny* were of two types, based on two separate provisions of the Fourteenth Amendment: the Due Process Clause and the Equal Protection Clause. I will deal with the due process claims quickly because they have not been successful, not only in this context but generally. The due process argument is essentially that there is a liberty interest in being free from harm, which is deprived without due process of law when an educational institution does not act to protect students from harm, particularly after being put on notice that harm is occurring.

The Supreme Court's jurisprudence generally under the Due Process Clause makes it very difficult to establish a duty on the part of an educational institution to protect a student from third-party harm, and in fact, those claims were unsuccessful in *Nabozny*. I mention the clause, however, because there is always the possibility, given other factual circumstances, that a due process violation could be established. So it is something you should look at.

The *Nabozny* case was ultimately decided in *Nabozny's* favor under the Equal Protection Clause, and the nature of the denial of equal protection was twofold. The court found that Jamie *Nabozny* was deprived of equal protection because of his sex in that the school district treated claims of harassment from male students differently than they treated claims of harassment from female students.¹⁰⁷ So there was intentional discrimination, based on sex, that was redressable under the Equal Protection Clause through Section 1983.

106. *Nabozny v. Poalesny*, 92 F.3d 446 (7th Cir. 1996).

107. *See id.* at 454-55.

Perhaps more significant in the long term, Nabozny was also able to establish a deprivation of equal protection based upon his sexual orientation. The court relied on *Romer v. Evans*¹⁰⁸ as establishing a new paradigm in federal constitutional law in the area of sexual orientation, soon to overshadow *Bowers v. Hardwick*.¹⁰⁹ The basis for the claim that the school district acted intentionally to discriminate against Jamie Nabozny based on his sexual orientation was statements that were made by the school authorities when he complained — statements like, “well, what do you expect? If you are out, if you act gay, you can expect that you will be harmed.” The court found that the statements established that the school authorities acted with a discriminatory motive with respect to Nabozny’s sexual orientation.¹¹⁰

Before I go any further, one of the important reasons why I highlight these federal causes of action is that, unlike most remedies under state law, you can obtain attorneys fees if you are successful with a 1983 claim or a Title IX claim, and that is quite significant.

Moving onto Title IX, the statute prohibits discrimination because of sex in educational programs that receive federal funding.¹¹¹ Since virtually all schools and school districts, public and private, receive federal funds, there is a possibility of an action under Title IX; but here the argument gets a little bit more attenuated. The argument is that antigay harassment, at least of certain kinds, is in the nature of sexual harassment, and that sexual harassment constituting discrimination because of sex, is redressable and subject to remedy under Title IX.

The Supreme Court of the United States is currently considering whether, in fact, Title IX provides a remedy for what is called student-on-student or peer harassment, as opposed to teacher-on-student harassment, and that ruling may preclude the possibility of an action for damages.¹¹² However — and this may be even more important than the attorneys’ fees point — Title IX is enforced by the Office of Civil Rights of the Department of Education, and there is an administrative proceeding, an administrative remedy, that can result in the loss of funding to a school district if the school district does not take action to remedy a situation that involves sexual har-

108. 517 U.S. 620 (1996).

109. 478 U.S. 186 (1986).

110. See *Nabozny*, 92 F.3d at 460.

111. See 20 U.S.C. § 1681(a) (1999).

112. See *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661 (1999) (holding that a private cause of action for damages is available).

assment. Moreover, the Department of Education has been willing to recognize that antigay harassment can be sexual harassment that is covered by Title IX.

However, the guidelines make a very strange distinction between general antigay harassment and harassment of a sexual nature. If the harassment is of a sexual nature, even though it is antigay harassment, it is sexual harassment covered by the statute. But, if the antigay harassment does not have a sexual component — that is, if it is harassment just with a sexual orientation cast — then it is not covered. The reason it is not covered is because the statute does not prohibit or provide a basis for redress of sexual orientation discrimination. Only sex discrimination is covered by the law, so there is a little bit of sleight of hand going on there.

Moving onto the First Amendment question, the *R.A.V.* case¹¹³ that Brian talked about is often used by those who would resist attempts to take action against harassment based on group membership as standing for the proposition that this kind of harmful speech/behavior is protected First Amendment activity. The context of *R.A.V.*, as Brian told you, was a cross burning, and the case is sometimes characterized as holding that cross burning is protected by the First Amendment.

But *R.A.V.* did not hold that cross burning is protected by the First Amendment; *R.A.V.* only held that a particular statute, drafted so as to cover cross burning only, when it is used to effect a certain response because of race, was unconstitutional on its face. Justice Scalia went out of his way in the very first paragraph of the majority opinion to point out that there were all sorts of other statutes that legitimately could prohibit and penalize and criminalize the cross burning that took place in that case; in fact, he pointed out that there was another charge, which was not being challenged, on which these individuals were convicted because of the cross burning.¹¹⁴

Another point about the *R.A.V.* case is that Justice Scalia distinguished the criminal statute in that case from action taken to remedy Title VII, i.e., employment discrimination actions, including those based on sexual harassment. Justice Scalia carved out from the thrust or the effect of the opinion conduct, i.e., discriminatory harassment, even when comprised of speech, that would be redressable under antidiscrimination laws — which would also

113. See *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

114. See *id.* at 370-80.

cover Title IX or any other law that prohibits discrimination, including discrimination based on sexual orientation.¹¹⁵

Another important point on the First Amendment is that the Supreme Court has developed a somewhat separate jurisprudence for the application of the First Amendment in schools. Beginning with a case most of you are probably familiar with that goes back to the Vietnam protest era, the *Tinker* case,¹¹⁶ the Court has held that high school authorities may censor or sanction student speech when it substantially interferes with order or discipline or with the rights of other students.

Subsequently, in *Hazelwood*,¹¹⁷ the Court relaxed even that standard for school-sponsored speech, or speech which takes place in a context that somebody could think constituted endorsement by the school, such as in the classroom or in programs that are part of the curriculum. In those cases, the Court said that the school can take action that is reasonably related to legitimate pedagogical concerns.

Well, it seems to me that there is an extraordinary amount of room there, both under the *Tinker* formulation, which is a little bit more stringent, and the *Hazelwood* formulation, for penalizing antigay harassment in schools.

A qualification on that conclusion is that, above the high school level, with respect to colleges and universities, the Supreme Court — and courts generally — have shown a greater reluctance to authorize restrictions on speech. The notion of the university as a place where people come in order to exchange ideas, in order to find truth and develop truth, is the countervailing consideration. Another aspect, of course, is the age of the students. It is considered more likely, as we would expect, that the role of the school would be more protective, and legitimately more protective, at the lower levels than on the university level.

Again, what is important about the *Tinker/Hazelwood* formulation in the lower grades is that it explicitly recognizes that schools have a role in teaching civic virtue and teaching the values of our dominant society, which includes teaching tolerance and the right of students to be free from harassment.

115. *See id.* at 389.

116. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).

117. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

NAME REPORTING AND PARTNER NOTIFICATION LEGISLATION

MS. COOPER: I am Liz Cooper. I teach here at Fordham. The panelists we have this afternoon are absolutely wonderful people. I will introduce them in the order that they are going to be speaking in. Catherine Hanssens is the director of the AIDS Project at Lambda Legal Defense and Education Fund. Matthew Carmody is an attorney with Brooklyn Legal Services. Haley Gorenberg is with The Legal Support Unit of Legal Services for New York City. Mildred Pinot is an attorney with the Legal Aid Society, herself with the Volunteer Law Office.

MS. HANSSENS: Thank you, Liz.

The issues of names-based HIV reporting and partner notification have been debated for some time, but the debate picked up heat over the last year. A focal point of that debate has occurred in New York, which adopted in 1998 a law mandating names reporting and partner notification.¹¹⁸

Although the law was scheduled to go into effect in January, 1999, final regulations implementing the law have not been issued. The law is vague or ambiguous in a number of important respects, and until we see the interpretation from the health department, we do not know exactly what the law will mean for people in New York with HIV who are contemplating getting testing.

The panelists here today thought it might be helpful to say something about why names reporting has become the debate that it has; why the Centers for Disease Control and Prevention ("CDC") has been pushing so hard for this, and how we think you should assess whether this kind of a program makes sense, focusing also on what the pros and the cons are. We also will address specifically how name reporting and partner notification are treated under New York law. Finally, we will discuss how those of you who might either be contemplating getting tested or who work with clients that might deal with the new law.

For the last several years, the CDC has been waging an aggressive campaign in states around the country to institute a national system of HIV test reporting. The CDC takes the position that names-based reporting is essential to get a more accurate picture of the epidemic. The CDC also contends that names reporting will be used to facilitate individual follow-up, so that health departments can track people supportively and get them into services.

118. See N.Y. PUB. HEALTH LAW § 2130 (McKinney 1999).

The CDC suggests that this names reporting initiative reflects broad community input and consensus. Contrary to what the CDC says there has not been substantial, meaningful community input into the CDC's recommendations for HIV surveillance, and in fact, it was very difficult for advocates — and impossible for people on the streets — to get copies of the CDC's proposed guidelines until they published it in December, 1998.

Basically, the CDC is proposing that states adopt a system that reports positive test results; they suggest this system should mirror the way AIDS reporting is done, which in all fifty states at this point is by name, as it has been for some time. While they do allow states the option of adopting what is called a "unique identifier system," which means that instead of using names, you can use some kind of a code, the proposed guidelines question the effectiveness of a unique identifier system and indicate that funding will hinge on a high rate of accuracy for reported data. In several states, unique identifiers for HIV reporting are a combination of initials, birth date and a portion of the individual's Social Security number. But there certainly is no universal, single definition of unique identifiers. Consider, for example, that anybody here who uses the internet also has a unique identifier for that purpose. Obviously, it is relatively easy to create a unique identifier system and that allows assignment of accurate, individualized codes while millions of people use a system at one time.

The CDC, nonetheless, is really actively discouraging any alternative to names-based HIV reporting. The CDC is making it clear that they may hinge the availability of federal money for HIV surveillance on a state's adoption of the CDC's preferred system. At the same time, however, while they explicitly recognize that the option of anonymous testing is essential to ensure that the maximum number of people are willing to get tested, the CDC refuses to withhold federal dollars from states that adopt laws to make anonymous testing unavailable. So far, eleven states that have names reporting also have banned the option of anonymous testing.

I, along with most advocates of people with HIV, believe that the CDC's proposal for names reporting is ill-advised and that it does not advance the public health goals that it is intended to serve. A primary objection to names reporting is that it threatens people's confidentiality, or more importantly, that there is a strong perception among people at risk of HIV that it will discourage many people from getting tested altogether.

While a number of the studies of the impact of names reporting on willingness to test are somewhat flawed, the clear majority of studies that have attempted to assess this indicate that a significant number of people will be deterred from getting tested if they have to give their name or if they feel the result could be tracked back to them. Most importantly, those who object to or who worry about names reporting are disproportionately people in already marginalized communities: people who are gay, people of color, IV drug users and at-risk youth. The primary goal of any health official in this epidemic has to be to increase testing, treatment and prevention. A reporting system that undermines this essential goal is simply bad public health policy.

The current estimates are that up to 900,000 people in this country are living with HIV, with at least 40,000 new infections every year; CDC reports make it pretty clear that these new infections occur disproportionately among younger people, particularly among young gay men, women with substance-abusing partners, people of color and those who use drugs intravenously.

When we are trying to assess the efficiency of a public health program, we need to get a sense of where the new infections are occurring and whether the public health measure that is supposed to deal with this is going to be more productive than destructive in accomplishing the goal.

HIV testing and counseling is described as central to the CDC prevention efforts, and yet the current estimates are that roughly forty to fifty percent of 900,000 people with HIV in this country have not been tested.

HIV, like many other frightening and expensive diseases, has always involved significant social risk as well as medical and public health risk, and historically people with stigmatized diseases — in the past, it was TB, STDs, syphilis — have been marginalized and demonized. What is happening with people with HIV is nothing new.

That type of social risk can and does deter people from getting diagnosed and treated. There is social science data that supports this premise, so there is a historical and current reason to be concerned.

In order to understand the impact of reportable HIV testing and whether the good outweighs the bad, we have to have the sense of the actual prevalence of harmful attitudes towards people with HIV, actual harmful policies aimed at people with HIV and some understanding of the subjective perception of individuals who are

at risk of the harm to them if they are identified as having HIV. We can look at the laws that are in existence, we can look at the available evidence of stigma and attitudes, and we can try to get a sense from that.

A recent study published in 1998 by research psychologist Gregory Herek showed that by comparing a 1998 survey of peoples' attitudes about HIV with an identical survey conducted eight years earlier, the level of stigma and misunderstanding that people have has remained relatively constant, and actually in some areas has increased. A substantial number of people across all sorts of economic and educational backgrounds and experiences are uncomfortable working with people with HIV, using a glass that somebody with HIV has used, even if it has been sterilized, wearing a sweater of somebody with HIV even if it has been dry-cleaned and believe that they are at risk by driving in the same car with people with HIV. The risk is real.

One of the primary problems in looking at what this will accomplish will actually give a better picture: if about fifty percent of those people who are infected are not voluntarily testing, and we have reason to believe that stigma and suspicion, political and medical system are still high, will we get accurate data?

I think we have very good reason to believe that names reporting will yield faulty data and, if anything, give us a very skewed and dangerously skewed, picture of who is infected, because if we rely on voluntary testing — people voluntarily going forward — and we have a fear of stigma and a fear of punishment, then we are going to disproportionately leave out those populations I mentioned before that have been traditionally marginalized. In fact, the CDC has produced no data to suggest that names reporting will accomplish the goal of getting a better picture of the epidemic.

In addition, names reporting is not necessary to allow follow-up with individual patients. Even with a unique identifier system, it is possible to do a backward track through reporting physicians to reach individual people. The truth is that the CDC has rarely used names-reporting data to accomplish such tracking, and in a well-constructed system where you get the needed epidemiological information up-front, you rarely need to backtrack. The likelihood that there are going to be extraordinary and new means of transmission that we need to track is only going to become increasingly unlikely.

I have tried to identify some of the issues raised by names reporting. I laid out for you some of the issues you should be think-

ing about as the next panelists talk about what is planned here in New York.

MR. CARMODY: I am going to talk to you about partner notification. First I will give you some historical and theoretical background to partner notification, and then discuss how partner notification has been applied to HIV and what some of the problems that result are.

Partner notification is a public health measure, which are actions the state imposes upon society to protect it from public health risks like communicable diseases. There are many public health measures in existence today, such as receiving a simple flu vaccine to being quarantined for tuberculosis. However, most public health measures impose to some degree a restriction in a persons constitutional right to liberty under the Fourteenth amendment.

The legal authority for states to exercise their public health measures was set forth in the 1905 Supreme Court case *Jacobson v. Commonwealth of Massachusetts*.¹¹⁹ This case was about a challenge to Massachusetts's mandatory small pox vaccine, citing that it was a violation of the plaintiff's personal liberty. The court describes in dicta how states have reserved for themselves a "police power" through which state public health measure are implemented. This "police power" was indirectly reserved by the states during the Constitutional Convention, as they did not delegate this power directly to the federal government. This "police power" allows the states to protect and preserve their populations apart from the protection provided by the federal government. Partner notification is just another example of the State exercising its police power to protect its populations from communicable diseases.

Partner notification originally started back in the 1930s by the then-Surgeon General Thomas Parran. Originally called "contact tracing," partner notification was envisioned after antibiotics were discovered as a cure for syphilis so that the state could more directly bring the cure to infected people, rather than waiting for the infected people to discover their infection and seek treatment. Surgeon General Parran wanted every case of venereal disease to be located, reported, its source ascertained and all contacts then informed about the possibility of infection, provided a Wasserman test (a test for venereal disease), and, if infected, treated. In seeking out infected people this way, the state could prevent transmission of Syphilis before people developed symptoms and thus

119. 197 U.S. 11 (1905)

realized their infection. There is a very good book by Gabriel Rotello called *Sexual Ecology*,¹²⁰ which examines more closely how diseases such as HIV spread through communities, and how communities can either foster or deter disease transmission.

Although partner notification's primary purpose is to stop the spread of communicable diseases, primarily venereal disease, it also has the secondary purpose of treating infected people. Although this was not really stressed with other sexually transmitted diseases in which partner notification was used, such as syphilis, gonorrhea, chlamydia, etc., because you could always cure a person with antibiotics when he or she discovered his or her infection. You will see with HIV how this secondary purpose becomes more and more important, especially as scientific theories are increasingly suggesting that early treatment of HIV is essential to a longer life after infection.

Applying partner notification programs to HIV infection and transmission is different from other diseases in several respects. One, there is no cure for HIV. Therefore, even if they notify someone of their infection, the state cannot prevent further transmission by this individual with a shot of penicillin. The only way the State can prevent is by encouraging a behavioral change in the individual: meaning counseling and educating the person how to prevent him or her from transmitting the virus to other people, and hoping that this person they have spent so much time and money on will listen and obey. Unfortunately, since HIV is primarily transmitted by sex and intravenous drug use, it is hard for people to simply listen and obey, because sex and drug uses involves a whole host of physiological and psychological pressures and variables that the state is not really able to or prepared to deal with for effective behavior modification. Therefore, after a person is contacted through a partner notification program, whether that person further transmits HIV to others really depends on the person and their situation. This is a lot less effective than a shot of penicillin for a syphilis infection.

The second variable is that HIV has a really long incubation period. It takes three to six months after infection before a person even starts producing antibodies, and it takes up to 10 years and more before someone might develop symptoms. It is very difficult for people to remember who they have exposed to HIV for such a long duration of time. Most partner notification programs limit the

120. GABRIEL ROTELLO, *SEXUAL ECOLOGY: AIDS AND THE DESTINY OF GAY MEN* (1997).

partners they are willing to contact to people who have been exposed only a year or two ago. But even here, it may be very difficult for people to remember all their sex and needle sharing partners in the previous two years, much less to provide a state with identifying information about these people. This is very different than diseases like syphilis and gonorrhea where symptoms usually manifest within a week to ten days, as it is much easier for people to remember who they had sex with last Wednesday, for instance, and the probable whereabouts of that person now.

Economically, this long incubation period has real ramifications. It has been estimated that it takes upward of \$5000 to perform one partner notification on average.¹²¹ This is primarily due to the amount of work it takes to track a person down whose identifying information is either very sketchy or is outdated. People who perform HIV partner notification must do things like comb shooting galleries and homeless shelters looking for the named contacts. This takes a lot of time and money. As endorsers of HIV partner notification have pointed out, this is still a lot less money than it takes to treat a person with HIV over the duration of their lifetime, so there is still a cost benefit to running partner notification programs. However, I think it is important to question how existing prevention efforts would be affected if all that money was poured into education, counseling and testing programs, rather than into partner notification.

HIV is also different in the social treatment of those infected. Possible discrimination, violence and de-racization await those who are infected. There is also an inherent distrust of the state to protect infected individuals from these harms. Partner notification programs generally rely on the cooperation of the participants to provide information in which the program can function. It may be very hard for people to give up this information, thinking that the contact may figure out the informant's identity and seek some sort of revenge.

This leads to the question of whether mandatory HIV partner notification could be considered an invasion of privacy. The type of privacy which frames this issue is really that of informational privacy, because we are talking about controlling the use of a person's HIV related information – whether this HIV related information can and should be disclosed in a limited form to a person's contact via the State. It is different than the privacy issue at issue

121. See Cheryl Ellenberg, *HIV Partner Notification Activities in New York State: A Comparative Analysis – Executive Summary*, AIDS Institute 4 (1996).

in *Jacobson* because the State action involved in that case involved the person's bodily integrity, not what happens to the information of the person's status as being or not being vaccinated.

One of the primary cases involving informational privacy is *Whalen v. Roe*.¹²² This U.S. Supreme Court case challenged a New York statute mandating the reporting of all prescriptions for controlled substances, along with the name of the prescribing doctor, dispensing pharmacy and patient receiving the drug to the N.Y. Department of Health. The challenge was based on the assumption that people would not go to their doctors to get necessary health care if they thought their name was going to be on some list in the Department of Health as someone who receives a prescription for controlled substances. The Supreme Court said that there were two interests involved: an interest of avoiding disclosure of personal matters, and an interest in independence of making certain kinds of important decisions. The Court held that these two interests were adequately safeguarded by the Department of Health, and therefore there was not privacy infringement. However, you might imagine some argument in which these interests are not adequately protected by the Department of Health when applying this standard to mandatory HIV partner notification.

Another important case dealing with informational privacy is *Nixon v. Administrator of General Services*.¹²³ This case was brought by Nixon to prevent the government from going through his private tapes, stating that there were personal conversations recorded on them and therefore mandatory disclosure should be considered an invasion of privacy. The Court applied a balancing test, weighing the expected privacy against the public interest in such an intrusion. Since the overwhelming majority of the content of the tapes was not personal, and the personal information would not be widely disclosed, the Court held that his privacy interests were not Constitutionally violated. This standard would be less useful in a facial challenge to a mandatory HIV partner notification law because even though the expected privacy of a person's HIV status is high, the public interest in this information would probably be considered even higher, particularly when the name of the HIV infected person would presumably be kept confidential.

I see I am out of time. I just want to emphasize the dis-empowering nature of mandatory HIV partner notification law. HIV affects mainly people who are in traditionally marginalized

122. 429 U.S. 589 (1977).

123. 433 U.S. 425 (1977).

populations, namely people of color, gay men and substance abusers. Mandatory HIV partner notification further disadvantages these populations by subjecting them to liberty infringements and consequently possible discrimination, harassment and violence. It is hard to believe that states are subjecting their citizens to such effects when partner notification is marginally effective when applied to HIV and other HIV prevention programs that are not disempowering in nature could be just as or more effective as partner notification with a comparable increase in funding.

MS. GORENBERG: I would like to spend some time talking about the actual law that is to be implemented in New York.

As has already been said, we are waiting for the regulations that will give us some detail about how this law is actually going to go into effect. They are overdue. We have been told that we will have an opportunity for comments, that they will not be instituted as emergency regulations. In fact, we had thought as panelists that we might have them some time this week and be able to discuss what we saw in the regulations that were proposed.

Since there will be a comment period and we have an opportunity to participate in that, what I would like to do is go over some sections of the law and identify what I consider to be some hot spots to watch for implementation and regulatory effect.

The law that we are talking about here that combines these two elements, names reporting and contact tracing, is a new Title 3 of Article 21 of the Public Health Law, Sections 2130 and about ten sections following. It was enacted on July 7, 1998, to take effect in 180 days, which have now elapsed.

The law has two parts. One of them is the so-called "names reporting" — and I will tell you why I am saying "so-called" in a moment — and the other piece is the contact tracing or partner notification piece.¹²⁴

Starting with names reporting, the first thing that is interesting to note about this statute is that the law itself does not say that names must be reported. When it talks about the index patient, the HIV-positive person, it says that information identifying the index patient is to be reported, as well as the names of the contacts.¹²⁵ Well, clearly the legislature knows how to use the word "names." They used it to talk about the contacts. But in the phrase preceding, they talked about "information identifying the case."¹²⁶ This

124. See N.Y. PUB. HEALTH LAW § 1230-1239 (McKinney 1998).

125. See *id.* § 2130.3.

126. See *id.*

brings to mind — it certainly brought to mind for a lot of us who wanted to comment on this law — the possibility that a unique identifier system would be possible and that there was nothing in the law that prohibited its use. We said that in our comments, and we hear that it probably is not going to be well-received and that actually some of the people who were pushing the law up in the state government were not too pleased to see that possible interpretation.

So, in a political world I would say that we do not have high hopes of seeing a unique identifier system coming out of this particular law, but we certainly made the argument, the argument is there to be made, and maybe we will be pleasantly surprised.

The other thing I would like to say about the names reporting issue is to highlight the fact that this law preserves anonymous testing. It very clearly preserves anonymous testing,¹²⁷ which makes a lot of sense in a public health context, if this is really going to be at all taken seriously as a public health law, since we know that some people will not get tested unless they have an anonymous option. We consider that to be a very important thing for people to know, for advocates to know, and anybody working with a population that is taking the possibility of testing seriously to know: anonymous testing does still exist in the State of New York and is specifically preserved.

The duty to report under this law is a duty on behalf of physicians, anybody else who is authorized to diagnose HIV or related illnesses and laboratories.¹²⁸ What those entities have the duty to report, according to this law, is an initial determination or diagnosis of HIV, HIV-related illness or AIDS.¹²⁹ Now the duty to report AIDS already existed in other law, but I want to call attention to this issue of the initial determination, or diagnosis, and also talk about the fact that we have read that together with the preservation of anonymous testing.

One of the arguments that advocates have made — and it remains to be seen whether the regulations will reflect — is that if we know that the preservation of anonymous testing is very important to the public health, because some people will be deterred from testing and getting diagnosed early if they are not given the opportunity for anonymous testing, and we have a law that says very clearly in three places that the duty to report applies to initial test-

127. *See id.* § 2138.

128. *See id.* § 2130.1.

129. *See id.* § 2130.1(a)-(c).

ing and initial determinations and initial diagnoses,¹³⁰ then I would certainly argue that somebody who enters the health system through anonymous testing for an initial diagnosis or determination and at that point goes for follow-up treatment or confirmatory testing could logically be excluded from the reporting requirements. That would be an extremely valid public health decision to make, especially when you see that the law recognizes the preservation of anonymous testing as an important public health measure. Again, a hot spot to watch for in the regulations.

I want to put all of these points that we are making about reporting and names and lists in a little bit of context here.

People have already mentioned stigmatizing diseases and stigmatizing infections and the effects on populations that are already undeserved in many ways. We have already noted that it seems that people who are deterred from testing are also disproportionately the people who are very often at greatest risk for HIV infection, and that that is a very dangerous intersection.

There are two more points that I want to mention as far as context when we talk about names reporting, lists and what it means to our clients or to patients or to any of us to be on these lists and reported and in databases.

My first call that I got for advice as the HIV Advocacy Coordinator at Legal Services was from somebody who said that he had just found out that his confidentiality had been breached, because he had met a guy at a bar the week before, and it turned out that this person worked at the Division of AIDS Services and Income Support, the public assistance source for people with HIV in New York City. They went out on a date, and a couple of days later he got a letter from this government employee revealing that this person had used his position to look him up in the database, saw he was receiving services associated with his HIV, and wrote on the outside of the envelope that the caller was HIV-positive, and how terrible it was that he had not disclosed this on the date.

Lists and databases can be used in scary ways. There are real-life examples. It is not just that we are saying that there is a theoretical potential. I mean, the questions of who has access, whether they are qualified people, people who understand confidentiality or might be inclined to use information for their own reasons, are very serious. I have seen it put into play in the real world.

130. *See id.*

The other thing that I wanted to mention as far as context is that last legislative session we had names reporting and partner notification passed. This session we have seen proposed, and sometimes re-proposed, laws that would criminalize all kinds of behavior, including having sex with somebody if you are HIV-positive or having sex with somebody if you are HIV-positive and do not disclose to them. Following right on the heels of the law creating a database is the suggestion of creating laws that will make it a crime for people who know their HIV status to be doing various things. This is pretty scary.

I want to move from the names reporting hot spots into contact tracing and partner notification. One of the things that this law does is modify who is considered to be a contact. There was already a legal provision talking about what is considered to be a contact for an HIV-positive person and that provision was limited to a sexual contact or needle-sharing partner.

The new law amends this section of the public health law, adding a phrase saying that a contact will also now be a person who is at risk of transmission as determined by the Health Commissioner, and we do not know what that is going to be. We do not know how it is going to be interpreted or broadened, whether that is going to mean somebody who received a needle stick. It is a big question, and it is a big question especially when people start talking about whether it is going to be limited to reasonable risk of transmission, or whether it is going to be anybody who is worried, with no medical support, that perhaps somehow their contact with someone could have led to transmission.

When we see recent studies that show that knowledge of actual risk of HIV transmission is, if not plateauing, maybe even decreasing, then we have to be concerned about what it means to say that some unelaborated "risk of transmission" could justify application of this law.

Another issue for us to watch out for in the regulations is how a contact will be identified. On one end of the spectrum is a suggestion that identifying the contact of an HIV-positive person should mean using information that comes out of a conversation that that person has with his or her physician, which is protected by a version of informed consent, where the physician would say, "This is the result of your test, and now we are going to have a conversation about contact tracing or partner notification, and what contacts you have, and what we will be reporting," and that physician would explain what the partner notification law requires.

Actually, we could say that we might hope that this information would be given ahead of time, when the person is tested, but the bottom line is that in the context of creating this list of contacts to be reported to the State, there should be a conversation with the physician where the physician explains what information is to be taken and what will be done with it. Then people could disclose as they see fit. That is one much more protected option that many advocates have supported.

At the other end of the spectrum is the possibility of some kind of sleuthing through the person's file — I mean, perhaps when they entered care with this physician they had a relationship with somebody whom they mentioned, somewhere deep in the file, maybe a couple years back or whatever — that they might go looking in the background and using various old parts of the medical file in reports to the State, perhaps without any particular discussion about that with the patient.

Obviously, one of the big concerns is what that means for physician/patient relationships in the future and whether people will be greatly deterred from sharing important aspects of their life and their sexual health and maybe drug use with their physician if we have a law in effect that means that anything is fair game for reporting should you develop an illness in the future.

A couple of other points. The law as it is written right now says that when the health departments come to do this actual contact tracing, it will strive for in-person notification unless circumstances reasonably prevent doing so.

Well, what does that mean? I am excused because my car broke down when I was supposed to go notify you? Does it mean I tried twice and you were not home and now I am going to stick notification on the door in a sealed envelope? I mean, that is allowed in certain other cases for service of a notice. I think we would argue that it is not reasonable in this context, but there is no real explanation of what it means to say personal notification unless reasonably prevented from doing so.

There is a major question about the potential retroactive application of this law, and that could be a real hot spot for litigation. If you have gone for an HIV test that was anonymous, then you know that you are given information — or you should be given information — on the current state of confidentiality law and how your testing information and results will be kept private. If we do not see regulations that make it clear that application of this law is prospective only, then we see a real conflict with what people have

signed in the past that they thought protected them, that they thought gave them certain rights to confidentiality, and what this law now requires.

I think it is important to note that there are provisions in the laws regarding criminal and civil liability that not only protect somebody who is acting in good faith trying to comply with this law but also protect someone who might fail to cooperate with the law from criminal or civil liability.

There is a real question about what the section of the law that deals with domestic violence screening will look like when regulations are finally handed down. There is a section of the law that talks about recognition of domestic violence risk and says that there will be identification and screening of both index patients and contacts for domestic violence risk.¹³¹ But there is nothing that says what will be done once these people are supposedly screened, and all kinds of questions about how you would do that screening. For instance, if I have a brief relationship with somebody or went on a date and had sex with somebody two days ago and do not know them very well, how would I contribute to an assessment of their risk for domestic violence?

I have asked some advocates for victims of domestic violence about this, saying, "Well, I understand the sensitivity of doing a domestic violence assessment of a person sitting with you — that is difficult enough. Now, what if I come in and say, 'Well, you know, I just met this person.' Do you think that you can assess through me whether they are at risk for domestic violence?" Nobody has really given me an answer for how on earth that could be effectively done.

In any case, one would assume that coming out of this idea of recognizing domestic violence risk should be some sort of exclusion, at least a limited exclusion — that partner notification would not happen if it were likely to exacerbate domestic violence. But right now what we have is a law that says "there shall be screening" and provides no real direction about what might then be done with it.

So that is going to be a very interesting section to see come down in regulations, and I believe, from some of what I have heard, that it may be a section that has been delaying the regulations.

All right, the last thing that I will say is that a demand that has been made by advocates across the board has been that there

131. *See id.* § 2137.

should be some kind of study of the effect of these measures some reasonable time after they have been put into place, especially since we are talking about the possibility of driving people from testing and treatment.

When we see that possibility in something called a public health law, the effect must be examined, especially when we have studies and indications from clients and patients that we may see severe adverse effects, and especially when we see in the Governor's new budget that millions of dollars are now proposed to be diverted from proven methods of HIV prevention to this extremely expensive system of names reporting and partner notification.

We really have to demand not only a study on rates of infection and deterrence linked to names reporting and partner notification, but also a look at what programs are suffering to fund these measures.

MS PINOT: I was asked to talk about some potential scenarios as a result of the new partner notification, contact tracing law.

I guess I should identify who I am. I am Mildred Pinot from the Community Law Offices of the Legal Aid Society. I am a supervising attorney of the HIV/AIDS Representation Project. I know some of the folks in the audience who I have had the pleasure of working with during the course of my ten years at Legal Aid.

So I am, in fact, going to talk about a couple of scenarios that have come up during the course of some community outreach and education that I have done, in Upper Manhattan primarily, and in the Bronx, because I think it is really important, exceedingly important, not just for us to educate ourselves but to educate the community at large. And, as a service provider, I think it is really important to educate my clients and to have them, in turn, educate their families, their friends and their acquaintances. And that goes for all of you as well.

There are many issues that attach to this legislation. I know, as an advocate that was opposed to it, that traveled to Albany on more than one occasion and spoke to many legislators, it was a difficult and disappointing process, because never in my wildest dreams did I really think this was going to pass. This is retrogressive.

The complexion of the epidemic has changed. Have people noticed that? Interesting how now we have legislative efforts not only to mandate names reporting and contact tracing, but also criminalization of behavior by individuals who happen to be HIV positive.

I am disgusted. I think it is horrific, and there should be a public outcry about this.

Who is affected primarily? Women and men of color and poor people. It was just announced recently — surprise surprise — that HIV/AIDS is an emergency in the African American community. Really? No! \$156 million has been earmarked for prevention. Now there is tons of controversy about how that money is going to be used. Lovely. Let's just go out and educate the folks that are getting infected the most. Who are they? Primarily adolescents. I heard a statistic the other day that totally blew me away. It was like two people under the age of twenty-five are infected per hour, on a daily basis. That is amazing. We are doing something wrong. We better start doing it right because if we do not, you think this is an epidemic now? This is going to start killing us off like we cannot imagine.

What is involved? Access to early testing. I talk to teenagers during the course of my work. I am not supposed to, because I am supposed to represent the adults, but I talk to their children, and I have kids who are thirteen, fourteen, fifteen, sixteen, some of whom are parents, telling me "I am not getting a test, I am not having my name going on some list, and then, you know, what if rumor has it that I am HIV-positive and somebody tries to come and kick my butt or kill me?" That is the reality of potential domestic violence. That is the reality of the situation that people do not talk about. I am not talking about, "Oh, I am going to curse you out because I am really enraged that you could have possibility infected me." I am talking real fear of imminent danger.

So this is the stuff that comes up at community forums.

Back to my initial statement, the reason I think it is so important to engage the communities that we serve is because most people do not ever see a copy of legislation. People have never seen this. People do not have an opportunity to read through the law. I take two-and-a-half hours with a community group or other audiences, and I spend an hour and fifteen minutes, and I read the law at community forums, and I have the audience tell me what they find problematic with it. So issues such as the one that Hayley brought up, which I guess are part of my scenarios, are some of the things that come up.

For example, I go to a doctor's office, my first time there. What do you all get when you go to a doctor's office? You get forms, right? You get that little clipboard and a pen. They tell you "could

you please fill this out, could I see your insurance card" — you know, the whole works.

On that form there is all kinds of information that you are listing. When I went for my first ob-gyn examination, I was a nervous wreck. I filled out all the stuff. I got inside, and my doctor said, "Oh, your husband's name is Eric."

I said, "How did you know he was my husband?"

She said, "Oh, I just assumed." You should never assume, because I do not share his last name. He is my husband, but she made an assumption, okay?

Assumptions are made. She asked me about my sexual history, and I shared that information, because, of course, I wanted to do everything I could possibly do to ensure that I had a healthy and good pregnancy. Okay, I am thinking now all that information I gave this provider, who I had never met before — this was a cold call that Eric, my husband, made to a hospital in Westchester County; he figured we will go to Westchester — "small hospitals, we can get a private room when you finally give birth, not a big deal" — I do not know who this woman is, never met her before.

I am developing a relationship with her. She now has all kinds of information about me. She knows how many times I have had miscarriages. She knows all about my gynecological history. She has asked me questions about sexual partners. During the course of your conversation with a medical provider, you share information.

She did not tell me anything about informed consent. She asked me if I wanted to be tested for HIV, if there was any reason why I thought I might be at risk. No, I did not. She asked me if I had ever done IV drugs. No. Anybody I had ever dated? I do not know. But these are just general questions that come up during the course of a regular visit with a physician.

I did not think anything of it then, just like I did not think anything of it when they asked me, "Is it okay to test your baby for HIV?" My initial response was I broke out into a sweat. I swear to God, I broke out into a sweat. I was like, "they are going to test the baby for HIV." Well, that means they are going to test me for HIV. I do not know if I can agree to this. The law had not even passed at the time.

They said, "Well, we really encourage it."

I said, "Okay, test the baby."

When did I get my results? My child is two years old. Had I not called a year later — a year later! — I would not have received the results of my child's HIV test, because no one volunteered that,

and my provider did not volunteer it. I did not say anything because I wanted to see how long it would take. Now mind you, I think, had she been HIV-positive they would have told me, especially because they know I am a lawyer.

It is telling, however, that these are problems. These are glitches within the law. I am at least savvy about this stuff. Most people are not.

So back to accessing care. Here I am at the doctor's office. I fill out a form, talk to my doctor, the doctor writes notes. Mind you, most doctors are not going to want to be in the practice of engaging in partner notification. I do not know that people talk about that, either. I talk to medical providers, and they are asking me, "How the hell can I get around this? I mean, I do not want to do this. Can't I just refer it to the Department of Health?"

I answer, "No, it is your patient's option whether they want to ask you to do it or someone from the Department of Health."

They reply, "So then what do I do if my patient says that I should do it?"

Well, what do you think doctors are going to do? Do you think a doctor is going to go out and try to personally contact someone that is a known contact? No, they are going to delegate that responsibility to someone on their staff. Do you think their nurses, physician assistants, anybody else that they work with is really going to want to engage in partner notification? No. This is a real problem. I do not know how they are going to do all of this.

It is a very expensive law. It is problematic. How is it going to go into effect?

Yesterday was Friday. I spoke to someone from the Department of Health at a legislative session we had up in Harlem:

"So, know anything about the amendments?"

"Amendment? No, do not know a thing. We are having a little trouble getting them together."

We have heard this for months. What is happening here?

First of all, I can tell you what is happening. No money was allocated to this legislation, and it is bad law. It was not properly thought out. It is going to be very, very hard to implement.

Let us talk about the database. My ten-year-old stepson can get into almost any database that exists. How are they going to ensure confidentiality? There is a lot of transmission of information here. You are going from a doctor or a lab or someone else who is authorized to give an initial diagnosis of a positive HIV result, an initial HIV-related illness diagnosis, or a diagnosis of AIDS. That

goes from that whatever you want to call them — entity, individual — to the State Department of Health. Then from the State Department of Health it goes back to the local Department of Health. Gee, that is a lot of transmission of information going around. Problems with potential breaches of confidentiality obviously exist. Who will have access to this information if it is not encoded, it is not encrypted, if they are actually transmitting information in terms of names?

I heard the story of all stories yesterday from a client. The client could not get some benefit, so he hooked up with somebody at the agency, and benefits got in place the next day. I say, “No, you need to stop.” The client said, “Oh yeah? It is the truth, and I have no reason to lie to you.” The client goes on to say “Now I am having another problem with the same agency, but I do not feel like hooking up with anyone, and I need you to help me. I mean, the first time around, it was fine. But not again.” Look, call me naïve. I did not think this stuff went down, all right? It goes down. I did not know about it. Now I know.

What if that agency person gets upset and divulges information? Obviously there was a breach in the instance that Hayley mentioned. Obviously these things happen more than I realized. This is the first I ever heard of the stuff. It is outrageous, and it is problematic, and we need to address it. That is why the commentary period is so important.

The other thing that I was told yesterday is there will be no public hearings but only written comments. Do you know what that means? Written comments mean no one is going to read them. Okay? We better make some major hoopla about this, either for public hearings or to ensure that our comments are, in fact, read, and that it is documented who read them and what recommendation was made upon reading the comments, because otherwise it is an exercise in futility.

MS. GORENBERG: When my o.b. asked me if I wanted to be tested, I had the same sweat reaction. I said “Okay, let’s do it, I gotta see,” and the lab lost the test. Leads to fantastic confidence in the system, I must say.

MS. PINOT: Unbelievable. People seem to think that we make this stuff up. It is not made up. Now, we are pretty mellow about it. Most people are not that mellow about it. It freaks them out. It is a major decision to be tested. It is not something to be taken lightly. Your entire life changes, or could potentially change, but it

is being treated as a one-shot deal, especially in light of partner notification/contact tracing, and that is problematic.

Do people think that folks in the neighborhood do not know who works for the Department of Health? They know. Just like when you have an STD, people know. Word gets out. If they think you are HIV positive, word is going to get out. People start seeing the same kind of envelopes, same people knocking on doors, word is going to get out. We talk about stigma.

MS. PINOT: If your baby gets tested, derivatively you get tested. Your partner is going to be informed if the child is positive. Your partner is going to be informed, if they know who he or she is.

MS. GORENBERG: I filled out the form when I walked into the doctor's office.

MS. PINOT: They know who it is. It is a problem. It is a real problem. And this is stuff that my clients were telling me: "If I have a baby, you know they test the baby."

"Yes, I know they test the baby. Well, if I list who helped me conceive this child, they are going to tell whoever it is."

"Yes, that is a distinct possibility."

"Well, then, what am I supposed to do? I just gave birth. How am I supposed to deal with that?"

Okay, psychosocial issues. How are they going to deal with this? Is there follow-up counseling for any of this? Have you seen anything apropos? Are people qualified to do it? Anyone funded to do it? I think it is a problem.

Okay, I am sixteen, I am sexually active, I have experimented with IV drugs. Friends suggest I get tested because rumor has it that Jack, who I hung out with last week, has been ill — I mean, in and out of the hospital. People do not know what the deal is with him. I should get tested. I go to an anonymous testing site. Test positive. Not only do I freak out, but after I test positive, I am told — counseled — that I should access care — prophylactic measures, I should talk to somebody. "There are ways to avoid becoming ill, so you should see a doctor."

Who do I go to? Are they going to tell me that if I go to a doctor, who is probably my family doctor, because who else do I know, that he will have to do a confirmatory test and if positive report my name and the names of my known contacts? I guess I could go to Planned Parenthood; I guess I could go to GMHC; I guess I could go to a CBO; but when I go I am going to have a confirmatory test. My argument, in this context, has consistently been a

confirmatory test of my HIV status is not an initial diagnosis and, therefore, it should not be reported and my name should not be reported.

Providers are not looking at it that way because they are nervous about being sanctioned. I mean, I do hospital-based legal services. They are telling us, "We are not sure that this is what it says. We want to comply with the law. We would probably err on the side of reporting rather than not." We need to educate, educate, educate, educate.

Okay, so I go. I now have an appointment with my doctor. I am nervous and scared. The doctor says to me, "You want to tell me who you have been with?" It is important, because you should engage in partner notification, and you should not be engaging in at-risk behavior. You need to take care of yourself. It is real, real important. And you, because you are feeling vulnerable at the age of sixteen and freaking out because you tested positive, share some information. They, in turn, have to engage in contact tracing, and they may.

Now, it could be a problem and it could not be a problem. On the other hand, whoever you have been with may have already identified you as a partner. So you may already be on a list. Say you get a letter at home. You are sixteen, get a letter at home from the Department of Health, because of course their attempts to reach you personally failed, and they were good-faith efforts.

They knock on your door. Maybe you are not home. Parents are home. They say, "Have your child get in touch with the Department of Health." Then they send the letter. You think Mom and Dad are not going to ask you why you are getting letters from the Department of Health? Then they may even read the letter.

And then what happens? I have situations where I have sixteen- and seventeen-year-olds who call my office and say, "My Mom just found out that I am positive and kicked me out of the house. My father found out I am positive and said that I cannot touch anything in the house, I cannot touch my brother and sister, I have to get a job. I mean, I gotta take care of business. How can you help me?"

Do we all know about the changes in the welfare laws? What do sixteen-year-olds do if they are not hooked up with another adult, unless they are emancipated? Remember, New York is not an emancipation state. You cannot go to court and get emancipated.

These are real problems, and they have far-reaching repercussions, and people do not think about it.

Say you are in a battering situation. Get tested. So you have been in counseling with a particular community-based agency that can provide comprehensive services. People know who the batterer is. They know who you are hooked up with. It may be a series of batterers that you have been with. I mean, it happens. It could be a historical situation. Is this agency now required to engage in contact tracing, and how much risk are you at this point?

So what is the point of getting tested? I would not. I would do the same things my clients tell me: "No. I would go to an anonymous site, and when I am really, really sick then I will get care."

Is that what this law was designed to accomplish? No. Allegedly, it was to do exactly the opposite, to encourage folks to access care early on, to alert people to the possibility that they may have been exposed to HIV and stem the tide of the epidemic. Well, I think it is going to do exactly the contrary, and I have real issues about informed consent.

What about a false/positive? Do you ever think about that? There are false/positives. I have a couple. People come in, tested positive, two years later come back and tell me, "No. You know what? They made a mistake. Thank you for helping me, and I am very happy."

Okay, the name is on a list now. How do you get it off? What do you do with contact tracing? People may have been contacted. Your life may be completely changed as a result of this. We thought about it enough. The folks who passed the law did not think about it enough.

I am trying to think if there are any other little scenarios that I have not talked about. Interesting questions.

I had a representative from one of those companies that does the HIV tests by mail — they are not New York-based. I forgot where they are. Is it Texas? There is one in Texas, and there is another one, because this gentleman was not from Texas — but anyway, say Texas. Okay, I do an HIV test by mail. This is supposed to be anonymous, except I do not understand, if they are so anonymous — I mean, you call in and you give them a number, but if there is some problem with the blood sample, then you are supposed to send another one, and they send you another kit, but by sending you another kit, they already know who you are.

AUDIENCE: But they do not have to link it to the — they could give you another kit with a new number.

MS. PINOT: Yes, but they send it to your home. Sure, you could send it to a Post Office box, assuming you have a Post Office

box. You could send it to your place of employment. You can send it to a friend's house.

You could send it anywhere. All I am saying is that there is no guarantee of confidentiality — what is confidentiality? Let's be real, okay?

So, anyway, can we use these tests to avoid the law? My problem with it is, say, there is a problem with the blood sample and you then have to do it again and instead of going out and purchasing another one, you call in. They tell you that there was a problem with xyz2000 and "if you give us your address or an address where we can send this, we will send you another one." All right, that is okay. Give somebody else's. I will give my mother's address, okay? Fine. What then? What happens then? Say you are positive. What do you do? What do you do?

Do you access care? How do you document that you are positive? You have this thing with a number on it. How do you know it is you? You know, I can see doctors going "No, no, no. This will not do. You have to take an initial HIV test here in the State of New York." And that is a problem because then there is disclosure; you know, you have to report.

Okay, I am trying to be creative. I am trying to think of as many scenarios as possible. You want to help me out?

AUDIENCE: Well, who has access to the lists legally?

MS. PINOT: The Department of Health.

AUDIENCE: Does anybody else? I mean, insurance companies, criminal justice?

MS. PINOT: Well, at the moment —

MS. HANSSENS: Illinois adopted a measure authorizing use of the state AIDS registry to crosscheck with names of licensed health care workers, although it has not been implemented. So, in theory, laws can be adopted allowing access or use outside the state health department. The CDC currently is advancing the adoption of a model state privacy law that would allow health officials across the country — local, state and federal — to all share identifiable information of persons with HIV. Such use would not be considered a disclosure requiring affected individuals' informed consent. Once names-based registries of those with HIV have been created, the list of agencies and individuals who have access to this information can be changed with the stroke of a legislative pen.

