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"Democracy Begins at Home"--Notes from the Grassroots on Inequality, Voters, and Lawyers

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ESSAYS

“Democracy Begins at Home”— Notes from the Grassroots on Inequality, Voters, and Lawyers

MARTHA R. MAHONEY†

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I. INTRODUCTION

Elections are a fundamental task of government in a democracy. Elections should be run so that every eligible voter can cast a ballot and have it counted accurately, and they should be run so that all voters are equally able to participate. The 2000 presidential election simultaneously exposed serious problems in election administration and showed how high the stakes could be: Every single vote matters. That election stimulated new waves of work on election reform, including more

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research and more cooperation between academics and activists. Civil rights groups developed innovative poll monitoring. This wave of organizing from civil rights, grassroots, and civic organizations; scholars; and technical experts brought new energy and research to the project of election reform.

Making elections work better for voters requires mobilizing resources to support voter advocacy. Those resources must include better connections between community groups and experts. This essay draws on lessons from Miami-Dade County about organizing around voting issues, developing and using expertise, collaborative decision-making, and the ability of activists to solve some problems without litigation. But litigation remains critically important in protecting voting rights and addressing problems. Therefore, voters are also in need of more access to the services of lawyers who will work to support civil rights and voter participation. Advocacy and the resources that support it must be organized in a way that does not rely on litigation but provides help when litigation is needed.

Richard Abel has suggested that “America may be unusually dependent on law because the institutions of civil society are relatively underdeveloped: political parties, trade unions, religious loyalties, long-term employment, and stable residential neighborhoods.”¹ With regard to voting problems, the relative weakness of labor unions, churches, and other voluntary organizations makes it more difficult for people to share information about their experiences and represent themselves in the political process.² That lack of social organization makes access to lawyers particularly important. On the other hand, that same lack of organization makes it difficult to bring voters together with lawyers who are willing to help. Voters who leave the polls move into a largely unorgan-

1. Richard Abel, *Big Lies and Small Steps: A Critique of Deborah Rhode's Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 *Geo. J. Legal Ethics* 1019, 1023 (1998).

2. There are various works on the weakness of civil society in the United States. See, e.g., ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 336–49 (2000) (arguing that the unequal organization of social capital is important to problems with participation in democracy). *But cf.* BARBARA ARNEIL, *DIVERSE COMMUNITIES: THE PROBLEM WITH SOCIAL CAPITAL* 177–82 (2006) (disputing Putnam's normative vision of civil society and arguing in support of the ongoing struggle for inclusion and equality among subordinated groups). The concept of “civil society” can be turned to arguments against the importance of state responsibility. See, e.g., Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 *HARV. L. REV.* 937, 941–42 (2007) (arguing that the concept of “civil society” is embraced for a wide variety of political purposes and that overemphasizing local activism misses the need for connections between local work, national work, and the continuing importance of work for law reform). In this essay, I do not mean to adopt any of these normative implications of the concept of “civil society” but to emphasize the impact of weakness in these structures of civil society on work for social justice and, in particular, on voter advocacy.

ized sea of citizens. It is difficult to identify them and coordinate their participation in legal *or* political actions.

Innovative advocacy should support voters even where political participation is diffuse and grassroots organizations are weak. The fundamental questions of casting ballots and having them counted are previous, in a sense, to the critically important issues of districting and representation that have occupied much of the analysis and enforcement energy under section 2 of the Voting Rights Act.³ Like other community-based lawyering, help for voters should support the ability of community groups to represent their own interests. That support may include help from lawyers or experts who provide data that expose unequal or inadequate resources and that help win solutions to problems. The principle is not to increase dependence on lawyers, but to find creative ways to bring the skills of lawyers and other experts to serve the political participation of historically subordinated and marginalized communities. To meet these goals, this essay proposes the creation of Voter Academic Support Team ("VAST") networks and the development of programs that will increase legal support for voter advocacy.

II. "BEGINS AT HOME"—INEQUALITY AND VOTER PARTICIPATION

A. *Inequality*

The title of this essay is ironic. "Democracy begins at home" in a society in which communities have unequal access to resources that affect political participation. Precinct-based voting remains the norm in the United States and, despite the increasing prevalence of early and absentee voting, the process of conducting elections is still largely organized around residence.⁴ Neighborhoods reflect the effects of racial and ethnic segregation, including unequal educational levels of voters

3. 42 U.S.C. § 1973 (2000).

4. The alternatives to precinct voting, including county-wide vote centers first implemented in Larimer County, Colorado, also raise questions about equal access and participation. See R. Michael Alvarez & Thad E. Hall, *Controlling Democracy: The Principal-Agent Problems in Election Administration*, 34 POL'Y STUD. J. 491, 503–04 (2006) (noting that reduction in polling locations reduces turnout and that distance to the polling place increases nonvoting); Leonard Shambon & Keith Abouchar, *Trapped by Precincts? The Help America Vote Act's Provisional Ballots and the Problem of Precincts*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 133, 183–90 (2006) (discussing evidence for and against proposals for vote centers, including evidence that they increase turnout and that moving polling places further from the home can diminish turnout); Robert M. Stein & Greg Vonnahme, *Engaging the Unengaged Voter: Vote Centers and Voter Turnout*, 70 J. POL. 487, 495 (2008) (finding evidence that Election Day vote centers increase voter turnout generally and among infrequent voters in particular). Malfunctions or management problems at vote centers pose the danger of impacting large numbers of voters. In November 2006, approximately half of the voting centers in Denver, Colorado had serious problems. E.g., George Merritt & Katy Human, "This Is a Nightmare"—Voting Problems Overwhelm Area, DENVER POST, Nov. 8, 2006, at A1 (describing long lines at twenty-six of the fifty-five voting

and poll workers. Poor and minority voters are likely to face greater difficulties at the polls.⁵ Staffing is also unequal. The 2004 Election Day Survey commissioned by the Elections Assistance Commission (“EAC”) reported that jurisdictions in which residents had lower incomes and levels of education tended to have “fewer poll workers per polling place and higher incidences of inadequately staffed polling places.”⁶ Nearly seventeen percent of predominantly African American communities reported inadequate numbers of poll workers.⁷ In contrast, jurisdictions with higher levels of income and education had many poll workers and few staffing problems.⁸ One of the fundamental challenges in voter advocacy is to make the system work smoothly for all people across such an uneven landscape: “Just as a state may not directly condition the franchise on one’s place of residence, one’s place of residence cannot cause his or her vote to be cheapened or devalued.”⁹

Voting problems happen quickly, even when they seem to unfold in slow motion. In Florida, as in many states, early voting opens weeks before election day.¹⁰ To open the first day of early voting for the November 2004 election in Miami-Dade County, civil rights and labor groups held a rally in Overtown, an African American neighborhood

centers because of problems with the centralized registration system, waits of up to three hours, and centers that ran out of ballots and noting reports of voters who left without casting ballots).

5. For example, a recent study in Los Angeles found that voters in low-income and minority neighborhoods were more likely to have low-quality polling places and misinformed poll workers. Alvarez & Hall, *supra* note 4, at 497–98; Matt A. Barreto et al., *Are All Precincts Created Equal? The Prevalence of Low-Quality Precincts in Low-Income and Minority Communities*, 61 POL. RES. Q. (forthcoming Dec. 2008). Factors affecting the quality of the polling place included parking, addresses posted visibly, outdoor lighting, poorly trained poll workers, and precinct relocations. Low-income and minority communities were already more likely to have low rates of voter turnout; low-quality polling places further depressed turnout.

6. U.S. ELECTION ASSISTANCE COMM’N, A SUMMARY OF THE 2004 ELECTION DAY SURVEY 3 (2005), available at http://www.eac.gov/clearinghouse/docs/eds2004/2004-election-day-survey/attachment_download/file.

7. *Id.* at 19.

8. *See id.* at 3.

9. *League of Women Voters of Ohio v. Blackwell*, 432 F. Supp. 2d 723, 728 (N.D. Ohio 2005). The court also held that “[e]qual protection is likewise violated where the state dilutes the votes of some voters by imposing barriers to the ability or opportunity to vote” and cited *Ury v. Santee*, 303 F. Supp. 119 (N.D. Ill. 1969), for the proposition that “defendants’ failure to provide adequate voting facilities that resulted in long lines and failure to provide [a] sufficient number of trained poll workers impaired citizens’ rights to vote and violated [the] equal protection clause.” *League of Women Voters*, 432 F. Supp. 2d at 728.

10. “Early voting” is defined by the United States Elections Assistance Commission as “any in-person voting that occurred prior to the date of the election at specific polling locations for which there were no special eligibility requirements,” but this definition does not include absentee voting as defined by a state’s absentee voting definitions. U.S. ELECTION ASSISTANCE COMM’N, THE 2006 ELECTION ADMINISTRATION AND VOTING SURVEY 7 (2007), available at http://www.eac.gov/clearinghouse/docs/eds-2006/edsr-final-adopted-version.pdf/attachment_download/file.

next to the downtown business district.¹¹ Speakers included Al Sharpton and Janet Reno as well as local community leaders. The rally concluded with a march to the county office building to begin early voting. Organizers had discussed the march with the elections department in advance and had been promised that sufficient voting machines would be available, with at least twelve laptops to check voters in. The voting machines were there, but stood mostly unused, as voters stood in long lines that moved very slowly. Officials had provided only four laptops, not the promised twelve. The president of the Miami-Dade League of Women Voters exclaimed that people were leaving without voting and would probably not return.¹²

A similar incident in Durham, North Carolina involved students from North Carolina Central University. Student leaders who organized a march to an early voting site explained, "Marching is unique in the African American tradition We thought it would be special and symbolic if we marched to the polls to cast our votes."¹³ Despite repeated notice by student organizers to the board of elections, the early voting staff had not prepared for the march. The lines and waits deterred hundreds of people from casting ballots.¹⁴

Problems that happen quickly at the polls have often been created far in advance. After the 2000 election, investigations revealed that, while the Florida recount drew most of the public attention, systemic election administration problems were endemic in many parts of the

11. For descriptions of this incident in a report that was co-written by this author, see, MIAMI-DADE ELECTION REFORM COAL., *GET IT RIGHT THE FIRST TIME: POLL CLOSING OBSERVATION, BALLOT ACCOUNTING, AND ELECTRONIC VOTING SECURITY 25–26* (2005), available at <http://www.reformcoalition.org/ressources/GetItRighttheFirstTime.pdf>. For more information, see *Glitches Mar First Day of Balloting in Florida*, BRADENTON HERALD, Oct. 19, 2004, at 1A; and Gail Epstein Nieves et al., *Early Voting Hiccups Upset Some on Day 1*, MIAMI HERALD, Oct. 19, 2004, at 1A. By 12:40 p.m., early voting site "poll workers had handed out 324 voting tickets, but only 109 people had actually voted" at the Miami Government Center. *Glitches Mar First Day of Balloting in Florida, supra*.

12. Telephone Interview with Bobbie Brinegar, President, Miami-Dade County League of Women Voters (Oct. 18, 2004).

13. ANITA S. EARLS ET AL., *Voting Rights in North Carolina: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 577, 590–91 (2008).

The October 14 march drew approximately 1500 students, faculty and citizens who walked two miles from NCCU's campus to an early voting site at Hillside High School. When the students arrived at the site, they waited for hours in long lines of over one hundred voters. Despite NCCU's notice, the board of elections clearly made no attempt to prepare for this crowd and, as a result, hundreds of voters were deterred from voting.

Id. at 591 (footnotes omitted).

14. *Id.* at 591.

United States.¹⁵ Voting technology left millions of votes uncounted.¹⁶ Eligible voters were turned away because of errors in voter-registration rolls or because poll workers were not adequately trained.¹⁷ Minority-language voters did not always receive the assistance to which they were entitled under the Voting Rights Act or other laws.¹⁸

Inequality at the polls does not immunize wealthy neighborhoods against problems. Rather, inequality affects the rate at which problems happen, with the burden falling more heavily on minority neighborhoods. Voter participation in the United States has a class bias; low-income citizens are less likely to vote in most elections.¹⁹ Hispanic and African American voters are less likely to be registered and to vote than non-Hispanic whites.²⁰ The groups that are more likely to suffer from problems at the polls include the same voters who are less likely to participate.

15. For example, Georgia, Illinois, North Carolina, South Carolina, and Wyoming all had higher residual-vote rates than Florida. See CALTECH/MIT VOTING TECH. PROJECT, VOTING: WHAT IS, WHAT COULD BE 89 tbl. (2001), available at http://www.votingtechnologyproject.org/media/documents/july01/July01_VTP_Voting_Report_Entire.pdf.

16. *Id.* at 8 (“Two million ballots, two percent of the 100 million ballots cast for president in 2000, were not counted because they were unmarked, spoiled, or ambiguous. Of this two percent it is estimated that 0.5 percent did not intend to vote for president, so 1.5 percent (or 1.5 million people) thought they voted for president but their votes were not counted.”).

17. *Id.* (“We lost between one-and-a-half and three million votes because of the registration process in 2000.”).

18. For example,

[i]n New York City during the general election of 2000, local political party officials appointed English-speaking poll workers despite the fact that many of the new voters in certain areas were Puerto Rican and only spoke Spanish. Voters of Chinese descent encountered similar disparities in New York and San Francisco.

Jocelyn Friedrichs Benson, *¡Su Voto Es Su Voz! Incorporating Voters of Limited English Proficiency into American Democracy*, 48 B.C. L. REV. 251, 266 (2007) (footnotes omitted). In Florida, the U.S. Commission on Civil Rights reported inadequate assistance in 2000 for voters who spoke Spanish and Creole. U.S. COMM’N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (2001), <http://www.usccr.gov/pubs/vote2000/report/ch6.htm>. The U.S. Department of Justice filed lawsuits against Orange County under sections 203 and 208 of the Voting Rights Act and against Osceola and Miami-Dade Counties under section 208. JoNel Newman, *Unfinished Business: The Case for Continuing Special Voting Rights Act Coverage in Florida*, 61 U. MIAMI L. REV. 1, 30–35 (2006).

19. See, e.g., Arend Lijphart, *Unequal Participation: Democracy’s Unresolved Dilemma*, 91 AM. POL. SCI. REV. 1, 1 (1997) (describing problem for democracy in inequality and low voter participation).

20. The census report on the 2004 election, for example, found that seventy-five percent of non-Hispanic white citizens were registered to vote, followed by sixty-nine percent of black citizens, fifty-eight percent of Hispanic citizens, and fifty-two percent of Asian citizens. KELLY HOLDER, U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2004, at 7 (2006), available at <http://www.census.gov/prod/2006pubs/p20-556.pdf>. “Among the registered citizen population—89 percent of non-Hispanic Whites, 87 percent of Blacks, 85 percent of Asians, and 82 percent of Hispanics voted.” *Id.*

B. Voter Participation Problems

Many administrative problems affect voter participation. Residential segregation ties these factors together, so that, in political participation, inequality "begins at home." This section briefly reviews some of the serious and recurring problems; later sections of this essay address the need for developing expert advice and legal assistance.

In general, no voter should be turned away at the polls without casting a ballot. The Help America Vote Act in 2002 required states to provide provisional ballots to voters whose eligibility could not be determined and for first-time voters who registered by mail but had not produced identification.²¹ Nonetheless, election monitors²² and hotline complaints reported in both 2004 and 2006 that voters without identification had been turned away illegally at the polls.²³ On the other hand, sometimes poll workers give provisional ballots to voters who actually need other problem-solving assistance. In several states, including Florida and Ohio, provisional ballots cannot be counted unless the voter casts that ballot at the correct polling place.²⁴ If a voter has moved, that

21. Pub. L. No. 107-252 §§ 302(a), 303(b)(2)(B), 116 Stat. 1666, 1706, 1712 (to be codified at 42 U.S.C. §§ 15482(a), 15483(b)(2)(B)) (requiring provisional ballots for voters whose eligibility cannot be determined and voters who cast ballots as a result of an order extending the time for closing the polls, and requiring "fail-safe" voting with provisional ballots for first-time voters who register by mail but have not submitted identification to election officials). Some states already required provisional ballots under state law. *See, e.g.*, FLA. STAT. § 101.048 (2008).

22. *See, e.g.*, LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, ELECTION PROTECTION: REPORT ON THE LEGAL PROGRAM TO BOARD OF DIRECTORS AND TRUSTEES, STAFF, AND PRO BONO PARTNERS 9-10 (2006), available at http://www.lawyerscomm.org/2005website/home/images/features/FINAL_EP%20Board%20Report.pdf (reporting that individuals have been turned away as a result of failure to provide identification as well as machine malfunctions).

23. For reports from 2004, see ELECTION PROT. 2004, SHATTERING THE MYTHS: AN INITIAL SNAPSHOT OF VOTER DISENFRANCHISEMENT IN THE 2004 ELECTIONS (2004), which gathers reports from the Election Incident Reporting System. In Florida, Ohio, Illinois, Michigan, Missouri, Nevada, Arkansas, Texas, Georgia (before the passage of the law requiring photo identification at the polls), and Louisiana, voters were improperly turned away if they lacked identification, and minority voters were discriminated against in identification. *Id.* at 18, 22, 33, 35, 39, 52-53, 55, 61, 65-67, 71, 74. A 2006 report notes that "in over a dozen states, reports [surfaced] of poll workers demanding identification from voters in violation of state law." LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, *supra* note 22, at 10. Reports came from several states of voters turned away from the polls without voting, contrary to state law, because of identification problems; these states included Florida, Illinois, Michigan, Minnesota, Missouri, Ohio, and Texas. *Id.* at 20, 24, 28, 31, 34, 38; *see also* Sasha Polakow-Suransky, *Hoodwinked: Katherine Harris Is Gone, but Her Successor Is Behaving Just as Badly*, AM. PROSPECT, Oct. 13, 2004, <http://www.prospect.org/cs/articles?article=hoodwinked> (recounting poll workers' insistence on identification in the August 2004 primary). In 2004, Florida law allowed voters who lacked photo identification to sign an affidavit and cast a regular ballot; in 2006, voters without photo identification had been moved to provisional ballots. *See infra* note 80 and accompanying text. But, in either year, no voter should have been turned away.

24. *See generally* Shambon & Aouchar, *supra* note 4, at 137-43 (discussing legislative history of the treatment of "jurisdiction," "state law," and "precinct" with respect to provisional

voter must be directed to the correct precinct. A voter who arrives at the wrong precinct and receives a provisional ballot may feel a “placebo” effect, but that ballot will not actually be counted.²⁵

Long lines like those in Miami, Durham, and Ohio cities in 2004 are an obstacle to voter participation. Even if most voters stay in line and ultimately cast ballots, some leave without voting. Lines often have a disproportionate impact. They are affected both by the distribution of technology or other resources and by how well that technology functions.²⁶

Relocating polling places can make it difficult for voters to arrive at the correct location. Changes in location are worst for voters who arrive at the end of the day when there is not enough time to go to another polling place.²⁷ Polling-place changes can defeat participation when no signs redirect voters, the new location is beyond walking distance, or signs are not available in the languages spoken by many voters. Polling-

ballots in the Help America Vote Act). Some states passed laws requiring provisional ballots to be cast in the correct precinct in order to be counted, while other states tracked the requirement of the Help America Vote Act that provisional ballots be cast in the correct “jurisdiction” in which the voter is registered, which in effect counts ballots only when the voter is registered in that county. “In 2004, twenty-eight states and the District of Columbia rejected provisional ballots not cast in the correct precinct. These states rejected, on average, 38% of provisional ballots. Seventeen states rejected ballots not cast in the correct ‘jurisdiction.’ These states rejected, on average, only 30% of provisional ballots.” Gerald M. Feige, Comment, *Refining the Vote: Suggested Amendments to the Help America Vote Act’s Provisional Balloting Standards*, 110 PENN ST. L. REV. 449, 457 (2005) (footnotes omitted). State laws requiring that provisional ballots be cast in the correct precinct to be counted have been upheld in both state and federal courts. See, e.g., *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 578 (6th Cir. 2004); *AFL-CIO v. Hood*, 885 So. 2d 373, 376 (Fla. 2004) (per curiam).

25. See ARI Z. WEISBARD, DEMOS, PLACEBO BALLOTS I (2004), available at <http://www.demos.org/pubs/HAVA%20-%20Placebo%20Ballots%20bw%20101904.pdf>. States have a variety of rules under which provisional ballots can be counted. See Electionline.org: Provisional-Ballot Verification, <http://pewcenteronthestates.org/uploadedFiles/ballot%20verification.pdf> (last visited Sept. 27, 2008). These rules are not always followed. See WENDY R. WEISER, BRENNAN CTR. FOR JUSTICE, ARE HAVA’S PROVISIONAL BALLOTS WORKING? 3 (2006), http://www.brennancenter.org/dynamic/subpages/download_file_39043.pdf (supporting a finding of widely varied state regulation pertaining to the use of provisional ballots, as well as general confusion amongst polling officials regarding provisional-ballot procedures and rules).

26. See, e.g., ELECTION PROT. 2004, *supra* note 23, at 8, 23 (noting inadequate voting equipment); Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1238–39 (2005) (discussing long lines in Ohio during the 2004 election); Adam Liptak, *Voting Problems in Ohio Set Off an Alarm*, N.Y. TIMES, NOV. 7, 2004, § 1, at 37 (reporting lines with unequal impact on voters, including many lines at two to three hours, some at seven to nine hours, and one report estimating a line at twenty-two hours).

27. See, e.g., STEVEN DONZIGER, ADVANCEMENT PROJECT, AMERICA’S MODERN POLL TAX: HOW STRUCTURAL DISENFRANCHISEMENT ERODES DEMOCRACY 23 (2001), available at <http://www.advancementproject.org/reports/AMPT.pdf> (noting last-minute polling-place relocations in Boston in 2000 as part of a series of difficulties for voters at the polls); Barreto et al., *supra* note 5 (noting more-frequent relocations of polling places in low-income and minority communities).

place accessibility problems may range from insufficient parking to structural barriers to disability access.²⁸

Voter-registration problems are especially difficult; some voters may not be registered by election day. The Election Incident Reporting System used by the Election Protection Coalition received 14,813 incident reports regarding voter registration during the November 2004 general election.²⁹ The Help America Vote Act mandated statewide voter-registration databases and the use of provisional ballots for voters whose eligibility could not be established at the polls or who lacked required identification.³⁰ State rules and practices vary widely for the requirements used to verify data in the new databases and for questions of making corrections to voter-registration applications when voters make errors on the forms.³¹ Voters who completed voter-registration applications will be unable to have their provisional ballots counted if they have not been registered by election day because of errors that could not be corrected or because their voter-registration applications could not be verified.

Failure to provide election materials in minority languages can also make voter participation difficult. Sections 4(f) and 203 of the Voting Rights Act require ballots and election materials in minority languages in some states and counties.³² Some jurisdictions go further to require

28. In 2001, a report by the General Accountability Office

estimate[d] that, from the parking area to the voting room, 16 percent of all polling places in the contiguous United States have no potential impediments, 56 percent have one or more potential impediments but offer curbside voting, and 28 percent have one or more potential impediments and do not offer curbside voting.

U.S. GEN. ACCOUNTING OFFICE, *VOTERS WITH DISABILITIES* 7 (2001) (footnote omitted), available at <http://www.gao.gov/new.items/d02107.pdf>. In 2007, an inspection conducted by the Public Advocate of New Jersey found that only twenty percent of polling places fully complied with disability-accessibility requirements; fifty-nine percent had a physical barrier to access; and twenty-one percent were physically accessible but failed to meet legal requirements in other ways (such as inadequate parking for the disabled). DIV. OF PUB. INTEREST ADVOCACY, N.J. DEP'T OF THE PUB. ADVOCATE, *STATE OF DENIAL: REPORT ON ACCESSIBILITY INSPECTIONS OF NEW JERSEY POLLING PLACES I* (2007), available at [http://www.state.nj.us/publicadvocate/home/reports/pdfs/StateOfDenial%20\(2\).pdf](http://www.state.nj.us/publicadvocate/home/reports/pdfs/StateOfDenial%20(2).pdf). Despite these failings, officials from six of nine county boards of elections had certified *all* their polling places as accessible. *Id.*

29. Lillie Coney, *A Call for Election Reform*, 7 J.L. & SOC. CHALLENGES 183, 186 (2005) (including early voting and election day). Coney notes that in 2004, only North Dakota, which does not have a voter-registration system, had no reports of voter-registration problems. *Id.*

30. 42 U.S.C.A. §§ 15482(a), 15483(a)(1)(A), (b)(2)(B) (West 2007).