AUDIENCE: Could you file a Freedom of Information Act request, if you are in litigation or anything like that?

AUDIENCE: Well, the law as it is written says that confidentiality will be maintained and will only be disclosed “as necessary to further the provisions of this Title.”¹³² But then, we have questions about what that really means, what is going to be necessary — especially when you see amendments that are pulling out things like a doctor before could make certain kinds of disclosures if the doctor reasonably believed there was the risk of transmission. Well, they struck the word “reasonably.”

MS. HANSSENS: Well, there are two words which illustrate how officials might define “necessary”: Nushawn Williams. Local officials responded by taking his picture into schools, and his mug shot broadcast on national television. While health department officials may not have intended that broad a result, the incident demonstrates that health officials, both state and federal, either are unwilling or unable to control those kinds of disclosures, particularly in changed situations.

AUDIENCE: And who is doing data entry? I mean, if we do not think that the Commissioner of Health is going to do this in a wrongful way — in the call that I got in my office — I mean, who was this person? I do not believe — although I do not know who it was — I do not believe that it was a high-ranking official at the local Department of Health or at the Division of AIDS Services, but it was a data entry person or it was a caseworker or it was somebody who had access to a computer screen.

AUDIENCE: In Florida last year there was this guy who worked for the Florida Department of Health, took the records and threatened to publish them in two newspapers.

AUDIENCE: Well, he sent them to the newspapers.

AUDIENCE: But the newspapers refused to publish it.

MS. HANSSENS: They prosecuted him and he got probation.

AUDIENCE: I am still confused on when you said the law presumes anonymous testing and yet you have to have names reporting. That does not seem to go.

MS. PINOT: You can go to an anonymous testing site and be tested. That is your option.

AUDIENCE: But once your doctor or someone else —

MS. PINOT: The big issue, or the big question, is if you go to a doctor to access care and the doctor suggests — because you tell the doctor “I am HIV, having a confirmatory test done” — the question is, is that test confirming your HIV diagnosis an initial test

132. *See id.* § 2139.

or not? Our argument is that it is not and, therefore, your name should not be reported.

We do not know what the regulations are going to say, but they hear us talking, so in all likelihood it is going to say if you get tested anonymously, upon accessing care a confirmatory test will be deemed an initial test subject to the requirements of the new law.

AUDIENCE: We should say as a baseline, though, — and maybe this goes to your question — that before this law, we had anonymous testing and we had confidential testing. There were specially licensed sites to do anonymous testing, and then there was your confidential document if you go to your doctor, or something. So what they are saying, we think, is that those anonymous sites, specially funded to give anonymous testing rather than confidential testing, will —

AUDIENCE: Well, it is just that with the partner notification I am wondering — I do not mean this to sound funny, given the political climate today, but where they say they have to contact your sexual partners, what is their definition of a “sexual partner?” What kind of sex are they talking about? What if you refuse to give names, or what if you honestly do not know the name of the person you had sex with?

AUDIENCE: There are, in fact, no criminal penalties, and I would suggest that you identify Assemblyperson Nettie Meyersohn.

MS. PINOT: She is the one that is pushing the “unblinding” of — she wants to make these lists of names available to other entities.

MS. HANSSENS: This happened with the newborn testing here in New York and this is something that Liz Cooper worked on a lot. We had blinded seroprevalence surveys among newborns, and once that information was there, Assemblyperson Meyersch was one of these people that pushed to say babies are going home and dying. So, with a stroke of the legislative pen, an anonymous survey turned into mandatory names reporting.

The bottom line is that once a list is there, then there will be this desire — this uninformed, usually politically driven desire — to use the data for other purposes. History supports us on this.

For folks that have money, these things are much less of a problem. There have always been doctors, certainly in the gay community, that will allow you to test as Donald Duck and you could still test as Donald Duck in a names reporting system. The problem is

that, for individuals who rely on publicly-funded benefits to survive, there may be some problems with continuing through the system as Donald Duck.

But there are certainly doctors — there always have been doctors — who will not report and who will do everything they can to protect their patients. So part of what you do is for your own protection is identify those doctors, and you also try to work with clients.

Ultimately, a lot of these policies are driven by politics and funding, funding, funding.

The CDC wants these names and numbers for a variety of reasons unrelated to the ones that they are offering. Politicians want names; government agencies want numbers to show that they deserve funding. There has been incredible pressure on the states, and it was clear even from members of the New York State HIV Advisory Council that they believed if they did not adopt a names-based reporting system, that we would lose funding. So a lot of the rhetoric supporting HIV reporting strikes me as an “emperor with no clothes” situation. There are mainstream health officials and even some directors of AIDS service organizations in the receiving line for this naked king that are saying, “You look fabulous, you look fabulous.” And then there are the rest of us in the crowd that are saying, “Excuse me, I think you are naked.”

AUDIENCE: There is an interesting and very painful historical twist in all this, which is that there was sort of a concession early on, or an understanding early on in the epidemic, that with AIDS when people got sick, they really died very close to the time of diagnosis. And now, ironically enough, we have all these reasons to give people incentives to go ahead and get tested early so that they can go ahead and get treatment — the direct opposite of what a lot of Millie’s clients talk about — and yet, we now are putting in a roadblock at exactly the time that we want to encourage people to go in to get tested, and possibly to get care. The irony of those things happening at the same time, quite frankly, on the backs of poor people and largely people of color, is just too painful in this epidemic.

AUDIENCE: And for data that is largely useless for the purposes that they are saying that they are collecting it.

AUDIENCE: A question and a comment. On unique identifiers, I mean, I realize that that has been thrown out as a way of trying to back off on names reporting. On the other hand, given all the risks to what happens to a database once it exists, and the fact

that for unique identifiers to work somebody has to have a match of the name and the unique identifier somewhere — I mean, that exists physically somewhere in the world.

AUDIENCE: It does not have to, actually. Anna Forbes of Philadelphia is the most brilliant person who could explain why you do not actually have to have a master list.

AUDIENCE: My concern is that even using unique identifiers, (1) there is a reality of a risk of confidentiality being breached, and (2) perhaps more important, is that there is probably going to be the same perception by people who are going to be deterred from taking the test.

AUDIENCE: And that has been shown.

AUDIENCE: It just struck me through the whole debate that while there was sort of a political tactic to raising unique identifiers, does it really accomplish anything? Does it really accomplish what we want it to accomplish with respect to the problems with names reporting?

The second question is, has there been any enforcement of the provisions of Article 27-F, the confidentially provisions that have been in effect now for a number of years in New York State? I think there actually are criminal penalties attached, right? Has anyone anywhere in New York State been prosecuted? Is it enough for institutions to think that if they err on the wrong side of reporting — for example, if they decide something is initial and it is not — they could be running afoul of that law?

MS. PINOT: Not if they are acting in good faith. There are some handouts here, but one of the ones that I brought says “disclaimers.” If you are acting in good faith in carrying out the provisions of the law, no criminal or civil liabilities attach —

AUDIENCE: So then the 27-F pressures just do not exist in that whole, so there is no incentive to err on that side.

The other thing I just wanted to mention is on the domestic violence point. The domestic violence provisions that are passed with respect to welfare are an abomination. The supposed domestic violence community was part of creating that abomination; they were part of creating the abomination as to the regulations, enforcing it. I would not trust either the administration, obviously, or people who call themselves domestic violence advocates to inform you on those provisions, and I would certainly — (1) they did not consult any poor people advocates, and certainly did not want consult poor people’s advocates, because we are seen as pariah and likely to

turn off the Governor because we actually care about the lives of poor people.

I would suggest — I am saying this very strongly, since it is absolutely true, and it has been a nightmare — that when it comes to domestic violence provisions, expect the worse. And certainly do not limit your consultations to people who call themselves domestic violence advocates, because they are dangerous.

MS. HANSSENS: Can I just answer your first question? I think what you are suggesting about unique identifiers is absolutely true. I think that the problems, the basic problems, with names reporting as surveillance — those are different things — are the same for unique identifiers as they are there. That is one of the reasons Lambda has never actively supported unique identifiers — we do not support HIV test reporting in any form as a way of getting a reliable picture of the epidemic.

In fact, the Latino Commission on AIDS did a phone survey with graduate students calling people with Hispanic surnames, and found that there was not a substantial difference between unique identifiers and names reporting in deterring people from willingness to get tested.

This fear is not unfounded. If I had a choice of a name and I could say, use either “Donald Duck,” or a unique identifier that includes the last four digits of my Social Security number — well, all I have to do is put those four numbers into a phone call to Visa and they say “Hi, Catherine Hanssens, how are you?” I mean, it is particularly easy to track people down with a social security number, and then of course there are immigrants at risk who do not have a number at all.

I think that people supported unique identifiers because people believe we need a better picture of the epidemic and it is a preferable alternative to names reporting. Fine, we do need a better picture — but none of the information we have about IV drug use has ever produced broad-based government support for needle exchanges.

In fact, in New Jersey when people involved in needle exchange programs are being chased down, prosecuted, arrested and programs are being shut down, and the information we know about youth is rejected for abstinence-only-based prevention education, what reason do we have to believe that more data will produce better programs?

AUDIENCE: Universal health coverage with confidentiality would do a lot more for giving a good picture of what is happening in the epidemic.

It also would be interesting to see — you know, there are unique identifiers in Massachusetts, starting in Massachusetts, and they have it in Maryland. It will be interesting if they are going to do a follow-up study, also to see negative impact, if any, and then do some sort of comparison in those states that have gone to name reporting and those that have gone to unique identifiers.

The problem with those systems, though, is that the systems — the Maryland system sucks. Excuse me, but it does. It is dumb. It is also based on using a portion of the Social Security number, which leaves out — oh, who are we forgetting? — oh, immigrants. There are those folks, of course, but they do not get HIV, so we are not really losing anything.

MS. PINOT: And if they do, we do not care, right?

AUDIENCE: We do not care because we are not going to give them health care.

And the system in Massachusetts is actually sort of scary, too, I think.

Plus, any unique identifier system you did manage to put together would do nothing for the contacts. If you are named as a contact, you are on the list. I mean, you are there. There is no way you can manipulate that any other way.

MS. PINOT: I mean, think of the potential for being on a contact list. I mean, I could be ticked off at all of you and put you all on my contact list.

AUDIENCE: But the track-back thing, again, there is this whole sort of suggestion that we need to be able to indefinitely — I mean, because if you are HIV-positive, it will be, as far as we know, it will be a pretty long time, somebody checking in on you. When you take a test, you do not, I think, envision that somebody from the Health Department is going to have the ability to track you and show up at your door — which, frankly, is not much better than a letter, and in fact most of the data that we have —

On the off chance that New York did end up adopting a unique identifier system, what additional obstacles would you see, considering the fact that New York has such a higher seroprevalence compared to Maryland and Massachusetts?

You mean in terms of that it is more difficult to do it?

I mean, in terms of if you are having the last four digits of the Social Security code.

MS. HANSSENS: Well, I never totally understood, first of all, why numbers are viewed as inherently more difficult than letters. I mean, just conceptually I do not understand that. My name is routinely misspelled. It is misspelled here in the program. It is always wrong. There is this sort of notion that it has to be a Social Security number. How many people here have AOL or use the Internet?

And you made up your own name, right, and you fed it in, and in nanoseconds they told you if that name was taken. So if you wanted to be reddog69, and damn, it was taken, you could become reddog70.

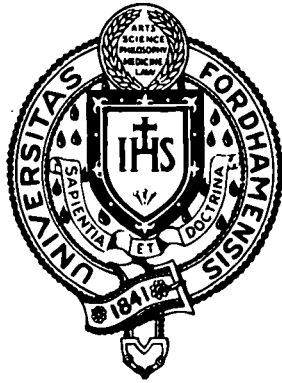
And that is your identifier. You have made up that name. The odds are — even if you are drunk or forgetful — that you will remember your identifier because it is your own special name named after your first love or your dog or whoever. So the likelihood that people will remember that and give that and that can be keyed to that test and subsequent tests is pretty decent. We have the technology.

Health officials, they talk about traditional health methods as if traditional forms of medical treatment — you know, like attaching leeches to your body — somehow have this kind of permanent value. And, in fact, as Matthew explained, this epidemic is different than the ones that we adopted these methods for in the 1920s and 1930s, where you slept with a few folks, you were tested, you were treated, you were rendered noninfectious. If they found out who you were with, they could treat you and render you noninfectious and that was the end of it.

This is very different, but there is no reason why, with the technology that we have, that we need or should rely on a names-based system to track people with HIV, but this is the way it has always been done. They would have to change some things, and bureaucrats hate change.

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**SECTION 60.41 OF THE NEW YORK CRIMINAL
PROCEDURE LAW: THE SEXUAL ASSAULT
REFORM ACT OF 1999 CHALLENGES
MOLINEUX AND DUE PROCESS**

*Brooks Holland**

Governor George Pataki recently submitted a crime bill to the New York State Legislature entitled the Sexual Assault Reform Act of 1999 (the "Act").¹ The Act proposes the addition of section 60.41 to Article 60 of the New York Criminal Procedure Law ("CPL").² CPL section 60.41 would allow prosecutors in sexual assault prosecutions to introduce evidence of a defendant's previous commission of any "offense or offenses of sexual assault . . . on any matter to which it is relevant, *including the defendant's propensity to commit an offense of sexual assault or the credibility of the alleged victim of the sexual assault . . .*"³

CPL section 60.41 is based upon Federal Rules of Evidence ("FRE") 413 and 414,⁴ which Congress enacted in 1994,⁵ and

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1. See S. 1592, 222d Leg. (N.Y. 1999), A. 3062, 222d Leg. (N.Y. 1999). The Senate passed the Act on February 8, 1999. At the time of this Article, the Act remains in the Assembly Committee on Codes, as amended A. 3062-B, 222d Leg. (N.Y. 1999). The Assembly will resume consideration of the Act upon reconvening for the January, 2000, legislative session.

2. See S. 1592, 222d Leg. § 10 (N.Y. 1999); A. 3062-B, 222d Leg. § 10 (N.Y. 1999). The Act also would repeal and redraft section 130 of New York Criminal Penal Law, change several evidence provisions in the CPL, enhance sentencing for sex offenses, modify aspects of the Sex Offender Registration Act and grant the prosecution the right to appeal bail and sentencing decisions.

3. *Id.* (emphasis added).

4. See Sponsor's Memorandum in Support of Bill 3062 (Jan. 28, 1999) (on file with the author).

5. FRE 413(a) provides: "In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant." FED. R. EVID. 413(a). FRE 414 uses similar language, focusing upon child molestation cases. See FED. R. EVID. 414; see also FED. R. EVID. 415 (civil cases). Although FRE 413 and 414 do not refer explicitly to propensity, as does the proposed CPL section 60.41, the legislative history makes clear that Congress intended for FRE 413 and 414 to allow criminal propensity evidence.

would upset almost a century of jurisprudence that exists in New York State under the *Molineux* rule.⁶ This rule, which "forms part of the law of evidence throughout the nation,"⁷ holds that the prosecution may not introduce evidence of prior crimes solely to demonstrate a defendant's propensity to commit crime,⁸ or to bolster the credibility of a witness.⁹ This article considers a question that surely will arise if the New York Legislature passes the Act: whether the *Molineux* rule, precluding criminal propensity evidence, finds its roots in the Due Process Clause of either the United States or New York State Constitution.¹⁰

Part I of this article recites the basic principles of the *Molineux* rule. Part II reviews the U.S. Supreme Court and New York State Court of Appeals authorities that suggest a constitutional basis to

See United States v. Guardia, 135 F.3d 1326, 1329 (10th Cir. 1998); United States v. Meacham, 115 F.3d 1488, 1491 (10th Cir. 1997); United States v. Larson, 112 F.3d 600, 604 (2d Cir. 1997). *See also* Louis M. Natali, Jr. & R. Stephen Stigall, *Are You Going to Arraign His Whole Life?: How Sexual Propensity Evidence Violates the Due Process Clause*, 28 LOY. U. CHI. L.J. 1, 5-9 (1996) (reviewing the legislative history of FRE 413-415); Edward J. Imwinkelried, *Perspectives on Proposed Federal Rules of Evidence 413-415: Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment off on the Right Foot*, 22 FORDHAM URB. L.J. 285 (1995) (analyzing policy issues underlying FRE 413-415).

6. *See* People v. Molineux, 61 N.E. 286 (N.Y. 1901).

7. RICHARD T. FARRELL, PRINCE, RICHARDSON ON EVIDENCE § 4-501, at 175 (11th ed. 1995).

8. *See* Molineux, 61 N.E. at 293-94; People v. Till, 661 N.E.2d 153, 154 (N.Y. 1995); People v. Alvino, 519 N.E.2d 812, 812-13 (N.Y. 1987); People v. Ventimiglia, 420 N.E.2d 59, 62 (N.Y. 1981); People v. Santarelli, 401 N.E.2d 199, 203 (N.Y. 1980); People v. Allweiss, 396 N.E.2d 735, 738 (N.Y. 1979); People v. Fiore, 312 N.E.2d 174, 176 (N.Y. 1974); People v. Bagarozzy, 522 N.Y.S.2d 848, 854 (App. Div. 1987).

9. *See* People v. Vargas, 666 N.E.2d 1357, 1358 (N.Y. 1996); People v. Hudy, 535 N.E.2d 250, 258-59 (N.Y. 1998); People v. Lewis, 506 N.E.2d 915, 917-19 (N.Y. 1987); People v. McKinney, 247 N.E.2d 244, 246 (N.Y. 1969); People v. Ortiz, 554 N.Y.S.2d 107, 109 (App. Div. 1990); People v. Harris, 541 N.Y.S.2d 593, 595 (App. Div. 1989).

10. *See* U.S. CONST. amends. V & XIV; N.Y. CONST. art. I, § 7 (1998). CPL section 60.41 may raise other constitutional issues that this article will not address. For example, this provision may raise Equal Protection claims for its disparate treatment of sex offense defendants over all other classes of defendants. *But see* United States v. Mound, 149 F.3d 799, 801 (8th Cir. 1998); United States v. Enjady, 134 F.3d 1427, 1433-34 (10th Cir. 1998). The Act further would permit the introduction of criminal propensity evidence, without regard to whether the defendant was actually convicted for this conduct. This provision indicates that criminal propensity evidence would remain admissible despite a disposition favorable to the defendant, such as a dismissal on the merits or an acquittal. Although such a provision would not violate federal constitutional law, it may not survive scrutiny under the New York State Constitution. *See* Dowling v. United States, 493 U.S. 342, 347-55 (1990). *Cf.* People v. Acevedo, 508 N.E.2d 665, 669-70 (N.Y. 1987); People v. Santiago, 204 N.E.2d 197, 198 (N.Y. 1964); People v. Correal, 559 N.Y.S.2d 1005, 1007-08 (App. Div. 1990); *cf. also* People v. Bouton, 405 N.E.2d 699, 704 (1980); People v. Colas, 619 N.Y.S.2d 702, 706-08 (App. Div. 1994).

the ban on criminal propensity evidence. Part III addresses two recent opinions from the Tenth Circuit Court of Appeals, upholding FRE 413 and 414 as facially constitutional. Part IV considers intermediate appellate court opinions from the State of California, upholding section 1108 of the California Evidence Code ("CEC"), which California modeled upon FRE 413 and 414. Part V suggests several questions that nonetheless remain regarding the constitutionality of CPL section 60.41, particularly under New York State precedents, focusing upon: (1) the ambiguous historical practice of admitting propensity-type evidence in sexual assault prosecutions; (2) the impact of criminal propensity evidence upon the presumption of innocence and the prosecution's burden of proof, despite its argued probative value; (3) the evidentiary disparity that may exist between application of the proposed CPL section 60.41 and the Rape Shield Act; and (4) the questionable ability of courts to "balance" the prejudice of true criminal propensity evidence. The article concludes with strong reservations about the constitutionality of the proposed CPL section 60.41, especially under the traditions and laws of New York State.

I. THE *MOLINEUX* RULE AND CRIMINAL PROPENSITY EVIDENCE

The *Molineux* rule assumed its title in 1901 from the seminal case of *People v. Molineux*,¹¹ in which the New York State Court of Appeals articulated this well-known rule of evidence: "The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment . . . as aiding the proofs that he is guilty of the crime charged."¹²

The *Molineux* rule acknowledges that evidence of a defendant's prior crimes has the unfair potential of suggesting his or her criminal propensity to commit the charged crime.¹³ Prior crimes evidence further implicates the more general rule of evidence that a defendant's character never constitutes an issue, unless the defendant "opens the door" to such evidence.¹⁴ The *Molineux* rule thus precludes prior crimes evidence, unless the evidence tends to prove a material fact other than criminal propensity, such as identity, in-

11. 61 N.E. 286 (N.Y. 1901).

12. *Id.* at 293.

13. *See id.* at 294-95, 302.

14. *See* *People v. Zackowitz*, 172 N.E. 466, 468 (N.Y. 1930); *cf.* *People v. Kuss*, 299 N.E.2d 249, 252 (N.Y. 1973).

tent, motive, or common scheme or plan.¹⁵ The trial court also must determine that the probative value of the evidence outweighs its potential for prejudice.¹⁶

New York state courts consistently have reaffirmed this rule of evidence.¹⁷ Federal courts also follow this rule,¹⁸ along with virtually every other United States jurisdiction. Congress codified the rule at the federal level under FRE 404¹⁹ and 403.²⁰

II. DUE PROCESS AND THE BAN ON CRIMINAL PROPENSITY EVIDENCE

The admission of prior crimes evidence solely to demonstrate a defendant's criminal propensity, and for no other evidentiary purpose, undoubtedly prejudices a defendant. Nevertheless, "[n]ot all admissions of [prejudicial] evidence are errors of constitutional dimension. The introduction of improper evidence against a defendant does not amount to a violation of due process unless the evidence 'is so extremely unfair that its admission violates funda-

15. See *Molineux*, 61 N.E. at 294. See generally FARRELL, *supra* note 7, § 4-503 to 4-516, at 179-94.

16. See *People v. Alvino*, 519 N.E.2d 808, 812 (N.Y. 1987); *People v. Ely*, 503 N.E.2d 88, 94 (N.Y. 1986); FARRELL, *supra* note 7, § 4-502, at 177-78.

17. See *People v. Cook*, 710 N.E.2d 654, 654-55 (N.Y. 1999); *People v. Blair*, 688 N.E.2d 503, 503-4 (N.Y. 1997); *People v. Till*, 661 N.E.2d 153, 154 (N.Y. 1995); *People v. Ingram*, 522 N.E.2d 439, 441 (N.Y. 1988); *Alvino*, 519 N.E.2d at 812-13; *Ely*, 503 N.E.2d at 93-94; *People v. Ventimiglia*, 420 N.E.2d 59, 62 (N.Y. 1981); *People v. Allweiss*, 396 N.E.2d 735, 738 (N.Y. 1979); *People v. Underwood*, 680 N.Y.S.2d 555, 556 (App. Div. 1998); *People v. Steinberg*, 573 N.Y.S.2d 965, 979 (App. Div. 1991); *People v. Correal*, 559 N.Y.S.2d 1005, 1009-10 (App. Div. 1990).

18. See *Estelle v. McGuire*, 502 U.S. 62, 68-75 (1991); *Spencer v. Texas*, 385 U.S. 554, 562-69 (1967); *Lisenba v. California*, 314 U.S. 219, 227-28 & n.9 (1941); *United States v. Germosen*, 139 F.3d 120, 127 (2d Cir. 1998); see also *Lovely v. United States*, 169 F.2d 386, 389 (4th Cir. 1948) (quoting from "the leading opinion in the celebrated *Molineux* case").

19. FRE 404 reads in pertinent part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404.

20. FRE 403 reads in pertinent part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

mental conceptions of justice.’”²¹ The state “is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”²²

“The primary guide in determining whether the principle in question is fundamental is . . . historical practice.”²³ Moreover, axiomatically, any constitutional right that a criminal defendant possesses by application of the Fourteenth Amendment ranks as “fundamental.”²⁴ Thus, any state rule of evidence or trial procedure that unduly infringes upon an established constitutional right violates due process because “‘substantive due process’ prevents the government from engaging in conduct that . . . interferes with rights ‘implicit in the concept of ordered liberty.’”²⁵

21. *Dunnigan v. Keane*, 137 F.3d 117, 125 (2d Cir. 1998) (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)); *accord Estelle*, 502 U.S. at 72-73; *Spencer*, 385 U.S. at 564.

22. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

23. *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996). *See also Medina v. California*, 505 U.S. 437, 446 (1992) (noting that “[h]istorical practice is probative of whether a procedural rule can be characterized as fundamental”); *Hurtado v. California*, 110 U.S. 516, 528 (1884) (commenting that “however exceptional it may be as tested by definitions and principles of ordinary procedure, nevertheless, this, in substance, has been immemorially the actual law of the land, and therefore, is due process of law”).

24. *See Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (finding that the protections of the Bill of Rights apply to the states through the Fourteenth Amendment, as part of due process, when “of the very essence of a scheme of ordered liberty”).

25. *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Palko*, 302 U.S. at 325). *Cf. also Reno v. Flores*, 507 U.S. 292, 301-02 (1995) (finding that “the Fifth and Fourteenth Amendments’ guarantee of ‘due process of law’ . . . include[s] a substantive component, which forbids the government to infringe certain ‘fundamental’ liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest”). *See e.g., Francis v. Franklin*, 471 U.S. 307, 313 (1985) (holding that evidentiary presumption violates due process if it relieves the prosecution of its burden of proof on any essential element); *Doyle v. Ohio*, 426 U.S. 610, 618 (1976) (finding that for a prosecutor to comment upon a defendant’s post-*Miranda* silence is “fundamentally unfair and a deprivation of due process”); *Pate v. Robinson*, 383 U.S. 375, 385 (1966) (noting that a trial of an incompetent defendant violates due process because an incompetent defendant cannot assist in his or her own defense); *Agard v. Portuondo*, 117 F.3d 696, 707-14 (2d Cir. 1997) (determining that the prosecutor’s “generic” commentary on the defendant’s advantageous presence in courtroom before testifying violates due process by infringing upon the defendant’s rights of confrontation and to testify); *People v. Shapiro*, 409 N.E.2d 897, 904-06 (N.Y. 1980) (finding that a prosecutor violates due process by granting immunity to state’s witnesses but withholding immunity from a defendant’s exculpatory witnesses and intimidating them from testifying for fear of perjury charges); *People v. Conyers*, 400 N.E.2d 342, 346-49 (N.Y. 1980) (holding that a prosecutor violates due process by commenting on a defendant’s post-arrest silence, even without *Miranda* warnings, because it undermines the right against self-incrimina-

Some circumstances certainly exist where the admission of criminal propensity evidence could prejudice a defendant so grossly as to violate due process, as applied under the facts of a particular case. If, however, "no set of circumstances exist under which the Act would be valid,"²⁶ the law in question violates due process on its face.²⁷ The question thus arises as to whether a statute, such as CPL section 60.41, would violate a defendant's due process rights by permitting criminal propensity evidence.

A. The U.S. Supreme Court and Criminal Propensity Evidence

The U.S. Supreme Court has not addressed the issue of whether criminal propensity evidence proves so fundamentally unfair as to violate due process.²⁸ In addressing the general policy of precluding prior crimes evidence, however, Supreme Court Justices have written of criminal propensity evidence in extremely strong and, on occasion, constitutional terms. These discussions do not just reveal a long-standing tradition of criminal propensity evidence preclusion, but also a concern that this evidence undermines the constitutionally-mandated presumption of innocence²⁹ and requirement that the prosecution prove guilt beyond a reasonable doubt.³⁰

For example, as long ago as 1892 in *Boyd v. United States*,³¹ the Supreme Court reversed a defendant's conviction because the trial court admitted evidence of uncharged robberies that the defendants allegedly committed prior to the charged murder.³² While the Court noted the relevance of prior crimes evidence in some cases,³³ the Court concluded:

Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and

tion); *People v. Roman*, 324 N.E.2d 885, 886 (N.Y. 1975) (commenting on how a trial court violates due process by forcing a defendant unnecessarily to appear at trial in prison garb, because such a presentation undermines the presumption of innocence).

26. *Salerno*, 481 U.S. at 745.

27. *See id.*

28. *See Estelle v. McGuire*, 502 U.S. 62, 75 n.5 (1991).

29. *See Estelle v. Williams*, 425 U.S. 501, 503 (1976).

30. *See In re Winship*, 397 U.S. 358, 364 (1970); *see also People v. Kohl*, 527 N.E.2d 1182, 1185 (N.Y. 1988).

31. 142 U.S. 450 (1892).

32. *See id.* at 454.

33. *See id.*

who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime. . . . However depraved in character, and however full of crime their past lives may have been, the defendants were *entitled to be tried upon competent evidence, and only for the offense charged*.³⁴

In 1948, the Supreme Court again discussed the policy of precluding prior crimes and bad character evidence to prove a defendant's propensity to commit a charged crime. Specifically, in *Michelson v. United States*,³⁵ the Court noted:

Courts that follow the *common-law tradition* almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a *probability of his guilt* The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. . . . [I]t is said to weigh too much with the jury and to so overpersuade them as to *prejudge* one with a bad general record and *deny him a fair opportunity to defend against a particular charge*.³⁶

One year after *Michelson*, the Supreme Court in *Brinegar v. United States*³⁷ explained why relevant evidence of prior crimes by a defendant, admissible at a pre-trial probable cause hearing, nevertheless may prove inadmissible on the question of guilt at trial. This discussion by the Supreme Court explicitly incorporates fundamental concepts of due process:

Much evidence of real and substantial probative value goes out on considerations irrelevant to its probative weight but relevant to possible misunderstanding or misuse by the jury. . . . Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard [people] from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.³⁸

34. *Id.* at 458 (emphasis added).

35. 335 U.S. 469 (1948).

36. *Id.* at 475-76 (emphasis added) (citations omitted). *See also id.* at 472-75 nn.3-6 (citing theories on the admission of character evidence of prior bad acts).

37. 338 U.S. 160 (1949).

38. *Id.* at 173-74.

In the 1967 decision in *Spencer v. Texas*,³⁹ then-Chief Justice Earl Warren, with Justice Abe Fortas, concurring in part and dissenting in part, placed the policy of precluding criminal propensity evidence squarely in constitutional terms:

[O]ur decisions . . . as well as decisions by courts of appeals and of state courts, suggest that *evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause*. Evidence of prior convictions has been forbidden *because it jeopardizes the presumption of innocence of the crime currently charged*. A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a "bad man," without regard to his guilt of the crime currently charged. . . . Recognition of *the prejudicial effect of prior-convictions evidence has traditionally been related to the requirement of our criminal law that the State prove beyond a reasonable doubt the commission of a specific criminal act*. . . . Because of the possibility that the generality of the jury's verdict might mask a finding of guilt based on an accused's past crimes or unsavory reputation, state and federal courts have consistently refused to admit evidence of past crimes except in circumstances where it tends to prove something other than general criminal disposition.⁴⁰

In the 1991 opinion of *Estelle v. McGuire*,⁴¹ two current Supreme Court Justices, Sandra Day O'Connor, with John Paul Stevens concurring in part and dissenting in part, reiterated the concerns presented in *Spencer* by Chief Justice Warren and Justice Fortas.⁴² In *Estelle*, the Ninth Circuit concluded that admission of evidence of prior child abuse as criminal propensity evidence in the defendant's trial for murdering his daughter, violated due process.⁴³ Contrary to the Ninth Circuit, however, the Supreme Court believed that the prior abuse evidence demonstrated intent and that the trial

39. 385 U.S. 554 (1967) (upholding convictions under Texas "recidivist" statute, under which the indictment charged and the trial court admitted the defendants' prior convictions, though the trial judge instructed the jury not to consider the convictions on the question of guilt).

40. *Id.* at 573-75 (Warren, C.J., concurring in part and dissenting in part) (emphasis added) (citations omitted).

41. 502 U.S. 62 (1991).

42. *See id.* at 75-80.

43. *See McGuire v. Estelle*, 902 F.2d 749 (9th Cir. 1990), *rev'd*, 502 U.S. 62 (1991). The Ninth Circuit has adhered to its position in *McGuire* that criminal propensity evidence violates the Due Process Clause. *See Henry v. Estelle*, 33 F.3d 1037 (9th Cir. 1994), *rev'd on other grounds sub nom. Duncan v. Henry*, 513 U.S. 364 (1995); *McKinney v. Rees*, 993 F.2d 1378, 1385-86 (9th Cir. 1993).

court did not give the jury a propensity instruction.⁴⁴ The majority of the Supreme Court thus declined to rule “on whether a state law would violate the Due Process Clause if it permitted the use of ‘prior crimes’ evidence to show propensity to commit a charged crime.”⁴⁵

Justices O’Connor and Stevens agreed with the majority that the prior abuse evidence demonstrated intent. But these Justices sided with the Ninth Circuit in its view that the trial court’s instructions allowed the jury to consider the evidence for propensity purposes in deciding whether the defendant inflicted the fatal injuries.⁴⁶ Justices O’Connor and Stevens framed this erroneous use of the prior abuse evidence in constitutional terms, focusing upon the principle that “prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime.”⁴⁷ These two Justices thus analogized criminal propensity evidence to a mandatory evidentiary presumption, which “may have relieved the State of its burden of proving the identity of [the] murderer beyond a reasonable doubt[.]”⁴⁸

The Supreme Court addressed the impropriety of criminal propensity evidence as recently as 1997, in *Old Chief v. United States*.⁴⁹ In *Old Chief*, the Court discussed the concept of “unfair prejudice” under FRE 403.⁵⁰ The Court opined that “[s]uch improper grounds certainly include . . . generalizing a defendant’s earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily).”⁵¹ The Court quoted extensively from *Michelson v. United States*⁵² in support of this proposition,⁵³ and noted that “Rule of Evidence 404(b) reflects this common-law tradition by addressing

44. See *McGuire*, 502 U.S. at 68-75.

45. *Id.* at 75 n.5.

46. See *id.* at 76-78 (O’Connor, J., concurring).

47. *Id.* at 78 (quoting *Francis v. Franklin*, 471 U.S. 307, 313 (1985)) (citing *Sandstrom v. Montana*, 442 U.S. 510, 520-24 (1979); *Patterson v. New York*, 432 U.S. 197, 210, 215 (1977)).

48. *Id.* at 76.

49. 519 U.S. 172 (1997) (holding that a district court abuses its discretion under FRE 403 if it spurns a defendant’s offer to concede prior conviction and instead admits full record of prior conviction).

50. See *id.* at 180.

51. *Old Chief*, 519 U.S. at 180-81.

52. 335 U.S. 469, 475-76 (1948).

53. See *Old Chief*, 519 U.S. at 181.

propensity reasoning directly. . . . There is, accordingly, *no question* that propensity evidence would be an 'improper basis' for conviction[.]"⁵⁴

From this lead by the Supreme Court, lower federal courts similarly have written on the preclusion of criminal propensity evidence in strong, tradition-laden terms. For example, in the oft-cited 1948 opinion in *Lovely v. United States*,⁵⁵ the Fourth Circuit Court of Appeals noted:

The rule which . . . forbids the introduction of evidence of other offenses having no reasonable tendency to prove the crime charged, except in so far as they may establish a criminal tendency on the part of the accused, is not a mere technical rule of law. It arises out of the *fundamental demand for justice and fairness which lies at the basis of our jurisprudence*.⁵⁶

Other federal courts have concluded that "[a] concomitant of the *presumption of innocence* is that a defendant must be tried for what he did, not for who he is."⁵⁷

This body of federal jurisprudence consequently establishes a long-standing "common law tradition,"⁵⁸ by the Supreme Court and the lower federal courts, precluding the use of prior crimes evidence solely to demonstrate a defendant's criminal propensity. This common law tradition reflects, if not explicitly relies upon, the established constitutional principles that the prosecution must prove guilt beyond a reasonable doubt, and that a defendant is presumed innocent.

54. *Id.* at 181-82 (emphasis added) (quoting FED. R. EVID. 404(b)).

55. 169 F.2d 386 (4th Cir. 1948) (holding that in a prosecution of a rape case where the defendant admitted intercourse, evidence of prior rape by defendant was not admissible on question of identity).

56. *Id.* at 389 (emphasis added); *cf.* *United States v. Simon*, 842 F.2d 552, 556 (1st Cir. 1988) (Torruella, J., concurring) (referring to "the prohibition against the introduction of 'evidence of other crimes . . . to prove the character of a person in order to show action in conformity therewith,' mandated by FED. R. EVID. 404(b), as well as *due process*" (emphasis added) (quoting *Lovely*, 169 F.2d at 389)).

57. *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977) (emphasis added); *cf.* *Henry v. Estelle*, 33 F.3d 1037 (9th Cir. 1994), *rev'd on other grounds sub nom. Duncan v. Henry*, 513 U.S. 364 (1995); *McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993).

58. *See Old Chief*, 519 U.S. at 181-82; *cf.* *Montana v. Egelhoff*, 518 U.S. 37, 41-44 (1996); *Medina v. California*, 505 U.S. 437, 446 (1992); *Hurtado v. California*, 110 U.S. 516, 528 (1884).

B. The New York Court of Appeals and the *Molineux* Rule

The New York State Court of Appeals similarly has rooted the prohibition of criminal propensity evidence in a long-standing common law tradition that conjures the same constitutional guarantees of due process. In 1901, the court of appeals explained the rationale for this rule in unambiguous constitutional terms in *People v. Molineux*.⁵⁹

This rule, so *universally recognized* and so *firmly established* in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Carta. It is the product of the same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the *presumption of innocence until he has been proven guilty beyond a reasonable doubt*.⁶⁰

The court thus foreshadowed Justices O'Connor and Stevens' concerns in *Estelle*, that "[i]t is not proper to raise a *presumption of guilt* on the ground that having committed one crime, the depravity it exhibits makes it likely he would commit another."⁶¹

In 1930, the court of appeals, in an opinion by Judge Benjamin Cardozo, further acknowledged the significance and tradition of the rule precluding criminal propensity evidence in New York jurisprudence:

If a murderous propensity may be proved against a defendant as one of the tokens of his guilt, a rule of criminal evidence, *long believed to be of fundamental importance for the protection of the innocent*, must be first declared away. Fundamental hitherto has been the rule that character is never an issue in a criminal prosecution unless the defendant chooses to make it one.⁶²

Since *Molineux*, the court of appeals has repeated its concern that criminal propensity evidence, by generating presumptions of guilt, will prompt a conviction when a jury otherwise might entertain a reasonable doubt of a defendant's actual guilt. For instance,

59. 61 N.E. 286 (N.Y. 1901) (reversing the defendant's first degree murder conviction because the admission of evidence at trial that the defendant committed a previous murder by poisoning was not relevant to prove that the defendant committed the present crime).

60. *Id.* at 293-94 (emphasis added).

61. *Id.* at 294 (emphasis added) (quoting *Shaffner v. Commonwealth*, 72 Pa. 60, 65 (1872)).

62. *People v. Zackowitz*, 174 N.E. 466, 468 (N.Y. 1930) (emphasis added).

in 1981 in *People v. Ventimiglia*,⁶³ the court explained that “[t]he rule excluding evidence of uncharged crimes . . . is intended to eliminate the danger that a jury may convict to punish the person portrayed by the evidence before them *even though not convinced beyond a reasonable doubt of his guilt* of the crime of which he is charged.”⁶⁴

The lower New York courts have expressed the same concerns as the court of appeals about the impact of criminal propensity evidence upon the prosecution’s burden of proof and the defendant’s presumption of innocence. In 1994, for example, the First Department noted in *People v. Colas*⁶⁵ that “[E]vidence of uncharged crimes is excluded because jurors will tend to ‘believe in the guilt of an accused person when it is known or suspected that he has previously committed a similar crime’ . . . and *so tend to convict upon lesser proof than required*.”⁶⁶

In *People v. Celestino*,⁶⁷ the First Department, again in 1994, referred to the “fundamental principal [*sic*] that evidence of uncharged crimes should not be admitted for the sole purpose of demonstrating that the defendant was predisposed to commit the crime charged.”⁶⁸ The court explained the rationale for this princi-

63. 420 N.E.2d 59 (N.Y. 1981) (weighing the probative value of defendants’ statements as to pre-meditation of murder and plan of conspiracy, against prejudice resulting from implication that defendants committed prior murders).

64. *Id.* at 62 (emphasis added); *see also* *People v. Lewis*, 506 N.E.2d 915, 917 (N.Y. 1987) (holding that prior crime evidence “is usually excluded because it may (1) require defendant to meet a charge of which he had no notice; (2) raise collateral issues and direct the attention of the jury away from the crime charged; or (3) result in the proof of the prior offenses being taken by the jury as justifying a condemnation of the defendant irrespective of his guilt of the offenses charged”); *People v. Ely*, 503 N.E.2d 88, 94 (N.Y. 1986) (quoting *Ventimiglia*, 420 N.E.2d at 62); *People v. Robinson*, 503 N.E.2d 485, 488 (N.Y. 1986) (finding that “[t]he *Molineux* rule excludes evidence of uncharged crimes when the danger that the jury may, on the basis of such testimony, convict, even though not convinced of defendant’s guilt of the crime charged beyond a reasonable doubt, is not overcome by the probative value of the prior crime evidence in relation to the crime now charged”); *People v. Allweiss*, 396 N.E.2d 735, 738 (N.Y. 1998) (commenting that “[t]he rule . . . is meant to eliminate the risk that a jury, not fully convinced of the defendant’s guilt of the crime charged may, nevertheless, find against him because his conduct generally merits punishment”); *cf.* *People v. Fiore*, 312 N.E.2d 174, 176-77 (N.Y. 1974); *People v. Condon*, 257 N.E. 2d 615 at 616-17(1970).

65. 619 N.Y.S.2d 702 (App. Div. 1994) (holding that cumulative effect of improper evidence along with weakness of the identification required a new trial).

66. *Id.* at 705 (emphasis added) (quoting *Molineux*, 61 N.E. at 302).

67. 615 N.Y.S.2d 346 (App. Div. 1994) (finding that the trial court should not have admitted evidence of uncharged crimes without weighing probative value against potential for prejudice).

68. *Id.* at 349.

ple, stating that the “risk is that a jury, not convinced of defendant’s guilt, may nevertheless find against him because his conduct generally merits punishment or because of his bad character.”⁶⁹

Over virtually the same century of jurisprudence, therefore, the New York Court of Appeals and lower courts have developed a common law tradition precluding the use of prior crimes evidence to demonstrate criminal propensity. This tradition echoes, if not exceeds, the U.S. Supreme Court’s concerns about the effect that criminal propensity evidence has upon the prosecution’s constitutionally-mandated burden of proof and the defendant’s constitutional entitlement to a presumption of innocence.

III. FEDERAL COURTS UPHOLD FRE 413 AND 414

After the passage of FRE 413⁷⁰ and 414⁷¹ in 1994, the lower federal courts began to consider and admit criminal propensity evidence in sexual assault prosecutions. So far, the Second Circuit Court of Appeals, which includes New York State in its jurisdiction, has not ruled upon the constitutionality of FRE 413 or 414 in sexual assault prosecutions. In 1998, however, the Tenth Circuit Court of Appeals adjudged the facial constitutionality of both FRE 413 and 414, in the cases of *United States v. Enjady*⁷² and *United States v. Castillo*.⁷³

A. *United States v. Enjady* and FRE 413

In *United States v. Enjady*, the Tenth Circuit considered, *inter alia*, a facial due process challenge to FRE 413. In *Enjady*, the defendant and the complainant spent the late morning and afternoon drinking with other people at the complainant’s house.⁷⁴ When the complainant passed out or fell asleep, everyone left.⁷⁵ The defendant returned, however, and the complainant alleged that she awoke to find the defendant raping her.⁷⁶ The defendant initially denied having sex with the complainant to the arresting

69. *Id.*

70. *See supra* note 5.

71. *See id.*

72. 134 F.3d 1427 (10th Cir. 1998).

73. 140 F.3d 874 (10th Cir. 1998).

74. *See Enjady*, 134 F.3d at 1429.

75. *See id.*

76. *See id.*

detective.⁷⁷ After DNA testing linked the defendant to rape kit evidence, however, the defendant asserted a consent defense.⁷⁸

During the trial, pursuant to FRE 413, the court permitted another woman to testify that the defendant raped her two years earlier, "to show propensity and to rebut defendant's statement to [the arresting detective]" that he "wouldn't ever do something like this to anyone."⁷⁹ As a result, the jury convicted the defendant of aggravated sexual abuse.⁸⁰

The Tenth Circuit acknowledged that "Rule 413 raises a serious constitutional due process issue,"⁸¹ and identified three due process arguments against criminal propensity evidence: (1) that the prohibition of propensity evidence has existed for so long that it enjoys "settled usage";⁸² (2) that propensity evidence undermines the prosecution's burden of proof by creating a presumption of guilt;⁸³ and (3) that propensity evidence erodes the presumption of innocence by licensing the fact-finder to punish a defendant's past acts.⁸⁴ Nevertheless, the Tenth Circuit upheld FRE 413 as constitutional.

In upholding FRE 413, the Tenth Circuit relied on two main factors. First, the court discussed that when passing FRE 413 Congress intended to minimize the "unresolvable swearing matches"⁸⁵ that occur in many sexual assault cases, particularly when the defendant proceeds with a consent defense.⁸⁶ Indeed, by

77. *See id.*

78. *See id.*

79. *Id.*

80. *See Enjady*, 134 F.3d 1427, 1429 (10th Cir. 1998).

81. *Id.* at 1430.

82. *Id.* at 1432 (citing *Hurtado v. United States*, 110 U.S. 516, 528 (1884)). *See also Montana v. Egelhoff*, 518 U.S. 37, 41-44 (1996) (plurality opinion) (using historical practice as the primary factor in determining whether due process guarantees require admission of certain evidence).

83. *See id.* at 1432 (citing *Estelle v. McGuire*, 502 U.S. 62, 78 (1991) (O'Connor, J., concurring)).

84. *See id.* (citing M. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 77-82 (1995)).

85. *Id.* at 1431 (quoting 140 CONG. REC. S129901-01, S12990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole); 140 CONG. REC. H8968-01, H8992 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari)); *see also* Paul G. Cassell & Evan S. Strassberg, *Evidence of Repeated Acts of Rape and Child Molestation: Reforming Utah Law to Permit the Propensity Inference*, 1998 UTAH L. REV. 145, 165-167 (1998); David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 20-21 (1994).

86. *Cf.* Roger C. Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases*, 22 FORDHAM URB. L.J. 271, 275-77 (1995) (describing the "intrusive and embarrassing" ordeal a complainant may experience when a defendant presents a consent defense).

analogizing criminal propensity evidence to the use of prior crimes evidence to impeach a defendant's testimony, the court wrote that "[i]t is no great stretch" to suggest that use of the evidence to "bolster[] the credibility of the victim" amounts to "a purpose for the evidence other than propensity."⁸⁷ The court thus deferred to Congress' judgment in identifying the unique probative value of sexual assault propensity evidence, and the fact that "Congress has the ultimate power over enactment of [evidentiary] rules."⁸⁸ Second, the court relied upon the safeguards that FRE 403 provides in the application of FRE 413, without which "we would hold the rule unconstitutional,"⁸⁹ along with the notice requirement under FRE 413(b), which "protects against surprise and allows the defendant to investigate and prepare cross-examination."⁹⁰

B. *United States v. Castillo* and FRE 414

Shortly after *Enjady*, the Tenth Circuit found FRE 414 facially constitutional in *United States v. Castillo*.⁹¹ In *Castillo*, the defendant faced four counts of sexual abuse concerning two of his five daughters.⁹² At trial, under FRE 414, the court permitted one daughter to testify to one uncharged act of sexual abuse, and the other daughter to testify to two uncharged acts of sexual abuse.⁹³ The jury convicted the defendant of four counts of sexual abuse and four counts of sexual abuse of a minor.⁹⁴

The court in *Castillo* acknowledged that Supreme Court and even Tenth Circuit precedent suggest a constitutional dimension to

87. *Enjady*, 134 F.3d at 1433.

88. *Id.* at 1432.

89. *Id.* at 1433. The Tenth Circuit noted that:

Rule 403 balancing in the sexual assault context requires the court to consider: "1) how clearly the prior act has been proved; 2) how probative the evidence is of the material fact it is admitted to prove; 3) how seriously disputed the material fact is; and 4) whether the government can avail itself of any less prejudicial evidence. When analyzing the probative dangers, a court considers: 1) how likely is it such evidence will contribute to an improperly-based jury verdict; 2) the extent to which such evidence will distract the jury from the central issues of the trial; and 3) how time consuming it will be to prove the prior conduct."

Id. (quoting Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 59 n.16 (1995)).

90. *Id.*

91. 140 F.3d 874 (10th Cir. 1998).

92. *See id.* at 878.

93. *See id.* at 878-79.

94. *See id.* at 878.

the ban on criminal propensity evidence.⁹⁵ The court also noted that “[t]he ban on propensity evidence dates back to English cases of the 17th century,” and “courts in the United States have enforced the ban throughout our nation’s history.”⁹⁶ The court thus “assume[d] for purposes of this case, without deciding the matter, that because of the ban’s lineage and significance in our jurisprudence, it is a protection that the Due Process Clause guarantees.”⁹⁷

The *Castillo* court, however, noted that “the historical record regarding evidence of one’s sexual character is much more ambiguous.”⁹⁸ Specifically, the court discussed the historical acceptance of sexual propensity-type evidence under the “lustful disposition” rule.⁹⁹ The “lustful disposition” rule allows evidence of prior sexual misconduct by the defendant in certain sexual assault prosecutions to demonstrate the defendant’s sexual “disposition.”¹⁰⁰ “Many of the cases in this area of the law concern sexual offenses against children,”¹⁰¹ the court noted, the subject of FRE 414.

The court further opined that the prejudice accompanying the admission of this criminal propensity evidence is no worse than that prejudice accompanying prior crimes evidence under its traditional use, with both chancing that the jury may convict because of the defendant’s past conduct.¹⁰² Finally, as in *Enjady*, the court relied upon the procedural protections that exist under FRE 403, which “should always result in the exclusion of evidence that has such a prejudicial effect” as to prove fundamentally unfair to a defendant.¹⁰³

95. See *id.* at 880 (citing *Spencer v. Texas*, 385 U.S. 554, 571 (1967) (Warren, C.J., concurring in part and dissenting in part); *Brinegar v. United States*, 338 U.S. 160, 173-74 (1949); *Michelson v. United States*, 335 U.S. 469, 475-76 (1948); *Tucker v. Makowski*, 883 F.2d 877, 881 (10th Cir. 1989) (finding that the improper admission of evidence of prior crimes “raises a due process issue”); *United States v. Biswell*, 700 F.2d 1310, 1319 (10th Cir. 1983) (holding that the “[i]mproper admission of a prior crime or conviction, even in the face of other evidence amply supporting the verdict, constitutes plain error impinging upon the fundamental fairness of the trial itself”); *United States v. Burkhart*, 458 F.2d 201, 205 (10th Cir. 1972) (en banc) (noting that “the exclusion of evidence of prior acts ‘is not a simple evidentiary [issue], but rather goes to the fundamental fairness and justice of the trial itself’”).

96. *Castillo*, 140 F.3d at 881.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* For a detailed review of the “lustful disposition” exception, see *infra* notes 160-210 and accompanying text.

101. *Id.*

102. See *id.* at 882.

103. See *id.* at 883.

Enjady and *Castillo* thus reserve any constitutional limitations upon FRE 413 and 414 to a case-by-case analysis because some "set of circumstances exist under which the Act would be valid."¹⁰⁴ At least two other federal appellate courts have relied upon the Tenth Circuit's reasoning to find FRE 413 and 414 constitutional.¹⁰⁵

IV. CALIFORNIA COURTS UPHOLD EVIDENCE CEC SECTION 1108

In 1995, California passed CEC section 1108, which the California Legislature modeled upon FRE 413 and 414.¹⁰⁶ CEC section 1108 exempts evidence of prior sexual assaults from the preclusion of character evidence that exists in California under CEC section 1101, so long as the evidence meets the prejudice-balancing test of CEC section 352, California's analogue to FRE 403.¹⁰⁷ Two of California's intermediate courts of appeals have upheld CEC section 1108 against facial due process challenges, in *People v. Fitch*¹⁰⁸ and *People v. Falsetta*.¹⁰⁹

A. *People v. Fitch*

In *People v. Fitch*, the defendant and the complainant, who met at their apartment complex in Sacramento, spent an evening together, planning to go to a local carnival.¹¹⁰ After meeting with one of the complainant's friends, buying and smoking some marijuana and buying food at a Taco Bell, the defendant and the complainant stopped their car at a park for the defendant to use the restroom.¹¹¹ At the stop, the defendant allegedly became aggres-

104. *United States v. Salerno*, 481 U.S. 739, 745 (1991). See also *United States v. McHorse*, 1999 U.S. App. LEXIS 11269, at *9-11 (10th Cir. June 3, 1999); *United States v. Charley*, 1999 U.S. App. LEXIS 8711, at *15-19 (10th Cir. Aug. 27, 1999).

105. See *United States v. Mound*, 149 F.3d 799, 801 (8th Cir. 1998) (citing *United States v. Enjady*, 134 F.3d 1427 (10th Cir. 1998)); see also *United States v. Wright*, 48 M.J. 896, 899-901 (U.S.A.F. Ct. Crim. App. 1998) (addressing MIL. R. EVID. 413); *United States v. Mann*, 145 F.3d 1347 (10th Cir. 1998) (unpublished opinion), reported in No. 96-2283, 1998 U.S. App. LEXIS 7459 (10th Cir. Apr. 13, 1998).

106. See *People v. Soto*, 75 Cal. Rptr. 2d 605, 613 (Cal. App. 1998).

107. CEC section 1108(a) provides in pertinent part: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." CAL. EVID. CODE § 1108(a) (West 1999).

108. 63 Cal. Rptr. 2d 753 (Cal. App. 1997).

109. 75 Cal. Rptr. 2d 232 (Cal. App. 1998).

110. 63 Cal. Rptr. 2d at 755.

111. See *id.*

sive with the complainant and raped her.¹¹² Afterwards, the defendant took the complainant home, and “invited her and her daughter to brunch the next morning.”¹¹³

Upon arriving at home, the complainant reported the rape to her friend, and the complainant’s sister called the police.¹¹⁴ DNA testing of semen samples taken from the complainant revealed a high likelihood of the defendant as the source.¹¹⁵ The defendant originally told the police, after his arrest, that he did not have sex with the complainant.¹¹⁶ At trial, however, the defendant presented a consent defense.¹¹⁷ Witnesses at trial described the complainant as looking “happy and not scared” that night.¹¹⁸ “One witness testified [the complainant] told her ‘I’m going to get mine tonight,’ which she interpreted as meaning [the complainant] intended to have sex with defendant.”¹¹⁹

The trial court permitted the prosecution to introduce evidence regarding the defendant’s prior conviction for raping another woman in 1990 pursuant to CEC section 1108.¹²⁰ The jury convicted the defendant of forcible rape.¹²¹

In addressing the defendant’s due process challenge to CEC section 1108 in *Fitch*, the California Court of Appeals, like the Tenth Circuit in *Castillo*, first asserted that historically, the “ambivalence about prohibiting character evidence is greatest in sex offense cases.”¹²² The *Fitch* court noted further: “Courts have liberally interpreted evidence rules to permit the admission of uncharged sexual misconduct under the rubric of motive, identity and common plan, or more directly admitted it under an exception known as the ‘lustful disposition’ rule.”¹²³

The *Fitch* court thus rejected the defendant’s reliance upon the 1993 Ninth Circuit Court of Appeals’ decision in *McKinney v.*

112. *See id.*

113. *Id.*

114. *See id.*

115. *See id.*; see also Robert W. Schumacher II, Note, *Expanding New York’s DNA Database: The Future of Law Enforcement*, 26 FORDHAM URB. L.J. 1635 (1999) (discussing the discriminatory power of DNA evidence).

116. *Fitch*, 63 Cal. Rptr. 2d at 756.

117. *See id.*

118. *Id.*

119. *Id.*

120. *See id.* at 755.

121. *See id.*

122. *Id.* at 758.

123. *Id.*

Rees,¹²⁴ which tied due process considerations to the historical ban on character evidence.¹²⁵ Instead, the court quoted extensively from the U.S. Supreme Court opinion in *Marshall v. Lonberger*,¹²⁶ concluding: "In short, the common law . . . implicitly recognized that any unfairness resulting from admitting prior convictions was more often than not balanced by its probative value and permitted the prosecution to introduce such evidence without demanding any particularly strong justification."¹²⁷

The court thus deferred to "the change in policy" by the legislature:

Our elected Legislature has determined that the policy considerations favoring the exclusion of evidence of uncharged sexual offenses are outweighed in criminal sexual offense cases by the policy considerations favoring the admission of such evidence. The Legislature has determined the need for this evidence is "critical" given the serious and secretive nature of sex crimes and the often resulting *credibility contest* at trial.¹²⁸

The *Fitch* court did recognize that "[t]he Due Process Clause requires proof beyond a reasonable doubt of every fact necessary to constitute the charged crime."¹²⁹ But, the court concluded:

While the admission of evidence of the uncharged sex offense may have added to the evidence the jury could consider as to defendant's guilt, it did not lessen the prosecution's burden to prove his guilt beyond a reasonable doubt. "The courts specifically addressing the question of Winship's application to uncharged misconduct uniformly hold that the admission of uncharged misconduct does not undermine Winship."¹³⁰

Further, just as the Tenth Circuit relied upon FRE 403, the court in *Fitch* relied upon CEC section 352's prejudice-balancing provision to protect a defendant's right to a fair trial in individual cases. "With this check upon the admission of evidence of uncharged sex

124. 993 F.2d 1378 (9th Cir. 1993) (holding that admission of other acts evidence, only probative of defendant's character, deprived defendant of a fair trial and violated his right to due process).

125. See *id.* at 1385-86; see also *Fitch*, 63 Cal. Rptr. 2d at 758.

126. 459 U.S. 422 (1983) (upholding trial court's limiting instruction regarding the jury's consideration of defendant's prior conviction).

127. *Fitch*, 63 Cal. Rptr. 2d at 758 (quoting *Lonberger*, 459 U.S. at 438 n.6).

128. *Id.* at 759 (emphasis added) (citation omitted). Cf. *United States v. Enjady*, 134 F.3d 1427, 1431 (10th Cir. 1998) (characterizing the contests as "unresolvable swearing matches").

129. *Fitch*, 63 Cal. Rptr. 2d at 759.

130. *Id.* at 759-60 (quoting EDWARD J. IMWINKELREID, UNCHARGED MISCONDUCT EVIDENCE § 10.11, at 21 (1986) (citation omitted)).

offenses in prosecutions for sex crimes, we find that CEC section 1108 does not violate the Due Process Clause.”¹³¹

B. *People v. Falsetta*

In *People v. Falsetta*,¹³² the defendant allegedly picked up the sixteen year-old complainant in his car.¹³³ The defendant then allegedly drove with the complainant, proclaiming, “We’re going on a date.”¹³⁴ The defendant eventually pulled into a darkened parking lot and attacked the complainant in his car.¹³⁵ At one point, the defendant allegedly placed his penis near the complainant’s mouth, ordering her to “Suck it.”¹³⁶ The complainant instead bit the penis.¹³⁷ The complainant next used a ruse to convince the defendant to drive her to a gas station, where the complainant told a customer, “some guy tried to rape me.”¹³⁸

At the police station later that night, the complainant identified someone other than the defendant from photographs.¹³⁹ The police exonerated that person, however, in part because he had no injury to his penis.¹⁴⁰ Several weeks later, the defendant was arrested for a parole violation.¹⁴¹ The police placed the defendant in a lineup because his residence and car matched information that the complainant provided, and because he had what appeared to constitute a small injury on his penis.¹⁴² The complainant identified the defendant in the lineup, and also identified his car.¹⁴³

At trial, the defendant called the gas station attendant, who testified that he overheard the complainant say to the customer, “my boyfriend beat me up, it’s the third time it’s happened.”¹⁴⁴ The prosecution presented rebuttal testimony,¹⁴⁵ and the trial court also permitted the prosecution to introduce in its direct case the defendant’s two prior convictions for rapes of strangers, under CEC

131. *Id.* at 760.

132. 75 Cal. Rptr. 2d 232 (Cal. Ct. App. 1998).

133. *See id.* at 235.

134. *Id.* at 236.

135. *See id.*

136. *Id.*

137. *See id.*

138. *Id.*

139. *See id.*

140. *See id.*

141. *See id.*

142. *See id.*

143. *See id.*

144. *Id.* at 237.

145. *See id.*

section 1108.¹⁴⁶ The jury convicted the defendant of several counts, including forcible oral copulation.¹⁴⁷

The *Falsetta* court similarly rejected the defendant's argument that "section 1108 violates due process because the admission of prior bad acts evidence to show propensity offends a fundamental, historical principle of justice."¹⁴⁸ The court noted that in *Fitch*, "[t]he Third Appellate District . . . examined this very argument and disagreed."¹⁴⁹ Rather, the Court found, "[a]t least 29 states and the District of Columbia 'use a special exception to the character evidence rule just for sex offenders called the 'lustful disposition' rule.'"¹⁵⁰

The *Falsetta* court thus also rejected the Ninth Circuit Court of Appeals' analysis in *McKinney*, because *McKinney* "failed to recognize that most states now permit the admission of uncharged sexual misconduct evidence in sex crime prosecutions in order to prove 'lustful disposition.'"¹⁵¹ Accordingly, the court found "unpersuasive [the defendant's] historical argument that courts have traditionally barred evidence of prior acts of sexual misconduct in a sex offense case to show disposition."¹⁵²

Moreover, the *Falsetta* court noted, "[n]either the Supreme Court nor any California court has held that this policy of excluding criminal propensity evidence is based upon the due process clause. . . . We presume that the Legislature was aware of prior judicial decisions holding that propensity evidence was inadmissible, and enacted section 1108 intending to change the law."¹⁵³ Consequently, the Court refused "to examine the correctness of the Legislature's policy decisions underlying section 1108 and its effect on the section 352 balancing test."¹⁵⁴

146. *See id.* at 237-38.

147. *See id.* at 235.

148. *Id.* at 238.

149. *Id.* (citing *People v. Fitch*, 63 Cal. Rptr. 2d 753 (1997)).

150. *Falsetta*, 75 Cal. Rptr. 2d at 238 (citation omitted).

151. *Id.* at 238 n.4 (analyzing *McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993)).

152. *Id.* at 238.

153. *Id.* at 239 & n.5 (citations omitted).

154. *Id.* at 240. Subsequent to the completion of this article, the California Supreme Court filed its opinion in *Falsetta*, upholding CEC section 1108 as facially constitutional. *See People v. Falsetta*, No. S071521, 1999 WL 983921 (Nov. 1, 1999). In upholding CEC section 1108, the California Supreme Court found it "unclear whether the rule against 'propensity' evidence *in sex offense cases* should be deemed a fundamental historical principle of justice." *Id.* at *11 (emphasis in original). The court nevertheless concluded that "even if the rule were deemed fundamental from a historical perspective, we would nonetheless uphold section 1108 if it did not unduly 'offend' those fundamental due process principles." *Id.* The court noted the circum-

Several California courts of appeals have cited to *Fitch* and *Falsetta* to uphold CEC section 1108 against facial due process challenges.¹⁵⁵ California courts of appeals also have relied upon the reasoning in *Fitch* and *Falsetta* to uphold CEC section 1109, which permits criminal propensity evidence in domestic violence prosecutions.¹⁵⁶ *Fitch* and *Falsetta*, therefore, similarly to *Enjady* and *Castillo*, leave any due process questions under CEC section 1108 to a case-by-case, as-applied analysis.¹⁵⁷

V. CONSTITUTIONAL QUESTIONS REMAIN FOR CPL SECTION 60.41

While not binding in New York State, *Enjady*, *Castillo*, *Fitch* and *Falsetta* do offer persuasive authority on the facial constitutionality

stantial relevance of prior convictions for sex offenses in sex offense prosecutions, and opined that CEC section 1108 does not create an unfair burden to defend against uncharged offences, does not interfere unduly with judicial efficiency and, under CEC section 352, “guards against undue prejudice arising from the admission of the defendant’s other offenses.” *Id.* at *8. The court also found that CEC section 1108 does not lessen the prosecution’s burden of proof or undermine the defendant’s presumption of innocence. Rather, the court adopted the view expressed in *Fitch* that “[w]hile the admission of evidence of the uncharged sex offense may have added to the evidence the jury could consider as to the defendant’s guilt, it did not lessen the prosecution’s burden to prove his guilt beyond a reasonable doubt.” *Id.* at *11 (quoting *Fitch*, 63 Cal. Rptr. 2d at 753). Therefore, the court resolved, “in light of the substantial protections afforded to defendants in all cases to which section 1108 applies, we see no undue fairness in its limited exception to the historical rule against propensity evidence.” *Id.* at *7.

Justice Mosk, however, concurred “[w]ith reluctance.” *Id.* at *17 (Mosk, J., concurring). Justice Mosk did find that “[a]lthough evidence of prior sexual offenses has traditionally been excluded under California law to show propensity, there appears to be no constitutional barrier to its admission.” *Id.* at *16. But, Justice Mosk continued,

I write separately because I am concerned that the majority leave open troubling questions. . . . I am concerned that, under the majority’s analysis, the “careful weighing process” under Evidence Code section 352 would appear to exclude, in every case, the long-standing principle that use of prior offenses to show “propensity” may itself be prejudicial.

Id. Justice Mosk thus concurred solely “under the present limited circumstances,” for “there are too many unanswered questions for me to concur with the reasoning of the majority opinion.” *Id.* at *17.

155. See *People v. Van Winkle*, No. F030661, 1999 WL 744028 (Cal. App. Sept. 24, 1999); *People v. Davis*, 84 Cal. Rptr. 2d 628 (Ct. App. 1999); *People v. Ritson*, 74 Cal. Rptr. 2d 698, 707 (Ct. App. 1998).

156. See *People v. Acosta*, 84 Cal. Rptr. 2d 370 (Ct. App. 1999); *People v. Hoover*, 75 Cal. Rptr. 2d 862, 866-9 (Ct. App. 1998).

157. See, e.g., *Davis*, 84 Cal. Rptr. 2d at 632; *People v. Soto*, 75 Cal. Rptr. 2d 605, 613 (Ct. App. 1998) (discussing the relationship between CEC section 1108 and FRE 413 and 414, and the proper application of CEC section 352 to cases under CEC section 1108).

of the proposed CPL section 60.41. The Tenth Circuit and the California state courts' opinions on this subject nevertheless fail to answer or even address many questions regarding the constitutional propriety of criminal propensity evidence in sexual assault prosecutions, particularly under New York State court of appeals and lower court precedents. And, "where there is a conflict between the decisional law of the Court of Appeals and that of an intermediate Federal appellate court on a constitutional issue, the ruling of the state Court of Appeals should be followed."¹⁵⁸

A. Historical Practice and the "Lustful Disposition" Exception

Castillo and the California opinions attempt to differentiate sexual assault propensity evidence from the common law preclusion of criminal propensity evidence by focusing on the distinct historical status that sexual assault propensity evidence has occupied, particularly under the "lustful disposition" rule.¹⁵⁹

The "lustful disposition" rule, which many United States jurisdictions recognize under various titles,¹⁶⁰ generally provides "that in prosecutions for adultery, seduction, statutory rape upon one under the age of consent and incest, acts of sexual intercourse between the parties prior to the offense charged in the indictment may be given in evidence."¹⁶¹ This exception permits such otherwise inadmissible prior crimes evidence "to show a lewd or adulterous disposition between the parties."¹⁶²

In recognizing the "lustful disposition" exception, some courts have applied it in broad fashion to demonstrate a defendant's general sexual "disposition." For example, in *Caldwell v. State*,¹⁶³ the Supreme Court of Georgia reviewed the defendant's conviction for murder, rape and child molestation. Relying upon the lustful dis-

158. *People v. Lugo*, 650 N.Y.S.2d 102, 103 (App. Div. 1996); *People v. Joseph*, 445 N.Y.S.2d 2, 2 (App. Div. 1981) (stating that "the Court did fairly recognize that a difference existed between the decisional law of the highest Court of this state and that of an intermediate federal appellate court. . . . In the absence of a ruling from the United States Supreme Court on the same issue, the Court below should have adhered to the rulings of the Court of Appeals of the State of New York"); *see also* *People v. Scott*, 593 N.E.2d 1328, 1337-38 (1992).

159. *See* *United States v. Castillo*, 140 F.3d 874, 881; *Falsetta*, 75 Cal. Rptr. 2d at 238; *People v. Fitch*, 63 Cal. Rptr. 2d 753, 757-60 (Ct. App. 1997).

160. *See* *United States v. Wright*, 48 M.J. 896, 900 (U.S.A.F. Ct. Crim. App. 1998) (referring to "lustful disposition," "sexual proclivity" and "depraved sexual instinct" exceptions).

161. *People v. Thompson*, 106 N.E. 78, 78 (1914).

162. *Id.* at 79.

163. 436 S.E.2d 488 (Ga. 1993).

position” exception, the court upheld the admission of four adult movies that the police recovered, depicting “women dressed as young girls having sex with various men.”¹⁶⁴ The court held:

This evidence was admissible to show appellant’s bent of mind toward the sexual activity with which he was charged and his lustful disposition. That this evidence may have incidentally put appellant’s character into evidence does not render inadmissible what is otherwise relevant and material to the issues in this criminal case.¹⁶⁵

Georgia courts continue to follow this broad use of the “lustful disposition” exception. In a very recent opinion, the Georgia Court of Appeals in *Condra v. State*,¹⁶⁶ upheld the admission of evidence that the defendant, as a youth, engaged in oral sex with his sister, some twenty years prior to the defendant’s trial for child molestation and aggravated sexual battery of his niece. The court explained:

In crimes involving sexual offenses, evidence of similar previous transactions is admissible to show the lustful disposition of the defendant and to corroborate the victim’s testimony. There need only be evidence that the defendant was the perpetrator of both crimes and sufficient similarity or connection between the independent crime and the offenses charged.¹⁶⁷

The court found that this exception permitted the twenty year-old evidence in the defendant’s case, as “[t]he rules regarding the use of similar transaction evidence are construed most liberally in cases involving sexual offenses.”¹⁶⁸

Other jurisdictions have mirrored Georgia’s liberal application of the “lustful disposition” exception.¹⁶⁹ These applications of this

164. *Id.* at 492.

165. *Id.* at 492-93 (citation omitted).

166. No. A99A0134, 1999 WL 314746 (Ga. App. May 20, 1999).

167. *Id.* at *1 (quoting *Gibbins v. State*, 495 S.E.2d 46, 50 (Ga. App. 1997)); *see also* *Ryan v. State*, 486 S.E.2d 397, 398 (Ga. App. 1997) (holding that “[i]n crimes involving sexual offenses, evidence of similar previous transactions is admissible to show the lustful disposition of the defendant and to corroborate the victim’s testimony”).

168. *Condra*, 1999 WL 314746, at *2 (quoting *Nichols v. State*, 473 S.E.2d 491, 493 (Ga. App. 1996)).

169. *See, e.g.*, *State v. Morey*, 722 A.2d 1185, 1189 (R.I. 1999) (citing to “an ‘almost universally recognized’ exception to [Rhode Island] Rule 404(b) for the admission of evidence of uncharged sexual misconduct to show ‘lustful disposition or sexual propensity’”); *State v. Tabor*, 529 N.W.2d 915, 918 (Wis. Ct. App. 1995) (affirming that “[i]t is the law in Wisconsin that ‘a greater latitude of proof is to be allowed in the admission of other-acts evidence in sex crimes cases, particularly in those involving incest and indecent liberties with a minor child.’”); *State v. Phillips*, 845 P.2d 1211, 1214 (Idaho 1993) (affirming “lustful disposition” exception to demonstrate a defend-

exception do suggest a special evidentiary place for prior crimes evidence in prosecutions for many sexual assault offenses. Indeed, these opinions seem to endorse the admission of criminal propensity evidence in sexual assault prosecutions, just simply by another name.

Many courts, however, have not applied the "lustful disposition" exception so as to evince a defendant's general propensity to commit sexual assaults, particularly in cases not involving incest and statutory rape-type offenses or the same parties as the prior crime evidence. As the court in *Lovely v. United States*¹⁷⁰ noted in 1948, "While evidence of other similar offenses . . . is admissible in prosecutions for crime involving a depraved sexual instinct . . . the overwhelming weight of authority is that such evidence is not admissible in prosecutions for rape."¹⁷¹ The *Lovely* court explained:

The reason for the difference in the rule applicable is obvious Acts showing a perverted sexual instinct are circumstances which with other circumstances may have a tendency to connect an accused with a crime of that character. The fact that one woman was raped, however, has no tendency to show that another woman did not consent.¹⁷²

State jurisprudence generally follows *Lovely's* more restricted view of the "lustful disposition" exception. For example, in *State v. McArthur*,¹⁷³ the Louisiana Supreme Court concluded that the trial court "erred in applying the 'lustful disposition' exception"¹⁷⁴ in the defendant's trial for rape. The *McArthur* court rejected the applicability of this exception, either to demonstrate that the defendant "'lure[d] acquaintances into situations where he could force them with brute force into nonconsensual sex acts'" or because the

ant's "general plan" to "exploit and sexually abuse" young women, and to corroborate the complainant's credibility, because the defendant's not guilty plea "places the credibility of the victim squarely in issue for the jury to decide"); *State v. Edward Charles L.*, 398 S.E.2d 123, 133 (W.Va. 1990) (holding that "[c]ollateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition to children generally, or a lustful disposition to specific other children . . .").

170. 169 F.2d 386 (4th Cir. 1948).

171. *Id.* at 390 (citation omitted).

172. *Id.*

173. 719 So.2d 1037, 1039 (La. 1998) (excluding evidence of defendant's past sex crimes because the current case did not involve child sex abuse).

174. *Id.* at 1040.

asserted defense of consent "plac[ed] her credibility at issue."¹⁷⁵ Other state courts similarly have limited the application of the "lustful disposition" exception, even in cases involving child-complainants.¹⁷⁶

Furthermore, many states do not recognize any evidentiary exception analogous to the "lustful disposition" exception. For example, in *Lannan v. State*,¹⁷⁷ the Supreme Court of Indiana extensively reviewed that state's "depraved sexual instinct" exception, and its own and other states' authorities regarding the "recidivism" and "bolstering" purposes for admitting such evidence. The court concluded that "any justification for maintaining the exception in its current form is outweighed by the mischief created by the open-ended application of the rule."¹⁷⁸ The court thus abandoned Indiana's "depraved sexual instinct" exception in sexual assault prosecutions "to show action in conformity with a particular character trait."¹⁷⁹

175. *Id.* at 1039. *But see* *State v. Phillips*, 845 P.2d 1211, 1214 (Idaho 1993) (affirming the use of "lustful disposition" evidence in part because a defendant's not guilty plea "places the credibility of the victim squarely in issue for the jury to decide").

176. *See, e.g.*, *Lambert v. State*, 724 So.2d 392, 394 (Miss. 1998) (holding that Mississippi's "lustful disposition" authorities "specifically limited evidence of other sexual relations to those between the defendant and the particular victim" (citations omitted)); *Commonwealth v. Barrett*, 641 N.E.2d 1302, 1307 (Mass. 1994). The court in *Barrett* stated that:

"When a defendant is charged with any form of illicit sexual intercourse, evidence of the commission of *similar crimes by the same parties* though committed in another place, if not too remote in time, is competent to prove an inclination to commit the [acts] charged in the indictment . . . and is relevant to show the probable existence of the same passion or emotion at the time in issue" . . . When a court is presented with evidence of uncharged conduct by the defendant toward a child other than the complainant, the conduct in issue, to be admissible, must be closely related in time, place, and form of acts to show a common course of conduct by the defendant toward the two children so as to be logically probative. . . . The conduct toward the children must form a "*temporal and schematic nexus*" which renders the evidence admissible to show a common course of conduct regarding the children.

Id. (emphasis added) (citations omitted). *See also, e.g.*, *Commonwealth v. Moore*, 278 S.E.2d 822, 825 (Va. 1981). The *Moore* court asserted that:

[I]n a prosecution for incest, evidence of acts of incestuous intercourse *between the parties* other than those charged in the indictment or information . . . is, if not too remote in point of time, admissible for the purpose of throwing light upon the relations of the parties and the incestuous disposition of the defendant toward the other party, and to corroborate the proof of the act relied upon for conviction.

Id. (emphasis added) (citations omitted).

177. 600 N.E.2d 1334 (Ind. 1992).

178. *Id.* at 1338.

179. *Id.* at 1339.

In 1997, in *State v. Osier*,¹⁸⁰ the Supreme Court of North Dakota “cautioned about the dangers underlying the trend of allowing prior crime evidence in sexual assault cases.”¹⁸¹ The court thus refused to affirm the use of prior sexual assault evidence during the defendant’s trial for sexual contact with a minor, either under the offered “lustful disposition” authorities,¹⁸² or by adopting FRE 414 as a state rule of evidence.¹⁸³ The court concluded, “[t]he sole purpose served by [the prior crimes] testimony was to demonstrate Osier’s criminal sexual character to show he probably acted in conformity with that character in committing the acts charged. . . . It is *fundamentally unfair* to tempt a jury to convict a defendant circumstantially on the basis of prior misconduct or character propensity rather than upon evidence of the criminal acts charged.”¹⁸⁴

In 1998, in *State v. Nelson*,¹⁸⁵ the Supreme Court of South Carolina reversed the defendant’s conviction for multiple counts of sexual contact and lewd acts with a minor, reasoning that the trial court admitted evidence that the police recovered portraying the defendant as a pedophile.¹⁸⁶ In response to the prosecution’s arguments for the admissibility of this evidence, the court noted:

In spite of the ban on character or propensity evidence, some states have nonetheless admitted evidence of collateral sexual crimes or sexual bad acts in sex offense cases, carving out specific exceptions they variously term ‘lustful disposition,’ ‘depraved sexual instinct,’ or the like. . . . South Carolina has not recognized such an exception, nor are we inclined to do so.¹⁸⁷

The court took this stance because, in its view, “‘the fairness and *due process* concerns underlying [South Carolina] FRE 404(b) are no less pertinent in sexual assault cases.’”¹⁸⁸ Indeed, the court

180. 569 N.W.2d 441 (N.D. 1997) (addressing the admissibility of evidence that the defendant engaged in prior sexual misconduct with his 15-year old niece when she was eight or nine years old).

181. *Id.* at 444.

182. *See id.*

183. *See id.* at 442 n.1.

184. *Id.* at 444 (emphasis added).

185. 501 S.E.2d 716 (S.C. 1998) (addressing whether children’s toys, videos and photographs of young girls, which the police seized from the defendant’s bedroom, were admissible in a trial for criminal sexual conduct).

186. *See id.* at 724.

187. *Id.* at 723 n.16.

188. *Id.* (emphasis added).

noted, “a corollary to the *presumption of innocence* is that a defendant must be tried for what he did, not for who he is.”¹⁸⁹

Other jurisdictions similarly have abandoned their version of the “lustful disposition” exception, or refused to adopt such an exception.¹⁹⁰ The “lustful disposition” authorities upon which *Castillo* and the California opinions rely, therefore, demonstrate no uniformly distinct historical status for criminal propensity evidence in sexual assault prosecutions.¹⁹¹ Rather, as *Castillo* itself acknowledges, “the historical record regarding evidence of one’s sexual character is . . . ambiguous.”¹⁹²

189. *Id.* at 723 (emphasis added) (quoting *State v. Melcher*, 678 A.2d 146, 151 (N.H. 1996)).

190. *See, e.g.*, *State v. Winter*, 648 A.2d 624, 626-27 (Vt. 1994). The court in *Winter* stated that:

[N]either before the adoption of the Vermont Rules of Evidence, nor since, have we allowed the admission of acts of sexual misconduct to show a lustful disposition. . . . Just as we have no special exception to [Vermont] Rule 404(b) for sexual misconduct cases, neither have we adopted special, more liberal, interpretations of Rule 404(b) to allow the admission of prior bad act evidence in such cases, especially when we would not admit similar evidence in other cases.

Id.; *see also* *State v. Rickman*, 876 S.W.2d 824, 825, 828-29 (Tenn. 1994). The *Rickman* court opined that:

Tennessee should not recognize a “sex crimes” exception to the general rule. . . . [E]vidence admitted under a general sex crimes exception is said to be for the purposes of corroboration, or to show the intimate relations between the parties, or to show that the defendant had a lustful disposition. . . . Our re-examination of the authorities convinces us that the general rule, which excludes evidence of other crimes or bad acts as irrelevant and prejudicial when defendant is on trial for a crime or act of the same character, remains sound.

Id.; *cf.* *Pendleton v. Commonwealth*, 685 S.W.2d 549, 552 (Ky. 1985). The *Pendleton* court held that:

[N]o evidence is admissible to show “lustful inclination.” This Court is uncertain as to what is meant by the broad and subjective phrase “lustful inclination.” The better standard requires evidence to be the type that shows a common plan or pattern of activity. . . . Kentucky, like many other jurisdictions, has consistently followed the general rule that evidence of other criminal acts of the accused is inadmissible unless it comes within certain well-defined exceptions which must be strictly construed.

191. *See generally*, L. Renee Lieux, Note, *The Michigan Pig Farm Perception: The Michigan Supreme Court Continues to Ignore the Opportunity to Create a Lustful Disposition Exception to Michigan Rule of Evidence 404(b)*, 76 U. DET. MERCY L. REV. 127, 151, 155-56 (1998) (reviewing the wide-ranging approach of various states to the “lustful disposition” exception, and concluding that “[t]he implementation of the exception varies in scope. Sometimes it is construed narrowly, allowing only admission of prior sexual acts against the complainant, and sometimes broadly, allowing the admission of any prior sexual acts”).

192. 140 F.3d at 881.

This ambiguous exception to the tradition of criminal propensity evidence preclusion provides a questionable basis upon which to eliminate that tradition *in toto*.¹⁹³ The Tenth Circuit and California state courts nonetheless use this narrow historical evidentiary exception to obviate the whole rule.

In suggesting otherwise, the California courts misplace their reliance upon *Marshall v. Lonberger's* acknowledgement that "the common law was far more ambivalent."¹⁹⁴ In *Lonberger*, as with the "vaguely defined [common law] exceptions" to which *Lonberger* cited,¹⁹⁵ the prosecution introduced the defendant's prior conviction to demonstrate a relevant evidentiary fact *other than criminal propensity*. Indeed, *Lonberger* relied upon the fact that "as in *Spencer*, the trial judge gave a careful and sound instruction requiring the jury to consider respondent's prior conviction *only for purposes of the specification*. . . . And, of course, if the jury considers a defendant's prior conviction only for purposes of sentence enhancement *no questions of fairness arise*."¹⁹⁶

This view of prior crimes evidence instead reveals a common law tradition of *not* allowing such evidence to prove criminal propensity. As the U.S. Supreme Court noted in 1997 in *Old Chief v. United States*, "Federal Rule of Evidence 404(b) reflects this *common law tradition* by addressing propensity reasoning directly."¹⁹⁷

Moreover, regardless of the historical pedigree of the "lustful disposition" rule in other jurisdictions, the New York State Court of Appeals significantly has limited, if not abandoned, New York State's version of the "lustful disposition" rule — the "amorous design" exception. In 1914, the court of appeals affirmed the "amorous design" exception to the rule precluding criminal propensity evidence, "in prosecutions for adultery, seduction, statutory rape . . . and incest."¹⁹⁸ The court wrote approvingly of the "amorous design" exception as recently as 1980.¹⁹⁹

193. *Cf. id.* at 889 (Holloway, J., concurring in part and dissenting in part) (concurring with Court's judgment upholding FRE 414 as constitutional, but avoiding "the extended analysis . . . discussing . . . the 'lustful disposition' rule in state jurisprudence . . .").

194. 459 U.S. 422, 438 n.6 (1983); *see also* *People v. Fitch*, 63 Cal. Rptr. 2d 753, 758 (Cal. App. 1997).

195. 459 U.S. at 438 n.6.

196. *Id.* (emphasis added) (citing *Spencer v. Texas*, 385 U.S. 554 (1967)).

197. 519 U.S. 172, 181 (1997) (emphasis added).

198. *People v. Thompson*, 106 N.E. 78, 78 (1914).

199. *See* *People v. Fuller*, 409 N.E.2d 834, 838-39 (N.Y. 1980); *see also* *People v. Bouton*, 405 N.E.2d 699, 704 (N.Y. 1980).

But in 1987, in *People v. Lewis*,²⁰⁰ the court of appeals rejected the defendant's use of prior incest evidence under the "amorous design" exception. The *Lewis* court directly questioned the viability of the "amorous design" doctrine, even under its own precedent.²⁰¹ The court held that the general rule precluding prior crimes evidence remains, even in sexual assault prosecutions, with the exception existing solely to establish "mutual disposition" and requisite corroboration.²⁰²

The primary duty of the fact finder in this case was to determine whether the victim's statements describing the incestuous act charged in the indictment were *credible* . . . [the complainant's] allegations concerning defendant's prior actions did not render her testimony pertaining to the charged crime more trustworthy.²⁰³

The prosecution, the court decreed, may not use such prior sexual assault evidence to prove "the defendant's attitude toward his victim."²⁰⁴

In 1988, the court of appeals reiterated its disapproval of propensity-type evidence under this doctrine in *People v. Hudy*.²⁰⁵ *Hudy* involved a teacher's alleged molestation of eight young male students. The trial court permitted evidence regarding the defendant's prior molestation of another young student.²⁰⁶ In rejecting this evidence to bolster the complainants' credibility,²⁰⁷ the court discussed the impropriety of propensity evidence under doctrines such as the "amorous design" exception. The court concluded, "[e]vidence of prior sexual contact with the same 'victim,' traditionally admitted under the rubric of 'amorous design,' [is] really no more than a form of propensity evidence hiding behind an assumed name and should no longer be permitted."²⁰⁸

Lewis and *Hudy*, therefore, reveal no inclination by the New York State Court of Appeals to permit "amorous design" evidence beyond this very narrow exception, if at all.²⁰⁹ The lower New

200. 506 N.E.2d 915 (N.Y. 1987).

201. *See id.* at 917 (citing *Thompson*, 106 N.E. at 78; *Fuller*, 409 N.E.2d at 834).

202. *See Lewis*, 506 N.E.2d at 917-18 (citing *Director of Pub. Prosecutions v. Ball*, 6 Crim. App. 31 (1908-1910)).

203. *Lewis*, 506 N.E.2d at 918 (emphasis added).

204. *Id.*

205. 535 N.E.2d 250 (N.Y. 1988).

206. *See id.* at 253.

207. *See id.* at 258; *see infra* notes 254-260.

208. *Hudy*, 535 N.E.2d at 259.

209. *See FARRELL, supra* note 7, § 4-515, at 191.

York courts have followed suit, holding that "such evidence of the defendant's predisposition is precisely the sort of evidence which ordinarily has no place in the prosecution's case."²¹⁰

B. Probative Value, Legislative Judgment and Burden of Proof

Enjady, Castillo and the California opinions also defer to the legislative judgment that evidence of prior sexual assaults presents unique probative value to subsequently charged sexual assaults, particularly in resolving "unresolvable swearing matches."²¹¹ True, intuitively, many people do attribute great significance to evidence of a person's history of committing sexual assaults in considering a subsequently charged sexual assault. The *Molineux* rule, however, does not depend upon criminal propensity evidence having no probative value.

On the contrary, the law *always* has recognized that "such facts might logically be persuasive that [the defendant] is by propensity a probable perpetrator of the crime."²¹² For this very reason, "this inquiry . . . is said to weigh too much with the jury and to so over-persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."²¹³ Accordingly, "[t]he rule is based on policy and not on logic,"²¹⁴ "rooted in the principle that a man may not be convicted

210. *People v. Gautier*, 544 N.Y.S.2d 821, 824 (App. Div. 1989). See also *People v. Jackson*, 524 N.Y.S.2d 846, 847-48 (App. Div. 1988); cf. *People v. Bagarozzy*, 522 N.Y.S.2d 848 (App. Div. 1987) (holding that evidence concerning the defendant's sexual tendencies was not admissible under the "amorous design" exception); *People v. Seaman*, 657 N.Y.S.2d 242, 243-44 (App. Div. 1997) (rejecting evidence of "sexual climate" in the defendant's household because it was "aimed at convincing the jury of the defendant's sexual proclivity"); but cf. *People v. Fitzgerald*, N.Y. L.J., Mar. 2, 1999, at 33 (proclaiming that "prior similar sex acts are admissible when the evidence of the prior similar sex acts is (1) reliable and (2) is being offered to corroborate the testimony of a young child when he or she is to identify the defendant as the person who had committed a particular sex act").

211. *United States v. Enjady*, 134 F.3d 1427, 1431-33 (10th Cir. 1998); see also *United States v. Castillo*, 140 F.3d 874, 881-83 (10th Cir. 1998); *People v. Fitch*, 63 Cal. Rptr. 2d 753, 758 (Ct. App. 1997).

212. *Michelson v. United States*, 335 U.S. 469, 475 (1948); see also *People v. Molineux*, 61 N.E. 286, 302 (N.Y. 1901).

213. *Michelson*, 335 U.S. at 475-76; accord *Lovely v. United States*, 169 F.2d 386, 388-90 (1948); *People v. Alvino*, 519 N.E.2d 808, 812 (1987); *People v. Robinson*, 503 N.E.2d 485, 488 (N.Y. 1984); *People v. Ventimiglia*, 420 N.E.2d 59, 62 (N.Y. 1981); *People v. Allweiss*, 396 N.E.2d 735, 738 (N.Y. 1979).

214. *Allweiss*, 396 N.E.2d at 738.

of one crime simply because he may be shown guilty of another when there is no connection between the two.”²¹⁵

The unique probative value that people attach to prior sexual assault evidence consequently implicates exactly the sort of prejudice that the *Molineux* rule seeks to prevent: that the evidence will prompt the jury to presume the defendant’s guilt and convict in the absence of proof beyond a reasonable doubt. The argued probative value of sexual assault propensity evidence only increases the danger of such a constitutionally impermissible result.

Neither *Enjady* nor *Castillo* addresses this constitutional paradox that their reasoning creates. Indeed, neither opinion even addresses the relationship between criminal propensity evidence and the presumption of innocence and the prosecution’s burden of proof, despite the U.S. Supreme Court and other authorities — including the Tenth Circuit’s own — that highlight this improper nexus. The court instead ignores the fact, which some proponents of this evidence candidly seek, that “[c]ombining direct evidence of guilt with evidence of the defendant’s past crimes may thus *eliminate reasonable doubt in a case that would otherwise be inconclusive*,”²¹⁶ or that “re-setting [jurors] regret levels can give them a more *appropriate attitude toward reasonable doubt* . . . [and] may therefore push jurors closer to *the right standard of proof*.”²¹⁷

California courts do recognize that “[t]he Due Process Clause requires proof beyond a reasonable doubt of every fact necessary to constitute the charged crime.”²¹⁸ *Fitch* even acknowledged that “[o]ur Supreme Court has recognized the possibility that propensity evidence may reduce the burden of proof.”²¹⁹ *Fitch* nonetheless offered the following rationale to uphold CEC section 1108:

While the admission of evidence of the uncharged sex offense may have added to the evidence the jury could consider as to defendant’s guilt, it did not lessen the prosecution’s burden to

215. *People v. Katz*, 103 N.E. 305, 311 (N.Y. 1913); cf. *McKinney v. Rees*, 993 F.2d 1378, 1386 (9th Cir. 1993) (affirming that “[i]t is part of our community’s sense of fair play that people are convicted because of what they have done, not who they are”); *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977) (finding that “[a] concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is”).

216. Cassell & Strassberg, *supra* note 85, at 167 (emphasis added).

217. Roger C. Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right about Consent Defense Cases*, 22 FORDHAM URB. L.J. 271, 274-75 (1995) (emphasis added).

218. *People v. Fitch*, 63 Cal. Rptr. 2d 753, 759 (Ct. App. 1997) (citing *In re Winship*, 397 U.S. 358, 364 (1970)).

219. *Id.* at 760 (citing *People v. Garceau*, 862 P.2d 664 (Cal. 1993)).

prove his guilt beyond a reasonable doubt. "The courts specifically addressing the question of *Winship's* application to uncharged misconduct uniformly hold that admission of uncharged misconduct does not undermine *Winship*."²²⁰

This reasoning misconstrues the actual constitutional question that criminal propensity evidence raises. Arguing that such evidence merely "add[s] to the evidence the jury could consider as to defendant's guilt,"²²¹ ignores whether evidence of a defendant's past, similar misconduct may be so considered by a jury consistent with our established constitutional principles.

On the contrary, if such collateral evidence leads a jury to convict "in a case that would otherwise be inconclusive"²²² on its own evidence, that collateral evidence lessens the prosecution's burden of proving that the charged crime in fact occurred. "[R]e-setting [jurors] regret levels [to] give them a more appropriate attitude toward reasonable doubt"²²³ simply raises the bar of reasonable doubt in sexual assault prosecutions, and may shift the burden to the defense entirely of demonstrating actual innocence to overcome the "regret levels" that the jurors otherwise will experience over acquitting. The courts' noted historical acceptance of prior crimes evidence in accordance with the mandate of *Winship* merely reflects the admission of such evidence for some valid purpose *other than to demonstrate criminal propensity*.²²⁴

To remedy this problem, the California courts, similar to the Tenth Circuit, simply revert to application of the prejudice-balancing provision under CEC section 352. Limiting criminal propensity evidence to an as-applied, prejudice-versus-probative value analysis, however, again fails to answer the more fundamental question of whether admitting prior crimes evidence to demonstrate criminal propensity, at its core, unduly infringes upon the presumption of innocence and the prosecution's burden of proof.²²⁵

220. *Id.* at 759-60 (citation omitted); *see also*, *People v. Van Winkle*, No. F030661, 1999 WL 744028, at *4 (Cal. App. Sept. 24, 1999) (holding that "evidence of uncharged sexual offenses increasing the evidence of defendant's guilt does not reduce the prosecution's burden of proving guilt beyond a reasonable doubt; prior sexual misconduct is simply an additional circumstance to be considered along with all the other circumstances of the case").

221. *Fitch*, 63 Cal. Rptr. 2d at 759-60.

222. *Cassell & Strassberg*, *supra* note 85, at 167.

223. *Park*, *supra* note 217, at 274-75.

224. *See, e.g.*, *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983) (noting that "if the jury considers a defendant's prior conviction only for purposes of sentence enhancement *no questions of fairness arise*" (emphasis added)).

225. *See also infra* Part IV.D.