31. See JUSTIN LEVITT ET AL., BRENNAN CTR. FOR JUSTICE, *MAKING THE LIST: DATABASE MATCHING AND VERIFICATION PROCESSES FOR VOTER REGISTRATION* 8–11 (2006) (discussing state plans for addressing verification including match criteria, consequences of a failed match, incomplete information, and opportunity to correct errors).

32. Pub. L. No. 94-73, §§ 203, 301, 89 Stat. 400, 401–03 (1975) (codified as amended at 42 U.S.C. §§ 1973b, 1973aa-1a (2000)); see also Angelo N. Ancheta, *Language Accommodation and the Voting Rights Act*, in *VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON*

materials in languages not covered by federal law.³³ But even where translations are required, they are not always available.³⁴ Furthermore, although the Voting Rights Act mandates that “instructions” be available in minority languages, the interface on most optical scan voting machines appears only in English, and counties do not always provide required signs or interpreters to explain the voting process.³⁵ Elections websites sometimes fail to provide translations for all election materials.³⁶ In one egregious example, the website for Hardee County, Florida had correct information in English on statutory Voter Rights and Responsibilities; the Spanish version was incorrect and more discouraging to voters who lacked identification.³⁷

DEMOCRACY, PARTICIPATION, AND POWER 293, 293–94 (Ana Henderson ed., 2007) (discussing assistance for minority-language voters in the Voting Rights Act under section 203).

33. See Benson, *supra* note 18, at 302 n.287 (noting Maine state law requiring materials in French and Miami-Dade County ordinance requiring materials in Haitian Creole).

34. See, e.g., Michael Jones-Correa & Israel Waismel-Manor, *Verifying Implementation of Language Provisions in the Voting Rights Act*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER, *supra* note 32, at 161, 178 (finding “significant noncompliance across counties covered by Section 203 provisions” in provision of written materials and staff assistance in languages other than English); James Thomas Tucker & Rodolfo Espino, *Government Effectiveness and Efficiency? The Minority Language Assistance Provisions of the VRA*, 12 TEX. J. C.L. & C.R. 163, 188 (2007) (surveying jurisdictions subject to minority language provisions of the VRA and finding that many jurisdictions reported election practices that fell short of complying with the VRA). The Department of Justice has brought several lawsuits in recent years resulting in consent decrees promising to provide interpreters and translated election materials. See Department of Justice Cases Raising Claims Under the Language Minority Provisions of the Voting Rights Act, <http://www.usdoj.gov/crt/voting/litigation/recent203.htm> (last visited Sept. 27, 2008) (reporting recent cases). Nonetheless, reports of precincts lacking language assistance persist. See LAWYERS’ COMM. FOR CIVIL RIGHTS UNDER LAW, *supra* note 22, at 20, 38 (noting that there were three complaints from Miami of precincts without assistance for Spanish speakers and that there were eighty-six complaints in two counties in Texas regarding inadequate language-assistance programs).

35. When poll monitors can observe inside the polls, sometimes these problems can be corrected during election day. Poll monitors observed ninety-six polling places in San Francisco in 2006. CHINESE FOR AFFIRMATIVE ACTION, 2006 POLL MONITORING IN SAN FRANCISCO COUNTY 1 (2006), available at [http://www.caasf.org/PDFs/Language Barriers to Voting APALC-CAA Poll Monitoring Results in SF County Nov 2006.pdf](http://www.caasf.org/PDFs/Language%20Barriers%20to%20Voting%20APALC-CAA%20Poll%20Monitoring%20Results%20in%20SF%20County%20Nov%202006.pdf). The “overwhelming majority” of precincts did not have bilingual signage, forty-seven lacked bilingual voter pamphlets, some busy sites did not have bilingual poll workers, and many poll workers were unaware of the multi-lingual election department hotline. *Id.* at 2–3. Poll monitors informed the elections department about the problems, many of which were corrected during election day. *Id.* at 4. Many states do not allow observation inside the polling place. ELECTIONLINE.ORG, CASE STUDY: ELECTION OBSERVATION DISPATCHES FROM THE POLLS 3 (2008).

36. See ELECTIONLINE.ORG, TRANSLATING THE VOTE: THE IMPACT OF THE LANGUAGE MINORITY PROVISION OF THE VOTING RIGHTS ACT 9–12 (2006), available at <http://www.pewcenteronthestates.org/uploadedFiles/EB14.pdf> (reviewing websites of states covered by minority-language provisions of the Voting Rights Act).

37. The Spanish version placed “Voter Responsibilities” before “Voter Rights,” inverting the order in Florida Statute section 101.031(2); added a phrase that did not appear in the statute at all, telling voters that they should bring appropriate identification to the polls “*para votar*” (in order to vote); and omitted the statutory “note to the voter” that explained that failure to perform these

These failures have a discouraging impact on voters. In 2002, the Justice Department sued Osceola County for providing inadequate assistance to Spanish-speaking voters and denying voters the right to assistance from the person of their choice.³⁸ The lawsuit settled with a consent decree requiring, among other things, election materials and ballots in Spanish, publicity in Spanish, bilingual poll workers, and assistance at the polls from a person of the voter's choice. Despite these measures, a study conducted less than a year after the expiration of the consent decree found that forty-five percent of Hispanics said that it was difficult to participate in elections there unless they spoke English.³⁹

Misleading information can also chill voter participation. In Florida, voters who lack photo identification must cast a provisional ballot; the canvassing board must then count the ballot if it was cast in the correct precinct and the signature of the voter on the provisional voting certificate matches the signature in voter-registration records.⁴⁰ Nonetheless, for the 2006 election, Florida state officials and most county supervisors of elections published information for voters stating that photo ID was *required* in order to vote.⁴¹ Few official sources explained

responsibilities did not prohibit a voter from voting. See Letter from Martha R. Mahoney, Professor, Univ. of Miami Sch. of Law, to Christopher Coates, Voting Section Acting Chief, U.S. Dep't of Justice Civil Rights Div. 2-7, app. (Dec. 27, 2007) (on file with the University of Miami Law Review) (discussing Hardee County misinformation in Spanish and attaching copy of website).

38. See Consent Decree, *United States v. Osceola County*, No. 6:02-CV-738-ORL-22JGG (M.D. Fla. July 22, 2002) (lawsuit under sections 208 and 203 of the Voting Rights Act). Osceola County has a fast-growing Hispanic population which went from 1.6% in 1980 to 29.4% of the total county population in 2000, JoNel Newman, *Ensuring that Florida's Language Minorities Have Access to the Ballot*, 36 STETSON L. REV. 329, 334 (2007), and to 39.9% of total county population between 2000 and 2006, see Census Bureau Population Fact Sheet, <http://factfinder.census.gov> (search "Osceola County") (last visited Sept. 27, 2008). In January 2008, Hispanics made up thirty-four percent of registered voters. See Florida Voter Registration by Race, <http://election.dos.state.fl.us/voter-registration/statistics/pdf/2008/2008primRace.pdf> (last visited Sept. 27, 2008). The majority of Hispanics in Osceola are Puerto Rican: "[N]ative-born United States citizens with a constitutional right to vote, Puerto Ricans who migrate to Florida from Puerto Rico are likely to have been educated in 'American-flag schools in which the predominant classroom language was [Spanish].'" Newman, *supra*, at 338-39 (second alteration in original).

39. Conswella C. Bennett, *Hispanics Say Discrimination Persists in Osceola County*, OSCEOLA NEWS-GAZETTE, Mar. 24, 2006, at A1 (reporting results of survey performed in December 2005); see also Consent Decree, *supra* note 38, at ¶ 17 (decree remained in effect through Jan. 31, 2005).

40. See Letter from Maria Matthews, Assistant Gen. Counsel, Fla. Dep't of State, to Amanda Payne, Chief of Voting Section, U.S. Dep't of Justice Civil Rights Div. 2 (Aug. 24, 2005) (on file with the University of Miami Law Review) (explaining that, under Florida law, provisional ballots from a voter who lacked acceptable photo identification would be counted if the signature matched and the voter was in the correct precinct).

41. At the time of the 2006 election, several Florida county websites indicated that photo identification was required to vote, but did not inform voters of their right to a provisional ballot in the event that they did not have identification at the time of voting. See Letter from Martha Mahoney, Racial Impact Comm. Chair, Miami-Dade Election Reform Coal., & Muslima Lewis,

that the voter had the right to cast a provisional ballot. Almost none explained the right to have the ballot counted if the signatures matched.⁴² Through the end of 2007, the state website and voter education guide failed to inform voters before they went to the polls that the provisional ballot could be counted even if they lacked identification.⁴³

When voters are told incorrectly that votes may not be cast or might not be counted in the absence of photo identification, voters who do not have identification and cannot obtain it quickly may be discouraged from going to the polls at all. Minority voters are disproportionately likely to lack photo identification.⁴⁴ Therefore, minority voters are disproportionately likely to be affected by misinformation about identification requirements.

Finally, the Florida experience shows that even if voters without identification have the right to have their ballots counted, they may be given inadequate information about their rights or misinformation about

Racial Justice Project Dir., Fla. ACLU, to Sue Cobb, Fla. Sec'y of State 2 (Nov. 6, 2006) (on file with the University of Miami Law Review).

42. See Letter from Prof. Martha R. Mahoney to Christopher Coates, *supra* note 37 (attaching examples from websites of counties covered by section 5 of the Voting Rights Act, showing misinformation about identification requirements, inadequate information, and failure to provide accurate information in Spanish).

43. Florida corrected this information in state-voter-education materials in 2008. Compare DIV. OF ELECTIONS, FLA. DEP'T OF STATE, 2006 FLORIDA VOTER REGISTRATION AND VOTING GUIDE 10–11 (2006), available at <http://web.archive.org/web/20061007174548/http://election.dos.state.fl.us/publications/pdf/2006VoterGuide.pdf> (informing voters who lack identification they have the right to cast a provisional ballot and informing voters who cast provisional ballots that they have the right to bring proof of eligibility to the supervisor of elections within three days after the election), with DIV. OF ELECTIONS, FLA. DEP'T OF STATE, 2008 FLORIDA VOTER REGISTRATION AND VOTING GUIDE 8 (2008), available at <http://election.dos.state.fl.us/publications/pdf/2007-2008/2008VoterRegisVoteGuide.pdf> (informing voters who use provisional ballots solely because they lack photo identification that they do not need to bring further proof to have their ballot counted if they voted in the correct precinct and the signature accompanying the ballot matches the signature in voter-registration records). The 2008 guide was published after the Department of Justice investigated the failure to provide accurate information on voter identification and provisional ballots during the process of preclearing the 2007 changes in Florida election law. See Letter from Martha R. Mahoney to Christopher Coates, *supra* note 37, at 2–7, app. (attaching examples of misinformation for voters, inadequate information, and failure to provide accurate information in Spanish); E-mail from Maria I. Matthews, Assistant Gen. Counsel, Fla. Dep't of State, to Hillary Maki & Yvette Rivera, Dep't of Justice (Jan. 10, 2008) (on file with the University of Miami Law Review) (responding to questions from Department of Justice and promising to revise Division of Elections website).

44. Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 699 (2006); see also Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 657–62 (2007) (gathering evidence of demographic impact of photo identification requirements and use of affidavits at the polls); Matt A. Barreto et al., *The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate* 16 (Wash. Inst. for the Study of Ethnicity and Race, Working Paper, 2007), available at http://depts.washington.edu/uwiser/documents/Indiana_voter.pdf (“[M]inority . . . Indiana residents are less likely to have access to valid photo identification.”).

identification requirements. There is no documentation at the polls of voters who were discouraged from attempting to vote. At the polls, affidavits or provisional ballots provide evidence that someone arrived without photo identification, but, if voters do not try to vote because they hear that they need identification, there may be no direct evidence of the reason for their non-participation. Therefore, voters who are discouraged from going to the polls might be more difficult to find than those who were wrongly turned away.

C. *Election Protection and Voter Hotlines*

Beginning in 2001, civil rights groups created an "Election Protection" program that grew to operate across the country.⁴⁵ Teams of volunteers, including lawyers and law students, mobilized before elections, with research in hand about state election laws, standing ready to provide legal support for voters. Seeking "same day relief" for voting problems, volunteers observed polling places to identify problems as they happened. When problems developed, voters called hotlines, and volunteers could refer problems to lawyers. By November 2004, activists working against electronic voting technology had joined national civil rights groups to create a national database of reported problems with voting. A national hotline took phone calls, and the Election Incident Reporting System consolidated the reports.⁴⁶ Election Protection organizers also organized before elections, meeting with state and local officials to discuss problems and the implementation of laws and procedures.

At the polls, monitors help solve immediate problems, such as finding voters' correct precincts or calling for legal advice and telling voters about their rights. Volunteer lawyers are prepared to go to court if necessary. In 2006, Election Protection lawyers filed three lawsuits, one of which succeeded in getting voting hours extended in Baltimore, and supported two ongoing lawsuits.⁴⁷ Monitors at the polls are most likely to be effective in solving problems that voters are able to identify and that

45. See Monique L. Dixon, *Minority Disenfranchisement During the 2000 General Election: A Blast from the Past or a Blueprint for Reform*, 11 TEMP. POL. & CIV. RTS. L. REV. 311, 324–25 (2002) (describing groups participating by 2002 and noting that election-protection lawyers helped persuade Governor Bush to extend voting hours in response to serious problems with voting systems); The Democracy Campaign History, http://www.workingfordemocracy.org/ep_history.php (last visited Sept. 27, 2008) (describing development from model program in Virginia in June 2001 to a seventeen-state mobilization in 2004).

46. See Election Incident Reporting System, <http://www.voteprotect.org> (follow "view and use EIRS public data" hyperlink) (last visited Sept. 27, 2008). For an article summarizing the serious problems revealed in the 2004 election and drawing on data from the Election Incident Reporting System, see Coney, *supra* note 29.

47. See LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, *supra* note 22, at 12.

can be helped by on-the-spot support; they can also gather information and report on problems such as voters who are turned away.

The Election Protection program and the Election Incident Reporting System brought unprecedented resources to voter advocacy and developing information on election problems. Nonetheless, many voter problems are not likely to be solved by election monitoring. The long lines after early voting marches illustrate the difficulty in providing same-day relief when the issue is difficulty in casting a ballot.⁴⁸ There may be no record if voters leave without signing in. When voters leave because of long lines, it may not be possible to bring them back. When the problems involve the validity of voter registration under state law, remedies can be difficult or impossible to obtain on or after election day.

III. GRASSROOTS VOTER ADVOCACY IN MIAMI

The Miami-Dade Election Reform Coalition built a model of grassroots advocacy for voters. The coalition formed after the disastrous September 2002 primary election,⁴⁹ which involved the collapse of a new direct recording electronic (“DRE”) “touchscreen” voting system. It was the second consecutive election in Miami in which voting-system failures had a devastating impact on minority voters. A broad spectrum of groups and individuals came together to confront the emergency.⁵⁰ The coalition has continued to meet almost every week since 2002. It has included citizens, civil rights organizations, labor unions, community leaders, poll workers, lawyers, professors (I have been a member since its founding), and students from high school through law school. The coalition analyzes issues, exposes problems while demanding solutions, educates the community, mobilizes the public to work the polls and observe poll closings, and works with election officials. Unlike some activist networks organized online, these meetings are conducted in person, around a table, with everyone invited to participate and to bring in people who have encountered new problems.

48. See *Lawyers' Committee Works To Secure Access to Polls on Election Day*, CALL TO JUST., (Lawyer's Comm. for Civil Rights Under Law, Wash., D.C.), Winter 2002, at 5, available at <http://www.lawyerscomm.org/2005website/publications/images/ctjwinter02.pdf> (“The purpose of the [Election Protection] hotline was to provide same-day relief to any voters who experienced difficulties at the polls on election day.”).

49. See Lida Rodriguez-Taseff, *Florida's Post 2000 Voting Systems Overhaul: The Road to Perdition*, 23 J. MARSHALL J. COMPUTER & INFO. L. 497, 500–01 (2005) (describing problems with DRE voting machines and police in charge of November 2002 election).

50. See Rebecca Wakefield, *Rage Against the Machines*, MIAMINEWTIMES.COM, Sept. 23, 2004, <http://www.miaminewtimes.com/2004-09-23/news/rage-against-the-machines> (recounting organization of the coalition and first two years of work, including presence of election monitors, problems with voting machines and the contract for the machines, issues in the search for the supervisor of elections, electronic voting problems, and misplaced election data).

The problems in 2002 were extraordinary. After the chaos of the primary election, the county manager gave the police department the responsibility of running the November election logistically.⁵¹ The coalition demanded that police presence be minimized at the polls.⁵² Creative and determined lobbying persuaded the Miami-Dade County Commission to bring in experienced election observers as independent monitors for the November election—the first such monitoring in a domestic election in the United States.⁵³ The coalition won expansion of the period for early voting and the mailing of both sample ballots and a voter-education pamphlet prepared by the League of Women Voters and the ACLU. Yet the county repeatedly broke promises to make election materials available in Creole, even after the Creole translation had been provided to the county. After the November 2002 election, as new problems were continually exposed, the coalition moved on to work on the flawed contract for the voting machines, problems in the search for a new Supervisor of Elections, electronic voting problems, and many other issues.⁵⁴

By the 2004 election, the reform coalition had exposed new problems with the electronic records from voting machines. The election management system sometimes reported the serial numbers of machines incorrectly in the event logs and ballot-image records that made up the

51. See CTR. FOR DEMOCRACY, PRE-ELECTION REPORT FROM THE CENTER FOR DEMOCRACY TO THE MIAMI-DADE COUNTY COMMISSIONERS ON "THE ADEQUACY OF THE COUNTY'S ELECTION PREPARATION" 8–9 (2002), available at <http://web.archive.org/web/20021203152725/www.centerfordemocracy.org/mia/PRPTMIA.pdf>. The pre-election report discusses the recommendation of Miami-Dade Inspector General to have police department take over training and organization, helpful aspects of police involvement in election preparation, and community concerns. *Id.* at 8–9; see also *id.* at 9 ("Participation in the planning and implementation of elections is not part of the mission of policing services, and on first impression, the inclusion of law enforcement in elections processes appears incongruent with commonly accepted standards in the conduct of democratic elections.").

52. MIAMI-DADE ELECTION REFORM COAL., FINAL REPORT ON THE NOVEMBER 5TH ELECTION 6 (2002), available at <http://www.reformcoalition.org/ressources/Post-Election%20Report.pdf>.

53. The proposal for independent observers, proposed by the Miami-Dade branch of the NAACP and the Workers Center, won the support of the coalition and ultimately, under great public pressure, the support of the county commission. See Andrea Robinson, *Coalition Demands Election Preparation*, MIAMI HERALD, Sept. 20, 2002, at 5B. One report by independent observers discussed the achievement of a successful election in November 2002 and continuing issues to be resolved, including training and the need for improvements to voting machines. CTR. FOR DEMOCRACY, POST-ELECTION REPORT FROM THE CENTER FOR DEMOCRACY TO THE MIAMI-DADE COUNTY COMMISSIONERS ON THE EFFECTIVENESS OF MIAMI-DADE'S NOVEMBER 5 ELECTION PROCESS 5–6, 16 (2002). The report stated, "Under normal conditions in most U.S. jurisdictions, poll workers should spend no more than one hour preparing the polling place before voting begins." *Id.* at 16. But the machines in Miami required at least one and one-half hours to boot up and four hours to open each polling place. See *id.* at 5.

54. See Wakefield, *supra* note 50.

electronic audit data from the voting machines.⁵⁵ The Supervisor of Elections dismissed coalition concerns and broke the public-records law by failing to produce documents discussing the audit data flaw.⁵⁶ At one point, the county reported that it had lost almost all the electronic records from the September 2002 election in a computer crash, vividly illustrating the danger of data destruction even through officials later announced that the missing records had been found.⁵⁷ The coalition developed an innovative poll-closing observation project to expose the difficulty in determining the number of votes cast and counted on DRE “touch screen” voting machines.⁵⁸ The project recruited members of the public to observe poll closings and trained them to identify problems. After 2004, the group continued to work on voting-system problems and civil rights issues. Members used the administrative processes of rulemaking and public comment to present evidence of problems and win changes to rules.

In 2007, when Governor Charlie Crist decided to move to optical-scan paper-ballot voting throughout the state, the reform coalition demanded that the new machines present a multilingual interface and instructions for voters. The Voting Rights Act requires “instructions” in minority languages,⁵⁹ but the interface on optical-scan systems had been available only in English; the interface in multiple languages is a strength of DRE machines. Although minority languages were not directly addressed in the bill, a Haitian-American representative in his first term in the Florida House introduced an amendment and withdrew it after eliciting a promise from the governor and the secretary of state that optical-scan machines would be available with an interface in English, Spanish, and Haitian Creole.⁶⁰ In March, Florida certified the

55. See Rodriguez-Taseff, *supra* note 49, at 503–04 (describing inaccurate election audit records).

56. See Wakefield, *supra* note 50.

57. See *Florida's Bad Record on Voting Records*, N.Y. TIMES, July 29, 2004, at A18; Abby Goodnough, *Lost Record of Vote in '02 Florida Race Raises '04 Concern*, N.Y. TIMES, July 28, 2004, at A1; Abby Goodnough, *Office Finds Disks Holding Data From 2002*, N.Y. TIMES, July 31, 2004, at A9.

58. See MIAMI-DADE ELECTION REFORM COAL., *supra* note 11, at 8–9.

59. 42 U.S.C. § 1973b(f)(3) (2000). Counties were allowed to meet this requirement with assistance including signs and interpreters at polls. Glenn D. Magpantay & Nancy W. Yu, *Asian Americans and Reauthorization of the Voting Rights Act*, 19 BLACK L.J. 1, 8 (2005).

60. Lida Rodriguez-Taseff, *The Road to Paper: Is E-Voting Reform Eroding the Gains of Language Minority Voters? The Case of Florida*, in INAUGURAL NATIONAL INSTITUTE ON COMPUTING AND THE LAW, at 11, 15 (2007) (recounting demand for multilingual interface on voting machines, unwillingness of most politicians to take up the issue publicly, and summarizing statement by State Representative Ronald A. Brisé regarding promise from Governor and Secretary of State when Representative Brisé withdrew his amendment); Alexandra Wayland & Lida Rodriguez-Taseff, Op-Ed., *Voting Machines: Disaster Looms Again on Election Day in Florida*, MIAMI HERALD, Mar. 31, 2008, at A17.

software in all three languages.⁶¹

Many of the successes of the coalition came from the prodigious initiative of its members. Success also came from the way the group was organized. Decisions were made by consensus. Important topics and difficult questions were resolved through a "round robin" discussion around the table. Part of the success came from the range of talents utilized. The emergency in 2002 brought together a remarkable group with many organizations and skill-sets represented at the table, including members diverse in their backgrounds, races, and countries of birth. Poll workers understood the challenges of training and polling-place administration. An expert on environmental law was deeply knowledgeable about administrative law and processes. The coalition treasurer, an officer of a labor union, brought transparency and custody problems of early voting to the attention of the coalition, county authorities, and commissions at which he spoke. People made themselves experts on difficult questions of election procedures.

The energy for voter advocacy in Miami has been extraordinary. Shortly before the 2004 election, a French journalist covering a coalition meeting asked incredulously, "You really meet and talk every week about voting?" He was amazed that voting could take up so much time or remain interesting. Four years after his question, the group is still meeting weekly.