A comparison to the Sex Offender Registration Act ("SORA")²²⁶ highlights the distinction between the probative value of a sex offender's recidivist behavior, and the significance of using that evidence to overcome a defendant's presumption of innocence and to establish guilt beyond a reasonable doubt. SORA addresses parallel sociological concerns to CPL section 60.41:

The seriousness of the harm that sex offenders' actions cause to society and the perception, supported by some data, that such offenders have a greater probability of recidivism than other offenders have recently combined to prompt the enactment of numerous laws across the country directed specifically toward persons convicted of crimes involving sexual conduct.²²⁷

SORA requires convicted "sex offenders"²²⁸ to register with the state, and in some cases authorizes the dissemination of personal information regarding a sex offender and his criminal history.²²⁹

Recently, in *People v. David W.*, an Appellate Term of the Second Department upheld SORA as facially constitutional.²³⁰ But as *David W.* and lower New York courts have noted in analyzing SORA, the "post-trial, post-conviction hearing [to determine risk-level under SORA] is not for adjudicating guilt but rather for supervising released offenders."²³¹ "The hearing is part of a criminal proceeding but not part of a criminal action,"²³² and "does not litigate guilt or nonguilt."²³³ Rather, a SORA adjudication determines how strictly the state should regulate an already-convicted individual whose background demonstrates a particular risk of recidivism.

Thus, an adjudication under SORA "is more analogous to the due process requirements for sentencing,"²³⁴ or for a violation of probation.²³⁵ Such a proceeding "is a summary, informal proce-

226. See N.Y. CORRECT. LAW § 168 (Consol. 1999).

227. *Doe v. Pataki*, 120 F.3d 1263, 1266 (2d Cir. 1997).

228. SORA defines what convictions render a person a "sex offender." See N.Y. CORRECT. LAW § 168(a)(1)-(3). Interestingly, SORA exempts certain "sex offenses" under section 130 of New York Penal Law from its definitions of a "sex offense" or "sexually violent offense," such as Sexual Misconduct and Sexual Abuse in the Third Degree. See N.Y. PENAL LAW §§ 130.20(1)-(3), 130.55, respectively.

229. See N.Y. CORRECT. LAW § 168(f), (h), (j), (p) & (q).

230. See *People v. David W.*, N.Y. L.J., Sept. 9, 1999, at 28.

231. *People v. Ross*, 646 N.Y.S.2d 249, 252 (Sup. Ct. 1996).

232. *People v. Brasier*, 646 N.Y.S.2d 442, 443 (Sup. Ct. 1996).

233. *Id.* at 444; see also *People v. Salaam*, 666 N.Y.S.2d 881, 885 (Sup. Ct. 1997) ("The risk assessment hearing is not intended to be used as a means to re-litigate the guilt or innocence of the convicted sex offender.").

234. *People v. Roe*, 677 N.Y.S.2d 895, 899 (Sup. Ct. 1998).

235. See *Brasier*, 646 N.Y.S.2d at 443-44.

dure which does not require strict adherence to the rules of evidence; statutory and due process requirements are met so long as defendant is given formal notice of the charges and an opportunity to be heard and to confront the witnesses against him through cross examination.”²³⁶ The state need not overcome a presumption of innocence with proof beyond a reasonable doubt to establish the state’s need to regulate in relation to the evidence of recidivist behavior.²³⁷

Therefore, the classification procedure under SORA does not invoke the “full panoply of constitutional rights”²³⁸ that the United States and New York State Constitutions extend to defendants litigating guilt or lack of guilt. SORA only must relate rationally to a legitimate governmental interest,²³⁹ and not prove “arbitrary and capricious” in its application.²⁴⁰ The court in *David W.* found “reasonable and necessary” both the classification procedure, as well as the “government’s interest in ensuring that the defendant be designated at the appropriate risk level . . . to protect the public from the danger of recidivism posed by sex offenders and to assist the criminal justice system to identify, investigate, apprehend and prosecute sex offenders.”²⁴¹

236. *People v. Minard*, 555 N.Y.S.2d 182, 183 (App. Div. 1990) (quoting *People v. Tyrrell*, 475 N.Y.S.2d 937, 939 (App. Div. 1984)). See also *People v. Recor*, 619 N.Y.S.2d 186, 187 (App. Div. 1994); *People v. Mitchell*, 587 N.Y.S.2d 187 (App. Div. 1992); *Salaam*, 666 N.Y.S.2d at 884-85. Cf. *Darvin M. v. Jacobs*, 509 N.E.2d 336, 337 (N.Y. 1987) (holding that a probation revocation hearing is a proceeding to determine whether a defendant’s subsequent acts violate the original sentence, not whether the acts constitute a crime); *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976).

237. The exact standard of proof that SORA requires has generated some uncertainty amongst lower courts. One court has suggested placing the burden of proof upon the person challenging the state’s classification findings. See *People v. Ross*, 646 N.Y.S.2d 249, 252 (Sup. Ct. 1996). Other courts have required the state to meet a “preponderance of the evidence” standard. See e.g., *Roe*, 677 N.Y.S.2d at 900; *Recor*, 619 N.Y.S.2d at 187; *Mitchell*, 587 N.Y.S.2d at 187; *Ross*, 646 N.Y.S.2d at 250. But see *Salaam*, 666 N.Y.S.2d at 885 (requiring a “clear and convincing evidence” standard). The New York Legislature, however, recently clarified this issue by amending SORA to require the state to prove risk classification factors by clear and convincing evidence. See L. 1999, ch. 453, §§ 6, 11, 16, 18. Irrespective of the applicable standard of proof, a SORA adjudication remains a “summary,” post-conviction proceeding. *Salaam*, 666 N.Y.S.2d at 884-85.

238. *Roe*, 677 N.Y.S.2d at 899.

239. See *David W.*, N.Y. L.J. Sept. 9, 1999 at 28; cf. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (discussing the “rational relationship” test applied to non-fundamental right); *Reno v. Flores*, 507 U.S. 292, 305 (1995) (same); *Payne v. Tennessee*, 501 U.S. 808, 824-25 (1991) (same); *Heller v. Doe*, 509 U.S. 312, 319-20 (1993) (same).

240. *Ross*, 646 N.Y.S.2d at 251-52.

241. See *supra* note 230.

Criminal propensity evidence, by contrast, asks a jury to forgive any inadequacies in the prosecution's proof of guilt at trial because of the defendant's history of similar criminal conduct.²⁴² While arguably relevant, and certainly persuasive,²⁴³ evidence that so undermines fundamental constitutional guarantees cannot be justified merely because it rationally relates to the government's interest in convicting guilty sex offenders. On the contrary, far from proving narrowly tailored to this governmental interest,²⁴⁴ such evidence creates an overbroad net that will ensure the conviction of a high percentage of the guilty, but at the expense of the innocent whom the presumption of innocence and requirement of proof beyond a reasonable doubt were designed to protect.

Such a catch-all approach to criminal law would require a significant reevaluation of our social priorities and the constitutional values that preserve them. As the U.S. Supreme Court expressed in *In re Winship*:

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence – that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law. . . . It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.²⁴⁵

Indeed, as Justice John Marshall Harlan wrote in concurrence, "In a criminal case . . . we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty."²⁴⁶ Thus, Justice Harlan "view[ed] the requirement of proof beyond a reasonable doubt in criminal cases as bottomed on a fundamental value determination of our society that

242. See Cassell & Strassberg, *supra* note 85, at 167; see also Park, *supra* note 217, at 274-75.

243. See *Michelson v. United States*, 335 U.S. 469, 475-76; see also *People v. Molineux*, 61 N.E. 286, 302 (1901).

244. Cf. *Washington*, 521 U.S. at 721 (discussing strict scrutiny test applied to fundamental rights); *Reno*, 507 U.S. at 301-02 (same); *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972) (discussing overbreadth doctrine in upholding anti-noise ordinance as sufficiently narrowly tailored, and not "an impermissibly broad prophylactic ordinance").

245. 397 U.S. 358, 363-64 (1970).

246. *Id.* at 372.

it is far worse to convict an innocent man than to let a guilty man go free."²⁴⁷

In this vein, the New York State Court of Appeals historically has proven unreceptive to allowing criminal propensity evidence to "tip the scales" in the prosecution's favor in cases involving credibility contests or challenges. In *People v. McKinney*,²⁴⁸ for example, the defendant faced domestic assault charges concerning his baby's mother. Competing testimony of the complainant and the defendant constituted the primary evidence.²⁴⁹ The trial court admitted evidence of the defendant's prior domestic assaults upon the complainant, ostensibly to prove the defendant's intent.²⁵⁰

The court of appeals, however, rejected this basis for admitting the prior crimes evidence, finding that the defendant's "intention to inflict physical injury may be inferred from the act itself."²⁵¹ The court consequently concluded:

The resolution of defendant's guilt . . . hinged upon whether Belinda's or defendant's version of the events on the night in question be believed. The impact of the erroneously received evidence of uncharged assaults was to demonstrate defendant's violent nature and propensity to commit assaults. . . . The admission of the evidence of uncharged assaults was certainly prejudicial to defendant²⁵²

Many would equate the probative value of a defendant's history of domestic assaults in establishing a domestic assault offense to the probative value of prior sexual assaults in establishing a sexual assault offense.²⁵³ Yet, unlike the Tenth Circuit and the California

247. *Id.*; cf. *Brinegar v. United States*, 338 U.S. 160, 173-74 (1949) (noting that "[m]uch evidence of real and substantial probative value goes out on considerations irrelevant to its probative weight but relevant to possible misunderstanding or misuse by the jury"); *People v. Molineux*, 61 N.E. 286, 292 (1901) (holding that "[a] person cannot be convicted of one offense upon proof that he committed another, *however persuasive in a moral point of view such evidence may be.*" (emphasis added)).

248. 247 N.E.2d 244 (N.Y. 1969).

249. *See id.* at 245-46.

250. *See id.* at 246.

251. *Id.* at 247.

252. *Id.*

253. *See, e.g.,* Lisa Marie DeSanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359 (1996); Benjamin Z. Rice, *A Voice from People v. Simpson: Reconsidering the Propensity Rule in Spousal Homicide Cases*, 29 LOY. L.A. L. REV. 939 (1996); Lisa A. Linsky, *Use of Domestic Violence History Evidence in the Criminal Prosecution: A Common Sense Approach*, 16 PACE L. REV. 73 (1995); Franklin W. Dunford, *The Measurement of Recidivism in Cases of Spousal Assault*, 83 CRIM. L. & CRIMINOLOGY 120 (1992).

state courts, the New York Court of Appeals discerned no proper basis for criminal propensity evidence to resolve the "swearing contest" in *McKinney*.

In *People v. Hudy*,²⁵⁴ the court of appeals extended to sexual assault cases its unwillingness to allow criminal propensity evidence to resolve difficult credibility contests against a defendant. In *Hudy*, the defendant argued that the complainants falsely accused him when following the suggestions of the police and the initial complainant, who assertedly adhered to his false story to avoid punishment for lying.²⁵⁵ In response, the trial court allowed evidence concerning another former student who accused the defendant of similar conduct more than a year before the investigation of the charged offenses began.²⁵⁶ The trial court admitted this evidence on the theory that "since [the prior alleged victim] had made his accusations against the defendant long before the [charged] story surfaced, his accusations had the ring of truth and lent credibility to the other boys' charges."²⁵⁷

The court of appeals flatly rejected this use of the prior sexual assault evidence, holding that "defendant's misconduct toward [the prior alleged victim] in the past has no legitimate, legally cognizable bearing on the truthfulness of the other children's allegations."²⁵⁸ The court noted further:

[T]here is a serious danger that the jury used [the prior sexual assault evidence] to draw the impermissible inference ("he did it before, so he probably did it this time too") and *to resolve any doubts it might otherwise have had about the other boys' stories in the People's favor. Again, it is precisely this type of result that the Molineux rule was adopted to prevent.*²⁵⁹

The court thus reversed, finding that this and other evidentiary errors "tainted the fairness of [the defendant's] trial."²⁶⁰

The court of appeals in 1996 adhered to this philosophy in *People v. Vargas*,²⁶¹ a rape case involving exactly the sort of credibility issues to which the Tenth Circuit and California state courts re-

254. See 535 N.E.2d 250 (N.Y. 1988); see also *supra* notes 100-101.

255. See *id.* at 252-53.

256. See *id.* at 253.

257. *Id.* at 259.

258. *Id.*

259. *Id.* (emphasis added).

260. *Id.* at 252.

261. See *Vargas*, 666 N.E.2d 1357 (N.Y. 1996).

ferred.²⁶² In *Vargas*, the complainant accused the defendant of forcible rape on an apartment rooftop.²⁶³ The complainant, however, admitted to giving the defendant her telephone number after the alleged rape and to meeting him at his residence for consensual sex the next day.²⁶⁴

In response to the defendant's proffered defense of consent, the trial court granted the prosecution's application to present "the testimony of several women that defendant had accosted them and demanded sex, fondled them or engaged in other sexually deviant behavior."²⁶⁵ The trial court admitted the evidence as necessary to demonstrate the defendant's "intent," because of the "'extraordinary' fact" that the complainant engaged in consensual sex with the defendant the day after the alleged rape.²⁶⁶ The defendant consequently abandoned his consent defense.²⁶⁷

The court of appeals concluded that this threatened prior sexual assault evidence "denied [the defendant] a fair trial."²⁶⁸ The court noted the swearing contest nature of the case, and the resultant prejudice that the threatened propensity evidence effected:

Here, two starkly contrasting scenarios were presented, *with only credibility in issue*. If the trier of fact believed the defendant's version of events, complainant consented to a sexual encounter with him. . . . If the trier of fact found complainant more credible, defendant used force and threats to rape her, with intent readily inferable from the acts alleged. *As in Hudy . . . the prior misconduct evidence was relevant only to lend credibility to complainant by suggesting that, because defendant had engaged in sexual misconduct with others, he was likely to have committed the acts charged.*²⁶⁹

Vargas thus reaffirms *Hudy* and the court's other holdings precluding the use of sexual assault propensity evidence, even in "consent" cases, to resolve credibility contests against a defendant.²⁷⁰

262. See *United States v. Enjady*, 134 F.3d 1427, 1431 (10th Cir. 1998) (referring to "unresolvable swearing matches"); *People v. Fitch*, 63 Cal. Rptr. 2d 753, 759 (Ct. App. 1997) (referring to "credibility contests").

263. See *Vargas*, 666 N.E.2d at 1357.

264. See *id.*

265. *Id.* at 1358.

266. See *id.*

267. See *id.*

268. *Id.*

269. *Id.* at 1357 (emphasis added).

270. See also *People v. Lewis*, 506 N.E.2d 915, 918-19 (N.Y. 1987); *People v. Liller*, 229 N.E.2d 617 (N.Y. 1967); *People v. Ortiz*, 554 N.Y.S.2d 107 (App. Div. 1990); *People v. Harris*, 541 N.Y.S.2d 593 (App. Div. 1989); *People v. Bagarozzy*, 522 N.Y.S.2d

The court consistently has required that prior crimes evidence in sexual assault prosecutions relate to some material issue beyond merely bolstering witness credibility by highlighting the defendant's criminal propensity.²⁷¹

Significantly, in *Vargas, Hudy* and the court's related holdings, the court reversed on a finding that the criminal propensity evidence deprived the defendant of a "fair trial," by resolving "doubts" that jurors otherwise might possess of the defendant's actual guilt. This language recalls the court of appeals' strong, constitutional language in *Molineux*.²⁷² Indeed, in *Hudy*, the court emphasized that "it is precisely this type of result that the *Molineux* rule was adopted to prevent."²⁷³

C. Criminal Propensity Evidence and the Rape Shield Act

Allowing evidence of a defendant's propensity to commit sexual assaults to resolve credibility contests also creates a questionable evidentiary disparity between criminal defendants and complainants under the Rape Shield Acts that exist in New York State,²⁷⁴ in most other states and at the federal level.²⁷⁵ This disparity high-

848, 854 (App. Div. 1987) ("As a review of this record makes clear, the court and the prosecutor mistakenly equated 'intent' with 'inclination' or proclivity,' subjects expressly proscribed by *Molineux*."); *People v. Dowdell*, 695 N.Y.S.2d 102 (App. Div. 1999); *People v. Hardy*, 695 N.Y.S.2d 103 (App. Div. 1999) (holding that the defendant's previous drug convictions "did not refute the defendant's claim that he had been framed by the police, but merely tended to show his criminal propensity").

271. See, e.g., *People v. Tas*, 415 N.E.2d 967, 968 (N.Y. 1980) (admitting the complainant's "[t]estimony concerning the prior assault on another prisoner in the victim's presence which occurred just minutes before the attack on the victim and was participated in by both defendants, . . . [because] it was highly relevant in establishing the victim's fear and, thus, *force as an element of the crime charged*" in jail-house sodomy prosecution (emphasis added)); *People v. Cook*, 710 N.E.2d 654, 655 (N.Y. 1999) (allowing prior crimes evidence to prove "forcible compulsion" element of rape charge); see also *People v. Gutkaiss*, 614 N.Y.S.2d 462, 464 (App. Div. 1994); *People v. George*, 602 N.Y.S.2d 643, 645 (App. Div. 1993); *People v. Steinberg*, 573 N.Y.S.2d 965, 979 (App. Div. 1991); *People v. DeLeon*, 521 N.Y.S.2d 777 (App. Div. 1987); *People v. Young*, 472 N.Y.S.2d 802, 803 (App. Div. 1984); cf. also *People v. Dauphinee*, 658 N.Y.S.2d 301 (App. Div. 1997); *People v. Williams*, 637 N.Y.S.2d 379 (App. Div. 1996).

272. 61 N.E. 286, 293-94 (N.Y. 1901); cf. *Old Chief v. United States*, 519 U.S. 172, 180-81 (1997); *Estelle v. McGuire*, 502 U.S. 62, 75-80 (1991) (O'Connor, J., concurring in part and dissenting in part); *Spencer v. Texas*, 385 U.S. 554, 572-76 (1967) (Warren, C.J., concurring in part and dissenting in part); *Michelson v. United States*, 335 U.S. 469, 475-76 (1948).

273. *People v. Hudy*, 535 N.E.2d 250, 259 (N.Y. 1988).

274. See N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1998).

275. See FED. R. EVID. 412.

lights the impropriety of the evidence that CPL section 60.41 would permit.²⁷⁶

Rape Shield Acts, such as New York's, preclude a defendant from admitting evidence of a complainant's past sexual conduct as evidence of her propensity to consent, except in very limited situations.²⁷⁷ This evidence is not precluded because juries attach little probative value to it. On the contrary, the evidence is precluded because juries usually attribute *too* much weight to this evidence, prompting juries to decide a case upon the complainant's sexual propensities rather than the evidence against the defendant, thus confusing the issues and unfairly prejudicing the complainant.²⁷⁸

Accordingly, as a matter of policy, the Rape Shield Act deems this evidence irrelevant and prejudicial,²⁷⁹ unless it bears upon a material issue other than a complainant's sexual propensities. The Rape Shield Act thus logically parallels the *Molineux* rule in its protection of similar interests of complainants. Neither the Tenth Circuit nor the California state courts, however, elucidate why evidence of past sexual propensities, so irrelevant and prejudicial to a complainant as to override a defendant's Sixth Amendment confrontation rights,²⁸⁰ suddenly becomes so probative and fair when admitted against a defendant.

One commentator, David Karp, an official with the Department of Justice who argued in support of FRE 413-415 prior to their

276. This disparity also may raise Equal Protection claims.

277. See N.Y. CRIM. PROC. LAW § 60.42(1)-(5).

278. See *Michigan v. Lucas*, 500 U.S. 145, 149-53 (1991); *Agard v. Portuondo*, 117 F.3d 696, 703 (2d Cir. 1997) (acknowledging that the Rape Shield Act "reinforces the trial judge's traditional power to keep inflammatory and distracting evidence from the jury"); *People v. Williams*, 614 N.E.2d 730 (N.Y. 1993); *People v. Crawford*, 531 N.Y.S.2d 598, 599 (App. Div. 1988) (stating that "the court's decision to preclude such an inquiry was consistent with the legislative purpose of barring harassment of victims of sexual crimes concerning irrelevant issues and of shielding the jury from confusing and prejudicial matters which have no bearing on the issue of the guilt or innocence of the accused"). Compare *Michelson v. United States*, 335 U.S. 469, 476 (1948). Apparently, a complainant's sexual history proves irrelevant and prejudicial only insofar as the *defense* seeks to offer it. The prosecution, by contrast, may introduce evidence of a complainant's *chastity* on "the issue of why complainant failed to immediately inform her husband of the rape, as well as to defendant's contention that the sexual encounter was consensual in exchange for employment." *People v. Wigfall*, 690 N.Y.S.2d 2, 3-4 (App. Div. 1999).

279. See *People v. Swain*, 567 N.Y.S.2d 318, 319 (App. Div. 1991); cf. *People v. Allweiss*, 396 N.E.2d 735, 738 (N.Y. 1979) (explaining that the *Molineux* rule "is based on policy and not on logic").

280. See *Lucas*, 500 U.S. at 149-53; *Williams*, 614 N.E.2d at 735; *People v. Smith*, 391 N.Y.S.2d 734, 737 (App. Div. 1977). See also *People v. Dixon*, 604 N.Y.S.2d 604 (App. Div. 1993); *Agard*, 117 F.3d at 696.

adoption by Congress, characterized this objection as "superficial."²⁸¹ Mr. Karp explained:

Inquiry into [the complainant's] sexual history will normally disclose nothing that particularly distinguishes her from the general population, and typically has little probative value on the question whether she consented to sex in the charged incident and fabricated a false accusation. In contrast, evidence showing that the defendant has committed sexual assaults on other occasions places him in a small class of depraved criminals, and is likely to be highly probative in relation to the pending charge. The difference in typical probative value alone is sufficient to refute facile equations between evidence of other sexual behavior by the victim and evidence of other violent sex crimes by the defendant.²⁸²

Significantly, however, Mr. Karp cites as the probative value of a defendant's sexual assault propensities only the fact that it "places him in a small class of depraved criminals." The argued relevance of this evidentiary fact contravenes centuries of jurisprudence under our system of adjudicating guilt or lack of guilt.

Mr. Karp also seems to ignore the fact that the Rape Shield Act does preclude evidence that, at least in the minds of some jurors, arguably "distinguishes [a complainant] from the general population."²⁸³ These same jurors, so easily misled and confused by this evidence of a complainant's sexual propensities, Mr. Karp readily trusts to weigh evidence that "places [a defendant] in a small class of depraved criminals." Such equally facile distinctions between the nature and purposes of the Rape Shield Act and laws such as

281. Karp, *supra* note 85, at 23.

282. *Id.* at 24.

283. See e.g., Mark Hamblett, *In the Courts: Shield Law, Consent Issues Arise in "Cybersex" Appeal*, N.Y. L.J., Feb. 3, 1999, at 3 (discussing appellate issues from the well-publicized "cybersex" sadomasochism-kidnapping trial of *People v. Oliver Jovanovic*, in which the trial court precluded, under Rape Shield Act, several e-mails from complainant concerning her sadomasochistic experiences, despite defendant's defense of consent to such conduct and complainant's assertedly misleading testimony about her experiences); *People v. Jovanovic*, 676 N.Y.S.2d 392, 395 n.3 (Sup. Ct., N.Y. Co., 1997) (denying disclosure of subpoenaed e-mails between complainant and third parties containing "information regarding the complainant's sexual history and/or proclivities"); *Williams*, 614 N.E.2d at 735 (precluding evidence that white complainant previously engaged in group sex with black males, which defendants offered to support consent defense in case charging several black males with forcible rape, as illustrating complainant's motive to fabricate and propensity to consent to this type of sexual encounter, and to rebut prosecution's summation characterization of defendants' group-consent theory as "a little peculiar"); *Dixon*, 604 N.Y.S.2d at 605 (precluding evidence of a complainant's arrests for prostitution, offered to support consent).

CPL section 60.41 cannot obviate the troublesome self-contradiction that their co-existence would create.

Another commentator, Professor Roger Park, offers a slightly different take on the significance of propensity evidence regarding a defendant rather than a complainant:

[E]vidence about a victim's sexual history is less probative than evidence about the defendant's prior sex offenses because the victim evidence cuts both ways. If the victim frequently consented to casual sex, that fact tends to show, however slightly, that she is more likely to have consented to casual sex on a particular occasion than another woman who never consents. It also tends, however, to show that she does not readily make accusations of rape. . . . The defendant's history of rapes does not cut both ways. It simply tends to show that the defendant is a rapist who is more likely to be guilty in this case than he would be without the evidence.²⁸⁴

Professor Park's analysis, however appealing, merely returns the analysis to questions of the relative *weight* of this competing evidence — generally a factor for the jury to decide — not its admissibility. The rule precluding criminal propensity evidence “is based on policy and not on logic.”²⁸⁵ As Professor Park notes, “rape shield laws [similarly] are not only designed to protect against jury misdecision. They are also aimed at goals outside the courtroom,” such as “to protect victims from embarrassment in order to encourage them to report rape,” and because “victims have a legitimate privacy interest in keeping facts about their (noncriminal) sexual history secret.”²⁸⁶ Professor Park, however, does not identify why the policies underlying the general preclusion of a complainant's sexual character in a criminal trial merit more protection than the policies underlying the preclusion of a defendant's sexual character during the very same trial.

D. Due Process and Prejudice-Balancing

The Tenth Circuit and the California State courts ultimately uphold FRE 413 and 414 and CEC section 1108 under a case-by-case, as-applied analysis, relying upon FRE 403 and CEC section 352's prejudice-balancing test. CPL section 60.41 would incorporate this balancing test. This familiar prejudice-versus-probative value anal-

284. Park, *supra* note 217, at 277-78 (internal citations omitted).

285. *People v. Allweiss*, 396 N.E.2d 735, 738 (N.Y. 1979).

286. Park, *supra* note 217, at 277.

ysis, however, provides an odd sort of protection against the prejudice of true propensity evidence.

Under a traditional *Molineux* analysis, as with FRE 403 and CEC section 352, the court, in deciding whether to admit prior crimes evidence, weighs the potential prejudice of prior crimes evidence — consideration of the defendant's criminal propensity — against its probative value at proving some other material issue.²⁸⁷ With the admission of prior crimes evidence specifically to demonstrate criminal propensity, by contrast, the proffered probative value of the prior crimes evidence *is* the prejudice against which the court must weigh the evidence: that the fact-finder will presume guilt because of the defendant's past conduct, even in the absence of proof beyond a reasonable doubt. Logic dictates that the greater the probative value of the criminal propensity evidence, the more acute its prejudice necessarily becomes.

Indeed, *Castillo* turns traditional *Molineux* analysis on its head by suggesting that criminal propensity evidence generates little or no prejudice beyond what already exists with traditional *Molineux* evidence, because in either case the jury may convict due to the defendant's past conduct.²⁸⁸ This reasoning ignores the delicate factual balancing and jury instructions that decades of decisional and statutory law has developed to prevent exactly this result when a trial court does admit prior crimes evidence.²⁸⁹

Quite contrary to the court's view in *Castillo*, criminal propensity evidence asks the jury to reach precisely the conclusion that the law so painstakingly has sought to avoid. Traditional *Molineux* balancing, therefore, as with much of the reasoning of the Tenth Circuit and the California state courts, fails to answer the due process concerns that criminal propensity evidence raises, perhaps most acutely in sexual assault prosecutions.

287. See *People v. Alvino*, 519 N.E.2d 808, 812 (N.Y. 1987); *People v. Ventimiglia*, 420 N.E.2d 59, 62 (N.Y. 1981); FARRELL, *supra* note 7, § 4-501, at 176.

288. *United States v. Castillo*, 140 F.3d 874, 882 (10th Cir. 1998).

289. See, e.g., *People v. Williams*, 409 N.E.2d 949, 950 (N.Y. 1980); *People v. Celentino*, 615 N.Y.S.2d 346, 349 (App. Div. 1994) (reversing conviction, because trial court "utterly failed to consider the [prior narcotics sale] evidence to be proffered or to weigh its probative value against its potential for prejudice," and "failed to instruct the jury, both at the time of its introduction and in its charge, on the limited purpose for which it may consider evidence of the uncharged crime"); *People v. Matthews*, 544 N.Y.S.2d 398, 402-3 (App. Div. 1989).

CONCLUSION

The proposed CPL section 60.41 reflects a legislative judgment that, for alleged sex offenders, a different set of evidentiary rules should apply regarding the admissibility of similar past criminal conduct. The question becomes whether the law in New York State will reject this legislative judgment, or whether "that jealous regard for the liberty of the individual" and "humane and enlightened public spirit"²⁹⁰ underpinning the *Molineux* rule no longer apply to those persons whom the State charges with sexual assaults. "His [will] not [be] the trial by peers promised by the Constitution of the United States, conducted in accordance with centuries-old fundamental conceptions of justice."²⁹¹

If the Legislature passes the Act, for proponents of this change, persuasive authority exists under federal and California law that the proposed CPL section 60.41, on its face, does not violate due process.²⁹² Until the Supreme Court or New York appellate courts rule upon this issue, however, defense counsel will possess meaningful arguments that CPL section 60.41 violates a common law tradition that preserves the presumption of innocence and holds the prosecution to its proper burden of proof. These arguments may prove strongest under New York State law.²⁹³ For before New York Courts could accept CPL section 60.41, "a rule of criminal evidence, long believed to be of fundamental importance for the protection of the innocent, must be first declared away."²⁹⁴

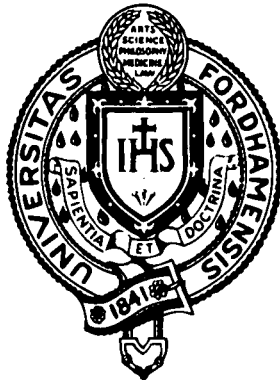
290. *People v. Molineux*, 61 N.E. 286, 293 (N.Y. 1901).

291. *McKinney v. Rees*, 993 F.2d 1378, 1386 (9th Cir. 1993).

292. Notwithstanding, these opinions make clear that a trial court's failure to conduct a patient, searching inquiry into proffered sexual assault propensity evidence, or the prosecution's failure to give adequate pre-trial notice of this evidence, may render the evidence unconstitutional as applied under both the New York and United States Due Process Clauses. *Cf. United States v. McHorse*, 179 F.3d 889, 896 (10th Cir. 1999); *United States v. Charley*, 1999 U.S. App. LEXIS 8711, at *15-19 (10th Cir. Aug. 27, 1999); *People v. Soto*, 75 Cal. Rptr. 2d 605, 615-21 (Ct. App. 1998).

293. *See People v. Scott*, 593 N.E.2d 1328, 1338 (N.Y. 1992); *People v. Lugo*, 650 N.Y.S.2d 103, 104 (App. Div. 1996); *People v. Joseph*, 445 N.Y.S.2d 2 (App. Div. 1981).

294. *People v. Zackowitz*, 172 N.E. 466, 468 (N.Y. 1930).



SHEDDING SOME LIGHT ON LENDING: THE EFFECT OF EXPANDED DISCLOSURE LAWS ON HOME MORTGAGE MARKETING, LENDING AND DISCRIMINATION IN THE NEW YORK METROPOLITAN AREA

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INTRODUCTION

In 1991, conventional home mortgage lenders disclosed vastly expanded information about their lending for the first time. The newly amended Home Mortgage Disclosure Act (the "HMDA")¹ required lenders to disclose information regarding the number of applications received, the race and income of applicants, the location of the property for which the loan was sought and the disposition of each application.² The federal government intended the disclosure of this information to impact the private allocation of credit – that is, to have an impact on to whom, where and on what terms private lenders make loans – without directly allocating credit through lending quotas or specific lending mandates.³

The HMDA is a federal home mortgage lending disclosure law that provides a significant amount of the data the federal banking regulatory agencies (collectively the "federal banking agencies") that enforce the Community Reinvestment Act ("CRA")⁴ use to

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1. 12 U.S.C. §§ 2801-2810 (1999).

2. *See id.*

3. *See infra* note 8 and accompanying text.

4. 12 U.S.C. §§ 2901-2906 (1999). The CRA states that banks have an affirmative obligation to meet the credit needs of their local communities, including low- and moderate neighborhoods. *See id.* §§ 2901(a), 2903(1), 2906(a)(1). The CRA does not

evaluate a bank's lending record in its local community.⁵ The HMDA is broader in its coverage than the CRA, covering banks, bank affiliates and subsidiaries, mortgage lenders that are not banks or related to banks, credit unions, mortgage companies and finance companies that make home mortgage loans.⁶ The HMDA contains no lending mandate; in fact it explicitly states that Congress did not intend that the HMDA allocate credit.⁷ Nevertheless, the HMDA's Congressional sponsors did intend that disclosure of

cover lenders other than banks, thus exempting bank subsidiaries or affiliates or non-bank lenders from scrutiny, although the lending record of a bank's subsidiaries or affiliates may be considered as part of the bank's CRA record. *See* 12 C.F.R. §§ 25.22(c), 25.23(c) (1999). Four federal banking agencies share regulatory jurisdiction over the CRA, and they have promulgated virtually identical CRA regulations. The agencies, the banks they regulate and their CRA regulations are:

Agency	Jurisdiction	Regulations
Office of the Comptroller of the Currency ("OCC")	National banks	12 C.F.R. pt. 25 (1999)
Board of Governors of the Federal Reserve System ("Federal Reserve")	State-chartered banks that are members of the Federal Reserve System	12 C.F.R. pt. 228 (1999)
Federal Deposit Insurance Corporation ("FDIC")	State-chartered banks that are not members of the Federal Reserve System	12 C.F.R. pt. 345 (1999)
Office of Thrift Supervision ("OTS")	Savings and loans	12 C.F.R. pt. 563e (1999)

The four federal banking agencies enforce the CRA through conducting periodic examinations of banks' CRA records, issuing public written evaluation reports that include performance ratings, and taking a bank's CRA record into account when the bank seeks permission from the agency to merge or otherwise expand. *See* 12 U.S.C. §§ 2903, 2906. Although the CRA requires banks to meet the credit needs of their local communities, including low- and moderate-income neighborhoods, the legislative history of the CRA indicates that Congress did not intend the CRA to allocate credit. Because the federal banking agencies fear that quantitative standards for evaluating bank lending under the CRA would allocate credit, they have not established such standards. For example, although the federal banking agencies evaluate bank lending using numerical indicia such as loan-to-deposit ratios and dollar amount of loans outstanding, they rely on subjective criteria such as "excellent," "good" or "poor" to evaluate those numbers. *See, e.g.*, 12 C.F.R. pt. 25, app. A (1999) (stating the OCC's standards for evaluating a bank's lending, investments and services).

5. *See* 12 U.S.C. § 2903(a)(1).

6. *See infra* note 17.

7. *See* 12 U.S.C. § 2801(c) (1999). *See also* S. REP. NO. 94-187, at 11 (1975); 121 Cong. Rec. 25,161, 26,162 (1975).

lending data would goad lenders into lending more money in low-income and inner-city areas.⁸

As originally enacted, the HMDA covered only banks, and it required banks to disclose the location, by state, county and census tract, of each residential real estate-related loan they made.⁹ In 1989, Congress amended the HMDA to cover lenders other than banks and to expand the HMDA's disclosure requirements significantly.¹⁰ Starting with loans made in 1990, the HMDA would require banks to disclose additional information about their residential real estate-related loans, including the number of applications they received, the race, income and gender of each applicant, the census tract in which the property that was the subject of the loan application was located, and the disposition of each application.¹¹ The goal of these amendments was to spur lenders to do more to meet the credit needs of certain individuals and communities, including African Americans, Latinos, low- and moderate-income ("LMI") persons, predominantly minority neighborhoods and LMI neighborhoods (collectively, the "subject communi-

8. See H.R. REP. NO. 94-561, at 14, 20-21 (1975); S. REP. NO. 94-187, at 1, 2, 9 (1975); 121 Cong. Rec. 25,154 to 25,161, 25,162, 34,455 (1975). The disclosure provisions of the federal securities laws and regulations are another example of governmental efforts to influence the behavior of private actors via disclosure rather than establishing specific behavioral rules or mandates. See James A. Fanto, *Investor Education, Securities Disclosure, and the Creation and Enforcement of Corporate Governance and Firm Norms*, 48 CATH. U. L. REV. 15 (1998); Cynthia Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999). For example, disclosure of the countries in which a company does business, the background of directors and the salaries of top management may induce corporations to behave in a certain way, even though their underlying behavior is not necessarily subject to specific rules of conduct. See Fanto, *supra*, at 24-25. See also Williams, *supra*, at 1227, 1297. Disclosure rules such as the HMDA and the SEC's rules thus may be seen as an effort to create and enforce norms of behavior beyond those required by law. See Fanto, *supra*, at 23-25; Williams, *supra*, at 1227.

9. The HMDA was originally enacted as Pub. L. No. 94-200, §§ 301-310, 89 Stat. 1125-1128 (1975). The disclosure provisions were at § 304, 89 Stat. 1125-26. A census tract is a small geographic unit within a larger jurisdiction that is designated by the Bureau of the Census for purposes of compiling census data. See <<http://www.census.gov/dmd/www/glossary.html#T>>.

10. See Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 744.

11. Pub. L. No. 101-73, §§ 1211(a), (b), (c)(1), (c)(2)(a)-(c), (f), (i), (j), 103 Stat. 524-526 (1989) (codified at 12 U.S.C. § 2803(b)(4)). See also 12 C.F.R. § 203.4(a) (1999). Depository institutions with assets of \$30 million or less are not required to report information about the race, gender and income of applicants. 12 U.S.C. § 2803(i) (1999); 12 C.F.R. § 203.4(b)(2)(ii) (1999). Other lenders did not begin to disclose their lending until 1993. See *infra* note 17.

ties").¹² Despite the HMDA's proviso that Congress did not intend it to allocate credit,¹³ lending to the subject communities nationally surged beginning in 1992, following the disclosure in 1991 of the first set of expanded HMDA data.¹⁴

This article is a study of the expanded HMDA's impact on conventional home mortgage lending in the New York City metropolitan area from 1991, when the expanded data was first released, until 1998, the last year for which the lending data is available. This study grows out of the author's broader examination into the various ways that the federal government allocates credit and influences its allocation.¹⁵ The goal of this larger investigation is to develop quantitative standards without establishing quotas, for evaluating the sufficiency of bank lending under the CRA.¹⁶

Part I of this study examines several ways to determine whether the disclosure of expanded HMDA data in 1991 influenced private lenders'¹⁷ allocation of credit in the New York City metropolitan

12. See H.R. REP. NO. 101-54(I), at 497-99 (1989). For purposes of the HMDA data collection and analysis, a predominantly minority neighborhood has a minority population of 80 percent or higher. See, e.g., *Financial and Business Statistics*, 85 FED. RES. BULL. A65, tbl. 4.37 (Sept. 1999). A predominantly minority neighborhood may include, in its minority population, Native Americans, Asians/Pacific Islanders, African Americans and/or Latinos. See *id.* An LMI neighborhood has a median family income of less than 80 percent of the area median income ("AMI"). See *id.* at n.3. An LMI individual has an income less than 80 percent of the AMI. See *id.*

13. See 12 U.S.C. § 2801(c); 12 C.F.R. § 203.1(b)(2) (1999).

14. See discussion *infra* Part II.A.2.

15. The working title of this investigation is "A Law in Search of Standards: The Evolution of Community Reinvestment Act Enforcement Policy and a Proposal for Change."

16. Besides the HMDA, some other governmental attempts to allocate credit or influence its allocation of credit include bank safety and soundness regulations, lending targets for the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation and loan-to-deposit ratio requirements for interstate banks.

17. The HMDA covers depository institutions, which include banks, savings associations and credit unions. See 12 U.S.C. § 2802(2) (1999). Depository institutions with assets of \$10 million or less are exempt from the HMDA's disclosure requirements as are institutions that do not have a home or branch office in an MSA. See *id.* §§ 2808, 2803(a)(1). In 1996, Congress created an annual inflation-adjusted asset-based exemption. See Pub. L. No. 104-208, § 2225(a), 110 Stat. 3009-415-16 (1996) (codified at 12 U.S.C. § 2808(b) (1999); 12 C.F.R. § 203.3(a) (1999)). The 1999 threshold is \$28 million. Federal Reserve System, Press Release, December 18, 1998, at 1-3.

In 1989, Congress also amended the HMDA to extend its coverage to "other lending institutions," which it defined as "any person engaged for profit in the business of mortgage lending." Pub. L. No. 101-73, § 1211(d), (e)(4), 103 Stat. 525-26 (1989) (codified at 12 U.S.C. § 2802(2)(B), (4) (1999)). In 1992, the Federal Reserve issued regulations requiring such "other lending institutions" that had total assets combined with any parent corporation of more than \$10 million or made 100 loans the previous calendar year to start reporting their 1993 lending under the HMDA. See 57 Fed.

area.¹⁸ First, it measures the annual change in the overall market share of applications for conventional home mortgage loans¹⁹ from each subject community from 1991 to 1997. Second, this Part analyzes lenders' actual lending performance by measuring the annual change in conventional home mortgage loan market share each subject community held from 1991 to 1997. Third, Part I examines lenders' treatment of applicants from the subject communities compared to their treatment of applications from control communities. It does this by deriving a "denial rate ratio" for each subject community.²⁰

Part II then evaluates the results from Part I to determine the actual effect of expanded HMDA disclosure. It begins by exploring the strong growth in the market share of applications from and

Reg. 56,965 (1992) (codified at 12 C.F.R. § 203.3(a)(2) (1999)). The inflation-adjusted asset threshold does not apply to these other lending institutions. 12 U.S.C. § 2808(a) (1999).

18. More precisely, this study examines conventional home mortgage lending in Metropolitan Statistical Area 5600 ("MSA 5600"), which includes New York City and Putnam, Rockland and Westchester Counties. An MSA is a central city of at least 50,000 people and its surrounding suburbs. See U.S. Census Bureau, *Decennial Management Division Glossary* (visited Nov. 19, 1999) <<http://www.census.gov/dmd/www/glossary.html#M>>.

19. The HMDA requires lenders to disclose information about four different types of applications for home mortgage loans: 1) conventional home mortgage loans; 2) federally-insured home mortgage loans; 3) home mortgage refinancing loans; and 4) home improvement loans. See 12 U.S.C. § 2803(b) (1999); 12 C.F.R. § 203.4(a) (1999); 12 C.F.R. pt. 203, app. A, §§ V.A.3-4. (1999). The HMDA also requires lenders to report whether the property that is the subject of the application has four or fewer residential units, or more than four residential units. See 12 C.F.R. pt. 203, app. A, §§ V.A. 4-5. (1999). If the property has four or fewer residential units, the HMDA requires the lender to report whether the property is owner-occupied. 12 U.S.C. § 2803(b)(2) (1999); 12 C.F.R. 203.4(a)(3) (1999).

This study examines only one type of loan covered by the HMDA: conventional home purchase loans on residential dwellings with one to four units ("conventional home mortgage loans"). Such loans represent a high percentage of all the HMDA-covered loans in MSA 5600. Of the 516,346 loans reported under the HMDA from 1992 to 1997 in MSA 5600, 42.9 percent were conventional home mortgage loans. See *infra* note 30 (containing the source of this data). A conventional home mortgage loan also represents a significant financial stake for both the lender and the borrower and serves as a strong indicator of the lender's and borrower's willingness to invest in a community.

20. This study calculates the denial rate ratio by dividing the denial rate on applications from a subject community by the denial rate on applications from a control community. The control communities are white applicants for African American and Latino applicants, predominantly white neighborhoods (white population greater than 80 percent) for predominantly minority neighborhoods, upper-income ("UI") applicants (income greater than 120 percent of AMI) for LMI applicants, and UI neighborhoods (median income greater than 120 percent of AMI) for LMI neighborhoods. See *Financial and Business Statistics, supra* note 12.

loans to four of the five subject communities in the New York metropolitan area from 1992 to 1995, followed by its general decline from 1996 to 1997.²¹ This study does not analyze enough data to conclude definitively that the disclosure of expanded data caused these increases. However, the release of expanded HMDA data in 1991 focused attention on lending in the subject communities, which lead to changes in the regulatory environment, sparked community activism and changed lenders' attitudes, thus suggesting that the expanded HMDA disclosure had a powerful impact. While this study cannot prove that the disclosure of expanded data began a chain reaction that resulted in the increase in the market share of applications from and loans to the subject communities, the increases are certainly consistent with this conclusion.

Part II then turns to the increase in the denial rate ratio for three of the subject communities between 1991 and 1997, and the high levels for all five subject communities.²² This Part examines whether the high denial rate ratios for three of the subject communities in particular – African Americans, Latinos and predominantly minority neighborhoods – indicate that lenders in the New York metropolitan area discriminate against these communities.²³ Although high denial rate ratios based on HMDA data are consistent with discrimination, they are not sufficient to prove discrimination. The HMDA does not control enough information to reach a definite conclusion about discrimination. The denial rates are high enough, however, to merit further analysis by the federal and state governmental agencies that have enforcement jurisdiction over home mortgage lenders and access to the data.

Finally, Part III of this study examines the apparent inconsistency in the conclusions of Parts I and II that, while the disclosure

21. This means that these subject communities' share of the conventional home mortgage loan "pie" increased from 1992 to 1997 and decreased from 1996 to 1997, although the 1997 share remained higher than the 1991 share. The change in share does not indicate whether the total number of loans they received increased or decreased.

22. This means that from 1991 to 1997, the ratio of the denial rate in three subject communities to the denial rate in their respective control groups increased. This, in turn, means that lenders rejected members of these subject communities more frequently than members of the control groups. It is important to note that these are ratios only; actual denial rates might have increased or decreased.

23. "Discrimination" against members of the subject communities may take many forms at different stages of the lending process, including discouraging them from applying for loans, failing to provide them with equal levels of information and assistance in applying for loans, utilizing race-neutral criteria for evaluating creditworthiness that have a disparate impact based on race, and intentionally denying them loans. For a discussion of these forms of discrimination, see *infra* notes 73, 74, 151, 153.

of expanded HMDA data influenced lenders to allocate more credit to four of five of the subject communities, lenders may be discriminating based on race. Lenders' allocation of more credit to the subject communities is not inconsistent with discrimination against them, however, because changes in lending were more directly correlated with marketing than differential treatment.

I. MEASURING THE EFFECTS OF THE DISCLOSURE OF EXPANDED HMDA DATA

This part examines three ways that the disclosure of expanded HMDA data in late 1991 may have influenced private lenders' allocation of credit in the New York metropolitan area. It begins by examining lenders' efforts to market loans in the subject communities following the disclosure of expanded HMDA data in 1991.²⁴ The study uses changes in the market share of conventional home mortgage loan applications filed by members of the subject communities from 1991 to 1997 as a proxy for marketing efforts.²⁵ The theory behind examining marketing is that if lenders desired to increase lending to the subject communities following the disclosure of expanded HMDA data in 1991, one way they could have done so was by increasing their marketing to the subject communities.²⁶

This part then examines lenders' actual lending performance by examining changes in the market share of conventional home mortgage loans each subject community held from 1991 to 1997.

24. In this context, marketing includes anything a bank does to sell its loans, from television advertising to conducting first-time homebuyer seminars.

25. This study uses 1991 as a baseline for measuring change because the first set of expanded HMDA data – covering 1990 – was disclosed in late 1991; therefore, the first year that the disclosure of the actual expanded HMDA data itself could have had an impact on lenders' behavior was 1992. The study uses the market share of applications and loans instead of total applications and loans because the total number of applications and loans fluctuates from year to year, distorting the relative changes in lending to each subject community. Relying on relative market share controls for these fluctuations.