The French reporter was basically correct: This wonderful effort really should not be necessary. Voting is such a singular, formal, and relatively short act within political participation. It should be reliable, easy, and effective from access to the system (registration) to casting ballots that will be counted accurately. Voting problems are not unique to Florida, as the 2004 election revealed, but the community response was unique. The coalition kept working because at every turn it found crucial voter-participation problems and met those problems with sustained nonpartisan demands for reform. People who sent e-mail rants about stolen elections were asked to stop and, if necessary, removed from the e-mail list. New problems loomed even as old ones were not fully solved yet. Gifted leadership transformed huge amounts of volunteer work into fun.

Working through the press, speaking directly to governmental bodies, and working with the supervisor of elections and other citizen groups, the coalition combined research, confrontation, and creative

61. See Memorandum from Donald L. Palmer, Dir., Div. of Elections, to Supervisors of Elections (Mar. 14, 2008) (on file with the University of Miami Law Review). The new systems were not fully certified until May 2008.

organizing in remarkably effective advocacy for voters.⁶² As of July 2008, as the coalition moved toward its sixth anniversary, it had not been a party in litigation, though some member organizations had been plaintiffs in voting rights cases.⁶³ Public exposure and political pressure had sometimes been swifter and more effective than lawsuits. For example, no lawsuit would have won independent observers for a remedy in 2002. Even when lawsuits bring victories, they take time.⁶⁴

But litigation has a crucial place in protecting voting rights. Despite all that effective work, some laws remained underenforced or unchallenged. Under the strong Florida public-records law, many agencies produced a huge number of documents. However, officials sometimes broke the law through failure to produce records or by denying their existence. When officials seek to avoid the exposure of problems, stonewalling may be effective unless community groups have access to lawyers. Community organizing does not always answer that kind of violation of law. It can be effective, especially quickly, with local ordinances and administration. Organizing to address state or federal laws is

62. The Coalition report on the 2004 election, MIAMI-DADE ELECTION REFORM COAL., *supra* note 11, was cited repeatedly in the Government Accountability Office's report on electronic voting. See U.S. GOV'T ACCOUNTABILITY OFFICE, ELECTIONS: FEDERAL EFFORTS TO IMPROVE SECURITY AND RELIABILITY OF ELECTRONIC VOTING SYSTEMS ARE UNDER WAY, BUT KEY ACTIVITIES NEED TO BE COMPLETED 30–31, 37–38, 96 n.16 (2005), available at www.gao.gov/cgi-bin/getrpt?GAO-05-956.

63. See, e.g., Fla. State Conference of the NAACP v. Browning, 522 F.3d 1153, 1158 (11th Cir. 2008) (including plaintiffs Haitian-American Grassroots Coalition and Southwest Voter Registration Education Project).

64. For example, in 2005 Florida passed draconian restrictions including potential fines up to \$5000 on third-party voter-registration groups but made an exception for political parties. See FLA. STAT. § 97.0575 (2006). The law went into effect in January 2006. See *id.* The League of Women Voters stopped registering voters because their potential liability under the statute exceeded their annual statewide budget. League of Women Voters of Fla. v. Cobb, 447 F. Supp. 2d 1314, 1325 (S.D. Fla. 2006), *appeal dismissed*, No. 06-21265-CV-PAS (11th Cir. Feb. 19, 2008) (*per curiam*) (finding unconstitutional both the “combination of heavy, strict, joint and several liability fines” and the exception for political parties and granting preliminary injunction). The League and other civil rights groups brought a lawsuit, represented by the Brennan Center, the Advancement Project, and local law firms. See *id.* at 1314–16. The district court enjoined the state restrictions as unconstitutional. *Id.* at 1316, 1341. Florida responded by passing a new version of the law with sanctions that were somewhat less draconian but still discouraged third-party voter registration. See FLA. STAT. § 97.0575 (2008). The state appealed the decision on the first law, but the Eleventh Circuit held that the appeal was moot because of the change in law. *League of Women Voters of Fla.*, No. 06-21265-CV-PAS, slip op. at 2. See generally Damien Cave, *Florida Alters Its Voting Laws, but New Disputes May Emerge*, N.Y. TIMES, Apr. 28, 2008, at A1 (noting that the League of Women Voters stopped registering voters in 2006 under the first law and again in 2008 and that the office of the secretary of state “acknowledged that the law is vague on whether the cap of \$1,000 would apply to an entire organization, a chapter or individual volunteers”). In August 2008, the federal district court in Miami denied the plaintiff's motion for a preliminary injunction in the challenge by the League of Women Voters and other plaintiffs to the revised third-party voter-registration statute. *League of Women Voters of Fla. v. Browning*, No. 08-21243-CIV, 2008 WL 3200654, at *1, *26 (S.D. Fla. Aug. 6, 2008).

slow and may be insufficient. And litigation requires resources that many community groups do not have.

IV. ORGANIZATION AND INFORMATION—A VAST PROJECT

Collection and analysis of data are critical to identifying and correcting deficiencies before election problems develop. Facts are crucial to proving the importance and impact of problems that develop in election administration, and obtaining those facts is not always easy. Voter advocates need access to public records. Someone must put data into usable form for statistical analysis by race and ethnicity, and someone must share information with community organizations and civil rights groups. To win legal remedies, statutory improvements, or changes in practices, information must also be gathered and analyzed after election problems develop. This section reviews the problems that affect voters and analysis that can be helpful in preventing or solving them. I propose the creation of Voter Academic Support Team ("VAST") networks to arm local groups with information and analysis that can support their demands and help move information to civil rights advocates.

A. *Data from Elections: The Importance of Race and Voting Problems*

State and federal governments must carry the burden of producing information on election administration. Two recent proposals from academics, a new grant program from the Election Assistance Commission, and some pending bills have proposed or taken steps in this direction. In 2007, Professors Thad Hall and Dan Tokaji proposed federal payments to state and local governments conditioned on the production of "comprehensive and reliable data . . . on such matters as registration, turnout, voting equipment, absentee voting, provisional ballots, and disability access."⁶⁵ The federal government would provide software and reporting mechanisms as well as money. Federal and state governments would "develop common standards for the collecting and reporting of election data and an interoperable system for reporting these data."⁶⁶

Also in 2007, Professor Heather Gerken proposed a "Democracy

65. Thad Hall & Daniel P. Tokaji, *Money for Data: Funding the Oldest Unfunded Mandate*, MORITZ ELECTION L., June 5, 2007, <http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=153>.

66. *Id.* As Hall and Tokaji point out, this is a difficult project:

Today, it is difficult enough to get all states to collect data on the number of ballots cast in the election—approximately 10 states cannot report this simple number!—or to have a common definition regarding what constitutes an early or absentee ballot. States need to collect a standard set of data with standard data definitions.

Id.

Index” that would rank the performance of all states on a variety of important criteria.⁶⁷ The goal of the index would be to create a device to motivate states to improve their rankings, harnessing partisan and regional competition. “A ranking system could tell us, for instance, which states and localities discard the most ballots, which polling places have the longest lines, and where the greatest political or racial disparities in registration and turnout levels lie.”⁶⁸ Two bills introduced in Congress in 2007 propose study or development of the “Democracy Index.”⁶⁹

The 2004 Election Day Survey commissioned by the Election Assistance Commission had reported that several states did not collect information or report it in a usable format.⁷⁰ In April 2008, the EAC published the applications for a new Election Data Collection Grant Program. The 2008 questions for the states, to be funded through federal grants, include important information but have some significant gaps. The questions ask for the number of provisional ballots cast, counted, and rejected and for the reasons why provisional ballots were rejected. But the EAC does not ask for the reasons why provisional ballots were used. Provisional ballots are mandatory under HAVA if eligibility cannot be established, if first-time voters who registered by mail lack identification at the polls, or if the ballot is cast as a result of an order extending the time for closing the polls.⁷¹ Provisional ballots are sometimes used as emergency backups when voting systems fail. Information about the reason for using a provisional ballot could yield data about the frequency with which eligible voters have difficulty showing their eligibility at the polling place, which might provide information on statewide voter-registration databases. It would also provide information about otherwise eligible voters who lacked identification at the polls and how many of those voters, if any, are able to provide identification to have their ballots counted after the election.

The EAC questions ask for the total number of persons who voted in the November 2008 federal general election but allow states an option

67. See Heather Gerken, *How Does Your State Rank on 'The Democracy Index?'*, LEGAL TIMES, Jan. 1, 2007, at 36.

68. *Id.*

69. Pending bills addressing the “Democracy Index” include the Voter Advocate and Democracy Index Act of 2007, S. 737, 110th Cong. (2007) (introduced by Sen. Barack Obama); the Count Every Vote Act of 2007, S. 804, 110th Cong. (2007) (introduced by Sen. Hillary Clinton); and the Count Every Vote Act of 2007, H.R. 1381, 110th Cong. (2007) (introduced by Rep. Stephanie Tubbs Jones).

70. U.S. ELECTION ASSISTANCE COMM’N, *supra* note 6, at 12–18.

71. See 42 U.S.C.A. §§ 15482 (a), (c), 15483(b)(2)(B) (West 2007).

to answer from the total number of ballots cast.⁷² In 2004, some states reported turnout from the number of votes for the contest at the top of the ticket, an even more inadequate measure, so this question is indeed an improvement.⁷³ But the number of ballots counted will not reveal discrepancies between voters and ballots. These discrepancies have been significant when ballots failed to record or were lost on DRE systems,⁷⁴ and discrepancies could be significant indicia of election problems in general. In short, the data-collection grant program will be a big step forward but will not address some critical questions.

Collecting data on voting-equipment problems is also important but was omitted from the EAC questions. Hotlines and election-incident reports have been helpful. But hotlines depend on self-reports, and often voters cannot tell when problems happen. For example, when 4500 votes failed to record on an electronic voting machine in Carteret County, North Carolina in 2004,⁷⁵ voters had no idea their votes would disappear. Voters received no information at all after three voting machines were erased in Miami-Dade County during early voting in 2004.⁷⁶ The Miami-Dade incident illustrates the best reason to ask direct questions about voting problems: Election officials do not always volunteer information about their problems.

The EAC questions do not reach the question of which states gather information on the race of voters and how they store that data. Election data should be organized in ways that make it possible to produce reports by race and ethnicity. If election data cannot be correlated with the race of the voter, research on equality and election issues is more difficult, expensive, and time-consuming and may be impractical to carry out. The importance of information on race is underlined by the 2004 Election Day Survey, which reported differences by race in use of absentee and provisional ballots and made findings about racial inequality at the polls.⁷⁷ Data on race is also important to understanding the impact of proposed or enacted changes in election laws.

72. See U.S. ELECTION ASSISTANCE COMM'N, 2008 ELECTION DATA COLLECTION GRANT PROGRAM (2008) (on file with the University of Miami Law Review).

73. See *id.* at 12–16.

74. Electronic ballots are not numbered, so the only way to know how many ballots should be tabulated is to count the voters who signed in at the polls. In many polling places, the number of ballots counted did not equal the number of voters. In most cases, this discrepancy did not reveal either ballot stuffing or vote erasure, but rather poor practices in polling-place administration. On the other hand, some polling places showed perfect matches only because clerks reported that the numbers of ballots and voters matched when, in fact, they did not. See MIAMI-DADE ELECTION REFORM COAL., *supra* note 11, at 12.