26. For studies that use the market share of applications to examine the lending record of individual banks, see KARL FLAMING & RICHARD ANDERSON, *MORTGAGE PRACTICES IN COLORADO* (1993); SAMUEL L. MYERS, JR. & BILL MILCZARSKI, *APPROPRIATE USES OF THE HMDA DATA IN MEASURING AND DETERMINING DISCRIMINATION IN LOCAL MARKETS: THE CASE OF CHICAGO* (1997); NATIONAL COMMUNITY REINVESTMENT COALITION, *AMERICA'S BEST AND WORST LENDERS* (1998); NATIONAL COMMUNITY REINVESTMENT COALITION, *WHO'S FINANCING THE AMERICAN DREAM* (1998); NATIONAL COMMUNITY REINVESTMENT COALITION, *AMERICA'S WORST LENDERS!: A COMPREHENSIVE ANALYSIS OF MORTGAGE LENDING IN THE NATION'S TOP 20 CITIES* (1995); WASHINGTON LAWYERS' COMM. FOR CIVIL RIGHTS AND URBAN AFFAIRS, *RANKING THE LENDERS: INVESTIGATING FOR PATTERNS OF RACIAL DISCRIMINATION IN THE MAKING OF HOME LOANS* (1994).

An increase in the market share of loans from the subject communities is consistent with the hypothesis that lenders responded to the disclosure of expanded data by making relatively more loans to members of the subject communities.²⁷

Finally, this part examines the relative treatment lenders gave to applicants from the subject communities compared to applicants from control groups by comparing annual changes in the denial rate ratio for each subject community, which is the rate lenders denied applications from a subject community divided by the rate they denied applications from a control community. The reason for examining denial rate ratios is that if lenders wanted to increase lending in the subject communities following the disclosure of expanded HMDA data, one way they could have done so was by treating applicants from the subject communities more favorably – or at least less unfavorably – than previously, and a good measure of this is the change in lenders' treatment of applicants from each subject community relative to their treatment of applicants from a control community.²⁸

27. For a discussion of this methodology and examples of studies that use the market share of loans to evaluate overall lending in a community and the lending record of individual lenders, see JONATHAN BROWN & CHARLES BENNINGTON, *RACIAL REDLINING: A STUDY OF DISCRIMINATION BY BANKS AND MORTGAGE COMPANIES IN THE UNITED STATES* (1993); JIM CAMPEN, *CHANGING PATTERNS IV: MORTGAGE LENDING TO TRADITIONALLY UNDERSERVED BORROWERS & NEIGHBORHOODS IN BOSTON, 1990-1996* (1997); MYERS & MILCZARSKI, *supra* note 26; FAIR LENDING ANALYSIS: A COMPENDIUM OF ESSAYS ON THE USE OF STATISTICS (Anthony M. Yezer ed. 1995); AMERICA'S BEST AND WORST LENDERS, *supra* note 26; WHO'S FINANCING THE AMERICAN DREAM, *supra* note 26; PETER SKILLERN & MAGRIT BERGHOLZ, *AN ANALYSIS OF 1992 MORTGAGE LENDING ACTIVITY TO AFRICAN AMERICANS AND LOW-INCOME HOUSEHOLDS IN WILMINGTON, NORTH CAROLINA* (1994); Robert B. Avery et al., *Trends in Home Purchase Lending: Consolidation and the Community Reinvestment Act*, 86 FED. RES. BULL. 81, 93 (1999); Katharine L. Bradbury et al., *Geographic Patterns of Mortgage Lending in Boston, 1982-1987*, NEW ENG. ECON. REV., Sept.-Oct. 1989, at 3; Glenn B. Canner, *Redlining: Research and Federal Legislative Response*, FED. RES. BULL. (Oct. 1982); Bill Dedman, *The Color of Money*, ATL. J.-CONST. (May 1-4, 1989) (reprint of four part series).

28. For example, if the denial rate for African American applicants in a given year is 50 percent, and the denial rate for white applicants in the same year is 25 percent, the denial rate ratio is 2 (50/25=2). If the denial rate ratio in the next year is 2.5, this means the denial rate ratio increased by 25 percent, indicating that lenders treated African Americans less favorably than whites in the second year than in the first year. Thus, in contrast to changes in the market share of applications and loans, where increases in the subject communities indicate more favorable treatment, increases in the denial rate ratio indicate less favorable treatment. For studies that use the denial rate ratio, see MYERS & MILCZARSKI, *supra* note 26; AMERICA'S BEST AND WORST LENDERS, *supra* note 26; WHO'S FINANCING THE AMERICAN DREAM, *supra* note 26.

A. Marketing and Applications

Table One depicts the market share of conventional home loan mortgage applications each subject community submitted from 1991 to 1997, the percentage change each year and the overall percentage change in share from 1991, when expanded HMDA data was first disclosed, to 1997.²⁹

TABLE ONE³⁰

	1991		1992		1993		1994		1995		1996		1997		1991-1997
	Share	Change	Share	Change	Share	Change	Share	Change	Share	Change	Share	Change	Share	Change	Change
African Americans	10.9	10.7	(1.8)	12.1	13.1	14.3	18.2	16.0	11.9	14.2	(11.3)	12.3	(13.4)	12.8	
Latinos	6.2	6.4	3.2	6.4	0.0	7.7	20.3	8.6	11.7	8.3	(3.5)	8.2	(1.2)	32.3	
LMI Applicants	6.9	6.8	(1.4)	8.1	19.1	6.7	(17.3)	4.7	(29.9)	4.7	0.0	9.3	97.9	34.8	
Minority Neighborhoods	8.9	11.3	26.9	11.2	(0.9)	12.5	11.6	13.5	8.0	12.6	(6.7)	13.3	5.6	49.4	
LMI Neighborhoods	11.9	8.8	(26.1)	8.4	(4.5)	8.9	5.9	9.5	6.7	8.9	(6.3)	9.9	11.2	(16.8)	

Table One shows that the market share of applications for conventional home mortgage loans increased overall from 1991 to 1997 in four of the five subject communities. The subject communities experienced the strongest growth in market share of applications from 1992 to 1995. During these four years, for all subject communities, the market share of applications grew in twelve of twenty observations, decreased in seven and remained the same in one.³¹ By 1995, the market share of applications from three subject

29. This study is not attempting to determine whether lenders are meeting the demand for loans in the subject communities, and therefore does not rely on proxies for demand such as the percentage of the population a subject community constitutes. Instead, this study analyzes what happened to lending in the subject communities following the disclosure of expanded the HMDA data in late 1991. This study does this by using relative changes in the market share of applications and loans and denial rate ratios in the subject communities to evaluate whether lenders are improving their lending records.

30. Unless otherwise indicated, the source of the HMDA data in this study is the Center for Community Change, which publishes "the HMDA Works," a software program for analyzing the HMDA data, and the website of the Federal Financial Institutions Examination Council, <www.ffiec.gov>. All numbers are rounded to the nearest tenth, except where that would result in a change of the integer. In this and subsequent tables, "share" represents the percentage market share, "change" represents the percentage change in market share from the previous year, and a number in parentheses indicates a decrease in the relevant share or ratio.

31. This means that during this three-year period, there were twenty opportunities for the market share of applications to change ("observations"): one observation in each of the five subject communities each year, for a total of five observations per year for four years, or twenty observations. This terminology will be used in the rest of this study.

communities – African Americans, Latinos and predominantly minority neighborhoods – had reached post-1991 highs. These gains slowed or eroded in 1996 and 1997, however. In those two years, for all subject communities, the market share of applications dropped in six of ten observations, increased in three and remained the same in one.

The largest increase in the market share of conventional home mortgage loan applications was in predominantly minority neighborhoods, for which the share grew 49.4 percent from 1991 to 1997, from 8.9 to 13.3 percent. The market share of applications also increased significantly for LMI applicants – 34.8 percent, from 6.9 percent in 1991 to 9.3 percent in 1997. Similarly, Latinos' market share of applications increased 32.3 percent, from 6.2 percent in 1991 to 8.2 percent in 1997. African Americans' market share of applications increased 12.8 percent, from 10.9 percent in 1991 to 12.3 percent in 1997. In contrast to these increases, LMI neighborhoods' market share of applications declined 16.8 percent, from 11.9 percent in 1991 to 9.9 percent in 1997.

B. Lending

Table Two depicts the market share of loans held by each subject community from 1991 to 1997, the percentage change in share for each year and the overall change in share from 1991, when expanded HMDA was first disclosed, to 1997.

TABLE TWO³²

	1991			1992			1993			1994			1995			1996			1997			1991-1997 Change
	Share	Share	Change	Share	Share	Change	Share	Share	Change	Share	Share	Change	Share	Share	Change	Share	Share	Change	Share	Share	Change	
African Americans	9.3	9.2	(1.1)	11.1	20.7	13.4	20.7	14.8	10.4	12.2	(17.6)	10.3	(15.6)	10.8								10.8
Latinos	5.5	6.2	12.7	5.9	(4.8)	7.6	28.8	8.1	6.6	7.8	(3.7)	7.6	(2.6)	38.2								38.2
LMI Persons	6.3	5.7	(9.5)	6.8	19.3	5.5	(19.1)	3.8	(30.9)	3.5	(7.9)	7.4	111.4	17.4								17.4
Minority Neighborhoods	7.4	9.8	32.4	9.9	1.0	11.2	13.1	12.1	8.0	10.1	(16.5)	10.2	0.9	37.8								37.8
LMI Neighborhoods	10.2	7.9	(22.5)	7.6	(3.8)	8.1	6.6	8.6	6.2	7.3	(15.1)	7.9	8.2	(22.5)								(22.5)

Table Two shows that the market share of conventional home mortgage loans increased in four of the five subject communities from 1991 to 1997. Lending grew strongly from 1992 to 1995, the first four years after the disclosure of expanded HMDA data. In these four years, in all subject communities, the market share of loans increased in thirteen of twenty observations and decreased in

32. See *supra* note 30 (containing the source of this data).

seven. The strongest gains came from 1993 to 1995. In these three years, the market share of loans increased in eleven of fifteen observations. By 1995, the market share for all subject communities, except LMI persons, had reached their post-1991 highs. These gains nearly reversed themselves for African Americans from 1996 to 1997, however, and the market share of loans held by all the subject communities decreased in seven of ten observations in these two years.

The largest increases in the market share of loans were for predominantly minority neighborhoods and Latinos. The market share of loans held by predominantly minority neighborhoods grew from 7.4 percent in 1991 to 10.2 percent in 1997, an increase of 37.8 percent. The market share of loans held by Latinos increased 38.2 percent from 1991 to 1997, from 5.5 percent to 7.6 percent. The market share of loans held by African Americans and LMI persons grew at smaller rates, 10.8 and 17.4 percent, respectively. In contrast to these increases, the market share of loans held by LMI neighborhoods declined from 10.2 percent in 1991 to 7.9 percent in 1997, a decrease of 22.5 percent.

C. Relative Treatment of Applicants

Table Three shows the denial rate ratios³³ on conventional home mortgage loan applications for the five subject communities and their corresponding control groups from 1991 to 1997. It also shows the percentage change in denial rate ratios in each year starting in 1992, and the overall percentage change from 1991 to 1997.

33. As a reminder, the denial rate ratio is the conventional home mortgage loan application denial rate for applicants from one of the subject communities divided by the denial rate for applicants from its control community. For example, if the denial rate for Latino conventional home loan mortgage applicants is 40 percent, and the denial rate for white conventional home loan mortgage applicants is 20 percent, the denial rate ratio is 2. ($40/20=2$)

TABLE THREE³⁴

	1991	1992	1993	1994	1995	1996	1997	1991-1997						
	Ratio	Ratio	Change	Ratio	Change	Ratio	Change	Change						
African American/ White Applicants	1.9	1.9	0.0	1.7	(10.5)	1.9	11.8	1.8 (5.3)	2.1	16.7	2.2	4.8	15.8	
Latino/White Applicants	1.9	1.5	(21.1)	1.6	6.7	1.6	0.0	1.6	0.0	1.7	6.3	1.7	0.0	(10.5)
LMI/UI Applicants	1.5	1.9	26.7	2.1	10.5	2.5	19.0	2.8	12.0	2.5	(10.7)	2.3	(8.0)	53.3
Minority/White Neighborhoods LMI/UI	1.9	1.9	0.0	1.7	(10.5)	1.9	11.8	1.7	(10.5)	2.0	17.6	2.0	0.0	5.3
Neighborhoods	1.8	1.7	(5.6)	1.6	(5.9)	1.8	12.5	1.5	(16.7)	1.9	26.7	1.8	(5.3)	0.0

Table Three shows that denial rate ratios were higher in 1997 than in 1991 for three of the five subject communities, lower for one, and unchanged for the remaining community. The denial rate ratio increased most significantly for LMI applicants, increasing from 1.5 percent in 1991 to 2.3 percent in 1997, an increase of 53.3 percent. The denial rate ratio increased modestly for African Americans and predominantly minority neighborhoods: 15.8 percent for African Americans, from 1.9 in 1991 to 2.2 in 1997; and 5.3 percent for predominantly minority neighborhoods, from 1.9 in 1991 to 2.0 in 1997. The denial rate ratio decreased 10.5 percent for Latinos, from 1.9 in 1991 to 1.7 in 1997. The denial rate ratio did not change for LMI neighborhoods, starting at 1.8 in 1991 and ending at 1.8 in 1997.

II. THE IMPACT OF THE DISCLOSURE OF EXPANDED THE HMDA DATA

This part explores the effect of expanded HMDA disclosure. It examines the overall growth in the market share of applications from and loans to four of the five subject communities following the disclosure and the factors that suggest that these increases correlate directly to the expanded HMDA disclosure. While this study cannot definitively conclude that the disclosure of expanded HMDA data alone resulted in these increases, the extent, timing and context of the increases and changes in the activist and regulatory environment following the disclosure point to a direct correlation.

This part then examines the connection between continually high denial ratios and the existence of discrimination in the lending market. This part concludes that strong evidence of discrimination

34. See *supra* note 30 (containing the source of this data).

exists that merits further analysis. The data, however, required for the confirmation or refutation of the existence of discrimination is not commonly available. The evidence of discrimination is strong enough that the federal and state governmental agencies with enforcement jurisdiction over home mortgage lenders should gather the necessary data to conduct a comprehensive study of jurisdiction.

A. The Allocative Effects of the Disclosure of Expanded the HMDA Data

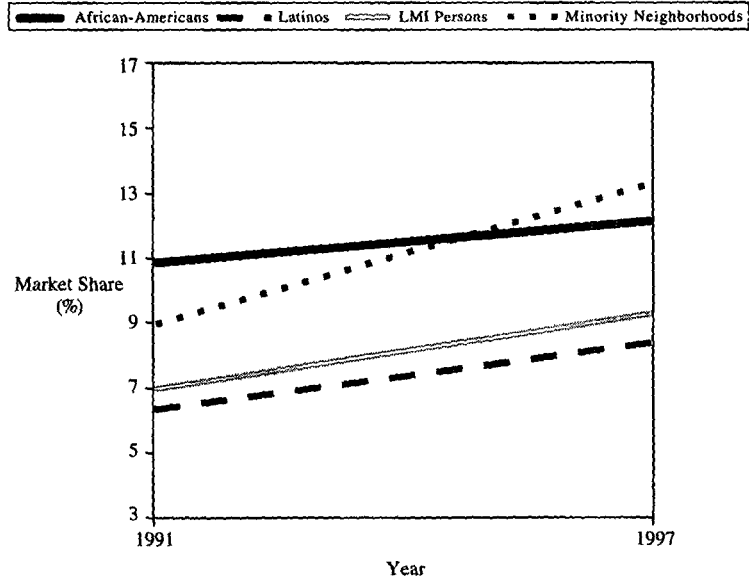
As the above data shows,³⁵ the market share of applications from and loans to four of the five subject communities increased significantly from 1991 to 1997. This study does not analyze sufficient data to conclude definitively that the disclosure of expanded HMDA data in 1991 caused these increases. Many other factors could have had a role in these increases, particularly the economic expansion in the United States and New York City. The extent and timing of the changes in market share, both locally and nationally, however, strongly suggest that the disclosure of expanded data influenced private lenders' decisions about allocating credit. In addition, direct evidence exists that the disclosure of expanded HMDA data changed the regulatory and activist environment, and that lenders attempted to increase lending to subject communities in explicit response to these changing circumstances.

1. *Extent and Timing of the Increases in the Market Share of Applications and Loans*

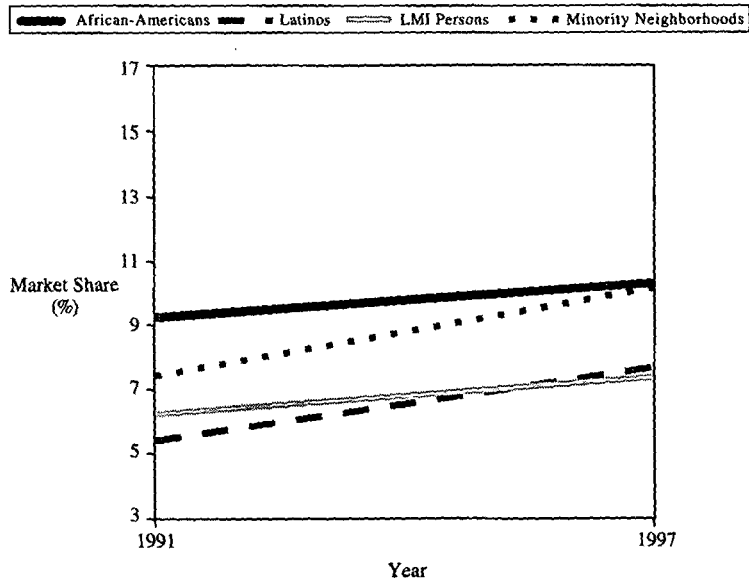
By 1997, the market share of conventional home mortgage loan applications from and loans to four of the five subject communities had increased from their 1991 levels. These increases are depicted graphically as follows:

35. See *supra* Parts I.A-B.

GRAPH ONE
OVERALL INCREASES IN MARKET SHARE OF APPLICATIONS, 1991-1997



GRAPH TWO
OVERALL INCREASES IN MARKET SHARE OF LOANS, 1991-1997



The increases were concentrated most strongly in the four years following the disclosure of expanded HMDA data, from 1992 to

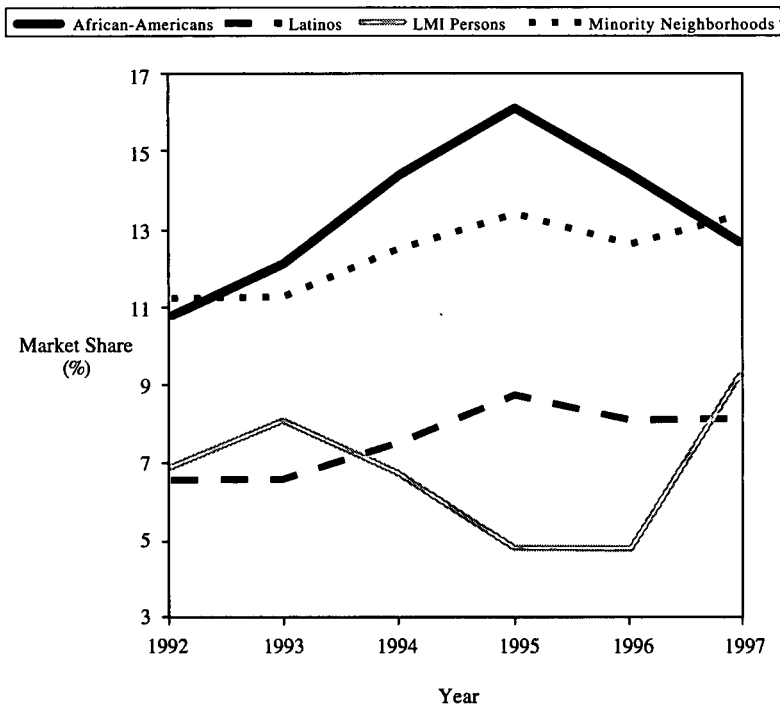
1995, but they trailed off from 1996 to 1997. As Table Four shows, during the period of the strongest increases, from 1992 to 1995, the market share of applications increased in twelve instances, decreased in seven and remained the same in one, for all subject communities in all years. The market share of loans increased in thirteen of twenty observations.

TABLE FOUR³⁶

	Increases	Decreases	No Change
Market Share of Applications	12	7	1
Market Share of Loans	13	7	0

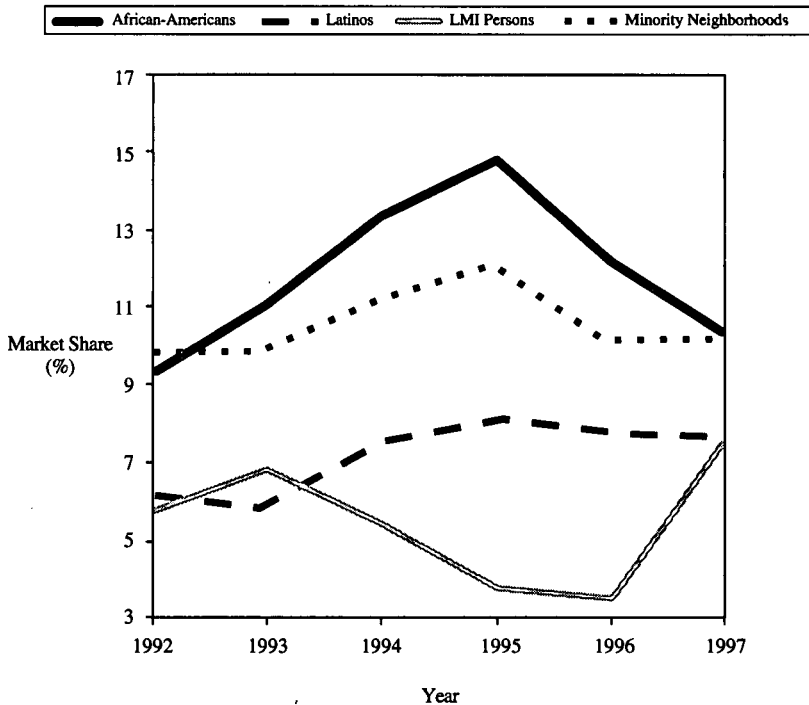
These results are depicted graphically as follows:

**GRAPH THREE
ANNUAL CHANGE IN MARKET SHARE OF
APPLICATIONS, 1992-1997**



36. See *supra* note 30 (containing the source of this data).

GRAPH FOUR
ANNUAL CHANGE IN MARKET SHARE OF
LOANS, 1992-1997



As Graphs Three and Four show, the most significant growth in the market share of applications and loans occurred from 1993 to 1995. In these three years, the market share of applications from and loans to the subject communities increased in eleven of fifteen observations. The timing of these increases provides further evidence that the disclosure of expanded HMDA data influenced private lenders' allocation of credit. The expanded HMDA was not disclosed until late 1991,³⁷ so presumably it would have taken lenders until well into 1992 to strengthen their efforts to lend more to the subject communities. These efforts would have been partially reflected in the 1992 HMDA data, but not fully until the 1993 data.

In the subject communities, two trends in the market share of loans appear inconsistent with the conclusion that the disclosure of expanded HMDA data had a strong influence on private lenders' allocation of credit: the overall decline in the market share of applications from and loans to LMI neighborhoods from 1991 to 1997; and the general decline in the market share of applications

37. See *infra* text accompanying note 48.

from and loans to the subject communities from 1996 to 1997. Despite this apparent inconsistency, however, two hypotheses about these trends, if correct, would indicate that the decreases are actually consistent with the conclusion that the disclosure of expanded HMDA data in 1991 had an allocative impact.

As to the general decline from 1996 to 1997, the hypothesis is that if lenders were under serving the credit needs of the subject communities before 1991, there would have been significant unsatisfied demand for loans in these communities. Lenders may have satisfied this accumulated demand between 1992 and 1995, after which demand returned to a more normal level. Under this hypothesis, the decline in lending from 1996 to 1997 was just a leveling after lenders satisfied this unfulfilled demand from 1992 to 1995. Consistent with this hypothesis, from 1990 to 1991, after the legislation requiring disclosure of expanded HMDA data was passed but before any data was released, the market share of loans to all five subject communities declined significantly.³⁸ Following the disclosure of the expanded data, lending increased.³⁹

The hypothesis regarding the decline in market share of applications from and loans to LMI neighborhoods is that the greater availability of credit to members of the subject communities opened previously unaffordable housing markets in higher income neighborhoods for them, allowing them to move there. According to this hypothesis, members of the subject communities who lived in LMI neighborhoods and received loans would have moved in disproportionate numbers to middle income ("MI") neighborhoods, and members of the subject communities who received loans and lived in MI neighborhoods, would have moved in disproportionate numbers into UI neighborhoods. It may be possible, through a combination of analyses of deed transfers, demographic patterns, home value changes and surveys, to determine whether this was the case. As for this study, the following data suggests that this hypothesis is correct. The hypothesis would predict, for example, that while loans grew in predominantly minority neighborhoods overall from 1991 to 1997, the strongest growth would have been in MI and UI predominantly minority neighborhoods. In fact, this is what happened. From 1991 to 1997, the market share of loans in all predominantly minority neighborhoods grew by 37.8 percent.⁴⁰ The growth in LMI predominantly minority neighbor-

38. *See supra* note 30 (containing the source of this data).

39. *See supra* Table Two.

40. *See id.*

hoods was only twenty percent,⁴¹ while the increase in MI predominantly minority neighborhoods was 167 percent⁴² and the increase in UI predominantly minority neighborhoods was 222 percent.⁴³

If these hypotheses prove correct, which seems likely from the data, no inconsistency exists between these two trends in the market share of loans in the subject communities and the conclusion that expanded HMDA disclosure had a strong influence on private lenders' allocation of credit.

2. *Local Results in National Context*

Examining the New York results in the context of national results also suggests that the increases in applications and loans resulted directly from the HMDA disclosure, rather than other anomalous local factors. Nationally, the market share of applications from and loans to all five subject communities increased,⁴⁴ in fact, the increases were greater than in the New York metropolitan area.⁴⁵ As Table Five shows, by 1997, the national market shares of conventional home mortgage applications from all five subject communities had increased significantly from their 1991 levels.⁴⁶

TABLE FIVE

	Market Share of Applications		
	1991	1997	% Change
African Americans	4.2	8.8	109.5
Latinos	4.9	5.9	20.4
LMI persons	23.0	31.7	37.8
Predominantly minority neighborhoods	2.3	3.5	52.2
LMI neighborhoods	10.2	14.2	39.2

As Table Six shows, the market share of approved loans also increased nationally in all five subject communities from 1991 to 1997.⁴⁷

41. See *supra* note 30 (containing the source of this data).

42. See *id.*

43. See *id.*

44. See Glenn B. Canner & Dolores S. Smith, *Home Mortgage Disclosure Act: Expanded HMDA Data on Residential Lending: One Year Later*, 78 FED. RES. BULL. 801, 806, 808, 810 (1991); *Financial and Business Statistics*, *supra* note 12, at A65, A67.

45. See sources cited *supra* note 44.

46. See *id.*

47. See sources cited *supra* note 44. The "Market Share of Loan Approvals" depicted in Table Six includes both loans originated and applications the lender approved but that the borrower did not accept. This differs from Table Two, which

TABLE SIX

	Market Share of Loan Approvals		
	1991	1997	% Change
African Americans	3.1	5.6	80.6
Latinos	4.1	5.0	21.9
LMI persons	18.6	25.1	34.9
Predominantly minority neighborhoods	1.9	2.6	36.8
LMI neighborhoods	9.2	11.6	26.1

Although the increases in the market share of applications and loans were greater nationally than in the New York metropolitan area, these national results show that the increases in New York were part of a national trend, providing support for the hypothesis that the increases were not the result of factors unique to New York.

3. *Efforts to Force Lenders to Increase Lending in Response to the Disclosure of Expanded HMDA Data*

In addition to the statistical increases in the market share of loans in the subject communities following the disclosure of expanded HMDA data, other evidence suggests that the disclosure of expanded HMDA data had an allocative effect. There is direct evidence – in the form of public outcry over the initial disclosure of expanded HMDA data in late 1991, followed by increased community activism and governmental efforts to strengthen enforcement of the fair lending laws, followed in turn by lenders' efforts to increase their lending in the subject communities in explicit response to the disclosure of expanded HMDA data and changed environment – that the disclosure of expanded HMDA data had an allocative effect.

(a) *The Public Response to the Disclosure of Expanded the HMDA Data*

In late 1991, the Federal Reserve released the first set of expanded HMDA data.⁴⁸ The data showed that in 1990, lenders across the nation denied conventional home mortgage loan applications from African Americans more than twice as frequently and

shows changes in the market share of loans in the New York metropolitan area, which included only loans originated.

48. For a description of the expanded data, see *supra* text accompanying note 11. See also *supra* notes 17, 19 and text accompanying notes 6-12 (providing a more complete description of the HMDA).

from Latinos nearly 1.5 times as frequently as from whites.⁴⁹ Lenders denied applications for conventional home mortgage loans from predominantly minority neighborhoods more than twice as frequently as from predominantly white neighborhoods.⁵⁰

The disclosure of this data immediately created a tremendous amount of negative publicity for lenders in New York and around the country.⁵¹ Community leaders called on banks to investigate the reasons for the rejection rate disparities and improve their lending records.⁵² Community groups, activists and journalists published numerous studies of bank lending records that generally confirmed the national data at the local level.⁵³

49. Denial rates were 33.9 percent for African Americans, 21.4 percent for Latinos and 14.4 percent for whites. See Glenn B. Canner & Dolores S. Smith, *Home Mortgage Disclosure Act: Expanded Data on Residential Lending*, 77 FED. RES. BULL. 859, 870 (1991). African Americans were denied 2.35 times as frequently as whites and Latinos were denied 1.4 times as frequently. See *id.*

50. See *id.* (stating that the denial rate was 24.0 percent for predominantly minority neighborhoods and 11.5 percent for predominantly white neighborhoods).

51. See John I. Douglas, *Banking Law*, NAT. L.J., October 24, 1994, at B4 ("This disparity created a tremendous amount of unfavorable publicity for banks and thrifts."); Jaret Seiberg, *Banks Making Good Progress in Their Fair-Lending Efforts*, AM. BANKER, Sept. 16, 1996, at 1 ("The first year's the HMDA data, which covered 1990, focused public attention on disparate rejection rates for whites and minorities. The numbers were publicized on the front pages of newspapers across the country - and inevitably drew charges of bias from activists.").

52. See Seiberg, *supra* note 51; see also Leslie Wayne, *New Hope in Inner Cities: Banks Offering Mortgages*, N.Y. TIMES, Mar. 14, 1992, at A1.

53. See Seiberg, *supra* note 51. Examples of such studies include ACORN, TAKE THE MONEY AND RUN: THE SIPHONING OF DEPOSITS FROM MINORITY NEIGHBORHOODS IN 14 CITIES (1992); BROWN & BENNINGTON, *supra* note 27; FLAMING & ANDERSON, *supra* note 26; WHERE THE MONEY ISN'T FLOWING, A PRELIMINARY REPORT ON MORTGAGE LENDING IN THE CITY OF ROCHESTER, NEW YORK (1994); JOHN E. LIND, EXPANDED METHOD FOR ANALYZING HOME MORTGAGE DISCLOSURE ACT DATA FOR THE EVALUATION OF A LENDER'S COMMUNITY REINVESTMENT (1993); AMERICA'S WORST LENDERS, *supra* note 26; CHARLES SCHUMER, HOME MORTGAGE REDLINING DENIES AMERICAN DREAM TO MINORITIES (1997); SKILLERN & BERGHOLZ, *supra* note 27; WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, *supra* note 26; Joel Glenn Brenner & Liz Spayd, *A Pattern of Bias in Mortgage Loans*, WASH. POST, June 6, 1993, at A1; Ford Fessenden et al., *Race and Mortgages*, NEWSDAY, Apr. 28-May 1, 1996 (four-part series); Michelle A. Hill & Paul D'Ambrosio, *Race Counts in Home Loans*, ASBURY PARK SUNDAY PRESS, May 22, 1994, at 1; David R. Sands, *D.C. Banks Said to Favor White Area Investment*, WASH. TIMES, June 5, 1992, at C1; Paulette Thomas, *Minority-Area Lenders Faulted in Acorn Study*, WALL ST. J., June 5, 1992, at A2; Sean Webby, *Mortgage Discrimination?, No Equal Treatment, and Unequal Lending*, GANNETT SUBURBAN NEWSPAPERS, Nov. 25-27 (1991).

(b) Increased Community Activism

Community activism regarding lending to the subject communities increased substantially following the disclosure of expanded HMDA data. The rallying point for CRA activists is the "CRA challenge," which is a community group's attempt to block a bank's expansion or merger plan on the grounds that the bank had not satisfied its CRA obligations.⁵⁴ These challenges frequently end with commitments by the bank to lend millions—if not billions—of dollars, to the subject communities.⁵⁵ The pace of these challenges increased after 1991, and by the end of the 1990s, banks had committed several billion dollars of loans to subject communities around the country.⁵⁶

A CRA challenge operates as follows: When a bank seeks to engage in several different types of expansion activities, it must file an application for permission to do so with the federal banking agency that has jurisdiction over it.⁵⁷ The bank must give notice of the application to members of the public, who can submit comments to the federal banking agency on the application.⁵⁸ When a bank files any one of six types of expansion applications, including applications to merge with another bank or open a new branch, the relevant federal banking agency must take the bank's CRA record into account when deciding the application.⁵⁹ The federal banking

54. See Allen J. Fishbein, *The Community Reinvestment Act After Fifteen Years: It Works, But Strengthened Federal Enforcement is Needed*, 20 *FORDHAM URB. L.J.* 293, 294, 296 (1993); Robert C. Art, *Social Responsibility in Bank Credit Decisions: The Community Reinvestment Act One Decade Later*, 18 *PAC. L.J.* 1071, 1073-74 n.10 (1987).

55. See NATIONAL COMMUNITY REINVESTMENT COALITION, *CRA COMMITMENTS* (1999).

56. See *id.*

57. See, e.g., 12 U.S.C. § 36 (1994 & Supp. 1997) (opening a new branch – national bank); 12 U.S.C. § 215a (1999) (merger and consolidation of national banks with state banks or national banks); 12 U.S.C. § 1464(i), (o), (p) (1999) (conversion of federal savings association to state savings association or banks and vice versa); 12 U.S.C. § 1467a(c)(4) (1991) (business expansion plans of savings and loan holding companies); 12 U.S.C. § 1842 (1999) (bank holding company applications to form a bank holding company, acquire a subsidiary bank, merge bank holding companies or acquire bank assets); 12 U.S.C. § 1467a(e) (1999) (acquisition by savings and loan holding companies); 12 U.S.C. § 1816 (1994 & supp. 1999) (factors to consider in application for deposit insurance); 12 U.S.C. § 1828(c) (1999); 12 U.S.C. § 1831a (1999) (activities of insured state banks).

58. See 12 C.F.R. §§ 5.4, 5.8, 5.10 (1999) (OCC); 12 C.F.R. §§ 225.14, 262.3 (1998) (Federal Reserve); 12 C.F.R. Pt. 303 (1999) (FDIC).

59. See 12 U.S.C. §§ 2903, 2902(3) (1999).

agencies can deny an application on the grounds that the bank has a poor CRA record.⁶⁰

From the earliest days of the CRA, this opportunity for the public to comment on or challenge a bank's application on the ground that it had not satisfied its CRA obligations has been a crucial part of the CRA's enforcement.⁶¹ Frequently, after a community group files a CRA challenge, the bank and the community group enter an agreement in which the bank commits to increase its lending in the group's community.⁶² After 1991, the number of CRA challenges and the amount of money banks committed increased significantly.⁶³ The National Community Reinvestment Coalition (the "NCRC") has published a catalogue of CRA agreements.⁶⁴ The NCRC has counted 360 agreements totaling approximately \$1 trillion.⁶⁵ The NCRC estimates that prior to 1992, banks had made commitments in connection with actual or threatened CRA challenges, totaling approximately \$8.8 billion.⁶⁶ After 1991, the total dollars committed was approximately \$1.028 trillion.⁶⁷ CRA challenge activity in New York City reflects this national trend. Between 1977 and 1992, the NCRC lists five commitments by banks in New York City, totaling approximately \$565 million.⁶⁸ After 1991, the NCRC counts eleven commitments, totaling approximately \$900 million.⁶⁹

(c) *Strengthened Enforcement of Fair Lending Laws*

The disclosure of expanded HMDA data in late 1991 and the subsequent calls for action were followed by strengthened governmental enforcement of the laws prohibiting lending discrimination and promoting lending in LMI communities.⁷⁰ The laws the gov-

60. See 12 C.F.R. § 563e.29 (1999) (OTS); 12 C.F.R. § 345.29(d) (1999) (FDIC); 12 C.F.R. §§ 5.13, 25.29(d) (1999) (OCC); 12 C.F.R. § 228.29 (1999) (Federal Reserve).

61. See Fishbein, *supra* note 54; Art, *supra* note 54.

62. See Avery et al., *supra* note 27, at 86; Fishbein, *supra* note 54, at 298-300.

63. See CRA COMMITMENTS, *supra* note 55.

64. See *id.*

65. See *id.* at 1.

66. See *id.* at 3.

67. See *id.*

68. See *id.* at 10.

69. See *id.*

70. See Jo Ann S. Barefoot, *Lending Analysis Must Include Discrimination Check*, A.B.A. BANKING J., Aug. 1, 1992, at 24; Steve Cocheo, *ABA Takes Constructive Tack on the HMDA Numbers*, A.B.A. BANKING J., July 1, 1992, at 13; Mary Colby, *Learning to be Colorblind*, BANK MGMT., Jan. 1993, at 27; Scott B. Schreiber & Beth S. DeSimone, *Avoiding Liability for Alleged Discriminatory Lending Practices*, BANKING L. REV., Winter 1992, at 3; Saul Hansell, *Shamed by Publicity, Banks Stress Mi-*

ernment began to enforce more strictly included the CRA, the Fair Housing Act ("FHA"),⁷¹ and the Equal Credit Opportunity Act ("ECOA").⁷² These efforts included the first serious steps by the Department of Justice ("DOJ") to enforce the FHA and ECOA against banks and other mortgage lenders in connection with their real estate-related lending, tightened enforcement of the fair lending laws and improved CRA regulations.

In 1992, the DOJ filed *United States v. Decatur Federal Savings & Loan Ass'n*,⁷³ the first case ever filed accusing a bank of engaging in a pattern and practice of home mortgage lending discrimination in the twenty-four years since the FHA had given the DOJ the authority to file such cases. Since then, the DOJ has filed twelve cases against home mortgage lenders around the country alleging a pattern of home mortgage lending discrimination.⁷⁴ The cases have

nority Mortgages, N.Y. TIMES, Aug. 30, 1993, at D1; Phil Roosevelt, *Justice Dept. In Probing Loan Bias At Banks*, AM. BANKER, May 29, 1992, at 1; Warren R. Stern et al., *Meeting the Challenge of Loan Bias Scrutiny*, AM. BANKER, Aug. 21, 1992, at 4; John R. Wilke, *Home Loans to Blacks, Hispanics Soared in '94*, WALL ST. J., July 19, 1995, at A2.

71. 42 U.S.C. §§ 3601-3613 (1999). The FHA prohibits discrimination on the basis of race, color, religion, sex, handicap, familial status and national origin in residential real estate-related transactions, including making loans in connection with such transactions. See *id.* § 3605. The Department of Justice ("DOJ") has the authority to institute a civil action in federal court to challenge a pattern or practice of behavior that violates the FHA. See 42 U.S.C. § 3614(a) (1999). The Secretary of the Department of Housing and Urban Development ("HUD") has the authority to file administrative complaints on its own behalf with HUD alleging FHA violations and to investigate and prosecute administrative complaints filed with HUD by individuals. See 42 U.S.C. §§ 3610, 3612. Individuals can also commence administrative or court proceedings under the FHA to challenge discriminatory lending practices. See *id.* § 3613.

72. 15 U.S.C. §§ 1691 to 1691f (1999). The ECOA prohibits discrimination on the basis of race, color, religion, national origin, sex, marital status or age with respect to any credit transaction. See *id.* § 1691(a). Various federal agencies have authority to enforce compliance with the ECOA, including the federal banking agencies, the DOJ, and the Federal Trade Commission ("FTC"). See *id.* §§ 1691c, 1691e(g). Individuals can also commence court proceedings to challenge ECOA violations. See *id.* § 1691e(f).

73. Fair Housing-Fair Lending Rptr. ¶ 19,377, No. 1-92-CV-2198 (N.D. Ga. filed Sept. 17, 1992).

74. See *United States v. Albank*, Fair Housing-Fair Lending Rptr. ¶ 19,401, No. 97-CV-1206 (N.D.N.Y. filed Aug. 8, 1997); *United States v. First Nat'l Bank of Doña Ana*, Fair Housing-Fair Lending Rptr. ¶ 19,395, No. CV97-96HB/JHG (D.N.M. filed Jan. 29, 1997); *United States v. Long Beach Mortgage Co.*, Fair Housing-Fair Lending Rptr. ¶ 19,392, No. CV 96-6159 (C.D. Cal. filed Sept. 5, 1996); *United States v. Fleet Mortgage Corp.*, Fair Housing-Fair Lending Rptr. ¶ 19,391, No. CV 96 2279 (E.D.N.Y. filed May 7, 1996); *United States v. First Nat'l Bank of Gordon*, Fair Housing-Fair Lending Rptr. ¶ 19,398, No. 96-5035 (W.D.S.D. filed Apr. 15, 1996); *United States v. Huntington Mortgage Co.*, Fair Housing-Fair Lending Rptr. ¶ 19,390, No. 1:9555-CV-2211 (N.D.O. filed Oct. 18, 1995); *United States v. Security State Bank of*

covered all stages of the real estate-related lending process. The DOJ accused lenders of establishing lending territories that excluded predominantly minority communities,⁷⁵ failing to advertise in minority communities,⁷⁶ discriminating against borrowers on the basis of their race,⁷⁷ placing more onerous application burdens on minority loan applicants than white applicants⁷⁸ and charging higher interest rates to minority borrowers.⁷⁹ The DOJ settled all of these cases. The consent decrees, which the mortgage lending industry and the DOJ have treated as informal legal precedent,⁸⁰ required the lenders to establish multi-million dollar loan pro-

Pecos, No. SA95CA0996 (W.D. Tex. filed Oct. 18, 1995); *United States v. Northern Trust Co.*, Fair Housing-Fair Lending Rptr. ¶ 19,388, No. 95-C3239 (N.D. Ill. filed June 1, 1995); *United States v. Chevy Chase Fed. Sav. Bank*, Fair Housing-Fair Lending Rptr. ¶ 19,385, No. 94-1824 (D.D.C. filed Aug. 22, 1994); *United States v. Blackpipe State Bank*, Fair Housing-Fair Lending Rptr. ¶ 8.10 No. 93-5115 (D.S.D. filed Jan. 21, 1994); *United States v. First Nat'l Bank of Vicksburg*, Fair Housing-Fair Lending Rptr. ¶ 19,384, No. 5:94CV6 (S.D. Miss. filed Jan. 21, 1994); *United States v. Shawmut Mortgage Co.*, Fair Housing-Fair Lending Rptr. ¶ 19,383, No. 3:93 CV-2453 (AVC) (D.Conn. filed Dec. 13, 1993).

75. See *Decatur* Compl. ¶ 14; *Blackpipe* Compl. ¶¶ 7-8, 13; *Chevy Chase* Compl. ¶¶ 11, 16; *Albank* Compl. ¶¶ 8, 14, 16-18.

76. See *Decatur* Compl. ¶¶ 10, 13; *Chevy Chase* Compl. ¶¶ 17, 18c; *Blackpipe* Compl. ¶ 13.

77. See *Decatur* Compl. ¶ { }; *Blackpipe* Compl. ¶ { }; *Shawmut* Compl. ¶ { }; *Northern Trust* Compl. ¶ { }; *Doña Ana* Compl. ¶ { }.

78. See *Northern Trust* Compl. ¶¶ 13-15; *Decatur* Compl. ¶ 17; *Blackpipe* Compl. ¶ 12.

79. See *Huntington* Compl. ¶¶ 6-9; *Fleet* Compl. ¶¶ 6-7, 9; *Bank of Gordon* Compl. ¶¶ 7-8.

80. See Steve Cocheo, *Fair Lending Won't Go Away*, ABA BANKING J., Jan., 1995, at 26; Barbara Ellis & Leonard Bernstein, *DOJ to Mortgage Lenders: Monitor Branches for Fair Lending*, INSIDE FAIR LENDING, Nov. 1996, at 6; *Justice Department Explains Fair Lending Enforcement Program*, 14 BANKING POL'Y REP., Mar. 20, 1995, at 7; William J. Sweet, Jr., *Fair Lending Pressures Spread to Regulations and Private Litigation*, 14 BANKING POL'Y REP., Feb. 6, 1995, at 2; Douglas, *supra* note 51; Robert M. Garsson, *Capital Account: Justice Dept.'s Firm Grip on Banking Industry Appears to be Loosening*, AM. BANKER, Oct. 28, 1994, at 3; Saul Hansell, *Stretching the Borders*, N.Y. TIMES, Aug. 25, 1994, at D1; Robert D. Hershey, Jr., *Wider Attack on Loan Bias Seen in Accord With S. & L.*, N.Y. TIMES, Aug. 23, 1994, at D1; Robyn Meredith, *Bank and Thrift Groups Ask U.S. to Spell Out Fair-Lending Policy*, AM. BANKER, Nov. 16, 1994, at 3; Christopher Rhoads, *Community Bankers Worried Over Justice Dept. Bias Push*, AM. BANKER, Oct. 31, 1994, at 1; Jaret Seiberg, *Huntington's Loan Bias Settlement With Justice Department Stirs Debate*, AM. BANKER, Oct. 25, 1995, at 1; Jaret Seiberg, *Chief Departs with a Legacy of Deterring Loan Bias*, AM. BANKER, Jan. 21, 1997, at 4; Jaret Seiberg, *Settlement of Bias Case Against California Lender Criticized for Vagueness*, AM. BANKER, Sept. 16, 1996, at 3; Jaret Seiberg, *California Lender Paying \$4M to Settle U.S. Bias Charges*, AM. BANKER, Sept. 6, 1996, at 1; Jaret Seiberg, *When the Justice Dept. Eases Up, Look Out*, AM. BANKER, Jan. 3, 1996, at 4; Jaret Seiberg, *Justice Department Says It Will Focus on Patterns of Bias, Not Single Instances*, AM. BANKER, Feb. 28, 1995, at 2; Jaret Seiberg, *Industry Sees Dangerous Extension of Basis for Discrimination Complaints*, AM. BANKER, Aug. 23, 1994, at 4.

grams,⁸¹ adopt new procedures to eliminate alleged discrimination⁸² and create compensation funds for alleged victims.⁸³

In addition to the DOJ's efforts, the federal banking agencies tightened their enforcement of the CRA and the fair lending laws against banks.⁸⁴ Upon releasing the expanded HMDA data in October 1991, Federal Reserve Governor John LaWare said the federal banking agencies would use the expanded HMDA data as an additional tool to evaluate bank compliance with the CRA and the fair lending laws.⁸⁵ Following this, the OCC targeted 266 banks for investigation whose HMDA data raised questions about their lending records.⁸⁶ Soon after this, the OCC announced that it was beginning to conduct matched-pair tests of the banks it regulated to determine whether they were engaging in discriminatory lending practices.⁸⁷

For the first time, the federal banking agencies began to use their authority to refer potential lending discrimination cases to the DOJ and HUD, many of which became the DOJ complaints and consent

81. See *Chevy Chase* Cons. Dec. §§ I., V.; *Doña Ana* Cons. Dec. §§ IV.8.b.d., V.13, 17; *Vicksburg* Cons. Dec. § VIII.

82. See, e.g., *Decatur* Cons. Dec. § II.E; *Blackpipe* Cons. Dec. § II.D.; *Northern Trust* Cons. Dec. § C; *Doña Ana* Cons. Dec. § III.2-4, 6-8.