75. John Schwartz, *Mostly Good Reviews for Electronic Voting*, N.Y. TIMES, Nov. 12, 2004, at A20.

76. See discussion *infra* notes 89–91 and accompanying text.

77. See U.S. ELECTION ASSISTANCE COMM'N, *supra* note 6, at 12–13.

Among Florida counties, practices have varied regarding the collection and storage of data in ways that can be correlated with the race of voters. In 2005, Florida changed its election laws in ways that were likely to have a disproportionate effect on minority voters. Voters who lacked photo identification, previously allowed to cast regular ballots after completing an affidavit, were moved to provisional ballots.⁷⁸ Florida also amended the law allowing assistance for voters at the polls⁷⁹ to ban solicitation to assist a voter within 100 feet of the polls.⁸⁰

Data from the 2004 election in Hillsborough and three other Florida counties showed that black and Hispanic voters were more likely to have used affidavits⁸¹ and to have completed declarations for assistance in the

78. 2005 Fla. Laws 2641 (codified at FLA. STAT. § 101.031 (2008)) (deleting from the "Voter's Bill of Rights" the right to "[p]rove his or her identity by signing an affidavit" and amending the right to cast a provisional ballot to include situations in which the voter's identity is in question). This provision was likely to affect minority voters disproportionately because studies had shown that minority voters were disproportionately likely to lack photo identification. See Tokaji, *supra* note 44, at 699.

79. The Voting Rights Act guarantees that voters who require assistance in voting can receive that assistance from "a person of the voter's choice." 42 U.S.C. § 1973aa-6 (2000). ("Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union."). Some voters arrive at the polls with a person who will assist them. Among those who have not already arranged help, some may prefer to be assisted by poll workers, but others prefer assistance that is not provided by the people who are administering the election. The Florida statute also applies to voters who require assistance because of blindness, disability, or inability to read or write. See FLA. STAT. § 101.051(2) (2008). The ban on solicitation to assist was not part of the statutory restriction on electioneering and other activities around the polls but an amendment to section 101.051 of the Florida Statutes. Everyone who assists a voter must now sign a statement, subject to criminal penalties, that the person providing assistance did not solicit to assist the voter within 100 feet of the polls. *Id.* § 101.051(5).

80. This provision was likely to affect minorities because it affected voters who had difficulty with literacy in English. Voters who do not read and write English rely on assistance with the ballot if they live in counties not subject to minority-language requirements, if required materials are not available, or if they speak languages that are not covered by the Voting Rights Act. African Americans and Hispanics in Florida have lower educational levels and lower scores on adult-literacy surveys than do white non-Hispanics. Of Florida residents over twenty-five-years-old, ninety-two percent of non-Hispanic whites completed high school, compared with 76.5% of African Americans and 70.8% of Hispanics. U.S. Census Bureau Table on the Educational Attainment of the Population, <http://www.census.gov/population/socdemo/education/cps2004/tab14.pdf> (last visited Sept. 27, 2008). In 1994, the Florida Adult Literacy Survey found that "African American and Latino adults were more likely than White adults to perform in the lowest two literacy levels and less likely to attain the two highest levels." LYNN B. JENKINS & IRWIN S. KIRSCH, EXECUTIVE SUMMARY FROM ADULT LITERACY IN FLORIDA 4 (1994).

81. Hispanic voters and black voters were two to three times as likely as white non-Hispanic voters to use affidavits to prove their identity at the polls. See Letter from Martha R. Mahoney, Racial Impact Comm. Chair, Miami-Dade Election Reform Coal., & Theresa Noble, Research Intern, Miami-Dade Election Reform Coal., to John Tanner, Voting Section Chief, U.S. Dep't of Justice 14-15 (Aug. 26, 2005), available at <http://www.reformcoalition.org/ressources/MDERC Letter Sec 5 2005-2390.pdf>.

November election.⁸² Although the Department of Justice precleared both provisions without objection, the department made preclearance for the change from affidavits to provisional ballots conditional on Florida actually counting the provisional ballots cast by voters who lacked identification based on matching their signatures, as required by Florida law.⁸³ In contrast, some other counties did not store data in ways that could be correlated with election records.⁸⁴ In such counties, research would require obtaining photocopies of hundreds of affidavits, declarations, and voter-registration records and entering the data for analysis—a time-consuming process that may be impossible to complete during the short time frame of state legislative action or section 5 preclearance review.

Election-incident reports generate data that will continue to be important to reveal problems and to illustrate the need for mandatory data collection. If Congress requires national data collection or enacts new standards to protect voters,⁸⁵ monitoring compliance will remain important. Independent statistical analysis will be needed even if legal requirements improve. But there are not enough experts well prepared on voting issues other than districting, which has made up the bulk of the litigation under section 2 of the Voting Rights Act. Social-science

82. Some of the disparities were very great. In Hillsborough County, Hispanic voters were almost four times as likely as white non-Hispanics to complete declarations for assistance, and black voters were twice as likely as white non-Hispanics; in Monroe County, Hispanics were more than eight times as likely to sign declarations. *See id.* at 15. It was not possible to obtain evidence quickly on how often assistance was arranged within 100 feet of the polls or how many voters would be directly affected by the ban on solicitation.

83. Letter from John Tanner, Voting Section Chief, U.S. Dep't of Justice, to Charlie Crist, Fla. Attorney Gen. app. at 1–2 (Sept. 6, 2005) (on file with the University of Miami Law Review) (granting preclearance of this provision provided that Florida actually count these ballots); *see also* Letter from Maria Matthews to Amanda Payne, *supra* note 40, at 2 (“If [the voter’s] signature on the voter certificate matches the signature on the voter registration record, the canvassing board must count the provisional ballot, provided the person voted at the right precinct.”). Because Florida counties have at times applied election laws differently from each other, conditioning preclearance on the actual practice of counting votes was helpful for voter protection. If Florida were in the future to consider requiring voters to produce photo identification to have their provisional ballots counted, the data from 2004 and the condition on preclearance would help show the retrogressive effect on minority voters.

84. Of the five counties in Florida covered by section 5 (Collier, Hardee, Hendry, Hillsborough, and Monroe), only Collier could not produce information correlating affidavits or declarations for assistance with data on the race of the voter. Miami-Dade County also does not store information in a form that can be correlated with the race of the voter. *See* E-mail from Lester Sola, Supervisor of Elections, Miami-Dade County Elections Dep't, to Martha R. Mahoney, Racial Impact Comm. Chair, Miami-Dade Election Reform Coal. (Sept. 26, 2005, 17:17 EST) (on file with the University of Miami Law Review).

85. For example, the Count Every Vote Act of 2007 would create standards for distribution of voting systems and other resources and would require state plans to ensure equitable waiting time and, to the extent possible, a wait of no more than one hour at the polls. S. 804, 110th Cong. §§ 301–302 (2007).

expertise exists far from the grassroots experience of voters who encounter problems at the polls. The interesting organizational question is how to create resources that serve community organizations despite the weaknesses of civil society, moving data and analysis effectively between grassroots groups and networks of lawyers and civil rights groups.

B. *The Need for Post-Election Review*

Post-election reports are a challenge. The urgent mobilization around the election is over. Regular attendance at election-reform meetings diminishes. Analyzing election records takes a substantial amount of time.

Two examples from 2004 show the importance and the difficulty of post-election review. In precinct 816 in Miami-Dade County, eighty-five ballots on a broken voting machine were added to the canvass twice at the precinct and once at the elections office, each time resulting in a message that seemed to show a failure to tally the votes. Ultimately, this incident exposed the vulnerability of the system to adding the same votes repeatedly; the failure of the vendor to make a timely, complete report; and the failures of state and local officials to demand such a report from the vendor. It also exposed the fact that results tapes could report numbers that did not add up without flagging the internal contradictions in machine records.⁸⁶ Until the publication of that set of results tapes, nobody had thought to check on whether the voting machine was adding correctly or to require that machines producing inconsistent totals must bring their own inconsistencies to the attention of elections officials. Exposing these problems required prodigious volunteer energy and slow, detailed, hard work.⁸⁷

Discrepancies in early voting records were even more difficult to investigate. Three voting machines had been erased during early voting at a library on Miami Beach, destroying all votes recorded on those machines. This vulnerability is unique to electronic ballots; it is difficult to imagine comparable destruction of paper in the middle of a polling place. The destruction of votes was difficult to identify because of omis-

86. See MIAMI-DADE ELECTION REFORM COAL., *supra* note 11, at 14–18.

87. The final report merged the efforts of many volunteers. An observer at precinct 816 reported that a machine failed during closing, that poll workers attempted to re-collect the votes, and that the number of votes and voters could not be reconciled. Another volunteer stopped outside Precinct 816 on his way home on election night; his notes on the results tape posted at the door showed different figures than other results tapes from that precinct. In a separate project with a research assistant, I compared the canvass with reports on the number of voter signatures at each precinct. A volunteer who had reviewed the poll-closing reports helped link the problems in the precinct with the discrepancy in the canvass in precinct 816. See *id.* at 17.

sions in the county lists showing the locations of voting machines and from electronic audit records of the election.⁸⁸ A detailed comparison with papers from early voting sites revealed some machines for which there were no electronic records at all. Eventually, an oblique reference in a letter attached to a report on the conduct of the election in Miami-Dade County confirmed the gap with a statement that three voting machines had been "clear and tested" in error during early voting.⁸⁹ The "clear and test" process erases all votes on a voting machine, but the letter did not acknowledge that votes that had been stored on the machines had been erased in error. Despite public scrutiny of the 2004 election in Miami-Dade County, the erasure of votes was not revealed publicly until 2006.⁹⁰ To facilitate investigation, official post-election data-collection forms should include direct questions that elicit information about whether votes were lost.⁹¹

Election problems should trigger routine investigation by officials. For example, precincts with late closing times can provide evidence of resource-allocation problems or other difficulties. Some states allow one voting machine to be allocated for hundreds of voters.⁹² Precinct 640 at the University of Miami revealed the inadequacy of those allocations. On election day, it took eighteen hours for 1078 ballots to be cast on five iVotronic voting machines.⁹³ University students are computer-literate

88. The combined effect of these errors made it difficult to be certain whether some machines had been omitted from the lists records or whether machines with votes had actually been omitted from the canvass.

89. Letter from Constance A. Kaplan, Supervisor of Elections, Miami-Dade County, to Dawn K. Roberts, Dir., Fla. Div. of Elections 1 (Nov. 12, 2004) (on file with the University of Miami Law Review).

90. See Michele Gillen, *Dade Votes Were Possibly Lost in 2004 Election*, CBS4.COM, Nov. 7, 2006, <http://cbs4.com/topstories/Miami.News.Audit.2.395560.html>. I am grateful for the meticulous assistance of Ajay Rai, J.D. University of Miami School of Law 2006, in sorting through discrepancies in the records from early voting sites, county forms, and audit records.

91. In 2005, Florida amended the law to require canvassing boards to certify that they had "reconciled" the number of ballots counted with the number of voters and that the certification contained all valid votes cast in the election. See FLA. STAT. § 102.112(1) (2007). In 2008, the legislature changed that requirement; canvassing boards will now certify they have "compared" the number of ballots and voters. See FLA. STAT. § 102.112(1) (2008). Since 2001, Florida has required regular reports on overvotes, undervotes, ballot design problems, and the performance of voting systems. See FLA. STAT. § 101.595(1) (2008).

92. See, e.g., GA. CODE ANN. § 21-2-323(b) (2005) ("In each precinct in which voting machines are used, the municipal governing authority shall provide at least one voting machine for each 500 electors, or major fraction thereof, except that at least one voting machine shall be provided in each such precinct in any case."); 25 PA. CONS. STAT. ANN. § 2730(b) (West 2007) (providing for one machine for each 350 or 600 voters, while empowering courts to order more, and providing for the equal distribution of voting machines); S.C. CODE ANN. § 7-13-1680 (2007) (requiring one machine for 250 registered voters).

93. Polls in Florida were officially open from 7:00 a.m. to 7:00 p.m., but students stood in line and continued voting until 1:00 a.m. At the beginning of October, the precinct showed 1737 registered voters; by election day, there were 1740. If the elections department had relied on early

and relatively well-educated. The ballot was long, but students skipped local contests at a high rate compared to average undervotes in those contests in the county. Post-election investigation could have helped evaluate the adequacy of machine allocations and the need for legal changes.

An inadequate supply of machines is one of the ways in which election administration is built on the expectation of limited turnout. Full participation would overwhelm voting systems. Extended voting hours and long lines should automatically trigger review and analysis. This poses a recurring problem in election administration: how to get information on the conduct of elections, have the information analyzed, and put findings into the hands of people who will use the data to help avoid problems in the future. Placing the burden on the state to produce this information is vital because advocates for voters need to be able to use it to monitor the process.