83. See, e.g., *Decatur* Cons. Dec. § IV; *Blackpipe* Cons. Dec. § IV.

84. See *supra* note 4. As stated earlier, the federal banking agencies regulate banks only. A large number of conventional home mortgage loans are made by lenders not subject to federal banking agency scrutiny.

85. See Board of Governors of the Federal Reserve System, *Release of 1990 HMDA Data 1* (1991).

86. See *National Banks Need More Work on the HMDA*, NAT'L MORTGAGE NEWS, June 1, 1992, at 8; Schreiber & DeSimone, *supra* note 70; Paulette Thomas, U.S., *Some Bankers Sharply Boost Use of "Testers" to Find Racial Bias in Loans*, WALL ST. J., May 27, 1992, at B6; Paulette Thomas, *U.S. Is Intensifying Inquiry Into Bias In Lending Practices at Banks, Thrifts*, WALL ST. J., May 15, 1992, at A3.

87. See Fair Housing-Fair Lending Rptr. ¶ 12.5 (June 1, 1993). In a matched-pair test, the testing agency sends pairs of undercover "testers," posing as loan applicants, to apply for a loan. Each member of the pair has identical characteristics except for the characteristic that is the subject of the test. For example, if the test is investigating whether a lender is discriminating against African American loan applicants, one tester would be African American and the other would be white. The testing agency would supply each member of the pair with a profile that contained identical credit-related characteristics. By eliminating all differences other than race, the test can determine whether any subsequent differential treatment is the result of race discrimination.

decrees described earlier.⁸⁸ Prior to 1991, they rarely, if ever, used this authority.⁸⁹

The federal banking agencies also changed their procedures for examining banks for fair lending compliance, and in doing so adopted a theory of discrimination more likely to uncover violations. Previously, the agencies examined files of individual minority applicants to see if denials were based on credit-related reasons.⁹⁰ By 1992, they changed their procedures so that they compared the application files of minorities and whites to see if lenders were treating them equally.⁹¹

The federal banking agencies also notified banks about their concerns regarding HMDA data and urged them to review their own data and lending practices for evidence of differential treatment.⁹² In March 1992, the federal banking agencies issued a statement suggesting ways that banks could reduce their rejection rate disparities, including establishing second review procedures for denied applicants, implementing matched-pair testing, offering credit

88. See FEDERAL DEPOSIT INS. CORP., REVISED EXAMINATION PROCEDURES FOR FAIR HOUSING ¶ 5287 (Apr. 1993); *OCC Report Lists Lending Discrimination Referrals to HUD, DOJ*, Fair Housing-Fair Lending Rptr. ¶ 3.7 (Mar. 1, 1996); Claudia Cummins, *Fed Using New Statistical Tool to Detect Bias*, AM. BANKER, June 8, 1994, at 3.

89. See *Discrimination in Home Mortgage Lending: Hearing before the Subcomm. on Consumer and Regulatory Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs*, 101st Cong. 1-119 (1989) (federal banking agencies reported finding few violations of the FHA or ECOA by banks); *Federal Financial Regulators Conducting the HMDA Follow-up Study*, BNA'S BANKING REP., May 18, 1992, at 863, 864 (describing study by Rep. Joseph Kennedy finding one referral to the DOJ in the previous ten years); *HUD to Fund \$1 Million Lending Testing Program*, Fair Housing-Fair Lending Rptr. ¶ 1.2 (July 1, 1992).

90. BNA'S BANKING REP., May 18, 1992, at 863-64 (including Federal Governor Lawrence Lindsey explanations that credit history was the single most commonly cited reason for credit denial of a mortgage loan).

91. See OFFICE OF THE COMPTROLLER OF THE CURRENCY, INTERIM PROCEDURES FOR EXAMINING FOR RACIAL AND ETHNIC DISCRIMINATION IN RESIDENTIAL LENDING, Fair Housing-Fair Lending Rptr. ¶ 5247 (1993); Stephen R. Steinbrick, *Remarks before the Federal Financial Institution Examination Council's Emerging Issues Conference on New Procedures for Examining National Banks for Mortgage Loan Discrimination*, reprinted in 12-2 OCC Q.J. 23 (1993), 1993 OCC Q.J. Lexis 85. See also FEDERAL DEPOSIT INS. CORP., REVISED EXAMINATION PROCEDURES FOR FAIR HOUSING ¶ 5287 (Apr. 1993).

92. See *Statement of Susan F. Krause, Senior Deputy Comptroller for Bank Supervision Policy, Before the House Banking Subcomm. on Housing and Community Dev. and the Subcomm. on Consumer Affairs and Coinage, on Home Mortgage Lending by National Banks*, Washington, D.C., 11-3 OCC Q.J. 49, 54 (1992), 1992 OCC Q.J. Lexis 227.

counseling and examining lending criteria that might have a disparate impact.⁹³

In addition, the federal banking agencies toughened their enforcement of the CRA. From June 30, 1990 to July 1, 1992, they awarded 89 percent of banks a CRA rating of satisfactory or higher, down from 98 percent prior to June 30, 1990.⁹⁴ They also denied several bank expansion applications and commenced enforcement proceedings against banks based on CRA, HMDA and fair lending concerns more frequently than they had prior to 1991.⁹⁵

93. See Glenn B. Canner & Dolores S. Smith, *Expanded the HMDA Data on Residential Lending: One Year Later*, 78 FED. RES. BULL. 801, 813, 815 (1992).

94. HOUSING SUBCOMM. OF THE SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, 102D CONG., REPORT ON THE STATUS OF THE COMMUNITY REINVESTMENT ACT 33-35 (1992) [hereinafter REPORT ON THE STATUS OF THE CRA].

95. Prior to 1991, there are few reported instances of the federal banking agencies denying bank expansion applications on CRA or fair lending grounds or commencing administrative proceedings against banks for violating the fair lending laws. See Richard Marsico, *Fighting Poverty Through Community Empowerment and Economic Development: The Role of the Community Reinvestment and Home Mortgage Disclosure Acts*, 12 N.Y.L. SCH. J. HUM. RTS. 281, 295-96 (1995) (observing that between 1977 and 1989, federal banking agencies denied less than 10 of 50,000 banking applications on CRA grounds); Richard Marsico, *A Guide to Enforcing the Community Reinvestment Act*, 20 FORDHAM URB. L.J. 165, 274 (1993) [hereinafter Marsico, *Enforcing the CRA*] (observing that Federal Reserve denied only one bank expansion application on CRA grounds between 1977 and 1991).

Starting in late 1991, the federal banking agencies denied bank expansion applications on CRA and fair lending grounds and commenced administrative proceedings against banks to enforce the fair lending laws with greater frequency.

The Federal Reserve denied at least seven applications on CRA or fair lending grounds. See Totalbank Corp., 81 FED. RES. BULL. 876 (1995); Johnson Int'l, Inc., 81 FED. RES. BULL. 507 (1995); Shawmut Nat'l Corp., 80 FED. RES. BULL. 47 (1994); Farmers & Merchants Bank of Long Beach, Fed. Res. Press Release (Feb. 9, 1993); First Colonial Bankshares Corp., 79 FED. RES. BULL. 706 (1993); Gore-Bronson Bancorp, Inc., 78 FED. RES. BULL. 784 (1992); First Interstate BancSyst. of Montana, Inc., 77 FED. RES. BULL. 1007 (1991). The Federal Reserve also reached consent decrees in administrative proceedings with at least four banks requiring them to improve their CRA and fair lending records. See Equitable Bank, Fed. Res. Sys., Doc. No. 94-083-WA/RB-SM (1995); First Bank of Berne, Indiana, Fed. Res. Sys., Doc. No. 92-110-WA/RB-SM (1992); Columbus Junction State Bank, Fed. Res. Sys., Doc. No. 92-076-WA/RB-SM (1992); Farmers and Merchants Bank of Long Beach, Fed. Res. Sys., Doc. No. 91-080-B-SM (1991).

The OCC denied at least three applications on CRA grounds. See Application to establish a CBCT branch, Mayde Creek Bank, App. No. 93-SW-06-148, OCC, Dec. (CRA) No. 66 (Dec. 9, 1993); Application to establish a domestic branch facility, National Bank of Commerce, App. No. 92-SW-05-035, OCC, Dec. (CRA) No. 56 (Nov. 20, 1992); Application to merge First City National Bank into First Commercial Bank, App. No. 92-SW-02-045, OCC, Dec. (CRA) No. 55 (Nov. 20, 1992). The OCC also brought several enforcement proceedings. See First Nat'l Bank of Vicksburg, OCC EA No. 94-220, 1994 OCC Enf. Dec. Lexis 271 (Jan. 21, 1994); Davis Nat'l Bank of Mullins, OCC EA No. 94-81, 1994 OCC Enf. Dec. Lexis 113 (Apr. 21, 1994); First

In 1993, the federal banking agencies announced that they intended to strengthen their CRA regulations to focus more on a bank's lending record than its lending efforts.⁹⁶ They issued proposals in 1993 and 1994, and finally announced the amended CRA

Nat'l Bank of Bar Harbor, OCC EA No. 205, 1993 OCC Enf. Dec. Lexis 285 (Aug. 6, 1993); Lake Area Nat'l Bank, OCC EA No. 93-150, 1993 OCC Enf. Dec. Lexis 241 (June 21, 1993); Metrobank of Philadelphia, N.A., OCC EA No. 93-117, 1993 OCC Enf. Dec. Lexis 169 (Mar. 18, 1993); Ka Wah Bank, Ltd., OCC EA No. 93-89, 1993 OCC Enf. Dec. Lexis 141 (Apr. 29, 1993); Metrobank of Philadelphia, N.A., OCC EA No. 93-68, 1993 OCC Enf. Dec. Lexis 120 (Mar. 18, 1993); First Nat'l Bank of Downsville, OCC EA No. 93-65, 1993 OCC Enf. Dec. Lexis 117 (Mar. 22, 1993); First Nat'l Bank of Polk County, OCC EA No. 93-22, 1993 OCC Enf. Dec. Lexis 73 (Feb. 25, 1993); First United Nat'l Bank, OCC EA No. 93-8, 1993 OCC Enf. Dec. Lexis 11 (Jan. 19, 1993); Tupper Lake Nat'l Bank, OCC EA No. 92-848, terminated by OCC EA No. 93-319, 1992 OCC Enf. Dec. Lexis 569 (Apr. 29, 1992); Consumer Nat'l Bank, OCC EA No. 92-760, 1992 OCC Enf. Dec. Lexis 492 (Oct. 28, 1992); Continental Nat'l Bank of Miami, OCC EA No. 92-757, 1992 OCC Enf. Dec. Lexis 490 (Nov. 10, 1992); City Nat'l Bank, OCC EA No. 92-745, 1992 OCC Enf. Dec. Lexis 480 (Nov. 18, 1992); South Branch Valley Nat'l Bank, OCC EA No. 92-731, 1992 OCC Enf. Dec. Lexis 465 (Oct. 7, 1992); First Philson Bank, N.A., OCC EA No. 92-728, 1992 OCC Enf. Dec. Lexis 464 (Oct. 13, 1992); Downingtown Nat'l Bank, OCC EA No. 92-532, 1992 OCC Enf. Dec. Lexis 210 (May 6, 1992); Superior Nat'l Bank, OCC EA No. 92-708, 1992 OCC Enf. Dec. Lexis 182 (Sept. 3, 1992); The Nat'l Republic Bank of Chicago, OCC EA No. 92-710, 1992 OCC Enf. Dec. Lexis 180 (Sept. 22, 1992); Addison Nat'l Bank, OCC EA No. 92-680, 1992 OCC Enf. Dec. Lexis 121 (Aug. 27, 1992); First Nat'l Bank of Brooksville, OCC EA No. 92-674, 1992 OCC Enf. Dec. Lexis 115 (July 15, 1992); First National Bank of Logan, OCC EA No. 673, 1992 OCC Enf. Dec. Lexis 114 (July 7, 1992); Palmer Nat'l Bank, OCC EA No. 92-488, 1992 OCC Enf. Dec. Lexis 38 (Mar. 11, 1992); Vinings Bank and Trust, OCC EA No. 435, 1992 OCC Enf. Dec. Lexis 19 (Jan. 8, 1992).

The FDIC also brought several enforcement proceedings against banks with poor CRA or fair lending records. See *Louisiana Bank Ordered to Reimburse Minority Borrowers*, Fair Housing-Fair Lending Rptr. ¶ 3.2 (Mar. 1, 1995); Sunniland Bank, FDIC 95-13b, 1995 FDIC Enf. Dec. Lexis 1 (Jan. 30, 1995); New England Savings Bank, FDIC 95-156e, 1995 FDIC Enf. Dec. Lexis 368 (July 14, 1995); Bank of Hollandale, FDIC 95-526, 1995 FDIC Enf. Dec. Lexis 155 (May 11, 1995); Bank of Pullman, FDIC 94-146b, 1994 FDIC Enf. Dec. Lexis 399 (Nov. 7, 1994); Pine Banking Corp., FDIC 94-146b, 1994 FDIC Enf. Dec. Lexis 371 (Nov. 18, 1994); First Scotland Bank, FDIC 94-115b, 1994 FDIC Enf. Dec. Lexis 277 (Aug. 29, 1994); American State Bank, FDIC 94-112b, 1994 FDIC Enf. Dec. Lexis 281 (Aug. 26, 1994); First State Bank, FDIC 94-79b, 1994 FDIC Enf. Dec. Lexis 217 (July 12, 1994); Bank of Coffey, FDIC-94-55b, 1994 FDIC Enf. Dec. Lexis 146 (May 27, 1994); Buckner State Bank, FDIC 94-38b, 1994 FDIC Enf. Dec. Lexis 127 (Apr. 6, 1994); Golden Security Thrift and Loan, FDIC 93-187b, 1993 FDIC Enf. Dec. Lexis 688 (Sept. 7, 1993). The FDIC also penalized eight banks for failing to file timely the HMDA reports. See *Fair Housing-Fair Lending Rptr.* ¶ 16.15 (Oct. 1, 1994).

96. Office of the Comptroller of the Currency, FDIC, Board of Governors of the Federal Reserve System, and the Office of Thrift Supervision, *Federal Regulators to Hold Hearings in New York on Community Lending by Financial Institutions*, Joint Release, Aug. 23, 1993, at 2.

regulations in 1995.⁹⁷ The amendments were fully effective as of July 1, 1997.⁹⁸ The new regulations are more demanding than the previous ones, in that they evaluate a bank's CRA record according to its record of lending, investing and providing banking services in low-income communities.⁹⁹ The old regulations placed a greater emphasis than they should have on a bank's efforts to lend, as opposed to its actual lending record.¹⁰⁰

Other federal agencies increased their efforts to enforce the fair lending laws as well. In 1994, a federal interagency task force comprised of nine federal agencies with fair lending law enforcement authority adopted a policy statement on lending discrimination.¹⁰¹ The policy statement describes practices that the agencies believe constitute lending discrimination and the enforcement actions the agencies would take against lenders who violated the law.¹⁰² The policy statement indicates that both the ECOA and the FHA prohibit lenders from engaging in several forms of discrimination, including providing different information and services about credit, discouraging or selectively encouraging credit applicants, refusing to extend credit and using different standards in determining whether to extend credit or varying the terms of credit offered.¹⁰³ The policy statement also indicates that the various agencies would take several actions to enforce the law, including commencing administrative and court enforcement proceedings, seeking civil

97. See 58 Fed. Reg. 67,466 (1993); 59 Fed. Reg. 51,232 (1994); 60 Fed. Reg. 22,156 (1995).

98. See 60 Fed. Reg. 22,156 (1995).

99. Under the new regulations, the CRA record of banks with more than \$250 million in assets is evaluated according to three tests: the lending, investment and service tests. See 12 C.F.R. § 25.21(a)(1) (1999) (citing only the OCC's CRA regulations). The result of the lending test has twice the weight of the other tests in assigning a performance rating to a bank. See 60 Fed. Reg. 22,156, 22,168-70 (1995). Banks with less than \$250 million in assets are evaluated according to their loan-to-deposit ratio, percentage of loans in assessment area, lending to borrowers at different income levels, lending to small businesses and farms and geographic distribution of loans. See 12 C.F.R. § 25.26(a)(1)-(5) (1999). Wholesale banks that do not serve retail customers are evaluated according to their community development lending, investment and service record. See 12 C.F.R. § 25.25(c) (1999).

100. REPORT ON THE STATUS OF THE CRA, *supra* note 94, at 61; 60 Fed. Reg. 22,156, 22,157 (1995); Marsico, *Enforcing the CRA*, *supra* note 95, at 200-11; *Former OCC Official: Some CRA Assessment Categories "More Equal than Others," Fair Housing-Fair Lending Rptr.* ¶ 7.2 (Jan. 1, 1991).

101. See Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266 (1994) [hereinafter Policy Statement]. The task force was composed of representatives of the DOJ, OCC, OTS, Federal Reserve, FDIC, Federal Housing Finance Board, FTC, National Credit Union Administration and HUD.

102. See *id.* at 18,267.

103. See *id.* at 18,268.

money penalties, damages and credit extensions for victims and requesting injunctive relief.¹⁰⁴

The Secretary of HUD, who has the authority to enforce the FHA on its own initiative by filing an administrative complaint with HUD,¹⁰⁵ used this authority to enforce the FHA against non-bank mortgage lenders more aggressively. In 1994, HUD signed a "best practices" agreement with the Mortgage Bankers Association, the trade organization that represents non-bank mortgage lenders, outlining "best" lending practices for such lenders to undertake to prevent or eliminate lending discrimination.¹⁰⁶ By November 1997, HUD had signed individual "best practices" agreements with 114 mortgage lenders.¹⁰⁷ HUD also reached consent decrees with several home mortgage lenders in cases involving allegations of lending discrimination, including at least two agreements to lend more than \$1 billion to minority borrowers.¹⁰⁸

Several states and municipalities also began initiatives to create or enforce their own versions of the CRA and the FHA more strictly.¹⁰⁹ In New York, the New York City Banking Commission tightened its rules for designating banks eligible to provide banking services to the City by requiring them to achieve a higher level of compliance with New York State's CRA and by assigning weights to the various evaluative criteria, assigning the highest weight to the bank's community lending programs.¹¹⁰ The New York State

104. See *id.* at 18,272-73.

105. See 24 U.S.C. §§ 3610, 3612 (1999).

106. Mortgage Bankers Ass'n of Am. and the U.S. Dept. of Housing and Urban Dev., Fair Lending — Best Practices Master Agreement, Sept. 14, 1994; *MBA, HUD Reach New Agreement On New 'Best Practices' Pact*, INSIDE FAIR LENDING, Nov. 1997, at 3; *MBA, HUD Sign New Pact on Fair Lending, Best Practices*, INSIDE FAIR LENDING, Jan. 1998, at 13.

107. *MBA, HUD Near Agreement on "Best Practices" Pact*, INSIDE FAIR LENDING, Nov. 1997, at 3.

108. See Michael Janofsky, *Texas Lenders Pledge \$1.4 Billion in Housing Case*, N.Y. TIMES, March 10, 1998, at A13; Snigdha Prakash, *Accubanc in \$2B Settlement of Fair Lending Charges*, AM. BANKER, April 6, 1998, at 2; Warren W. Traiger, *New Fair Lending Initiatives*, REV. BANKING AND FIN. SERVICES, Mar. 4, 1998, at 51; Jaret Seiberg, *Lender Assails Implication it Broke Bias Law*, AM. BANKER, Jan. 20, 1999, at 1.

109. See Ellen Braitman, *6 N.Y. Banks Pass City's Account As Burden*, AM. BANKER, June 1, 1992, at 6; Teresa Carson, *California May Join States Mandating Deep Disclosure*, AM. BANKER, June 8, 1992, at 11; Teresa Carson, *L.A. May Seek Bias Data Before Placing City Deposits*, AM. BANKER, Nov. 12, 1991, at 8; Jeffrey Marshall, *City Deposits - CRA Weapon*, U. S. BANKER, Apr. 1991, at 18; Rick Del Vecchio, *Oakland Urges Banks to Invest*, SAN FRAN. CHRON., May 19, 1992, at A12; Phil Roosevelt, *N.J. Prods Banks on Lending Bias*, AM. BANKER, May 18, 1992, at 6.

110. THE CITY OF NEW YORK BANKING COMMISSION, AMENDMENT TO THE RULES RELATING TO REQUIREMENTS FOR DESIGNATION OF DEPOSITORY RULES BY THE

Superintendent of Banks sent a letter to banks urging them to adopt more flexible lending standards for low-income borrowers, publicize their willingness to make loans in low-income and minority communities and provide credit counseling.¹¹¹ Subsequently, the Superintendent proposed regulations that would have strengthened New York State's CRA law by requiring banks to devote at least fifteen percent of their assets to lending, investments and other services for low-income communities.¹¹² After New York State issued its proposal, the federal banking agencies commenced their CRA amendment process, and New York State held its proposal in abeyance. Eventually, the State adopted CRA regulations that essentially matched the federal CRA regulations.¹¹³ In 1997, the New York State Banking Department settled a lending discrimination case against Roslyn Savings Bank for \$3 million.¹¹⁴

4. *Lenders' Increased Efforts to Lend to LMI and Minority Individuals and Neighborhoods Resulting from Publicity, Activism and Enforcement*

In response to the public controversy, increased activism and strengthened law enforcement that followed the 1991 HMDA data disclosures, lenders took several steps to increase their conventional home mortgage lending to low-income and minority borrowers and communities.¹¹⁵ These steps included adopting new

BANKING COMMISSION (1992). See Braitman, *supra* note 109; Alan C. Emdin & Warren W. Traiger, *New York City's Bank Regulations*, N.Y. L.J., Apr. 22, 1992, at 1.

111. See Andree Brooks, *Removing Barriers to Loans*, N.Y. TIMES, Apr. 5, 1992, § 10, at 5; Paulette Thomas, *Federal Data Detail Pervasive Racial Gap in Mortgage Lending*, WALL ST. J., Mar. 31, 1992, at A1.

112. See NEW YORK STATE BANKING DEP'T, PROPOSED CRA REGULATIONS (1993); Thomas J. Lueck, *Banking Department Proposes Changes in Rating Rules*, N.Y. TIMES, Sept. 10, 1992, at B3; Warren W. Traiger, *New York State's CRA Plan*, N.Y. L.J., Dec. 21, 1992, at 1.

113. See Warren W. Traiger, *New York Adopts Community Reinvestment Act Rules*, N.Y. L.J., Dec. 5, 1997, at 1. New York's CRA regulations are codified at Part 76 of the General Regulations of the Banking Board.

114. See John T. McQuiston, *Loan Rate Discrimination Case is Settled by Long Island Bank*, N.Y. TIMES, Feb. 18, 1998, at B7; *Governor Pataki Announces Historic \$3 Million Settlement With Roslyn Savings Bank on Fair Lending Laws* (visited Oct. 15, 1999) <<http://www.banking.state.ny.us/prfeb17.htm>>.

115. See Canner & Smith, *supra* note 93, at 817-18; J. Linn Allen, *Banks, Activists Tailor Loans to Communities*, CHIC. TRIB., Sept. 1, 1992, at 1; Bill Atkinson, *ABA Admits Bias by Home Lenders*, AM. BANKER, May 22, 1992, at 1; Andree Brooks, *Mortgage Outreach Efforts*, N.Y. TIMES, Oct. 30, 1994, § 9, at 5; Brooks, *supra* note 111; Claudia Cummins, *Riegle: Congress Will Crack Down On Loan Bias if Regulators Don't*, AM. BANKER, Oct. 29, 1992, at 1; Charles H. Grice, *The Challenge of Lending Disparities*, AM. BANKER, Oct. 24, 1991, at 4; Cocheo, *supra* note 70; Timothy R. Dougherty, *Closing the Gap: Stung by Charges of Bias Against Minorities, Lenders*

lending programs designed to make loans to low-income persons,¹¹⁶ implementing new lending procedures such as a second review of rejected loan applications,¹¹⁷ examining and changing loan underwriting criteria,¹¹⁸ creating lending consortia with other banks,¹¹⁹ increasing outreach to minority and low-income communities¹²⁰ and working with community groups to design credit counseling programs to assist low-income home buyers to qualify for

are Trying to do Right Thing, NEWSDAY, Jan. 30, 1993, at 30; Joanne Johnson, *Mortgage Lenders Re-Examining Their Methods*, HARTFORD COURANT, Nov. 17, 1991, at C1; Albert R. Karr, *Loan-Denial Rate is Still High for Blacks*, WALL ST. J., Dec. 21, 1993, at A2; Edward Kulkosky, *Low-Income Lending Tips: Use Local Groups*, AM. BANKER, Feb. 22, 1995, at 11; Paulette Thomas, *Persistent Gap*, WALL ST. J., Nov. 30, 1992, at A1; *U.S. Probes Bank Records for Race Bias*, WALL ST. J., May 19, 1992, at A2; Thomas, *supra* note 86; Heather Timmons, *Improving Minority Lending a Hands-On Proposition*, AM. BANKER, Sept. 17, 1996, at 1; John R. Wilke, *Home Loans to Blacks, Hispanics Soared in '94*, WALL ST. J., July 19, 1995, at A2.

Theorists who argue that disclosure rules such as the SEC's corporate disclosure rules help to create and enforce norms suggest that publicity about the disclosed information is crucial because it alerts affected individuals that the norms exist and are important and helps affected individuals identify actors who are not following the norm, allowing affected individuals to take appropriate action. See Fanto, *supra* note 8, at 24. For a discussion of the role of publicity in norm creation and enforcement, see Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 362-64, 388, 399 (1997). In the case of the disclosure of expanded HMDA data, theory about publicity would mean that banks responded to the negative publicity and expanded enforcement efforts following the disclosure of expanded HMDA data in order to comply with the norm expressed by the 1989 amendments to the HMDA – that they should lend to the subject communities – because they were embarrassed and worried about the consequences of violating this norm following disclosure that they were doing so.

116. See Glenn B. Canner & Wayne Passman, *Residential Lending to Low-Income and Minority Families: Evidence from the 1992 the HMDA Data*, 80 FED. RES. BULL. 79, 87 (1994); Allen, *supra* note 115; Keith Bradsher, *Minority Home Loans Rise, But Many Are Still Rejected*, N.Y. TIMES, Oct. 27, 1994, at D1; Brooks, *supra* note 111; Cummins, *supra* note 115; John R. Wilke, *Giving Credit*, WALL ST. J., Feb. 13, 1996, at A1. For example, in 1990, only 70 lenders nationwide participated in Fannie Mae's Community Homebuyer's Program, which provides loans with flexible terms to low-income borrowers. By 1992, 700 lenders participated, and lending increased from \$130 million to \$3.5 billion. See Dougherty, *supra* note 115.

117. See Karr, *supra* note 115; Jaret Seiberg, *Greenspan Says Banks Reaching Out To Minorities*, AM. BANKER, July 20, 1995, at 1.

118. See Canner & Passman, *supra* note 116, at 88; Karr, *supra* note 115. For example, some banks changed their underwriting criteria relating to employment and credit history, the definition of family members and the percentage of a down payment that could be from gifts. See Brooks, *supra* note 111.

119. See Canner & Smith, *supra* note 93, at 817-18; *New York Banks Form Mortgage Coalition*, NEWS RELEASE, May 11, 1992.

120. See Canner & Smith, *supra* note 93, at 817-18; Dougherty, *supra* note 115; Seiberg, *supra* note 117.

loans.¹²¹ In New York, for example, Chemical Bank established a \$10 million home mortgage loan pool for borrowers who did not satisfy traditional loan criteria.¹²² Several lenders combined to create the New York Mortgage Coalition, a consortium that offered loan counseling and a second review of rejected loan applications by all banks in the consortium.¹²³ This coalition made 191 loans in 1993.¹²⁴

Thus, the extent and timing of the increase in the subject communities' market share of applications and loans, the consistency of local results with national results and the widespread public outcry over the first data disclosure, followed by increased activism, government enforcement and efforts by lenders to increase their lending in the subject communities, demonstrate the allocative impact of the HMDA.

B. Discrimination in the Conventional Home Mortgage Lending Market

As discussed above, denial rate ratios have been consistently high in the subject communities.¹²⁵ This trend leads to an inquiry about whether lenders have been discriminating in the conventional home mortgage loan market in the New York metropolitan area, even in spite of the allocated effort of the expanded HMDA disclosure. While the high denial rate ratios are consistent with discrimination, they alone cannot prove conclusively that there is discrimination in the conventional home mortgage lending market. Other data exists that evidence lending discrimination, including lenders' failure to report the race of borrowers on a high percentage of loans, a relatively high percentage of minority applicants whom lenders apparently discouraged from pursuing their loan applications and lenders' use of evaluative criteria that have a disparate impact based on race.¹²⁶ This data, along with the consistently high denial rate ratios, suggest the need for a comprehensive study

121. See Canner & Smith, *supra* note 93, at 817-18; Brooks, *supra* note 111; Dougherty, *supra* note 115; Hansell, *supra* note 70; Karr, *supra* note 115; Timmons, *supra* note 115.

122. See Dougherty, *supra* note 115.

123. See Christine Dugas, *Lenders Organize to Right Wrong*, *NEWSDAY*, Aug. 15, 1994, at 6.

124. See *id.*

125. See *supra* Part I.C.

126. As described more fully *infra* at note 153, use of a lending criterion that has a disparate impact based on race is not illegal as long as it fulfills a business purpose and there is not an alternative criterion that serves the same purpose but does not have a disparate impact.

of discrimination in the New York City metropolitan area conventional home mortgage market by the federal and state governmental agencies with access to the data and authority over lenders.

1. Denial Rate Ratios in the New York Metropolitan Area

In 1997, denial rate ratios in the New York metropolitan area were high for African Americans (2.2), Latinos (1.7) and predominantly minority neighborhoods (2.0).¹²⁷ A Chi-Square test,¹²⁸ based on this HMDA data, indicates that the chance that any of these denial rate ratios is explicable other than by race is less than .1 percent.¹²⁹ The results of this Chi-Square test do not prove discrimination because causality is not tested and because of the

127. Although denial rate ratios were also high for LMI applicants and LMI neighborhoods, this study does not use this as evidence of discrimination against these communities because differences in income may explain differences in denial rates, while differences in race do not.

128. The Chi-Square test is a statistical method used where more than one variable has been collected as part of a sample survey and the variables are in a categorical form (when numbers are used as symbols to stand for individual characteristics of the category chosen). The data is then put into a contingency table. The numbers in the table are the actual numbers of individuals that fit the description. The test statistic used is $\chi^2 = \sum(O - E)^2/E$. "O" is the actual observed value in each case. "E" is the expected value in that same cell. The expected value is the product of the total number in its row times the total number in its column divided by the grand total of the entire table. See JAMES BROOK, A LAWYER'S GUIDE TO PROBABILITY AND STATISTICS 199-206 (1990) (describing how to conduct the Chi-Square test).

129. The Chi-square test results are based on the following data for 1997:

African-Americans/Whites			
	Approvals	Denials	Total
African-Americans	5,923	2,249	8,172
Whites	33,944	4,615	38,559
Total	39,867	6,864	46,731

Latinos/Whites			
	Approvals	Denials	Total
Latinos	4,320	1,130	5,450
Whites	33,944	4,615	38,559
Total	38,264	5,745	44,007

Predominantly Minority/Predominantly White Neighborhoods			
	Approvals	Denials	Total
0-20% Minority	33,778	4,668	38,446
80-100% minority	6,268	2,292	8,560
Total	40,046	6,960	47,006

See *supra* note 30 (containing the source of this data).

HMDA's limitations, but the Chi-Square test results do show a strong association between race and the outcome of a lending decision that merits further study.¹³⁰

Denial rate ratios in the New York metropolitan area in 1997 were also high when controlling for the income of the applicant or the neighborhood, as Table Seven shows.

TABLE SEVEN¹³¹

	Denial Rate Ratio
LMI African American Appl./LMI White Appl.	1.9
MI African American Appl./MI White Appl.	1.8
UI African American Appl./UI White Appl.	2.2
LMI Latino Appl./LMI White Appl.	1.4
MI Latino Appl./MI White Appl.	1.3
UI Latino Appl./UI White Appl.	1.7
LMI Minority Neighborhood/LMI White Neighborhood	1.4
MI Minority Neighborhood/MI White Neighborhood	1.5
UI Minority Neighborhood/UI White Neighborhood	2.2

In 1997, the denial rate ratios for African Americans to white applicants at the LMI, MI and UI levels stood at 1.9, 1.8 and 2.2, respectively. A Chi-Square test on these HMDA data indicates that there is less than a .1 percent chance that no link existed between status as an African American person and the decision on a lending application at each of these three income levels.¹³² The corresponding rates for Latinos were 1.4, 1.3 and 1.7. A Chi-Square test indicates that the chance that race was not related to a decision on LMI and MI Latino applicants is between one and five percent, and less than .1 percent for UI Latino applicants.¹³³ By

130. See BROOK, *supra* note 128, at 199-200. For a discussion of the HMDA's limitations, see text accompanying notes 135-137 *infra*.

131. See *supra* note 30 (containing the source of this data).

132. The data that these results are based on are as follows for 1997 in MSA 5600:

	Approvals	Denials	Total
LMI African-American	870	623	1,493
LMI White	1,955	532	2,487
Total	2,825	1,155	3,980
MI African-American	1,682	604	2,286
MI White	5,215	874	6,089
Total	6,897	1,478	8,375
UI African-American	2,920	880	3,800
UI White	24,539	2,787	27,326
Total	27,459	3,667	31,126

See *supra* note 30 (containing the source of this data).

133. The data that these results are based on are as follows for 1997 in MSA 5600:

1997, the denial rate ratios for LMI, MI and UI predominantly minority neighborhoods to white neighborhoods at the same income levels were 1.4, 1.5 and 2.2, respectively. A Chi-Square test on these results indicates that the chance that the racial composition of a neighborhood was not related to a lending decision is between five and ten percent for LMI minority neighborhoods, between .1 percent and one percent for MI minority neighborhoods and less than one percent for UI minority neighborhoods.¹³⁴ As previously stated, these Chi-Square tests do not prove discrimination, but they do suggest a strong association between race and a decision on a loan application that merits further study.

2. *The Meaning of High Denial Rate Ratios*

The persistently high denial rate ratios in the New York metropolitan area are consistent with the existence of lending discrimination, although the high denial rate ratios alone do not conclusively prove this discrimination. The HMDA does not require lenders to provide sufficiently detailed information about applicants or the property that is the subject of the loan application to justify a conclusion that a high denial rate ratio is the result of discrimina-

	Approvals	Denials	Total
LMI Latino	546	236	782
LMI White	1,955	532	2,487
Total	2,501	768	3,269
MI Latino	1,191	291	1,482
MI White	5,215	874	6,089
Total	6,406	1,165	7,571
UI Latino	2,281	507	2,788
UI White	24,539	2,787	27,326
Total	26,820	3,294	30,114

See *supra* note 30 (containing the source of this data).

134. The data that these results are based on are as follows for 1997 in MSA 5600:

	Approvals	Denials	Total
LMI Minority	2,887	1,123	4,010
LMI White	186	44	230
Total	3,073	1,167	4,240
MI Minority	2,218	744	2,962
MI White	4,038	780	4,818
Total	6,256	1,524	7,780
UI Minority	1,157	424	1,581
UI White	29,487	3,819	33,306
Total	30,644	4,243	34,887

See *supra* note 30 (containing the source of these data).

tion.¹³⁵ Further, the HMDA does not require lenders to provide information about most of the factors that lenders consider when deciding a loan application, including the applicant's credit and employment history, housing expense-to-income ratio and overall debt-to-income ratio.¹³⁶ The HMDA also does not require lenders to disclose crucial information about the property that is the subject of the loan application, including its appraised value and the loan-to-property value ratio.¹³⁷

Despite the HMDA's limitations, a high denial rate ratio is consistent with discrimination and merits further investigation.¹³⁸ Even when considering complete data, including factors relating to borrower creditworthiness and the value of the collateral, it is possible that differences will remain in denial rates. A good example of this proposition – as well as an example of the sort of study that would be necessary to reach a more definitive conclusion about lending discrimination – is a study three economists from the Federal Reserve Bank of Boston published in 1992 (the “Boston Fed Study”).¹³⁹ According to the Boston Fed Study, in 1990, lenders in Boston denied conventional home mortgage loan applications from African Americans and Latinos 2.7 times more frequently than whites.¹⁴⁰ The Boston Fed Study found that the average minority applicant had weaker financial characteristics than the average white applicant, including higher debt burdens and weaker credit histories.¹⁴¹ To control for these differences, the authors of the Boston Fed Study conducted a multiple regression analysis using twelve variables about borrower qualifications and the property that were relevant to a bank's decision on a loan application.¹⁴²

135. See Cathy Cloud & George Galster, *What do We Know about Racial Discrimination in Mortgage Markets?*, June 1992, at 9; FAIR LENDING ANALYSIS, *supra* note 27.

136. See FAIR LENDING ANALYSIS, *supra* note 27, at 2, 16, 41.

137. See 12 U.S.C. §§ 2801-2810 (1999).

138. See Policy Statement, *supra* note 101, at 18,270 (noting that the HMDA data can provide “red flags” that there is a problem at a particular institution); Clark H. Nielsen, *Regulators Looking for Racial Bias in Lending*, MAG. BANK MGMT., July 1992, at 16 (discussing that the OCC examined lenders for potential discrimination if they rejected minorities twice as frequently as whites); Thomas, *supra* note 86 (discussing that the OCC reviewed banks with denial rate ratios of two or higher).

139. ALICIA H. MUNNELL ET AL., MORTGAGE LENDING IN BOSTON: INTERPRETING THE HMDA DATA, Federal Reserve Bank of Boston, Working Paper No. 92-7 (1992) [hereinafter “Boston Fed Study”].

140. See *id.* at 2.

141. See *id.* at 2, 25.

142. The Boston Fed Study identified several variables relevant to a lending decision, including: 1) housing expense-income ratio; 2) total debt payment-income ratio;

Controlling for these factors reduced the denial rate ratio between minorities and whites to 1.6 to 1.¹⁴³ Lenders rejected minority applicants with the same financial characteristics as whites seventeen percent of the time but rejected whites only eleven percent of the time.¹⁴⁴ The Boston Fed Study concluded that this was a statistically significant gap of greater than two standard deviations that was associated with race.¹⁴⁵ Put another way, even accounting for differences in finances, employment and neighborhood characteristics, minorities were sixty percent more likely to be rejected for home mortgage loans than whites, with race serving as the only explanation.¹⁴⁶

3) net wealth; 4) consumer credit history; 5) mortgage credit history; 6) public record of defaults; 7) probability of unemployment; 8) self-employment; 9) loan/appraised property value ratio; 10) private mortgage insurance; 11) neighborhood rent/value ratio; 12) personal characteristics of mortgage applicants; and 13) number of units in the home. The study then assigned a weight to each variable based on its relative importance to the lending decision. When applied to the characteristics of a particular applicant, these variables predict the result of the applicant's application. *See id.* at 24.

143. *See id.* at 2.

144. *See id.*

145. *See id.*

146. *See id.* The Boston Fed Study was and is controversial and has many supporters and detractors. Two critics found that errors in the Boston Fed Study's data tainted the results, and that by using correct data there was no evidence of discrimination. *See* JAMES H. CARR & ISAAC F. MEGBOLUGBE, *THE FEDERAL RESERVE BANK OF BOSTON STUDY ON MORTGAGE LENDING REVISITED* (1993) (reporting on the criticisms of the Boston Fed Study). However, both the Federal National Mortgage Association ("Fannie Mae") and the OCC conducted studies that corrected the data and confirmed the Boston Fed Study's original results. *See id.* at 15-21; *see also* DENNIS GLENNON & MITCHELL STENGEL, *AN EVALUATION OF THE FEDERAL RESERVE BANK OF BOSTON'S STUDY OF RACIAL DISCRIMINATION IN MORTGAGE LENDING 1* (1994).

Economist Mark Zandi concluded that the Boston Fed Study was flawed because it failed to account for the fact that housing prices in Boston declined in 1990 at higher rates in minority neighborhoods than white neighborhoods; it should have included several additional variables, including whether the applicant's credit history met the lender's guidelines, whether the borrower submitted information that could not be verified, the presence of a co-signor, and the loan amount; and it should have analyzed how much the denial rate for minorities would have decreased if lenders treated minorities like whites rather than how the denial rate for whites would have changed if lenders treated whites like minorities. *See* Mark Zandi, *Boston Fed's Bias Study Was Deeply Flawed*, *AM. BANKER*, Aug. 19, 1993, at 13. Studies by Fannie Mae and the OCC rebutted Zandi's conclusions. CARR & MEGBOLUGBE, *supra*, at 15; GLENNON & STENGEL, *supra*, at 17-20. Several economists argued that the Boston Fed Study was wrong to conclude there was discrimination in the Boston area because the default rate in minority census tracts was equal to the default rate in white census tracts, meaning that lenders were appropriately measuring the true default risks of whites and minorities and were not discriminating against minorities. *See* Gary S. Becker, *The Evidence Against Banks Doesn't Prove Bias*, *BUS. WK.*, Apr. 19, 1993, at

3. *Other Data Consistent With Lending Discrimination*

Other data exists that is consistent with the existence of lending discrimination in the New York metropolitan area. First, lenders did not report the race of the applicant on a large percentage of applications.¹⁴⁷ One possible explanation for this is that they may have been masking discriminatory intent by reporting that the race of minority applicants whom they intended to deny was not available.¹⁴⁸ Table Eight shows that in 1997, lenders did not report the race of the applicant on 9.9 percent of applications, and that they failed to do so on 11.2 percent of applications from 1990 to 1997.¹⁴⁹

TABLE EIGHT¹⁵⁰

	1990	1991	1992	1993	1994	1995	1996	1997	1990-1997
Percent of Race Not Available	14.4	14.5	9.6	9.8	10.5	10.5	11.1	9.9	11.2

Second, lenders appear to be discouraging a relatively high percentage of minority applicants and residents of predominantly minority neighborhoods from pursuing loan applications that they

18; Peter Brimelow & Leslie Spencer, *The Hidden Clue*, FORBES, Jan. 4, 1993, at 48. One author of the Boston Fed Study responded to this criticism by stating that a higher proportion of whites who were granted loans were at the higher end of creditworthiness than minority applicants who were granted loans. See Lynn E. Browne, *Default Rates Aren't the Way to Determine Bias in Boston*, BUS. WK., May 24, 1993, at 7. Therefore, whites and minorities had an equal default rate even though minorities were subject to higher (discriminatory) loan standards. Both Fannie Mae and the OCC conducted independent analyses of the Boston Fed's data, and after employing several different studies using different variables, concluded that lenders in Boston discriminated on the basis of race. See CARR & MEGBOLUGBE, *supra*, at 35; GLENNON & STENGEL, *supra*, at 36-37.

147. The HMDA requires lenders to report the race of applicants, if known, but the HMDA does not require applicants to report their race. If an applicant does not do so, the HMDA requires the lender to report the race of the applicant to the extent possible. If it is not possible for the lender to report the race of the applicant, the HMDA permits the lender to report that the race of the applicant is not available. See 12 C.F.R. § 203.4(b) (1999).

148. There may be many other reasons lenders fail to report the race of an applicant that are not related to intent to discriminate. One possible reason is that a large number of applicants who made applications telephonically or electronically declined to report their race and the lender had no way to determine the race of those applicants. Even if innocent, however, at the very best, lenders' failure to report the race of applicants renders it more difficult to identify potentially discriminatory lending patterns.

149. Tables Eight, Nine and Ten start from 1990, the first year expanded the HMDA data was available. This is in contrast to the previous tables that start in 1991 because Tables Eight, Nine and Ten are not attempting to measure lender behavior following the disclosure of expanded HMDA data.

150. See *supra* note 30 (containing the source of this data).

have filed.¹⁵¹ The HMDA requires lenders to report one of five dispositions of an application: 1) loan originated; 2) loan denied; 3) application withdrawn; 4) file closed for incompleteness; and 5) application granted but not accepted by the borrower.¹⁵² Any one of the last three outcomes suggests the possibility that the lender, either implicitly or explicitly, discouraged the applicant from pursuing a loan application.¹⁵³ For example, the lender might have

151. The FHA prohibits housing providers from discouraging individuals from pursuing housing without explicitly rejecting them. See ROBERT SCHWEMM, HOUSING DISCRIMINATION LAW § 13.2, at 13-3 (Release No. 1, 1991). Professor Schwemm's treatise cites several cases in support of this proposition. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 207-09 (1972); *Bellwood v. Dwivedi*, 895 F.2d 1521, 1529 (7th Cir. 1990); *Davis v. Mansards*, 597 F. Supp. 334, 343 (N.D. Ind. 1984); *United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 648 (N.D. Cal. 1973). See also 24 C.F.R. §§ 100.65(b)(3), 100.70(d)(3) (1999). Although a search turned up no cases that determined whether the FHA and ECOA prohibit lenders from discouraging an applicant from pursuing a home mortgage loan, the Policy Statement states that the FHA and ECOA prohibit lenders from discouraging an applicant from pursuing a filed application by, for example, providing different information or services regarding any aspect of the lending process. See Policy Statement, *supra* note 101, at 18,628. HUD regulations reflect the Policy Statement. See 24 C.F.R. §§ 100.120(b), 100.130(b)(1) (1999).

152. See 12 C.F.R. pt. 203, App. A, § V.B.1 (1999).

153. These outcomes do not include another form of discouragement, known as "pre-screening," by which a lender discourages a potential applicant from filing an application in the first place. See Policy Statement, *supra* note 101, at 18,266 (stating that the FHA and ECOA prohibit discouraging applicants with respect to inquiries about credit). See also Krause Statement, *supra* note 92, at 51 (suggesting that the fact that half of national banks received no applications from African Americans might have been the result of pre-screening); Thomas, *supra* note 86 (observing that OCC examined banks for pre-screening if they received at least 350 home mortgage applications and less than one percent were from minorities). A lender is required to report a "pre-screened" application as a denial under the HMDA. See 12 C.F.R. § 202.5(f) (1999); Board of Governors of the Federal Reserve System, Official Staff Interpretation, Regulation B, 12 C.F.R. § 202.2(f), *supp.* 1, *cmt.* 2 (1999). This rule, however, is subject to many exceptions, and the result is a rather murky requirement. See FDIC, MORTGAGE LOAN PRE-QUALIFICATIONS: APPLICATION OR NOT? (1996). In addition, the ECOA requires lenders to provide loan applicants with a statement of reasons for an "adverse action," which includes a denial of credit or a refusal to grant credit in substantially the terms or amount requested. See 15 U.S.C. §1691(d) (1999).

A search found no cases that concluded that pre-screening violated the ECOA or FHA, but the Policy Statement takes the position that it is illegal. It states that lenders are prohibited from failing to provide information or services about credit, providing different information or services regarding application procedures, or selectively encouraging applicants with respect to inquiries about applications for credit. See Policy Statement, *supra* note 101, at 18, 628. HUD regulations are similar. See 24 C.F.R. §§ 100.120(b), 100.130(b)(1) (1994).

Matched-pair testing of lenders can be an effective way to determine whether they are pre-screening. See Eugene Ludwig, Statement (1993), *reprinted in* OCC Q. REP., 1st Qtr. 1994, at 119. For a more detailed description of matched-pair testing, see *supra*, note 87.

taken too long to make a decision, suggested to the applicant that the loan would be denied or demanded unreasonably extensive documentation. As a result, the borrower might have withdrawn the application, abandoned it or applied elsewhere. While it is impossible to tell from the HMDA data alone whether the lender in fact discouraged an applicant, if lenders disproportionately report these three outcomes for the subject communities, this raises a concern that they might be discriminating by discouraging members of the subject communities from pursuing their loan applications.