Post-election reports are an important contribution to local voter advocacy. Even a short review of problems can help grassroots groups demand improvements. If community leadership develops an innovative solution, creating a record of the project helps other activists learn from its strengths and weaknesses. The 2004 Miami-Dade poll closing observation project grew by 2006 to cover precincts that had nineteen percent of all voters in the county, and it was adapted by Verified Voting for use around the country. In 2007, the coalition produced a detailed guide to organizing citizen-based observation projects.⁹⁴

C. *Voter Academic Support Team ("VAST") Networks*

There are two basic ways to learn about inequality in voting—ask the people or interrogate the data. Both are important. With some kinds of problems, community groups and individuals can see inequality plainly. For example, in 2004, Duval County initially opened only one early voting site but opened four more after community protests that included a march to the office of the supervisor of elections.⁹⁵ Other

October figures to allocate machines, there would have been one machine per 347.4 voters. If voter turnout in the statewide primary in August had been used to predict the need for voting machines, that measure would disfavor students, who were less likely than most county residents to vote in local contests in a primary held just as students returned to campus (only county non-partisan contests appeared on all ballots in that election). Voter turnout during smaller elections might also disfavor groups that vote less frequently.

94. MIAMI-DADE ELECTION REFORM COAL., POLL CLOSING OBSERVATION AND BEYOND: TOWARD CREATING A REPLICABLE MODEL FOR CIVIC PARTICIPATION AND RESEARCH IN THE AREA OF VOTING SYSTEM REFORM, 3, 19–20 (2006), available at <http://www.reformcoalition.org/ressources/FINAL%20REPORT%202006%20-%20MDERC.pdf> (illustrating statistics on 2006 observations and work with Verified Voting on forms for observers).

95. See Matthew I. Pinzur, *Gov. Bush Against Duval's Plan for a Single Early Voting*

problems become obvious when voters know their rights. When voters do not receive election materials in languages required by the Voting Rights Act, they will know that the process is difficult, but they may not know that their rights are being violated. Education on voting rights, as well as on the process of elections, can be especially important when local communities have different capacities to identify problems and organize for change.

In contrast, for some issues, community groups cannot easily collect information or evaluate whether resources will be sufficient. Statistical analysis would help both in demanding equality and in proving inequality when problems develop. The availability of interpreters in different languages, computers for determining voter eligibility, voting machines, regular updates on pending and incomplete voter-registration applications, and physical-access questions, like parking and ramps, can all be monitored in part through public-records work.⁹⁶ But the gap between experts and grassroots communities is multilayered. It involves both the general weakness of civil organizations and the structure of academia. Innovative structures are needed to push more resources toward community organizations and to link academic skills with civil rights groups.

A Voter Academic Support Team ("VAST") would mobilize academic resources from colleges around the country, including professors with statistical training and student volunteers, to obtain information on election resources before elections and synthesize information after elections. This monitoring would require more research or social-science analysis than the meetings that election-protection organizers have held with election officials in some communities, which have included checking the implementation of election laws and the status of known problems for voters. A VAST network coordinator would work with community groups to assemble lists of known problems facing voters or remedies that are supposed to be implemented. Standardized template letters and charts could be used to gather information and evaluate the adequacy and equality of the distribution of resources in advance. Putting the information together in post-election summaries and giving it back to the community would support demands for better administrative measures, whether those demands are ultimately taken up through community-group advocacy or, if necessary, legal action by civil rights lawyers.

Facility, MIAMI HERALD, Oct. 17, 2004, at 13A; Ron Word, *More Duval Voting Sites Sought, Groups Asking Judge To Force County's Hand*, S. FLA. SUN-SENTINEL, Oct. 23, 2004, at 6B.

96. Effective monitoring of parking might involve the use of a tool such as Google Earth, <http://earth.google.com>. Incomplete voter-registration applications and information about disability access are both likely to require in-person inspection of records or facilities.

The goal is to put expertise into the hands of local activists. VAST experts would be needed for fundamental questions and administrative details. This will probably require the development of standardized inquiries and consultation with communities to find out what additional research is needed.

The renewed Voting Rights Act includes a provision for fees for experts in litigation.⁹⁷ But screening for problems before elections and reporting them after election day will often involve expert work that is not directly related to litigation. Support for expert work should include developing pools of experts with supporting volunteers such as college students, as well as funds for costs and fees. This effort will involve outreach to social scientists, including work through social-science networks and conferences. It would also be helpful to develop funds that can advance litigation costs that can be repaid after cases have concluded.⁹⁸

The harder question is how to reach the grassroots and create bridges that can use this expertise effectively. The same lack of organization in civil society that makes participation more difficult also affects interactions with experts. The answer cannot be long-term mobilizations on voting issues in every community like the election coalition in Miami. A more practical model would be a network with relatively short time commitments that can organize intermittently. Small community groups may be located in different cities within a county, or be active in different sectors of society; the question is what structures would make it possible for them to work together or with professors, students, and civil rights groups. If voting problems remain critical, the information exchange in the network and the contact with experts and civil rights groups can facilitate any larger organization that is needed.

97. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 6, 120 Stat. 577, 581 (to be codified at 42 U.S.C. § 19731). Expert fees authorized in this statute will help protecting the rights of voters in litigation.

98. For example, the Impact Fund, a California-based, non-profit organization founded in 1992, provides supplementary funding for public-interest litigation by awarding grants to eligible law firms or private attorneys working in areas such as human and civil rights. Grants are awarded four times a year and average between \$10,000 and \$15,000, with a maximum allowance of \$25,000 to any single applicant, in any given year. The Impact Fund has made the continued litigation of relevant cases possible by providing the funding necessary to cover reasonable costs and expenses of legal proceedings. For information on the Impact Fund, see Jessica Guynn, *Underdog Affinity Fires Seligman's Legal Career; Experience in Private, Nonprofit Spheres Informs His Wal-Mart Case Strategy*, *CONTRA COSTA TIMES* (Cal.), June 27, 2004, at A1; Russell Mitchell, "I Saw My Joy Curve Flattening Out," *BUS. WK.*, Jan. 23, 1995, at 89, 89; and Impact Fund, <http://www.impactfund.org> (last visited Sept. 27, 2008).

V. ACCESS TO LAWYERS

A. *The Importance of Attorneys*

Lawyers have crucial roles in support of voter participation. When laws and regulations affect voters adversely, the political process is too slow and often too unfriendly. Alternatives to litigation may be available. Lawyers are important to help enforce freedom-of-information laws, analyze proposed laws and regulations for community groups so that they can lobby regarding proposed laws, and comment on proposed rules or work with experts to show officials that they are likely to be found in violation of the Voting Rights Act. And litigation can be critically important when election officials breach state laws and when state laws or local practices violate the Voting Rights Act or other laws. Voter-advocacy problems go beyond currently proposed federal solutions. Even if election-reform legislation is enacted, it will require work from lawyers to protect the rights of voters.

The voting rights bar is very small. The Department of Justice litigates voting rights cases, but it is not staffed to pursue on-the-ground enforcement across the country. Civil rights centers litigate many voting rights cases,⁹⁹ but among most of these groups, voting rights are only part of a set of litigation priorities. Few independent civil rights attorneys handle voting cases, and very few lawyers in any state have handled more than one federal voting rights case. Voter-registration groups work mostly on front-end registration issues and are seldom involved in litigation. Redistricting issues have been the basis for most cases under section 2 of the Voting Rights Act. When the universe of possible cases is expanded to include a wider range of actions, such as enforcing Freedom of Information Act ("FOIA")¹⁰⁰ requests, the shortage of lawyers becomes even more obvious.

Most election litigation is brought on behalf of candidates and parties. These legal resources are not adequate for voter protection. While the parties have greatly increased the number of lawyers mobilized for elections,¹⁰¹ they are generally oriented toward short-term election

99. These civil rights organizations include the Brennan Center, the Advancement Project, the NAACP Legal Defense and Education Fund, the Puerto Rican Legal Defense and Education Fund, the Mexican American Legal Defense and Education Fund, and the Voting Rights Project of the American Civil Liberties Union.

100. 5 U.S.C. § 552 (2000).

101. See Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration To Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 939 (2005) (describing mobilization of lawyers by both Democratic and Republican parties to litigate election-administration issues); Charles Anthony Smith & Christopher Shortell, *The Suits That Counted: The Judicialization of Presidential Elections*, 6 ELECTION L.J. 251, 260 (2007) (discussing a dramatic increase in the amount of election-related and strategic litigation from the

problems and contests. Lawyers who represent candidates and parties do not usually work for civil rights organizations and community groups. The parties are inherently interested in protecting their own bases. The obstacles that make voter participation difficult and make the provision of legal services difficult also affect political parties. Even when parties know that it is in their interests to help voters, sustaining the widespread organizational and legal efforts is outside the usual scope of election litigation. To solve problems for voters, lawyers need to identify problems in advance, work with a variety of groups and individuals in disadvantaged communities, and improve compliance and voter access well before election cycles kick into overdrive.

The greatest structural problem is the difficulty of moving between the attorneys and the widespread and unorganized set of people who experience problems in voting. This gap is where the underlying lack of organization among many low-income and minority populations has a circular effect on voting problems. Unions have been engaged in voter registration and voter advocacy, but since most working people are not organized in unions,¹⁰² organized labor reaches a relatively small sector of voters. While African American churches have played a leading role in mobilizing voters, they cannot reach many of the people who encounter voting problems. As with problems in enumerating low-income citizens in the census, many aspects of life for low-income people exacerbate the difficulty of coordinating with lawyers over voting, including frequent moves, apartments shared by people with different last names, and the many forms and mail exchanges required to update postal service or voter registration.

Either the organizational gap between voters and lawyers will overwhelm the ability to seek legal remedies at the local level, or new organizational forms must be developed. Grassroots activists can master technical voting issues, but the process takes time and expert consultation. Organizing around voting can drain work on other crucial social and economic problems, such as housing, police-community relations, living wages, health care, and many other issues that engage civic activists around the country. Yet those grassroots activists have knowledge that is crucial to effective work on voting. They know many of the local problems. They are often connected to organizations and communities

2000 election to the 2004 election); Jerry Seper, *Democrats, Republicans Trade Charges on Voters*, WASH. TIMES, Oct. 30, 2004, at A2 (describing election-related litigation by both Democratic and Republican parties before the 2004 election).

102. See, e.g., Steven Greenhouse, *Union Membership Up 311,000 in '07, Biggest Rise Since '83*, N.Y. TIMES, Jan. 26, 2008, at A11 (noting that 12.1% of workers are union members, including 7.5% of private-sector workers and 35.9% of public-sector workers).

that can be resources for change, and they are able to mobilize local constituents.

The challenge is not only to identify illegal practices and bring legal challenges, but to head off new problems before they develop. It is also difficult for low-income and minority communities to keep track of state legislative changes in time to lobby against regressive laws. It can be difficult to participate from the grassroots in rule-making processes or to make timely comments during preclearance reviews by the Department of Justice.

Preclearance review "often provides the public with its only opportunity to review and comment on a new electoral law's fairness to minorities."¹⁰³ Public input may lead the Department of Justice to request more information or to interpose an objection to the law. In Florida, this dialogue has been very effective. Proposed legal changes have at times been withdrawn or modified after requests for more information; in other instances, the state changed its practices to conform to representations it had made to Department of Justice during preclearance review.¹⁰⁴ While many processes are open to public comment or participation and some accept comments that are not written, time and money constrain working people from traveling to state legislatures or from taking off work to speak to county commissions. The information that would connect practical problems to legal claims is spread diffusely among voters who may not have adequate, organized ways of sharing their experiences, identifying patterns and problems, and communicating them to lawyers. What is missing is a structure to connect grassroots knowledge and experience with enough legal expertise to support the voters.

Scholarly work on law and community-justice movements has grown rapidly in the past sixteen years.¹⁰⁵ Insights from this work can

103. Newman, *supra* note 18, at 24.

104. Al JoNel Newman has pointed out "The dialogue Section 5 necessitates between and among the Civil Rights Division, state officials, and interested persons and groups is, perhaps, even more important for protecting Florida's minority voters than the Department of Justice's objections." *Id.* at 19; *see also id.* at 19–24 (providing examples of legal changes modified or withdrawn after requests for more information during preclearance, and examples of civil rights advocacy persuading state to make changes based on previous representations to the Department of Justice). In a recent example of this process, after the Justice Department requested more information during preclearance review of the 2007 changes in Florida election law, the state amended its educational materials to include specific information on counting provisional ballots cast by voters who lacked photo identification. *See* E-mail from Maria I. Matthews, *supra* note 43 (promising to improve state voter education materials and attaching memoranda and e-mails to county supervisors of elections).

105. *See, e.g.,* LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 13–15 (2001) (explaining how residents in embattled communities build upon their own knowledge and acquire knowledge

help shape innovative programs, linking lawyers, voters, and voter advocates. The goal is not to make all voter problems into lawsuits. Rather, voters and community groups need access to legal advice about voter rights. Training programs should go beyond the scope of most continuing legal-education programs by bringing together community activists *as well as* lawyers, developing methods for working together and sharing information, and training lawyers in how to work with community groups.

Existing legal-services organizations and nonprofits may be able to help in creative ways. Statutory restrictions prevent agencies using Legal Services Corporation ("LSC") funds from working on redistricting, which is defined to include the time and manner of taking the census.¹⁰⁶ Even for voting issues that are not restricted, the resources of LSC-funded agencies are always stretched thin. In communities experiencing voting problems, agencies including legal-services offices might serve as centers for collecting information and forwarding complaints to election officials and civil rights organizations.

B. *A Role for Private Law Firms*

Public records are critical in voting cases. Requests for documents under public-records acts or freedom-of-information laws have uneven results. Sometimes agencies withhold relevant documents or produce them slowly, undermining the effectiveness of investigations. While

about substantive and procedural environmental decision-making, creating expertise that empowers community residents and allows them to influence decision-making); GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 11–83 (1992) (criticizing the "regnant" idea of lawyering in which the attorney is the primary force behind the client's case, arguing that litigation ignores the long-term needs of clients, and advocating work with community organizers); John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 *FORDHAM L. REV.* 1927, 1927–29 (1999) (describing cause lawyering); Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 *COLUM. HUM. RTS. L. REV.* 67, 109–31 (2000) (identifying challenges and opportunities for lawyers working with community groups); William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 *OHIO N.U. L. REV.* 455, 473–74 (1994) (arguing that lawyers should serve the goals of community organizations); Stephen Wexler, *Practicing Law for Poor People*, 79 *YALE L.J.* 1049, 1053 (1970) (arguing that a lawyer is likely to leave clients where they originated but more dependent on the lawyer's skills and that the lawyers serving the poor "must put his skills to the task of helping poor people organize themselves"); cf. Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 *UCLA L. REV.* 443, 469–79, 484–88, 502–16 (2001) (discussing successes and limits of local organizing and the importance of the professional role of lawyers working with community groups).

106. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, § 504(a), 110 Stat. 1321, 1321–53; William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960's to the 1990's*, 17 *ST. LOUIS U. PUB. L. REV.* 241, 258–61 (1998) (describing regulatory restrictions in 1980s and statutory restrictions in 1996).

attorneys' fees are available, there are few lawyers who bring these cases. It can be very difficult for community groups to find legal help for these actions.

Lawyers from the private bar have mobilized for election-protection programs, reflecting their enthusiasm for helping voters. However, the private bar has not developed any clear role in long-term work on voter protection. Voting cases often require protracted litigation. To maximize contributions from private firms that are willing to take up voting and democracy issues, it is important to find forms of involvement that work well with the needs and organization of law firms.

The private bar has resources that can be useful for voter advocacy, but identifying a helpful role for pro bono lawyers requires both analysis and coordination. Law firms could take on the litigation of FOIA and public-records issues. The presence of lawyers will expedite and improve the production of records.¹⁰⁷ Public-records issues can provide fruitful training for young attorneys, and these issues are relatively easy to supervise. Longer-term possibilities for law-firm assistance include funding fellows to work on voter-advocacy issues and taking on litigation of fees on behalf of civil rights lawyers in voting rights cases. Since conflicts of interest with governmental bodies can be an issue, large firms could commit to work in areas where they are not conflicted against local governments.

VI. TENSIONS AND TRANSFORMATIONS

In some ways, the effort to bring legal services to voters can be compared to the National Network of Innocence Projects. Those projects worked through law-school courses and clinics. They transformed public certainty about convictions, showing the existence of errors in the criminal-justice system. They broke new ground in the use of scientific evidence in post-conviction relief. The Innocence Project and the groups created through its model and initiative brought resources from law schools to meet the needs of wrongfully convicted prisoners.¹⁰⁸ A pro-

107. The skills of lawyers are helpful in identifying records and drafting effective requests. Lawyers can take quick legal action when documents are not produced in accordance with legal deadlines. Also, the danger of accruing attorneys' fees is an incentive for the production of documents.

108. See The Innocence Project Mission Statement, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited Sept. 27, 2008) (indicating that the Innocence Project has helped effectuate 220 successful post-conviction exonerations in the United States based on DNA evidence alone). See generally Keith A. Findley, *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 CLINICAL L. REV. 231 (2006) (summarizing the success of the Innocence Project and subsequent similar projects across the country in bringing about the exoneration of wrongfully convicted people and in promoting greater knowledge about the problem and causes of wrongful convictions).

ject focused on voter participation can highlight the persistence of difficulty in casting a ballot and having it counted. Increasing legal help for voters has some structural similarity to the network of innocence projects that have connected experts with lawyers and people in need.

In other ways, however, work on voting is very different than work on wrongful convictions. Part of the organizing power of the Innocence Project lay in the cool certainty of DNA evidence, and part of it lay in the moral weakness of the positions of states resisting the introduction of evidence of innocence. In contrast, arguments about the danger of voter fraud have won some support in debates about photo identification requirements. *Crawford v. Marion County Election Board* denied a facial challenge to the Indiana law, accepting as legitimate the stated interest of Indiana in preventing fraud as a justification for enacting the photo identification requirement, despite the lack of evidence of voter impersonation at the polls.¹⁰⁹ There has been no equivalent to DNA evidence in the debates about photo identification. The rejection of facial challenges in *Crawford* increases the need for information on problems in voter participation. Because measures that chill voter participation can affect the ability to develop evidence about the factors affecting participation, *Crawford* will tend to heighten both the need for evidence and the difficulty of getting it. Experts can help, and *Crawford* made them even more necessary.

Part of the impetus for better data collection is to avoid reliance on anecdote. The collection of election-incident reports relies substantially on anecdotes and emergency phone calls. Better data production from state and local officials will help. Work by experts and lawyers will also be important to support arguments for legislative reform. The process of analyzing data *before* elections can encourage better documentation throughout the process and better accountability for the adequate supply of election resources. When legislation reforms are enacted, local monitoring of implementation will be important to making change effective.

The project of gathering evidence of voting problems requires expertise. Simultaneously, that project demands connection to community knowledge of the problems and issues affecting voters. Therefore,

109. 128 S. Ct. 1610, 1617–20, 1627, 1629 (2008). Three justices, Stevens, Roberts, and Kennedy, found the goal of protecting against voter fraud plainly legitimate despite the lack of evidence of voter impersonation at the polls, *id.* at 1618–19; those justices would consider an as-applied challenge with evidence of the burden of the law and the difficulty of complying with it, *see id.* at 1621–23. Three justices, Scalia, Thomas, and Alito, found the burden imposed by the law “minimal and justified.” *Id.* at 1624. Justices Souter and Ginsburg found that the state had failed to justify the limitations on the right to vote and the burden on voters who are poor and old to be unreasonable and irrelevant to the goals of the state. *Id.* at 1627, 1640–43. Justice Breyer found it unconstitutional because of the burden on voters who lacked drivers’ licenses or other acceptable identification. *Id.* at 1643.

effective work will require outreach and training for both lawyers and non-lawyers. Lawyers need training to work with communities and take up issues of greatest concern to community members. Activists need training on how to work with lawyers on voting issues. They also need to assess how much they can work with legal support in contexts such as legislative lobbying and rulemaking.

The proposal for access to lawyers for voter advocacy can also be compared to institutional efforts to change the practice of law by changing compensation for attorneys. These efforts have included expansive projects such as Interest on Lawyers Trust Accounts ("IOLTA") being used for legal aid,¹¹⁰ as well as restrictive projects such as capping attorneys' fees to limit tort litigation. Mobilizing experts and lawyers would work through identifying key areas for intervention and creating new methods of delivering services. But the project of bringing experts and lawyers to voters does not focus primarily on attorneys' fees, nor even primarily on lawyers themselves. It must focus on structural obstacles inside and outside the legal profession, because political participation is so closely bound up with other conditions of life for disadvantaged voters.

The goal of increasing legal assistance is not to turn all community struggles over voting into litigation. As with other areas of community-based lawyering, supporting community development and self-representation are also important goals. Sometimes change is won more quickly, effectively, or durably through organizing. Even when change takes time, community activism can protect gains and help work on future issues. Too much time in court may diminish rather than support the role of community activists, especially if the courtroom diverts energy from other strategies that may be successful.¹¹¹

There are roles for both experts and lawyers that encourage activism rather than replace it. If the private bar takes on the development of public records, that work can support many different uses by community groups. Academic analysis can provide information that would be useful either for activism or legal action.

The more difficult question may be how to deal with the tension

110. See generally David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209 (2003) (discussing IOLTA programs and legal challenges to these programs); Tarra L. Morris, Comment, *The Dog in the Manger: The First Twenty-Five Years of War on IOLTA*, 49 ST. LOUIS U. L.J. 605 (2005) (explaining the history of IOLTA programs and legal challenges to IOLTA).

111. See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 502-06 (1976) (exploring differences in goals between class members and attorneys in desegregation, class-action litigation); Quigley, *supra* note 105, at 462 (emphasizing the responsibility of lawyers to "journey with the community" and work with local organizers).

between increasing legal assistance for a variety of election problems, and, on the other hand, the importance of developing well-crafted lines of litigation in claims under the Voting Rights Act and the Constitution.¹¹² This has long been a concern in lawyering for community justice. In past civil rights struggles, divisions have sometimes emerged between national and local legal strategies, or between litigators and client communities. The highly technical nature of voting rights claims and the wide sweep of political-participation issues may pose these issues particularly sharply. Therefore, some of the most important work to be done to develop legal resources will involve building channels of communication that can work with the complex needs and legal possibilities. These bridges are needed not only between activists and lawyers but also between local and national organizations.

Despite the structural challenges, it is important to take up work on voting as part of community-based lawyering. John Calmore describes “the people who suffer injustice most acutely” as “tough, resilient, and able to survive under the worst of circumstances. The character and persistence they develop, when translated into a social movement, is inspiring without romance.”¹¹³ People have “few places from which they are able to lift their voices and assert their collective strength. Where this occurs, however, is often through their own organizations and activism.”¹¹⁴ In the process of building political participation for those who suffer injustice most acutely, casting a ballot is only one part of the work. Building work for social change in many areas is the rest of the project.

Voting problems have led to a period of activism for democracy and grass-roots interest in voting. Attorneys and academics can make unique contributions to this movement for voter empowerment. “[B]ecoming a part of activist social movements for social justice is imperative for lawyers to heed their public calling in the truest sense.”¹¹⁵ We need to develop ways to deliver expert and professional help that will enrich the resources of local activists and strengthen their work for democracy and equality.

112. For example, tension and litigation strategy questions developed when *Shelley v. Kraemer*, 334 U.S. 1 (1948), was brought by a lawyer who at the time was not working with the NAACP Legal Defense and Education Funds. William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1627–32 (1997).

113. John O. Calmore, “Chasing the Wind”: Pursuing Social Justice, Overcoming Legal Mis-Education, and Engaging in Professional Re-Socialization, 37 LOY. L.A. L. REV. 1167, 1203 (2004).

114. *Id.* at 1203–04.

115. *Id.* at 1203.