Table Nine shows the percentage of applicants that lenders discouraged from applying for loans.¹⁵⁴ It shows the combined percentage of applications that lenders approved but borrowers did not accept, that borrowers withdrew and that lenders closed because incomplete, for African Americans, Latinos and predominantly minority neighborhoods, and their corresponding control groups, and the percentage difference, from 1990 to 1997.

TABLE NINE¹⁵⁵

Community	Percent	Percent Differential
White	11.7	N/A
African American	13.7	+17.1
Latino	13.6	+16.2
Race Comp. <20% Min.	12.6	N/A
Race Comp. >80% Min.	17.7	+40.5

Lenders discouraged applicants from minority neighborhoods 40.5 percent more frequently than they discouraged residents of white neighborhoods. There was also a pronounced difference in the experiences of African Americans and white applicants, as lenders discouraged African American applicants 17.1 percent more frequently than whites. The difference in discouraged Latino and white applicants was similar, at 16.2 percent. A Chi-Square test indicates that there is less than a .1 percent chance that race

In one series of tests conducted in Kentucky, the testing agency found that lenders discouraged applicants from applying by falsely stating that they did not take mortgage applications, by referring a minority applicant to get an insured loan at another institution, and by informing minority testers of the rules but not the exceptions. See *HUD Enforcement Efforts Target Three New Areas, Mansfield Tells FHA Group, Fair Housing-Fair Lending Rptr.*, ¶ 5.1 (Nov. 1, 1990); Brenner & Spayd, *supra* note 53.

154. As described earlier, it is impossible to conclude whether any one of these three results indicates that a lender, in fact, discouraged an applicant. It is only possible that the lender discouraged an applicant. As shorthand, however, this study refers to applicants whose application resulted in one of these three results as “discouraged” applicants.

155. See *supra* note 30 (containing the source of this data).

did not play a role in the results for African Americans and predominantly minority neighborhoods and between a .1 and one percent chance that race did not play a role in the results for Latinos; these results are qualified by the limits of the HMDA data and Chi-Square testing as described earlier.¹⁵⁶

Finally, lenders appear to be using several criteria for evaluating loan applications that have a disparate impact on Latinos, African Americans or both.¹⁵⁷ The HMDA permits, but does not require,

156. These Chi-Square test results are based on the following data:

Predominantly Minority Neighborhoods			
	Discouraged	Processed	Total
≥80% Minority	8,791	40,852	49,643
<20% Minority	28,576	198,855	227,431
Total	37,367	239,707	277,074

African-American Applicants			
	Discouraged	Processed	Total
African-American	7,136	45,097	52,233
White	26,022	196,842	222,864
Total	33,158	241,939	275,097

Latino Applicants			
	Discouraged	Processed	Total
Latino	4,062	25,897	29,959
White	26,022	196,842	222,864
Total	30,084	222,739	252,823

See *supra* note 30 (containing the source of this data).

157. Under the disparate impact theory of discrimination, if a lender uses criteria that have a significant disproportionately negative effect on minorities, this would violate the FHA unless the lender could justify the use of that criterion as serving a legitimate business purpose and not replaceable by an alternative criterion that served the same purpose but did not have the same effect. See Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J., 409, 458-95 (1998). The U.S. Supreme Court has not determined whether the FHA prohibits housing providers from employing housing eligibility criteria that have a disparate impact, but the lower courts have generally ruled that the FHA does do so. See SCHWEMM, *supra* note 151, ¶ 10.4, at 10-21 to 10-22 (Release No. 7, 1997). Professor Schwemm's treatise cites several cases as among those finding that the FHA prohibits practices that have a discriminatory effect. See *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 250-51 (9th Cir. 1997); *Larkin v. Michigan Dep't of Soc. Servs.*, 89 F.3d 285, 289 (6th Cir. 1996); *Mountain Side Mobile Estates Partnership v. HUD*, 56 F.3d 1243, 1250-51 (10th Cir. 1995); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995); *Jackson v. Okaloosa County*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Orange Lake Assocs. v. Kirkpatrick*, 21 F.3d 1214, 1227-28 (2d Cir. 1994); *Casa Marie, Inc. v. Superior Ct. of P.R.*, 988 F.2d 252, 269 n.20 (1st Cir. 1993); *Doe v. City of Butler*, 892 F.2d 315,

lenders to report the reasons they denied a loan.¹⁵⁸ A lender can report eight specific reasons for denying a loan.¹⁵⁹ If a lender denies loans to minorities at a disproportionately higher rate than whites based on the failure to satisfy a particular criterion, that criterion has a disparate impact on minorities. In order to pass scrutiny under the fair lending laws, the lender would have to justify its use of this criterion on the basis that the criterion had a legitimate business purpose and that there were no alternative criteria that would serve the same business purpose but would not have a disparate impact.¹⁶⁰ Table Ten depicts the percentage of applicants that lenders rejected for each reason by race of the applicant.

TABLE TEN¹⁶¹

	Debt-To- Income Ratio	Employment History	Credit History	Collateral	Insufficient Cash	Unverifiable Information	Application Incomplete	Mortgage Insurance Denied
African American	19.7	2.6	25.6	9.1	6.7	2.7	4.4	1.2
Latino	18.0	1.6	18.9	11.8	7.5	3.7	5.2	1.3
White	20.0	3.2	15.4	17.4	5.5	3.0	6.5	0.9

323 (3d Cir. 1989); *Edwards v. Johnston County Health Dep't*, 885 F.2d 1215, 1223 (4th Cir. 1989); *Summerchase Ltd. Partnership I v. City of Gonzales*, 970 F. Supp. 522, 527-31 (M.D. La. 1997); *Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F. Supp. 148, 153-54 (S.D.N.Y. 1989). See SCHWEMM, *supra* note 151, § 10.4(1), at 10-28 & n. 113.1. Similarly, whether the disparate impact theory of discrimination applies to lending under the FHA has not been resolved. At least one court of appeals has held that the FHA does prohibit lenders from employing practices that have a disparate impact based on race. See *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996). District courts have agreed. See *Steptoe v. Savings of Am.*, 800 F. Supp. 1542, 1546-47 (N.D. Ohio 1992); *Old West End Ass'n v. Buckeye Fed. Sav. & Loan*, 675 F. Supp. 1100, 1105-06 (N.D. Ohio 1987); *Thomas v. First Fed. Sav. Bank of Ind.*, 653 F. Supp. 1330, 1340 (N.D. Ind. 1987). The courts have made similar rulings regarding the ECOA. See *Miller v. American Express Co.*, 688 F.2d 1235 (9th Cir. 1982); *Cherry v. Amoco Oil Co.*, 490 F. Supp. 1026 (N.D. Ga. 1980). A federal task force concluded that the disparate impact theory of discrimination applies to lending. See *Policy Statement*, *supra* note 101, at 18,268-70.

It is also possible that, rather than applying these criteria equally, resulting in a disparate impact, lenders apply them differently based on race. One study concluded that lenders in Botson held marginal African American and Latino applicants to higher standards regarding credit history and debt-to-income ratios than marginal white applicants. WILLIAM C. HUNTER & MARYBETH WALKER, *THE CULTURAL AFFINITY HYPOTHESIS AND MORTGAGE LENDING DISCRIMINATION* (1995).

158. See 12 U.S.C. § 2803(h)(5) (1999); 12 C.F.R. § 203.4(c) (1999).

159. See 12 C.F.R. § 203, App. A, § V.F.1 (1999). The reasons are debt-to-income ratio, employment history, credit history, collateral, insufficient cash, unverifiable information, credit application incomplete and mortgage insurance denied.

160. See *Policy Statement*, *supra* note 101, at 18,270; SCHWEMM, *supra* note 151, § 10.4(2)(b), at 10-37; *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 939 (2d Cir. 1988).

161. See *supra* note 30 (containing the source of this data).

Lenders rejected African Americans and Latinos more frequently than whites for credit history, meaning poor credit history or lack of a credit history;¹⁶² insufficient cash for closing costs, fees and reserves; and mortgage insurance denied.¹⁶³ They rejected Latinos more frequently for unverifiable information.

In conclusion, the permanently high denial rate ratios, even when controlling for income, combined with lenders' failure to report the race of borrowers on a high percentage of loans, lenders' discouragement of a high percentage of minority applicants from pursuing their loan applications and lenders' use of evaluative criteria that have a disparate impact based on race are consistent with the existence of discrimination in conventional home mortgage lending in the New York City metropolitan area.

III. THE RELATIONSHIP BETWEEN DIFFERENTIAL TREATMENT AND LENDING

Part II of this study reports what appears to be anomalous results: while the disclosure of expanded HMDA data appeared to influence private lenders' allocation of credit in terms of increasing the market share of applications from and loans to African Americans, Latinos, LMI and predominantly minority neighborhoods, other data is consistent with finding that lenders are discriminating on the basis of race. HMDA data, however, offer an explanation for this: changes in the market share of applications were more strongly correlated than changes in denial rate ratios with changes in the market share of loans. In order to demonstrate this, it is necessary to examine the relationship between: 1) denial rate ratios and lending; 2) applications and lending; and 3) denial rate ratios, applications and lending.

162. See FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL, HOME MORTGAGE LENDING AND EQUAL TREATMENT (1992). In order to alleviate any disparate impact from this criterion, the Federal Financial Institutions Examination Council ("FFIEC") suggested to lenders that rather than focus on credit history as defined in a credit report, they should focus on evidence of a borrower's ability and willingness to repay a loan, including a record of regular payments for utilities and rent. See *id.* at 7, 9.

163. See *id.* at 15-16 (suggesting that lenders may want to use private mortgage insurance ("PMI") providers that are willing to employ alternate criteria in order to ensure that PMI denials do not have a disparate impact).

A. Denial Rate Ratios and Lending

One hypothesis about the relationship between denial rate ratios and lending is that a decrease in the denial rate ratio¹⁶⁴ for a subject community will be associated with an increase in that community's market share of loans, and vice versa. The basis for this hypothesis is that if lenders deny proportionately fewer loans to one community than another, that community's share of loans relative to the other community should increase, and vice versa. Table Eleven depicts the change from the prior year in the denial rate ratio ("D") and the market share of loans ("L") for each of the five subject communities in each year from 1991 to 1997.

TABLE ELEVEN¹⁶⁵

	African Americans		Latinos		LMI Persons		Minority Neighborhoods		LMI Neighborhoods	
	D	L	D	L	D	L	D	L	D	L
1992	0.0	(1.1)	(21.1)	12.7	26.7	(9.5)	0.0	32.4	(5.6)	(22.5)
1993	(10.5)	20.7	6.7	(4.8)	10.5	19.3	(10.5)	1.0	(5.9)	(3.8)
1994	11.8	20.7	0.0	28.8	19.0	(19.1)	11.8	13.1	12.5	6.6
1995	(5.3)	10.4	0.0	6.6	12.0	(30.9)	(10.5)	8.0	(16.7)	6.2
1996	16.7	(17.6)	6.3	(3.7)	(10.7)	(7.9)	17.6	(16.5)	26.7	(15.1)
1997	4.8	(15.6)	0.0	(2.6)	(8.0)	111.4	0.0	0.9	(5.3)	8.2

According to Table Eleven, changes in the denial rate ratio are correlated with changes in the market share of loans in seventeen of twenty-four observations, excluding the six observations in which the denial rate ratio did not change.

B. Applications and Lending

One hypothesis about the relationship between applications and lending is that when the market share of applications in a community increases, its market share of loans will increase as well. The basis for this hypothesis is the assumption that, all things being equal, a community that files relatively more applications will receive relatively more loans. Table Twelve depicts the change from the prior year in market share of applications ("A") and the market share of loans ("L") for each of the subject communities.

164. As a reminder, the denial rate ratio is the denial rate for a subject community divided by the denial rate for a control group. A high denial rate ratio indicates that the bank is rejecting applications from a subject community more frequently than the control group. An increase in the denial rate ratio from one year to the next indicates that the differential rejection rate is increasing, while a decrease indicates that the differential rejection rate is decreasing.

165. See *supra* Tables Two and Three (containing the source of this data).

TABLE TWELVE¹⁶⁶

	African Americans		Latinos		LMI Individuals		Minority Neighborhoods		LMI Neighborhoods	
	A	L	A	L	A	L	A	L	A	L
1992	(1.8)	(1.1)	3.2	12.7	(1.4)	(9.5)	26.9	32.4	(26.1)	(22.5)
1993	13.1	20.7	0.0	(4.8)	19.1	19.3	(0.9)	1.0	(4.5)	(3.8)
1994	18.2	20.7	20.3	28.8	(17.3)	(19.1)	11.6	13.1	5.9	6.6
1995	11.9	10.4	11.7	6.6	(29.9)	(30.9)	8.0	8.0	6.7	6.2
1996	(11.3)	(17.6)	(3.5)	(3.7)	0.0	(7.9)	(6.7)	(16.5)	(6.3)	(15.1)
1997	(13.4)	(15.6)	(1.2)	(2.6)	97.9	111.4	5.6	0.9	11.2	8.2

Table Twelve shows that changes in the market share of applications are very strongly associated with increases in the market share of loans. Excluding observations in which the market share of applications did not change, changes in the market share of applications were correlated with changes in the market share of loans in twenty-seven of twenty-eight observations.

C. Applications, Denial Rate Ratios and Lending

The examination of the relationship between denial rate ratios and lending and applications and lending has shown that changes in the market share of applications were correlated more frequently than changes in denial rate ratios with changes in the market share of loans. Not surprisingly, when examining the combined relationship between applications, denial rate ratios and lending, the change in the market share of applications more frequently controlled the change in the market share of loans than the change in the denial rate ratio. Table Thirteen shows the changes in market share of applications ("A"), denial rate ratios ("D") and market share of loans ("L") for each subject community for each year from 1992 to 1997.

TABLE THIRTEEN¹⁶⁷

	African Americans			Latinos			LMI Individuals			Minority Neighborhoods			LMI Neighborhoods		
	A	D	L	A	D	L	A	D	L	A	D	L	A	D	L
1992	(1.8)	0.0	(1.1)	3.2	(21.1)	12.7	(1.4)	26.7	(9.5)	26.9	0.0	32.4	(26.1)	(5.6)	(22.5)
1993	13.1	(10.5)	20.7	0.0	6.7	(4.8)	19.1	10.5	19.3	(0.9)	(10.5)	1.0	(4.5)	(5.9)	(3.8)
1994	18.2	11.8	20.7	20.3	0.0	28.8	(17.3)	19.0	(19.1)	11.6	11.8	13.1	5.9	12.5	6.6
1995	11.9	(5.3)	10.4	11.7	0.0	6.6	(29.9)	12.0	(30.9)	8.0	(10.5)	8.0	6.7	(16.7)	6.2
1996	(11.3)	16.7	(17.6)	(3.5)	6.3	(3.7)	0.0	(10.7)	(7.9)	(6.7)	17.6	(16.5)	(6.3)	26.7	(15.1)
1997	(13.4)	4.8	(15.6)	(1.2)	0.0	(2.6)	97.9	(8.0)	111.4	5.6	0.0	0.9	11.2	(5.3)	8.2

166. See *supra* Tables One and Two (containing the source of this data).

167. See *supra* Tables One, Two and Three (containing the source of this data).

Table Thirteen shows that for the fifteen observations where the change in the market share of loans and the change in the denial rate ratio would suggest the same result in the change in the market share of loans—that is, when the market share of applications increased and the denial rate ratio decreased, and vice versa—the change in the market share of loans was correlated. However, in the seven observations when the change in the market share of applications and denial rate ratio predicted different results, the change in the market share of applications trumped the change in the denial rate ratio, correlating with the market share of loans in six of the seven observations.

D. The Relationship Between Anti-Discrimination Efforts and Efforts to Increase Lending

HMDA data depicted in Tables Eleven, Twelve and Thirteen, in addition to reconciling the apparent inconsistency between the existence of increased lending and discrimination, offer some insights about anti-discrimination efforts, which are generally directed toward reducing denial rate ratios. First, the data shows that it was more likely than not that a reduction in the denial rate ratio would result in an increase in the market share of loans, but this result was by no means guaranteed. Second, a reduction in denial rate ratios combined with an increase in the market share of applications guaranteed an increase in lending. Thus, to be most effective, these data show that anti-discrimination efforts should be combined with efforts to generate more applications.¹⁶⁸ Finally, in fourteen out of twenty-two observations, excluding observations in which the market share of applications or the denial rate ratio did not change, changes in the denial rate ratio were correlated with the scope of the change in lending. That is, more frequently than not, an increase in the denial rate ratio was associated with a smaller increase or a larger decrease in the market share of loans relative to the change in the market share of applications, and a decrease in the denial rate ratio was associated with a larger increase or smaller decrease in the market share of loans relative to the change in the market share of applications.

168. This conclusion contradicts a popular hypothesis that efforts to generate more applications from the subject communities will result in higher denial rate ratios because more—but less-qualified—individuals apply for credit. See LIND, *supra* note 53, at 7-8. In this study, the fifteen increase in the market share of applications were accompanied by only four increases in the denial rate ratio. See Table Thirteen.

CONCLUSION

This study makes three primary conclusions. First, the disclosure of expanded HMDA data in late 1991 had an influence on private lenders' allocation of conventional home mortgage credit in the New York metropolitan area. Following the public controversy about the initial disclosure of expanded HMDA data, increased activism and strengthened government enforcement, the market share of applications from and loans to Africans-Americans, Latinos, LMI applicants and predominantly minority neighborhoods increased from 1991 to 1997. The increase was strongest from 1993 to 1995, and tailed off from 1996 to 1997. LMI neighborhoods, however, did not share in these lending increases.

Second, there is evidence that lenders discriminate against African Americans, Latinos and predominantly minority neighborhoods in the conventional home mortgage loan market. This evidence includes persistently high denial rate ratios between these communities and whites, even when controlling for income, lenders' failure to report the race of applicants on a high percentage of applications, the relatively high percentage of discouraged minority applicants and lenders' use of several lending criteria that have a disparate impact based on race.

Finally, changes in the market share of applications and changes in the denial rate ratio correlated positively with changes in the market share of loans, but the correlation between applications and lending was more powerful than the correlation between denial rates and loans. Changes in denial rate ratios also correlated positively with the scope of the changes in the market share of loans.

These conclusions have several policy implications. First, disclosure of lending data is an effective way to influence lenders' behavior and implement policy. Consequently, to the extent that governmental policy is to influence lenders to make more small business loans to the subject communities, they should impose HMDA-like disclosure requirements for small business lending. Since this study also shows that the effects of the initial disclosure appear to diminish over time, vigilance and regular publication of the data is essential to maintaining this policy goal. In this regard, lenders, the federal banking agencies and community activists in the New York metropolitan area should work together to publish,

publicize and analyze the HMDA data each year. A consortium in Boston has done this since 1995.¹⁶⁹

Second, conventional home mortgage loans are not reaching LMI neighborhoods to the extent they are reaching other subject communities. This article has suggested that the reason for this may be that members of the subject communities who live in LMI neighborhoods are moving into higher income neighborhoods. Even if this is the case, this does not excuse the failure to make more loans in LMI communities. Lenders, government agencies and community activists should focus efforts to expand lending in these communities.

Third, the federal banking agencies and other state and federal government agencies, including the New York State Banking Department and HUD should undertake a comprehensive study of conventional home mortgage lending in the New York metropolitan area to determine whether lenders are discriminating against Latinos, African Americans and predominantly minority neighborhoods. If they lack access to all of the necessary information, they should encourage voluntary disclosure of the data, and if they are not able to secure this, they should issue the necessary regulations or propose the necessary laws. In addition, the government agencies should sponsor a comprehensive set of matched-pair tests of lenders. The government agencies should then conduct a study of lending similar to the Boston Fed Study in 1992.¹⁷⁰ If the study indicates that lenders discriminate, the government agencies should work with lenders and community groups to develop a plan to end the discrimination and compensate for its effects.

Fourth, marketing is a very effective way to increase lending. Lenders should continue to engage in the various techniques for marketing their loans in the subject communities that they developed following the disclosure of expanded HMDA data in 1992.¹⁷¹ Although bank marketing is no longer one of the evaluative criteria under the new CRA regulations, the federal banking agencies

169. See JIM CAMPEN, *CHANGING PATTERNS V: MORTGAGE LENDING TO TRADITIONALLY UNDERSERVED BORROWERS & NEIGHBORHOODS IN GREATER BOSTON, 1990-1997* (1998); CAMPEN, *supra* note 27; JIM CAMPEN, *CHANGING PATTERNS III: MORTGAGE LENDING TO TRADITIONALLY UNDERSERVED BORROWERS AND NEIGHBORHOODS IN GREATER BOSTON, 1990-1995* (Dec. 1996); JIM CAMPEN, *CHANGING PATTERNS: MORTGAGE LENDING IN BOSTON, A 1994 UPDATE* (1995); JIM CAMPEN, *CHANGING PATTERNS: MORTGAGE LENDING IN BOSTON, 1990-1993* (Dec. 1995).

170. See Warren Traiger, *Mortgage Discrimination: Get to the Bottom of It Now*, *AM. BANKER*, Nov. 4, 1997, at 4.

171. See *supra* text accompanying notes 115-124.

should urge banks that have a relatively low market share of loans in the subject communities to increase their marketing efforts in those communities. Community groups should work with banks to provide outreach and marketing in their neighborhoods.

Finally, the federal banking agencies and other government entities with jurisdiction over lending discrimination should continue to expand their efforts to detect and eliminate lending discrimination. Combining these efforts with efforts to generate more applications will create the best opportunity to increase lending in the subject communities.

EPILOGUE – 1998 RESULTS

As this article was being completed, the Federal Reserve issued HMDA data covering lending in 1998. The data does not change the three main conclusions of the article, that the disclosure of expanded HMDA data in late 1991 had an allocative impact, that there is strong evidence of discrimination in the conventional home mortgage lending market and that applications had a stronger impact on changes in the market share of loans than differential treatment of applications, although both were correlated positively with changes in the market share of loans. Nor do the 1998 results require a change in the policy recommendations, although the continued decrease in lending to African Americans and Latinos suggest that there is more urgency to follow the policy recommendations.

SUMMARY OF RESULTS

The market share of applications increased in three of the subject communities and decreased in two.

MARKET SHARE OF APPLICATIONS

	Market Share	Percent Change	Change, 1991-1998
African Americans	11.2	(8.9)	2.8
Latinos	7.4	(9.8)	19.4
LMI persons	11.4	22.3	65.2
Predominantly minority neighborhoods	14.4	8.3	61.8
LMI neighborhoods	10.8	9.1	(9.2)

The market share of loans decreased in the same subject communities – African Americans and Latinos, and increased in the other three subject communities.

MARKET SHARE OF LOANS

	Market Share	Percent Change	Change, 1991-1998
African Americans	9.4	(8.7)	(1.1)
Latinos	6.9	(9.2)	25.5
LMI persons	9.1	(22.9)	44.4
Predominantly minority neighborhoods	10.7	4.9	44.6
LMI neighborhoods	8.4	6.3	(17.6)

Finally, denial rate ratios increased for predominantly minority neighborhood applicants, decreased for African Americans and LMI persons, and remained the same for the remaining two subject communities:

DENIAL RATE RATIOS

	Denial Rate Ratio	Percent Change	Change, 1991-1998
African Americans	2.1	(4.5)	10.5
Latinos	1.7	—	10.5
LMI persons	2.0	(13.0)	33.3
Predominantly minority neighborhoods	1.9	5.0	—
LMI neighborhoods	1.8	—	—

The denial rate ratios also remain high when controlling for applicant or neighborhood income:

<i>LMI</i>	<i>Denial Rate Ratio</i>
African Americans	1.8
Latinos	1.4
Predominantly minority neighborhoods	1.4
<i>MI</i>	<i>Denial Rate Ratio</i>
African Americans	1.7
Latinos	1.5
Predominantly minority neighborhoods	1.5
<i>UI</i>	<i>Denial Rate Ratio</i>
African Americans	2.3
Latinos	1.8
Predominantly minority neighborhoods	1.9

ANALYSIS OF RESULTS

The other indicia of discrimination cited earlier in this article – lenders' failure to report the race of applicants, lenders' discouraging members of the subject communities from applying for loans and lenders' use of criteria that have a disparate impact – continue to point toward discrimination. The percentage of applicants for which lenders did not report race increased significantly from 9.9 percent in 1997 to 14.9 percent in 1998. This was the highest per-

centage of applicants whose race was not reported during the nine years such data has been available. Second, lenders discouraged applicants from the subject communities more frequently than applicants from control communities in 1998 than the average for 1990 to 1997. Lenders discouraged Latinos 1.3 times more frequently and African Americans 1.5 times more frequently than whites, and applicants from minority neighborhoods 1.7 times more frequently as applicants from white neighborhoods. Finally, lenders continued to reject African Americans and Latinos more frequently for credit history and insufficient cash and for debt-to-income ratios.

AN INDIVIDUAL PREFERENCE APPROACH TO SUBURBAN RACIAL DESEGREGATION

*Paul Boudreaux**

INTRODUCTION

Thirty years after the enactment of the Fair Housing Act of 1968 (the "FHA"),¹ racial segregation in housing persists throughout America's metropolitan areas.² Despite the hope that outlawing housing discrimination would result in desegregation, African Americans³ in metropolitan areas continue to live in neighborhoods that are composed predominantly of members of their own race.⁴ In particular, the replication of this segregation in the suburbs, to which African Americans are moving in large numbers, seems to contradict the assumptions of 1968, at which time it was argued that blacks were trapped in central city ghettos due to dis-

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1. 42 U.S.C. §§ 3601-3631 (1994).

2. See DOUGLAS A. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* 67-74 (1993).

3. The FHA prohibits housing discrimination on account of any racial factor. See 42 U.S.C. §§ 3604-3605 (1994). Most commentary on racial integration focuses on African Americans and whites in large part because of the small numbers of other racial groups in the United States as recently as 1968. Since then, a surge in immigration has increased tremendously the numbers of Hispanics, Asians, and members of other racial groups. See *WORLD ALMANAC* 379 (1997) (observing that the Hispanic population was up to 9.0% in 1990 from 6.4% in 1980 and the Asian population was up to 2.9% from 1.5%). For the sake of simplicity, this paper will concentrate on the concept of a two-race metropolitan area. Some of what this essay proposes can apply to other racial minorities, but it has been asserted that no other racial group has experienced the same level of segregation as have African Americans. See MASSEY & DENTON, *supra* note 2, at 77. Finally, as a matter of style, this paper employs the term "African American," which appears to have superseded the term "black" in most academic writing as of 1998. Exceptions include some references to census data that uses the term "black."

4. See MASSEY & DENTON, *supra* note 2, at 221-23 (comparing Census data from 1980 and 1990 and concluding that "segregation [especially in the north] remains high and virtually constant").

crimination by the housing industry, hostile white suburbs and timid government.⁵

What accounts for the replication of segregation in the suburbs? The traditional model explaining racial segregation has blamed discrimination by institutional actors in the housing industry and government. The traditional model ignores the individual preference factors that contribute to segregation. This essay does not deny the continued existence of institutional discrimination but instead argues that the traditional model cannot explain all the causes of segregation in housing. Understanding and accepting the importance of the individual preference factors may change our view and eventually lead to more effective means of pursuing metropolitan racial desegregation in the twenty-first century.

Part I describes the replication of segregation in the expanding suburban jurisdictions of metropolitan areas and the traditional legal responses to metropolitan segregation. The part ends by explaining the implications of suburban migration of African Americans and questioning the adequacy of the traditional model.

Part II sets forth the individual preference factors of both whites and African Americans that contribute to the replication of segregation in suburbs. This part first develops the traditional concept of the segregation premium in housing prices in predominantly white suburbs. The premium reflects the personal reluctance of whites to live alongside African Americans that in turn socially discourages African American migration. Part II then discusses the personal housing choices of African Americans that play a role in suburban segregation, such as a reluctance to be an icebreaker in an all-white neighborhood, a desire not to move too far from pre-existing social ties, or a preference for building successful suburbs of African American homeowners. There is currently no method to compare the relative weight of institutional discrimination against individual preference factors, nonetheless, if government and society desire greater racial integration in housing, law and policy must directly address these individual preference factors.

Finally, in Part III, implications of the individual preference factors are discussed. In order to break through the segregation premium dilemma and other preference factors, legislation must affirmatively attract African Americans to particular suburban regions. Out of the three methods of attack against racial segregation, enforcement of laws prohibiting institutional discrimination,

5. See *id.* at 17-59 (tracing the history and listing examples of the discrimination by institutional actors).

integration of public housing, and the *Mount Laurel*-type fair share approach,⁶ only the fair share idea holds hope for overcoming the individual preference factors. Although these state-law mandates for low-cost housing have failed to create widespread desegregation, this essay suggests that fair share approaches might be more successful if they focused less on housing for low-income persons and more on encouraging the construction of apartment units in suburban areas. Wider zoning for apartments, while not a cure-all for segregation in housing, at least holds the promise of being easier to administer than the traditional fair share mandates by engendering less local opposition and by more effectively creating desegregation in the suburban realm.

I. IMPLICATIONS OF AFRICAN AMERICAN SUBURBAN SEGREGATION FOR THE TRADITIONAL MODEL OF METROPOLITAN SEGREGATION

A. The Dilemma of Suburban Segregation

Racial segregation in American culture and society has been well documented. It has been the essential “American dilemma” throughout much of the nation’s history.⁷ The mid-20th century civil rights decisions of the U.S. Supreme Court, which ordered school desegregation⁸ and laws outlawing segregation in employment and accommodations,⁹ have been among the most famous and significant American legal attempts at social justice. By 1968, there was even an optimism over eradicating a fundamental and far-reaching aspect of segregation – residential segregation.¹⁰ At that time, there had not been much progress in integrating residential areas. In March 1968, the federally ordered Kerner Commission Report lamented that the effects of American policy and culture had made “permanent the division of our country into two

6. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, 732-33 (N.J. 1975) (requiring, as a matter of New Jersey law, certain suburban jurisdictions to take steps to permit migration of a “fair share” of the region’s low-income persons).

7. See generally GUNNAR MYRDAL, *AN AMERICAN DILEMMA* (1944).

8. See *Sweatt v. Painter*, 339 U.S. 629, 633-34 (1950) (attacking aspects of segregation of law schools); *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (holding that racial segregation of schools was unconstitutional); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22 (1971) (ordering desegregation plans of school districts).

9. See Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h(6) (1994); Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973a-1973p (1994).

10. See MASSEY & DENTON, *supra* note 2, at 59.

societies; one, largely Negro and poor, located in the central cities; the other, predominantly white and affluent, located in the suburbs."¹¹ The Report concluded that this sharp segregation created the urban ghettos that trapped and impoverished African Americans.¹²

Thirty years since the passage of the FHA, there has been limited integration of the races in metropolitan areas. The most significant recent study of racial segregation is Douglas S. Massey and Nancy A. Denton's *American Apartheid*.¹³ Sociologists Massey and Denton detail the disappointing history of American policy fostering housing segregation,¹⁴ the persistence of this segregation,¹⁵ the deleterious effects of segregation on urban African Americans,¹⁶ and their prescriptions for change.¹⁷ They perceive a decline in interest in residential desegregation in the decades after the FHA and call for a national refocus on efforts to desegregate metropolitan areas.¹⁸

Throughout most of the Massey and Denton study, the work uses 1980 census figures, but concludes with some preliminary 1990 data that was available before their monograph went to press. Massey and Denton show that most African Americans in the thirty metropolitan areas with the largest black populations in the United States remain highly segregated in terms of isolation and concentration.¹⁹ For sixteen of these metro areas, Massey and Denton characterize the pattern of African American living as "hypersegregation."²⁰ They forcefully dispel the notion that the Fair Housing laws desegregated metropolitan areas.

A trend not addressed at length by Massey and Denton is the persistence of residential segregation in metropolitan suburbs. They show that metro areas with significant African American suburban populations in 1980, such as Washington, D.C., Memphis, St. Louis and Birmingham, held segregation indices that were somewhat lower than those of the central cities but which were still

11. MASSEY & DENTON, *supra* note 2, at 4 (citing U.S. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, THE KERNER REPORT 1 (1988)).

12. *See id.* at 2.

13. MASSEY & DENTON, *supra* note 2.

14. *See id.* at 16-59.

15. *See id.* at 60-114.

16. *See id.* at 115-85.

17. *See id.* at 186-235.

18. *See id.* at 7, 16.

19. *See* MASSEY & DENTON, *supra* note 2, at 60-82 (1980 figures), 221-29 (1990 figures).

20. *See id.* at 74-78.

unacceptably high in their opinion.²¹ Only suburban regions with very few African Americans showed significant integration.²² In the end, Massey and Denton view segregation as still a matter of a "chocolate city with vanilla suburbs."²³

Since Massey and Denton's use of 1980 census figures, African American migration to suburbs has proceeded rapidly in certain areas. By the early 1990s, more than half of the Washington area's African American population lived in the suburbs as well as about half of the Atlanta area's African Americans.²⁴ Other metropolitan areas showed similar types of migrations of African Americans to suburban regions.²⁵ Also following these migrations to the suburbs is the urban pattern of racial segregation. Consider the Washington, D.C. metro area, the nation's leader in African American suburbanization.²⁶ The city is surrounded by three very large sub-

21. *See id.* at 75-77.

22. *See id.* (citing examples from Indianapolis and Kansas City).

23. *Id.* at 61.

24. In the Washington, D.C. area, the number of African Americans in the central city was estimated in 1996 to be 340,837 (62.7% of the city population), which was exceeded by the estimated total of 429,371 African Americans in suburban Prince George's County, Maryland. Compare U.S. BUREAU OF THE CENSUS, COUNTY POPULATION ESTIMATES BY RACE AND HISPANIC ORIGIN (visited Sept. 29, 1999) <<http://www.census.gov/population/estimates/county/crh/crhdc96.txt>>, with U.S. BUREAU OF THE CENSUS, COUNTY POPULATION ESTIMATES BY RACE AND HISPANIC ORIGIN (visited Sept. 29, 1999) <<http://www.census.gov/population/estimates/county/crh/crhmd96.txt>>. The black population of the suburban Atlanta counties of DeKalb (230,425, some of whom lived in the City of Atlanta), Cobb (44,154), Clayton (43,403) and Gwinnett (18,175) totaled 336,157 in 1990, which exceeded the black population of Fulton County (324,008), which includes most of Atlanta. See U.S. BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK 102 (1994).

25. For example, Burlington County, New Jersey, east of Philadelphia, was estimated to be 16.1% African American in 1996. See U.S. BUREAU OF THE CENSUS, COUNTY POPULATION ESTIMATES (visited Sept. 29, 1999) <<http://www.census.gov/population/estimates/county/crh/crhnj96.txt>>. Burlington County was the home of the famous "fair share" litigation. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975). St. Louis's major suburban county, St. Louis County, which does not include the city, was 16.0% African American. Baltimore County, Maryland, which surrounds Baltimore but does not include the city, was 14.4% African American. Nassau County, New York, east of New York City, was 9.6% African American, according to the 1996 estimates. See U.S. BUREAU OF THE CENSUS, COUNTY POPULATION ESTIMATES (visited Sept. 29, 1999) <http://www.census.gov/population/www/estimates/co_crh.html>. These figures compare to the nationwide figure of 12.6% of Americans who were African American in 1996. See *WORLD ALMANAC* 379 (1998) (citing Census data).

26. Prince George's County, Maryland is the nation's first predominantly black suburban county. See Martin Walker, *All the Kings' Forces — Today is Martin Luther King Day but as His Family and the City of Atlanta Squabble Over His Memorial, What Does He Now Mean to America's Increasingly Suburban Blacks?*, *THE GUARDIAN*, Jan. 16, 1995, at T002, available in 1995 WL 7574025.

urban counties. In 1996, while suburban Prince George's County, Maryland held a population that was estimated to be 56.0% African American,²⁷ neighboring Montgomery County's population was 14.4% black,²⁸ and that of Fairfax County, Virginia, the nation's richest county per household,²⁹ was only 8.3% black.³⁰ East of Atlanta, DeKalb County had the highest percentage of African Americans in the metropolitan population at 45.1% in 1996.³¹ Despite the fact that Georgia's population as a whole was 28.2% African American,³² no other suburban county in the Atlanta metro area exceeded a 10% black population.³³

Suburban living is favored as an ideal residential option. Nearly a majority of Americans now live in suburban areas.³⁴ Suburbanites outnumber city dwellers in nearly every metropolitan area of the country.³⁵ With the popularity of the suburban lifestyle, any future successful racial desegregation program will have to address the replication of segregation in the suburbs. The Kerner Commission's prediction that the separation between black city and white suburb would melt with large numbers of African Americans migrating to the suburbs is far from the reality of the racial separation recreating itself in the suburbs. Lawmakers and commentators should reassess the traditional assumptions of racial segregation in order to find the most effective approaches for law and policy for the coming decades.³⁶

27. U.S. BUREAU OF THE CENSUS, COUNTY POPULATION ESTIMATES (visited Sept. 29, 1999) <<http://www.census.gov/population/www/estimates/county/crh/crhmd96.txt>>. In 1970, only 22.7% of the Washington area's blacks lived in the suburbs, in comparison to the slightly more than 90% of area whites who did so — a reflection of the traditional dichotomy between heavily black central cities and mostly white suburbs. See MASSEY & DENTON, *supra* note 2, at 68. By 1980, after more than a decade of fair housing laws, the percentage of the area's blacks living in the suburbs rose sharply, to 46.2%. See *id.*

28. See U.S. BUREAU OF THE CENSUS, COUNTY POPULATION ESTIMATES, *supra* note 27.

29. See U.S. BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK xv (1994).

30. See U.S. BUREAU OF THE CENSUS, COUNTY POPULATION ESTIMATES BY RACE AND HISPANIC ORIGIN (visited Sept. 28, 1999) <<http://www.census.gov/population/estimates/county/crh/crhva96.txt>>.

31. See *id.* at <<http://www.census.gov/population/estimates/county/crh/crha96.txt>>.

32. See *id.* at <<http://www.census.gov/population/estimates/state/srh/srh96.txt>>.

33. See U.S. BUREAU OF THE CENSUS, *supra* note 31.

34. See William F. Gibson, *Self-Governing Movement Mirrors Republican Base*, ORLANDO SENTINEL, Apr. 23, 1995, at G1 (citing Census estimates).

35. See WORLD ALMANAC 384-85 (1998).

36. This paper proceeds on the assumption that racial desegregation is a significant goal of public law and policy. There remains disagreement as to this goal. Since the passage of the 1960s' anti-discrimination legislation, many reformers have argued

B. The Traditional Legal Responses to Metropolitan Segregation

Traditional legal efforts against residential segregation can be identified into three broad categories: 1) the outlawing of institutional discrimination; 2) the imposition of an affirmative burden on the federal government to foster desegregation; 3) and the state fair share initiatives for spreading low income housing.

1. Institutional Discrimination

Institutional discrimination is discrimination on the part of real estate agents, lenders, other commercial parties in the housing industry and by the government. By outlawing such discrimination in the sale or rental of housing and in real-estate lending, the FHA offered the promise of desegregating residential patterns.³⁷ Leading commentators on racial segregation patterns have traditionally focused most of the blame for metropolitan segregation on these institutional parties.³⁸ Massey and Denton describe the "construction of the ghetto"³⁹ as the result of historical practices of the real estate industry and governmental entities. In blockbusting, real estate agents played on racial fears to encourage the panicked flight of white residents from an area and financially benefited from

that African American urban neighborhoods need to be re-built from within, that desegregation efforts distract from local efforts and that effective desegregation might better be achieved as the result of urban policies that accept current racial patterns. See generally WILLIAM J. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987) (discussing the dilemmas of urban African American poverty). Some modern conservatives have suggested that a considerable amount of segregation is the natural outcome of racial and cultural differences and that economic efficiency is not necessarily harmed but may be maximized by permitting voluntary segregation. See generally RICHARD EPSTEIN, *FORBIDDEN GROUNDS* (1992). Finally, a growing number of African American leaders see integration as an outmoded notion that would serve only to disperse racial pride and hamper the opportunities for the success of an Afro-centric culture. See, e.g., Michael Fletcher, *NAACP Facing New Challenges Over Integration As Group Continues, Some Seek Greater Focus on Self-Help*, WASH. POST, July 14, 1997, at A1. On another side of the debate, one politically moderate commentator has argued that "building from within" has not worked and cannot work for racially isolated neighborhoods, and therefore efforts at integration are more needed than ever. Former mayor and metropolitan commentator David Rusk has written bluntly that "[b]ad communities defeat good programs." DAVID RUSK, *CITIES WITHOUT SUBURBS* 121 (1993).

37. See 42 U.S.C. § 3604 (1994) (outlawing discrimination in the sale or rental of housing); 42 U.S.C. § 3605 (1994) (outlawing discrimination in real estate-related transactions, including lending).

38. See RICHARD MUTH, *CITIES AND HOUSING* 106 (1969) (summarizing policy views in the late 1960s that stated that segregation is the result of landlords' and real estate agents' refusal to rent and sell to African Americans).

39. See MASSEY & DENTON, *supra* note 2, at 17-59, 186.

these fears.⁴⁰ Historian Kenneth Jackson blames the actions taken by government entities before 1968 for the segregation in the American suburb. The Fair Housing Administration actively discouraged the mingling of races out of a belief that only white neighborhoods, and not the redlined areas with a significant black population, could insure stable property values.⁴¹ By forcing the housing industry to accept African Americans as homeowners and tenants, de-segregationists hoped that metropolitan neighborhoods, in particular the ever-growing suburban regions,⁴² would become more racially integrated.⁴³

The FHA, however, has accomplished only limited success in achieving integration. Massey and Denton conclude that the FHA was "structurally flawed and all but doomed to fail."⁴⁴ They blame largely the lack of enforcement under the original FHA: the limited litigation powers for the U.S. Department of Housing and Urban Development ("HUD"), the short limitations provisions for bringing lawsuits and the expense of bringing private suits against institutional defendants without providing for attorney's fees or punitive damages.⁴⁵ The 1988 amendments to the FHA ameliorated many of these flaws by extending the time in which to file a Fair Housing complaint to two years, permitting recovery of attorney's fees, providing for expedited administrative adjudication, authorizing large fines and mandating that HUD bring suit once discrimination was found to have occurred.⁴⁶ While there is some evidence that segregation has slowed since the 1988 amendments, whether they will significantly alter the patterns and trends of metropolitan housing segregation is yet to be seen.⁴⁷

40. See *id.* at 37-38.

41. See KENNETH JACKSON, *CRABGRASS FRONTIER* 207-08, 214 (1985) (criticizing the Federal Housing Administration's underwriting guidelines in the 1930s and 1940s).

42. See generally GREGORY R. WEIHER, *THE FRACTURED METROPOLIS* (1991) (arguing that the political fragmentation of suburban areas into numerous localities has encouraged locational stereotyping and racial insularity).

43. See MASSEY & DENTON, *supra* note 2, at 60.

44. *Id.* at 14.

45. See *id.* at 193-200.

46. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619. See also MASSEY & DENTON, *supra* note 2, at 210 (discussing the Fair Housing Amendments Act of 1988).

47. According to census estimates, black household home ownership was 41.6% in 1970 and 34.5% in 1950. The overall rate of African American household home ownership rose slightly in the early 1990s, from 43.4% in 1990 to 43.6% in 1995. See U.S. Bureau of the Census (visited Sept. 28, 1999) <<http://www.census.gov/hhes/www/housing/census/historic/ownrate.html>>.

2. Federal Government Responsibilities

The FHA has been judicially interpreted as imposing an affirmative duty upon HUD to promote desegregation in the administering of its programs and activities.⁴⁸ In *Hills v. Gautreaux*,⁴⁹ the Supreme Court affirmed an order requiring HUD and the Chicago public housing authority to institute a program to place public housing tenants in predominantly white suburban neighborhoods. Other lawsuits over the placement of public housing units have proven to be among the most contentious in American civil rights history, as localities have fought fiercely to avoid the placement of largely African American public housing facilities in predominantly white neighborhoods.⁵⁰

The executive branch has also pushed HUD to take an active role in desegregation. President Kennedy's 1962 Executive Order against discrimination in federally supported housing⁵¹ led to HUD rejecting the placement of largely African American public housing in largely African American neighborhoods. More recently, the Clinton administration, through the enforcement of an affirmative mandate, declared its intention to use HUD programs to effect desegregation.⁵² Nonetheless, the affirmative mandate reaches only HUD programs and activities and is limited due to the small number of federally supported public housing units.⁵³

48. In the FHA, Congress declared that "it is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601 (1968). The FHA refers to actions against "discriminatory housing practices." See 42 U.S.C. § 3608(e) (functions of HUD Secretary); 42 U.S.C. § 3613 (private enforcement). Certain courts have interpreted these statements, along with the command to all federal agencies to "administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further the purposes of this subchapter," 42 U.S.C. § 3608(d) (obliging HUD to conduct its operations so as not to result in housing patterns of segregation). See, e.g., *NAACP v. Secretary of HUD*, 817 F.2d 149 (1st Cir. 1987); *Anderson v. City of Alpharetta*, 737 F.2d 1530 (11th Cir. 1984); *Otero v. New York City Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973).

49. 425 U.S. 284 (1976). For the most part, the effect of this suburban migration on those who have chosen to participate has been favorable. See James Rosenbaum et al., *Can the Kerner Commission's Housing Strategy Improve Employment, Education, and Social-Integration for Low-Income Blacks?*, 71 N.C. L. REV. 1519 (1993).

50. See, e.g., *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987).

51. Exec. Order No. 11,063, 3 C.F.R. 652 (1959-1963 comp.), reprinted in 42 U.S.C. § 1982 app. at 6-8 (1994).

52. See Exec. Order No. 12,892, 59 Fed. Reg. 2939, reprinted in 42 U.S.C. § 3608 (1994); Memorandum of President, 59 Fed. Reg. 2939, reprinted in 42 U.S.C. § 3608.

53. Only two percent of the nation's housing units were publicly financed in the early 1990s. See MASSEY & DENTON, *supra* note 2, at 229.

Without effective enforcement, federal plans integrating public housing recipients will do little to affect the overall level of racial integration in a metropolitan area.

3. *State Fair Share Initiatives*

State governments have pursued desegregation through initiatives that require localities to provide for a fair share of low and middle-income housing. Typically, these fair share initiatives have not been aimed primarily toward racial desegregation, but the effects of such plans have appealed to progressive advocates.⁵⁴

One of the most notable efforts was New Jersey's *Mount Laurel* litigation.⁵⁵ Under the New Jersey Constitution, localities were obliged to accept a fair share of housing for the poor. This litigation, which dragged on for decades in various incarnations,⁵⁶ spurred the enactment of state legislation designed to foster the creation of low-cost housing in growing areas of the state.⁵⁷ A number of states have followed New Jersey's lead through their own judicial and legislative efforts.⁵⁸ An example of an interesting and less politically objectionable approach has been the requirement of new private developments to include a share of low-cost housing. In Montgomery County, Maryland, the area has achieved a moderate amount of racial integration since adopting this "inclusionary zoning" requirement more than twenty years ago.⁵⁹ Such

54. See generally CHARLES M. HAAR, *SUBURBS UNDER SIEGE* (1996) (discussing New Jersey's initiatives).

55. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975); *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983).

56. More than two decades after the litigation began, the township of Mount Laurel finally approved the construction of low-cost housing in 1997. See Ronald Smothers, *Ending Battle, Suburb Allows Homes for Poor*, N.Y. TIMES, Apr. 12, 1997, at 21.

57. See Fair Housing Act of 1985, N.J. STAT. ANN. § 52:27D-301 to 329 (West 1986). Under the New Jersey plan, jurisdictions are sometimes entitled to "pay off" up to half of their fair share duty. See also JACKSON, *supra* note 41, at 225 (discussing some suburban opposition to public housing).

58. See Harold A. McDougall, *From Litigation to Legislation in Exclusionary Zoning Law*, 22 HARV. C.R.-C.L. L. REV. 623 (1987) (summarizing the judicial and legislative efforts of several states to limit exclusionary zoning and to increase the availability of affordable housing). For an assessment of the reported failures of the *Mount Laurel* efforts, see Bernard K. Ham, *Exclusionary Zoning and Racial Segregation: A Reconsideration of the Mount Laurel Doctrine*, 7 SETON HALL CONST. L.J. 577 (1997); see also W. DENNIS KEATING, *THE SUBURBAN RACIAL DILEMMA* 36-48 (1994).

59. See RUSK, *supra* note 36, at 64-65 (citing the diverse racial composition of Montgomery County).

“inclusionary zoning” puts the burden largely on developers and avoids the inherent political difficulties in having to secure local government participation in low-cost housing.⁶⁰

C. Implications for Future Desegregation Initiatives

Advocates of racial desegregation have focused their attention largely on the desirability for greater enforcement of the laws against institutional discrimination in the housing market.⁶¹ Massey and Denton call for HUD and the Department of Justice to “throw their full institutional weight into locating instances of housing discrimination and bringing those who violate the [FHA] to justice.”⁶² They argue for increased use of testers to ferret out institutional discriminators, greater scrutiny of lending disparities among the races, improvement in the placement of public housing, and more efficient means of litigating FHA violations.⁶³ They conclude that if the nation as a whole made a firm commitment to enforcing the FHA, then the money for these federal programs would follow.⁶⁴

It is not surprising that leading critics of racial segregation argue that enforcement of the FHA has been ineffective and that more effort is needed in order to effect desegregation. What is surprising is that their prescriptions for change ignore some fundamental elements of segregation. No attempt is made to assess the relative weight of the white-reluctance factor and how such reluctance might work to frustrate the desegregation efforts of those prosecuting institutional discrimination. They also ignore the states' fair share approach. One may respond that Massey and Denton do focus on federal efforts at desegregation, but this observation is more

60. See Serena M. Williams, *The Need for Affordable Housing: The Constitutional Viability of Inclusionary Zoning*, 26 J. MARSHALL L. REV. 75, 85-88 (1992) (discussing Montgomery County's ordinance and similar laws); see also RUSK, *supra* note 36, at 64-65.

61. See, e.g., MASSEY & DENTON, *supra* note 2, at 195-236 (discussing lack of enforcement of the institutional discrimination provisions of the FHA); Florence Wagman Roisman, *Intentional Racial Discrimination and Segregation By the Federal Government as a Principal Cause of Concentrated Poverty: A Response to Schill and Wachter*, 143 U. PA. L. REV. 1351, 1372-75 (1995) (critiquing advocates' focus on enforcement as the primary means of ending segregation in housing); Michael A. Schill, *Local Enforcement of Laws Prohibiting Discrimination in Housing: The New York City Human Rights Commission*, 23 FORDHAM URB. L.J. 991 (1996) (citing the ongoing importance of the Commission's enforcement activities); see also MUTH, *supra* note 38.

62. MASSEY & DENTON, *supra* note 2, at 218.

63. See *id.* at 229-34.

64. See *id.* at 234-35.

of an admission of a drawback than a justification. Many other commentators either have argued in favor of a national fair share program or at least have noted the importance of such plans in the fight against segregation.⁶⁵

If desegregation efforts are to be successful, then what is needed is an analysis that incorporates the effects of individual private housing decisions on segregation. The fair share efforts address this need in part by actively working for the direct placement of the poor in mostly white and affluent suburbs rather than solely clamping down on institutional discriminators.

Moreover, an effective policy of metropolitan desegregation will have to take into consideration the movement of African American suburbanization and the replication of segregation in the suburbs. The traditional assumption that segregation is caused predominantly by institutional discrimination insufficiently explains the replication. First, the fact that significant numbers of African Americans have achieved city-to-suburb mobility and are migrating to the suburbs challenges the assumption that segregation is caused solely by the trapping of African Americans in isolated urban ghettos.⁶⁶ Second, the fact that home ownership rates for African Americans continue to rise, especially in the suburbs,⁶⁷ challenges the traditional assumptions about institutional discrimination against African Americans in mortgage lending.

Despite such optimistic progressions, this essay does not argue that institutional discrimination does not exist, but rather that this discrimination is not the sole explanation for the patterns associated with segregation of the suburbs. The recognition of an additional and equally important category of factors in the replication of segregation is timely and appropriate. This essay proposes the study of individual preference factors and suggests implications of these factors on racial desegregation law and policy.

II. INDIVIDUAL PREFERENCE FACTORS IN THE REPLICATION OF RACIAL SEGREGATION IN THE SUBURBS

Individual preference factors must be distinguished from those of institutional discrimination. The latter focuses on the real estate industry and government's discriminatory efforts to frustrate inte-

65. See, e.g., McDougall, *supra* note 58; KEATING, *supra* note 58, at 40 (describing fair share plans at a regional level as "[t]he most promising method of metropolitan dispersal of low-income subsidized housing and households").

66. See MASSEY & DENTON, *supra* note 2, at 70.

67. See *supra* text accompanying note 47.

gration. Individual preference factors, in contrast, reflect the preferences of individual residents, both white and black, in choosing where to live.

There are a number of reasons why commentators on law and policy may have chosen to rely largely upon the theory of institutional discrimination to explain segregation. First, such laws fit within the familiar model of anti-discrimination statutes that are already in place for equality in employment opportunities and at the polls.⁶⁸ Second, accepting that individual preference factors play a significant role in segregation might lend support towards the position that segregation is a natural outcome of human affairs.⁶⁹ Finally, institutional discrimination appears to have a ready solution in the implementation of laws forbidding the consideration of race in selling, renting, marketing and lending. Individual preference factors raise a dilemma of response. It is far more difficult to change or shape individual preferences than it is to target institutional discrimination. Nonetheless, the difficulties of developing an effective response should not prevent a complete assessment of the causes of segregation. If law and policy are to be successful in pursuing desegregation, they must take into account all of the significant and contributing factors.

The following parts support the theory that distinctive individual preference factors for whites and African Americans contribute to the replication of racial segregation in the suburbs. For whites, the preference for isolation results in a segregation premium for houses in suburban neighborhoods with few African Americans that then discourages African Americans from choosing to migrate to those areas. For African Americans, the preference factors that work against desegregation include the desire to be near an African American community, the reluctance of being an ice-breaker in an all-white neighborhood and the desire to participate in a strong African American suburban neighborhood.

A. Whites' Preference for Isolation and the Segregation Premium

The fact that many white suburbanites dislike the idea of living in close proximity to African Americans is a sociological observa-

68. See Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h(6) (1994); Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973a-1973p (1994).

69. See EPSTEIN, *supra* note 36.

tion that has been noted for decades.⁷⁰ Massey and Denton cite compelling empirical studies of this pattern,⁷¹ but they fail to relate their observations to broader theories of residential segregation or with legal and policy choices. This essay seeks to make these links.

In 1959, economist Gary Becker formalized the study of preferences for segregation.⁷² Although his analysis primarily focuses on employment discrimination, his work is still a valuable reference to the anti-discriminatory efforts of the 1960s. His principal contribution to this discussion on residential segregation is his characterization of a preference for discrimination: certain persons hold as part of their economic preferences an affirmative desire to discriminate.⁷³ A racial discriminator "will act [on the basis of race] as if he were willing to pay something . . . to be associated with some persons instead of others."⁷⁴

The implications of Becker's theory are far-reaching when correlated to the individual residential choices of those living in suburban neighborhoods. Economist Richard Muth saw individual prejudice as the primary roadblock to desegregation. He writes, "If the customer preference hypothesis is correct, then enforced open-occupancy legislation would have little effect on the residential segregation of Negroes."⁷⁵ Becker himself observes that "[m]any whites do not want to live near Negroes, and this is the primary cause of residential segregation, not of residential [i.e., institutional] discrimination (as is often believed)."⁷⁶ Massey and Denton express no doubt that suburban white attitudes today remain largely hostile to racial integration. "When it comes to determining where, and with whom, Americans live," they conclude, "race overwhelms all other considerations."⁷⁷ They cite studies showing that many whites surveyed have little tolerance for neighborhoods that are more than twenty percent black, and that only

70. See, e.g., MYRDAL, *supra* note 7, at 75; MUTH, *supra* note 38, at 107-08; MATS LUNDINAL & ESKIL WADENSJO, *UNEQUAL TREATMENT: A STUDY IN THE NEO-CLASSICAL THEORY OF DISCRIMINATION* 21 (1984).

71. MASSEY & DENTON, *supra* note 2, at 191-211.

72. See GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971). Becker published his first edition in 1959. It was useful on a number of grounds, including the debunking of the inchoate idea that discrimination simply was a means for whites to improve their financial status. See LUNDINAL & WADENSJO, *supra* note 70, at 20-21.

73. See BECKER, *supra* note 72, at 13-14.

74. *Id.* at 14.

75. MUTH, *supra* note 38, at 109.

76. BECKER, *supra* note 72, at 160.

77. MASSEY & DENTON, *supra* note 2, at 110.

twenty-eight percent of those whites surveyed would live in a neighborhood that was fifty percent black.⁷⁸ According to Massey and Denton, these white attitudes are shaped by stereotypes that African Americans are more likely to commit crimes and to be noisy. In a white neighborhood, such stereotypes create fear of a decline in demand for property which would then result in lowered property values.⁷⁹ "Once one or two black families enter a neighborhood," Massey and Denton state, "white demand begins to falter as some white families leave and others refuse to move in."⁸⁰

Both economic theory and empirical evidence show that racial integration does decrease property values in many suburban neighborhoods. The resulting disparity in prices between integrated and all-white neighborhoods further discourages African American migration to traditionally all-white areas.

Economic analysis of housing prices include a number of variables, most notably housing prices and what is commonly referred to as "location, location, location."⁸¹ Housing prices are affected by buyers' desires for certain amenities, such as air conditioning, a large kitchen or a driveway.⁸² Housing prices will vary when certain features rise or fall in desirability. Housing prices are also affected by whether the location of housing is near desirable or undesirable metropolitan features. Houses that are close to convenience stores and gas stations hold lower property values, because suburbanites dislike the noise, smells, traffic and human density associated with these places.⁸³ Suburbanites tend to have a preference for quiet, low-density, non-commercial neighborhoods, because these sorts of neighborhoods command premium prices.⁸⁴

These preferences also include the preference for discrimination. If it is true that many whites dislike the notion of living in proximity to African Americans and desire to live in an all or mostly white neighborhood,⁸⁵ then these white suburbanites can be described as holding a preference for isolating themselves from African Ameri-

78. *See id.* at 91-94, 213.

79. *See id.* at 94-96.

80. *Id.* at 96.

81. *See* John R. Tarpley, *Alternative Dispute Resolution, Substantive Doctrine, and Power*, 21 VT. L. REV. 1107, 1135 n.17 (1997) (citing the adage).

82. *See* DENISE DiPASQUALE & WILLIAM C. WHEATON, *URBAN ECONOMICS AND REAL ESTATE MARKETS* 65-72 (1996) (discussing housing attributes and household preferences); EDWIN S. MILLS, *URBAN ECONOMICS* 120-27 (2d ed. 1980).

83. *See* DiPASQUALE & WHEATON, *supra* note 82, at 60-81 (studying urban density).

84. *See id.*

85. *See* MASSEY & DENTON, *supra* note 2, at 91-96; BECKER, *supra* note 72, at 160.

can residences. They prefer to live in segregated neighborhoods and are willing "to pay something . . . to be associated with some persons instead of others."⁸⁶ Under fundamental economic theory, when a substantial group of consumers is willing to pay more for a certain type of a good, assuming the types of goods cost the same to produce, this preference will result in commanding a higher price in the market.⁸⁷ When whites hold a preference for isolation, they are willing to pay more to live in a segregated neighborhood. The higher prices commanded in all or nearly all-white neighborhoods is what is called the segregation premium.⁸⁸

The segregation premium theory may explain, in part, the replication of segregation in the suburbs. Consider two hypothetical white suburban neighborhoods, A and B. Assume that each house in neighborhood A and neighborhood B is identical and that the market price for each is \$100,000. Now assume that an African American family migrates from the central city to neighborhood A. Under the preference for isolation assumption, many prospective white homeowners will now view the houses in neighborhood A as marginally less desirable than those in neighborhood B. Translating this change in preference into a change in price, one can assume that the average price of houses in neighborhood A will hypothetically fall to \$95,000.⁸⁹ In correlation to this price drop in neighborhood A, the houses in neighborhood B are now relatively more desirable. The price for the house may rise to \$105,000.⁹⁰ The discrepancy in price is an example of the segregation premium.

Whites who dislike residential proximity to African Americans may exit or flee from neighborhood A and thus further exacerbate the decline in property values in neighborhood A. With lower

86. BECKER, *supra* note 72, at 14.

87. See generally PAUL SAMUELSON, *ECONOMICS* 430-50 (10th ed. 1976) (discussing how price is determined by the schedules of supply and demand).

88. See BECKER, *supra* note 72, at 79-81; MILLS, *supra* note 82, at 127.

89. No claim is made here for the magnitude of the change. It is also important to note that if African American families prefer an integrated neighborhood to a single-race neighborhood, they will view neighborhood A as being more desirable than neighborhood B, an effect that will marginally increase the prices of houses in neighborhood A relative to those in B. This is contrary to the change resulting from white preferences. Assuming that whites outnumber African Americans, or at least that the number of whites with a preference for isolation outnumbers African Americans in the pool of prospective residents, we would expect that the white preferences would outweigh the African American preferences, and that the prices for houses in neighborhood B would rise in comparison to those in neighborhood A.

90. As noted in the previous footnote, African American preferences would tend to work in the opposite direction, but we would expect these preferences to be overcome by the greater number of persons holding the white preferences.

prices and the racial barrier broken in neighborhood A, the balance may tip in favor of an ever-greater percentage of African American residents.⁹¹ A suburban neighborhood can result in tipping towards becoming mostly African American as each new migrant breaks another racial tolerance level among whites.⁹²

Choices made by prospective African American migrants to the suburban area also significantly affect the sharp segregation likely to result in the two hypothetical neighborhoods. When faced with a choice of entering either neighborhood A, in which the price of the houses is lower and there is some racial integration, or neighborhood B, an African American buyer may be more likely to choose a house in neighborhood A. An African American family, who possesses a particularly strong desire to affirmatively integrate neighborhood B and a willingness to spend more for the house, may choose neighborhood B. Realistically, there may be few such crusaders.⁹³ Thus, African Americans would choose neighborhood A, while neighborhood B, holding the segregation premium in higher prices,⁹⁴ would attract whites with a relatively high preference for racial isolation. Under this model, segregation occurs solely by the preference for isolation and the segregation premium and without reference to institutional discrimination in selling, marketing or lending.⁹⁵

Apparently seeking to debunk a hypothesis that white preferences result in stable segregation, Massey and Denton argue:

91. See, e.g., J. Peter Byrne, *Are Suburbs Unconstitutional?*, 85 GEO. L.J. 2265, 2269 (1997).

92. The "tipping" theory states even if whites have varying degrees of tolerance for black migration, and even if many whites are somewhat tolerant, a neighborhood may be "tipped" to becoming nearly all-black. To briefly summarize the theory: as the first black migrants enter, the least tolerant whites leave, thus shifting the racial balance further. This shift then encourages the next level of somewhat-more tolerant whites to leave and so on. Eventually, when the percentage of black residents rises to a certain level, the bulk of white residents seeks to leave, resulting in tipping the neighborhood to nearly all-black status. See MASSEY & DENTON, *supra* note 2, at 96-97 (citing THOMAS C. SCHELLING, *MICROMOTIVES AND MACROBEHAVIOR* 135-66 (1978)).

93. See MASSEY & DENTON, *supra* note 2, at 89.

94. The analysis in the text proceeds under the assumption that African American demand does not exceed white demand. If African American buyers outnumbered whites, then we would expect that their demand for neighborhood A would eliminate the gap entirely. If African American demand far exceeded white demand, and African Americans held a preference for avoiding all-white neighborhoods (such as neighborhood B) in favor of integrated or all-black neighborhoods, we might expect this preference to result in a premium for prices in neighborhood A.

95. Of course, the existence of such institutional discrimination would exacerbate the segregation effect.

Whites can only avoid co-residence with blacks if mechanisms exist to keep blacks out of most white neighborhoods. They can only flee a neighborhood where blacks have entered if there are other all-white areas to go to, and this escape will only be successful if blacks are unlikely to follow. Some method must exist, therefore, to limit black entry to a few neighborhoods and to preserve racial homogeneity in the rest. Although white prejudice is a necessary precondition for the perpetuation of segregation, it is insufficient to maintain the residential color line; active [institutional] discrimination against blacks must occur also.⁹⁶

The segregation premium theory refutes this argument. Massey and Denton assume that, absent institutional discrimination, African Americans will choose to move into any neighborhood to which whites may retreat. This assumption is incorrect, because Massey and Denton have not considered variations in housing prices, which is the mechanism and method that stabilizes segregation, even without institutional discrimination. By virtue of a segregation premium for neighborhoods that remain predominantly white, African Americans are effectively discouraged from entering such neighborhoods. Without reference to institutional discrimination, variations in preference and price can result in the replication of segregation in suburbs.

B. African American Individual Preference Factors

The segregation premium hypothesis leads to a conclusion that African American migrants will be drawn to suburban neighborhoods that have been somewhat racially integrated. This section argues that individual preference factors of African American suburbanites also contribute to the replication of segregation in the suburbs. Traditionally, it has been argued that African American preferences do not contribute to segregation.⁹⁷ This blanket assessment was made in the context of seeking to debunk conservative academics who believed that racial segregation was a natural state of human affairs.⁹⁸ Rejecting the argument that segregation is natural, this essay proposes that certain sociological patterns encourage African American migrants to move in greater numbers to

96. MASSEY & DENTON, *supra* note 2, at 97.

97. See Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479, 498 (1995) (citing Richard H. Sander, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 N.W. U. L. REV. 874, 887 n.97 (1988)).

98. See *id.* at 498.

suburbs with substantial black populations than to all or nearly all-white suburbs.

In arguing that African American preferences do not foster segregation, Florence Roisman cites to surveys showing that most African Americans would prefer to live in a neighborhood that is integrated fifty-fifty between whites and blacks as opposed to a neighborhood of mostly one race.⁹⁹ Massey and Denton rely on similar surveys.¹⁰⁰ These surveys suggest the idea that African Americans may not hold the same sort of preference for racial isolation that whites have in America. Their conclusions, however, that African American preferences do not contribute to the segregation in housing are too abrupt. The analysis is much more complicated than answering the simple question of whether African Americans prefer to live in a one race neighborhood.

First, the preferred choice of suburban migrants for a fifty-fifty integrated suburb may not be available. A 1976 Detroit survey, studied by Massey and Denton, showed a reluctance on the part of African Americans to move into all or mostly white neighborhoods.¹⁰¹ When asked to rank choices among hypothetical neighborhoods that were 100%, 70%, 50% or 0% black, a majority of the respondents chose the fifty percent black area.¹⁰² The respondents also evinced a strong reluctance to enter an all-white neighborhood — sixty-two percent chose this as their last choice.¹⁰³ By contrast, twelve percent of the respondents chose the one hundred percent black neighborhood as their first choice, and the seventy percent black neighborhood was preferred in large numbers over the fifteen percent black area.¹⁰⁴ In sum, the survey showed a marked preference for a neighborhood that is mostly black to one that is mostly white. To the extent that prospective African Americans must make such a second best choice because of the unavailability of their first choice of a fifty percent black area, their decisions become part of the persistence of segregation in the suburbs.

99. *See id.*

100. *See MASSEY & DENTON, supra note 2, at 88-89.*

101. *See id.* at 90.

102. *See id.* at 89.

103. *See id.*

104. The all-black neighborhood choice sparked the most polarized responses. While 12% made this their first choice, 27% made it their last choice. By contrast, the 15% black neighborhood choice was ranked first by only eight percent of those surveyed and was ranked last by only three percent. *See id.*

A second and related preference factor is the idea that many African Americans are reluctant to become icebreaker migrants in an all-white neighborhood. They wish to avoid becoming the first African American family in such a neighborhood. Massey and Denton cite to evidence that states that many African Americans fear hate crimes and other racially motivated behavior towards them, which may occur when African Americans first move into all or mostly white neighborhoods.¹⁰⁵ From this data, they conclude that African American reluctance to migrate is not voluntary.¹⁰⁶

For persons of any race, migration from city to suburb typically does not involve movement to a random neighborhood in the suburban realm encircling the city. Many city residents wish to retain their ties to jobs, friends, family, churches, favorite stores or social groups, and therefore, most suburban migrants tend to move to a suburb not too far from the familiarity of their former city residence.¹⁰⁷ If this migration pattern is correct, then African American migrants to the suburbs would also tend to relocate to areas not too far from their city residences. In fact, this pattern has occurred in certain metropolitan areas. In the Washington, D.C. area, most African American suburban migration has been to Prince George's County, which is an area directly east of the city and adjacent to the city's African American sectors.¹⁰⁸ This evidence is consistent with the theory that migrants tend to move to suburbs close to their former city homes. As African Americans migrate in larger numbers to the suburbs, we would expect them to move disproportionately to the suburbs closest to their former city homes, thus replicating the city segregation regardless of institutional discrimination.

Finally, there is some evidence that African Americans may choose a predominantly African American suburb because of pride in the existence of a successful African American suburb. Commentators have detected such pride among African Americans in Prince George's County, Maryland, the nation's leader in black

105. See MASSEY & DENTON, *supra* note 2, at 90-91.

106. See *id.* at 91.

107. See OFFICE OF TECHNOLOGY ASSESSMENT, THE TECHNOLOGICAL RESHAPING OF METROPOLITAN AMERICA 79-99 (1995) (documenting the shift of economic activity and population to the suburbs).

108. Compare U.S. BUREAU OF THE CENSUS, COUNTY POPULATION ESTIMATES BY RACE AND HISPANIC ORIGIN (visited Sept. 29, 1999) <<http://www.census.gov/population/estimates/county/crh/crhmd96.txt>>, with U.S. BUREAU OF THE CENSUS, COUNTY POPULATION ESTIMATES BY RACE AND HISPANIC ORIGIN (visited Sept. 29, 1999) <<http://www.census.gov/population/estimates/county/crh/crhmdmars.txt>>.

suburbanization.¹⁰⁹ This county is now home to BET Holdings, Inc., which operates Black Entertainment Television and recently moved from Washington¹¹⁰ and Pulsar Data Systems, a systems design company that in 1996 was the nation's fourth largest black-owned company.¹¹¹ Many African American business leaders now view Prince George's County, not Washington, D.C., as the center for African American capitalism in the metropolitan area.¹¹² Besides commercial enterprises, the suburban county also provides upscale social outlets for its affluent African American residents.¹¹³ African Americans may prefer to migrate to a town that represents the pride in the creation of their own successful suburbs and businesses.¹¹⁴ Such personal preferences also contribute to the replication of segregation in the suburbs.

In sum, individual preference factors of both whites and African Americans, even without particular reference to institutional discrimination, foster the replication of racial segregation in the suburbs. Any successful policy effort to combat segregation must take account of these individual preference factors. The simplistic idea that segregation is caused solely by institutional discrimination is a

109. See, e.g., Eugene L. Meyer & Peter Behr, *In Prince George's, 2 Steps Up, 1 Step Back — High Profile Business Moving to County, But Job Development Isn't Keeping Pace*, WASH. POST, June 16, 1997, at A1 (illustrating African American pride in Prince George's county); Michael A. Fletcher, *The Changes; over 30 Years, the Washington Region's Black Population Has Been Redefined by Its Education and Affluence*, WASH. POST MAG., Feb. 1, 1998, at W11.

110. See Peter Perl, *His Way; Bob Johnson Wants To Turn His Washington-Based Black Entertainment Television into an African-American Disney*, WASH. POST MAG., Dec. 14, 1997, at 8.

111. See WORLD ALMANAC 121 (1998).

112. See Jonathan D. Glater, *The Industrial Strength Move; Black-Owned D.C. Bank Switches Charter to Tap Growing Market in Prince George's*, WASH. POST, July 6, 1995, at D9; Peter Behr, *Prince George's Says: Support Your Local Business; Black-Owned Shops Are Fighting An Uphill Battle, County Residents Complain*, WASH. POST, Oct. 22, 1995, at A21 (discussing Black capitalism); Jason Goins, *Black Enterprise*, FORWARD, June 27, 1997, at 1, available in 1997 WL 11612480; 79 FED. RES. BULL. 11, Nov. 1, 1993, at 1026, available in 1993 WL 3014008 (referring to Prince George's county as having the largest number of black-owned businesses of any county).

113. See Eugene L. Meyer, *In a Tale of Two Mitchellvilles, Similarities End With the Name*, WASH. POST, Apr. 7, 1996, at B1 (discussing pockets of Prince George's affluence); Robert E. Pierce, *In Prince George's, The Place to Be: Upscale BET Soundstage a Big Attraction for County*, WASH. POST, July 7, 1997, at B1; Jackie Spinner, *National Harbor Project Endorsed; Planning Board Urges Conditions Be Set For Final Approval*, WASH. POST, Apr. 24, 1998, at C4 (discussing "upscale" plans for county). But see Rudolph A. Pyatt, Jr., *Why Are So Many Retailers Still Snubbing Prince George's County?*, WASH. POST, Oct. 23, 1997, at C3.

114. See KEATING, *supra* note 58, at 33 (finding that "some African Americans feel that metropolitan racial dispersion strategies will dilute the hard-won political gains").

generalization that made more sense in the 1960s. Today, as more and more African Americans migrate from city to suburb, law and policy must keep pace. They must recognize that successful efforts at desegregation in the twenty-first century need to address the individual preference factors that arise in suburban residential decisions.

III. IMPLICATIONS OF THE INDIVIDUAL PREFERENCE FACTORS FOR THE LAW AND POLICY OF RACIAL DESEGREGATION

A. The Dilemma of Suburban Segregation, Revised

Part II of this paper set forth individual preference factors that help frustrate efforts to integrate the suburbs. The argument does not propose that the traditional approaches of fighting segregation by combating institutional discrimination be disregarded. Institutional discrimination exists and must remain outlawed.

This essay argues that in order to create effective desegregation in the suburbs, law and policy must consider alternatives to the FHA's outlawing of institutional discrimination. Distinguishing whether institutional factors or individual preference factors are more significant in the replication of segregation in the suburbs is difficult. This difficulty, however, does not mean that addressing the individual preference factors has no practical benefit. Some of the time and money that would be spent in a national action against institutional discrimination called for by Massey and Denton¹¹⁵ could be better spent by directly addressing the individual preference factors.

Since the preference for isolation and the segregation premium appear to be difficult to change by law, reformers may hesitate to acknowledge their importance. Reformers may loathe admitting to other factors, such as the African American pride proposition, out of the fear of ceding to conservative and libertarian ideas that segregation is a natural result of voluntary decisions in a free market.¹¹⁶ Finally, reformers may be disinclined to recognize individual preference factors, because the factors cannot be ad-

115. See MASSEY & DENTON, *supra* note 2, at 234-35.

116. See *id.* at 91 (rejecting the notion that African American reluctance to move into all-white neighborhoods means that segregation is "voluntary"); MUTH, *supra* note 38, at 109 (noting that Milton Friedman opposed a law similar to the FHA in the 1960's, because he believed that such a law would be ineffective and would result only in making real estate agents act in a manner contrary to the presumably prejudiced preferences of their clients).

dressed through the traditional civil-rights approaches of outlawing discriminatory conduct, authorizing lawsuits and relying on federal judges to spearhead social change.¹¹⁷ This wariness must be overcome, however, if the sources of suburban segregation are to be understood thoroughly and the means to adequately address it are to be found.

B. A Proposal for Indirect Desegregation Through Suburban Apartment Construction

As summarized in Part I, desegregation efforts of the past thirty years have followed three broad avenues: 1) outlawing institutional discrimination; 2) fostering desegregation through publicly assisted housing; and 3) imposing regional fair share requirements for low-cost housing, which to date have only been at the state level. Of these three avenues, only the fair share approach is likely to counteract significantly the effects of the individual preference factors. Fair housing laws that prohibit discrimination in sales, rentals, marketing and lending do not address the individual preference factors.¹¹⁸ For example, they do not make it illegal for a seller to demand more for a house because of a perception that the house and neighborhood will command a segregation premium.¹¹⁹ Likewise, publicly assisted housing does not address individual preferred factors in suburban housing, because recipients of public housing assistance are unable to financially afford migration to the suburbs and are a small percentage of the nation's racial minority citizens. Such subsidies, therefore, cannot address the breadth of suburban segregation.¹²⁰

117. The FHA followed the Civil Rights Act of 1964 in this regard.

118. Possible exceptions are the various federal and state provisions for hate crimes against migrating racial minorities may violate a variety of federal and state laws. *See, e.g.*, Violent Crime Control and Enforcement Act of 1994, 42 U.S.C. § 13701 (1994) (providing for enhanced penalties for hate crimes in section 280003); *see generally* Terry A. Maroney, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564 (1998) (summarizing state and federal hate crimes laws).

119. Nothing in the FHA, which prohibits racial and other discrimination in the sale or rental of housing or in making real-estate transactions, as well as interference, coercion and intimidation, appears to make illegal a decision not to live in a particular neighborhood because of racist reasons, or to charge the market rate for particular housing. *See* 42 U.S.C. §§ 3604-3605, 3617.

120. Publicly assisted housing recipients are necessarily very poor. Governmental efforts to effect integration through them is likely to encounter the greatest opposition from suburbanites, who link poverty with propensity to commit crime and other social ills. Consider the depth of local opposition to fairly minor desegregation efforts of public housing recipients in Yonkers, New York. *See United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987).

The fair share approach, however, is a promising mean of achieving a significant amount of racial and class integration. The potential benefits and proven results of fair share initiatives have been thoroughly explored in legal and policy literature.¹²¹ Considering the significance of individual preference factors in housing, this essay proposes a variant of this fair share approach.

Legislatures should zone for and construct more multi-family housing to effectively desegregate today's suburban areas, especially apartment-style housing. Such a proposal is closely related to the fundamental idea of fair share: localities must provide for their fair share of low-cost housing needs of an entire region.¹²² Regardless of whether or not they are categorized as housing for low-income persons, this essay argues that the law should encourage the zoning for and construction of apartments per se.

Two broad observations support the argument that apartment construction per se will foster considerable racial integration of the suburbs. First, as explained below, there is a strong correlation between apartment dwelling and African American residency in many suburban areas. Second, the proposal for apartment construction per se, as opposed to more traditional fair share initiatives, may engender less political opposition in the localities where the apartments would be built. Apartment zoning is not a silver bullet against segregation, but the apartment construction proposal would be more politically feasible than the traditional means of attack and therefore holds a brighter promise for fostering the desegregation of suburbs.

1. *The Suburban Apartment/Race Correlation*

This essay concludes that there is a strong correlation between apartment living and race in today's American suburbs. This observation may at first appear to relate largely to financial distinctions. According to the author's analysis, African Americans tend to be less affluent than their white counterparts,¹²³ and the less affluent a person is the more likely he is to live in an apartment than

121. See, e.g., McDougall, *supra* note 58; KEATING, *supra* note 58.

122. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975); Federal Housing Act of 1985, N.J. STAT. ANN. § 52:27D-301 to 329 (West 1998).

123. As of 1995, the median income of family households led by African Americans was \$25,970, while the median income for households led by whites was \$42,646. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 469 (1997).

in a house.¹²⁴ In the central urban area of Washington, D.C., there is only a small difference between the apartment-dwelling rates of blacks and whites.¹²⁵ Using the author's calculations from raw numbers provided by the 1990 census, 63.6% of whites lived in apartments, 17.1% lived in single detached houses, and 19.3% in single attached houses.¹²⁶ For African Americans, the figures were 68.1%, 11.0% and 30.9%, respectively.¹²⁷ The suburbs, however, tell another story. For each of the three large surrounding suburban counties, the percentage of African Americans living in apartments was almost or more than double the rate of whites.¹²⁸ The rates are shown in Table 1.

TABLE 1. PERCENTAGES, BY RACE, OF PERSONS LIVING IN PARTICULAR TYPES OF HOUSING, 1990

Type of Unit	Fairfax Cty., Virginia		Montgomery Cty., Maryland		Prince George's Cty., Maryland	
	Wh.	A.A.	Wh.	A.A.	Wh.	A.A.
Single Detached	57.0%	24.3	57.8	26.1	62.4	39.0
Single Attached	21.2	27.8	16.8	19.8	11.8	13.9
Apartment	21.8	47.9	25.4	54.1	25.8	47.1

The suburbanization of African Americans in the Washington, D.C. area thus appears to be related in large part to a movement to apartments, at least in comparison to the housing patterns of white suburbanites. According to the 1990 census, a similar pattern of African Americans settling in apartments existed for the suburban counties of Atlanta, New York and San Francisco.¹²⁹

124. As of 1995, the median income of households who rent was less than half of the median income of households who own their own residence. See U.S. BUREAU OF THE CENSUS, AMERICAN HOUSING SURVEY FOR THE UNITED STATES 190, 140 (1997).

125. The apartment figures cited here also include mobile homes and trailer units, which form very small percentages of Washington, D.C. area housing units.

126. See U.S. BUREAU OF THE CENSUS, GENERAL HOUSING CHARACTERISTICS, DISTRICT OF COLUMBIA 31 (1992) (percentages calculated from raw population data).

127. See *id.* at 32.

128. See U.S. BUREAU OF THE CENSUS, GENERAL HOUSING CHARACTERISTICS, MARYLAND, 107 (1992); U.S. BUREAU OF THE CENSUS, GENERAL HOUSING CHARACTERISTICS, VIRGINIA 174 (1992) (percentages calculated from raw population data).

129. In the Atlanta suburb of DeKalb County, 29.4% of whites and 44.9% of African Americans lived in apartments, as opposed to percentages of 47.7% of whites and 52.0% of African Americans who live in apartments in the central city of Atlanta. See U.S. BUREAU OF THE CENSUS, GENERAL HOUSING CHARACTERISTICS, GEORGIA 183-84, 303 (1992) (percentages calculated from raw population data). In the New York suburb of Nassau County, only 18.8% of whites but 32.0% of blacks were apartment dwellers, compared with respective figures of 83.4% and 86.2% for New York City. See U.S. BUREAU OF THE CENSUS, GENERAL HOUSING CHARACTERISTICS,

There are many potential factors that account for the greater propensity of African American suburbanites to live in apartments. First, as noted above, is the financial factor. The African American population typically is less affluent than its comparable white population and is therefore expected to occupy apartments more often than whites.¹³⁰ Second, African Americans disproportionately live in suburbs that are closer to the city and hold a larger percentage of their housing stock in apartments. If suburbs further away from the city had more apartments, they might attract more African Americans.¹³¹ Third, to the extent that a higher proportion of African American households in a jurisdiction are single-adult households, fewer African American households might be expected to seek the burdens of home ownership.¹³² Fourth, the continuance of institutional discrimination, especially from mortgage lenders, may make it more difficult for an African American family to obtain a home mortgage than it is for a similar white family.

These patterns of race and apartment housing support the proposal for the creation of more apartments in suburban regions. Such construction holds promise for increasing the number of African American residents. Particularly for towns that remain nearly all-white, it is possible that encouraging more apartment zoning and construction, at any level of rental cost, may be a more effective means of achieving residential integration of the town than either greater enforcement of anti-discrimination laws or adoption of more traditional fair share requirements.

2. *Addressing the Roadblocks to Integration*

The experience of the fair share efforts to provide low-cost housing shows that localities will oppose such efforts. Nearly twenty years after New Jersey's *Mount Laurel* litigation imposed fair share requirements, fewer than 10,000 low-cost housing units had actually been developed as part of fair share plans.¹³³ Initiatives in other states have encountered similar roadblocks. Many localities

NEW YORK 327, 590 (1992). In Alameda County, California, which includes Oakland, 34.4% of whites and 55.7% African Americans lived in apartments and closely matched respective figures of 69.1% and 68.7% in San Francisco. See U.S. BUREAU OF THE CENSUS, GENERAL HOUSING CHARACTERISTICS, CALIFORNIA 216, 650-51 (1992).

130. See *supra* notes 123-124.

131. See *supra* text accompanying notes 127-129.

132. As of 1996, 53.9% of African American family households had only one spouse present, as compared to 18.7% of white family households. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 65 (1997).

133. See KEATING, *supra* note 58, at 39-40.

do not want low-cost housing and do not like the idea of the state imposing these housing requirements upon them.¹³⁴ An apartment zoning and construction plan could be more successful, and three related arguments support this proposition. All of the arguments work in conjunction with, as opposed to struggling against, existing market forces.

First, apartment construction could be spurred by the relatively straightforward, possibly even politically feasible, method of amending suburban zoning laws to permit more multi-family housing units. Most suburban jurisdictions have implemented zoning restrictions that limit the number of apartments to fewer than would be constructed in a free market for housing construction.¹³⁵ By freeing developers and builders from some of these zoning restrictions, the market demand for apartments would presumably result in the construction of more apartments in suburban areas. The difficulty lies in convincing or coercing a reluctant locality to permit such zoning changes. As generations of advocates challenging exclusionary zoning have learned, there is no easy method to persuade or force a town to change its zoning preferences away from detached houses.¹³⁶ Zoning for apartments, however, does not necessarily generate the politically poisonous tag of "low-income housing" that often is implicated in traditional fair share plans. It is possible that apartment zoning changes in the pursuit of desegregation would be relatively easier for localities to swallow. This would be especially true for jurisdictions in which a fair share plan necessitates active participation of the locality through public financing.

Opponents of re-zoning may also be more willing to accept the apartment construction if a limited system of compensation for the parties who are most directly affected was created. If a town re-zoned a block for apartments, the state or local government, perhaps partially assisted by a private developer, could provide compensation for the decrease in property values incurred by those

134. See *id.* at 36-48.

135. See generally Michael Allen Wolf, *Euclid at Threescore Years and Ten: Is This the Twilight of Environmental and Land-Use Regulation?*, 30 U. RICH. L. REV. 961 (1996) (discussing suburban zoning trends against uses other than single-family houses). It is often stated that localities oppose apartment zoning because apartments typically necessitate more local government services per capita, and generate fewer local taxes per capita, than does detached-house zoning. See, e.g., PAUL KANTOR, *THE DEPENDENT CITY REVISITED: THE POLITICAL ECONOMY OF URBAN DEVELOPMENT AND SOCIAL POLICY* 163 (1995).

136. See Wolf, *supra* note 135, at 974.

homeowners within one block of the new apartment building. Compensation costs money, but it is often effective in assuaging local opposition than a fiat from above without any compensation.¹³⁷ Local opposition to apartments in developed areas could also be ameliorated by locating the apartments in areas that are currently zoned for commercial use. In many older suburbs, there is an abundance of underdeveloped land that is zoned for commercial use since retailers and other businesses have de-camped for outer areas of the suburbs.¹³⁸

An alternative to comprehensive zoning reform is inclusionary zoning, which requires new private developments to include a percentage of apartments or other low-cost housing.¹³⁹ An example of inclusionary zoning is the Montgomery County, Maryland ordinance which requires that every new housing development of a certain size include a certain percentage of low- or moderate-cost housing.¹⁴⁰ While such laws do not integrate already developed suburbs, they are beneficial, because they do not upset the settled expectations of residents in already-developed towns. Through the construction of apartments, the new housing developments might be successful in encouraging African American migrants to move out to the less integrated suburbs.

Laws fostering the zoning and construction of apartments would accommodate the following conservative theories concerning broad local authority over zoning power. While some federalists reflexively believe that any governmental authority exercised at a local level is more democratic than that employed at a higher

137. Money holds the promise of overcoming a large political hurdle. For example, to lessen the degree of local opposition to the introduction of wolves into Yellowstone National Park, an environmental group agreed to compensate nearby property owners for any livestock killed by the wolves. See *Defenders of Wildlife Will Compensate for First Yellowstone Wolf Kill*, U.S. NEWSWIRE, Jan. 18, 1996, available in 1996 WL 5619036. But see *The Wolf Finds a Home*, L.A. TIMES, July 4, 1998, at B7 (arguing that compensation to stock growers for any losses incurred as a result of the reintroduction program was a "smart decision and has restored a dramatic feature of American history").

138. See, e.g., Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1137 (1996) (referring to declining inner suburb phenomenon); Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 37 (1998).

139. See, e.g., Williams, *supra* note 60 (summarizing such laws and ordinances).

140. See MONTGOMERY COUNTY, MD., CODE § 25A-1-12 (1989); see also Philip J. Tierney, *Bold Promises But Baby Steps: Maryland's Growth Policy to the Year 2020*, 23 U. BALT. L. REV. 461, 492 (1994); Williams, *supra* note 60; RUSK, *supra* note 36, at 64-65 (discussing the success of the Montgomery County ordinance).

level,¹⁴¹ other more-libertarian oriented conservatives view local power as equally invasive upon the fulfillment of human desires.¹⁴² Theorists also argue that many supposed public welfare plans are merely the reflection of the political success of well-organized private interest groups.¹⁴³ The twentieth century's deference to local governmental authority to zone out apartments and other non-single-family uses is the quintessential example of the ambiguity in the notion of public welfare.¹⁴⁴ In many suburban jurisdictions today, such exclusionary zoning supports the interests of affluent homeowners at the expense of the public good. Some judges and legislators might be convinced that limitations on local authority to zone out apartments would support the principles of free market and important property rights.¹⁴⁵ Under inclusionary zoning tactics, a coalition of affordable housing advocates and de-segregationists may be more influential in state politics than under typical fair share proposals.

Finally, an effort to build more apartments might be psychologically less troubling to suburbanites than other fair share proposals. Recent history is replete with examples of suburban jurisdictions' fierce opposition to the imposition of even small amounts of low-cost housing.¹⁴⁶ Many suburbanites instinctively associate government-sponsored, low-cost housing with stereotypes and urban social problems.¹⁴⁷ Many of these fears have proven to be misguided.¹⁴⁸ Such automatic opposition is the first, and often fatal, roadblock to fair share initiatives.¹⁴⁹ Suburbanites are more likely to have had some personal experiences with apartment-dwelling

141. See generally John Kincaid, *Regulatory Regionalism in Metropolitan Areas: Voter Resistance and Reform Persistence*, 13 PACE L. REV. 449, 467-68 (1993) (discussing arguments against removing local authority).

142. See CHARLES FRIED, *ORDER AND THE LAW* 186 (1991) (discussing a former Solicitor General's reluctance to embrace federalism out of a fear of local governmental intrusions).

143. See, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 283-95 (1962).

144. See *Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926).

145. See Wolf, *supra* note 135 (discussing the attack by the property rights movement on *Euclid's* deference to local authority from the property rights).

146. See, e.g., MYRON ORFIELD, *METROPOLITICS* 83, 127-28 (1997) (discussing the opposition to minor measures in the Minneapolis area); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987).

147. See MASSEY & DENTON, *supra* note 2, at 94-96.

148. See Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825, 865 (1996) (discussing positive changes in attitudes after the placement of low-cost housing).

149. See McDougall, *supra* note 58.

rather than with government-assisted low-income housing. An apartment-oriented proposal would not be branded with the "low-income" label and its immediate associations with crime and poverty. A plan to foster more apartment zoning, therefore, might not instinctively generate the same level of initial antagonism and would be a more moderate and acceptable approach to easing the racial segregation in today's suburbs.

Advocating wider zoning for apartments will not be a cure-all against segregation. It is possible that the individual preference factors that work to limit integration in traditional suburban neighborhoods will also hamper efforts to integrate apartment housing. With their preference for isolation, many whites will tend to shun apartment buildings with significant numbers of African Americans and will be willing to pay a segregation premium for buildings with few African Americans. With the segregation premium in price, African Americans will be financially discouraged from moving to such apartment units. This essay, however, argues that apartment construction will be able to foster integration.

First, construction of new apartments in the suburbs would tap a demand, which, according to current residential trends, is likely to be disproportionately African American.¹⁵⁰ Apartments in mostly white areas may initially hold a segregation premium over those in mostly African American areas, but the release of the demand with the construction of new apartments should encourage African Americans to pay higher prices for apartments in mostly white areas. The eventual integration of these apartment buildings will in turn dampen the segregation premium and eventually encourage further African American migration.

Second, if a state command or a cooperative agreement permitted a large number of localities to construct apartments at the same time, then roughly equal numbers of African Americans might be encouraged to migrate to a variety of towns at about the same time. These simultaneous actions would thus diminish the likelihood that one town would remain nearly all-white or would be able to gain a segregation premium in housing prices.

Third, migration of African Americans to a specially zoned apartment area would not trigger the preference for isolation as strongly as would migration to detached houses. A separation, both spatial and psychological, between an all-white home-owning sector and an integrated apartment sector might mitigate the ef-

150. See *supra* text accompanying notes 123-132.

fects of the preference for isolation.¹⁵¹ For example, in an area adjacent to a suburb's commercial complex, white homeowners may retain a sense of social, economic and cultural distinction from these apartment dwellers. This distinction may make them less fearful that their community will become largely African American and may eventually make them more tolerant of African Americans in their community.¹⁵²

Would such a spatial and psychological distinction between homeowners and apartment dwellers undermine the purposes of desegregation? Although integration through special apartment construction will be less than completely satisfactory, such integration would hold some real benefits. African American residents would gain greater access to the booming employment markets that have left the central city for the suburbs. Socially, shoppers would encounter persons of other races at the suburban mall, and perhaps most significant of all, children would likely experience racial integration in their public schools. These possibilities hold the promises of diminishing, in generations to come, the individual preference factors that continue to stand in the way of residential desegregation.

CONCLUSION

As experience, logic and the law have shown, there is no magic bullet to solve metropolitan residential segregation. Thirty years after the FHA, new demographic trends pose new challenges and should spur innovative thinking. African Americans are migrating from cities to suburbs in increasing numbers and are challenging the traditional idea that they are trapped in urban ghettos. Concurrent with this migration movement is a replication of segregation by race in suburban housing patterns. These trends should lead to a re-evaluation of the traditional idea that institutional discrimination is the overriding source of segregation. This essay has suggested some individual preference factors that contribute to the replication of segregation in the suburbs. The most notable of these is the segregation premium which is created by whites' pref-

151. These apartment zones hopefully will attract significant numbers of African Americans to an otherwise nearly all white town. Some might view such zones as the town's "ghettos." Accepting such apartment "ghettos," however, may be the best way to integrate a town and reverse the replication of segregation in the suburbs.

152. To the extent that significant numbers of African Americans were limited largely to the apartment zone, residential organizations such as homeowner's associations would remain largely white.

erence for isolation and simple economic forces. This premium contributes to the replication of segregation in the suburbs. Individual preferences of African Americans also contribute to the replication of suburban segregation. For a de-segregationist policy to be successful, the policy must acknowledge the trends in suburbanization and must address the individual preference factors. This essay does not claim to offer the definitive solution. Nonetheless, the strong associations between apartment-dwelling and African American suburbanization offer support to pursuing the apartment fair share type of plan as an effective means of de-segregating the suburbs in the coming century.