QUEER STUDIES II:
SOME REFLECTIONS ON THE STUDY OF SEXUAL ORIENTATION BIAS IN THE LEGAL PROFESSION

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The [U.S. Court of Appeals for the] Ninth Circuit takes pride, justifiably, in the fact that it is the first federal court to have conducted a study of gender bias in the judicial system. We voted at our 1993 conference to conduct a similar circuit-wide study of racial, ethnic and religious bias in the judicial system. However, when a lawyer raised the subject of bias based on sexual orientation, an embarrassed silence followed. Finally, the chief judge stepped in and explained that we couldn't take on too many problems at one time. It is doubtful that the answer convinced anyone. The subject just made our judges and lawyers too uncomfortable.[1]

I. INTRODUCTION

In the past seven years, eleven bar associations have undertaken studies and issued reports about sexual orientation bias in the legal profession. It is fair to assume that this is only a beginning, and that calls for such studies will continue to escalate in the coming years. This is, therefore, an opportune time to evaluate what has been accomplished to date and to consider how future efforts can be even more efficacious. In what follows, I describe the contexts from which the sexual orientation bias studies arise (Part II); look at how the reports have been sponsored and issued (Part III); describe the methodologies that have been used and analyze their strengths and weaknesses (Part IV); re-

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1. Stephen Reinhardt, *The Court and the Closet; Why Should Federal Judges Have to Hide Homosexuality?*, WASH. POST, Oct. 31, 1993, *available in* 1993 WL 2091078.

count and consider the meaning of the findings that have been documented (Part V); consider the recommendations that have been issued (Part VI); and, finally, provide a set of suggestions for future efforts (Part VII).

The three primary conclusions that I draw, discussed more fully below, are the following. First, the bar is to be commended for the initial steps it has taken in surveying sexual orientation bias — no other profession can claim this degree of self-analysis and concern. Yet the studies conclusively demonstrate just how preliminary these steps have been. No judiciary has yet to issue a report on sexual orientation bias. All eleven reports have been issued by bar associations, and by bar associations in only a handful of large cities. As Judge Reinhardt's statement above implies, it would be an important step for the judiciary to embrace the normative message of these studies and to lend its imprimatur — nationwide — to ensuring equal justice for all Americans regardless of their sexual orientation.

Second, these reports constitute a significant portion of all of the existing empirical work about anti-gay bias. Yet methodological problems with surveying gay people, coupled with the fact that it is so obvious that such bias exists, lead to the conclusion that future studies should focus more on making concrete, achievable recommendations; on developing model sexual orientation policies; and on the perpetuation of such programs, rather than on the task of quantitative analysis which will, inevitably, never satisfy its critics.

Finally, these bias studies have the potential to produce more justice for gay people, not just more professional stability for queer attorneys. To this end, the studies should be geared towards culminating with judicial education programs and such programs should be developed, tested, and implemented.

Pro-gay advocates can be emboldened by the fact that sexual orientation bias is already outlawed by canons of judicial ethics. Society knows that sexual orientation bias exists and has largely accepted that it is bad. The time has come to devote energy to doing something about it by training judges to provide more justice and, simultaneously, by propelling gay people onto the bench.

II. THE CONTEXT IN WHICH SEXUAL ORIENTATION BIAS STUDIES ARISE

The sexual orientation bias studies emerge out of several distinct contexts. First, the studies emulate similar efforts to study gender and racial bias at the bar and in the courts. The first gender bias study was conducted by the New Jersey court system in 1982. By 1988, the Conference of Chief Justices and the Conference of State Court Administrators had adopted resolutions "urging every state supreme court chief justice to establish a task force 'devoted to the study of gender bias in the court system.'"[2] Within a decade, more than thirty state judiciaries had convened task forces on gender bias and nearly thirty reports had been issued.[3] In the early 1990s, spurred in part by congressional encouragement,[4] the United States Courts of Appeals for the D.C. and Ninth Circuits established task forces to study gender bias in the federal courts and nearly all of the Circuits have since followed.[5] Interestingly, studies of racial bias in the courts and bar came later;[6] the first race bias studies appeared in the

2. Lynn Hecht Schafran, *Gender and Justice: Florida and the Nation*, 42 U. FLA. L. REV. 181, 186 (1990) [hereinafter Schafran, *Gender and Justice*] (quoting Conference of Chief Justices, *Resolution XVIII, Task Forces on Gender Bias and Minority Concerns* (adopted Aug. 4, 1988), *published in* 26 CT. REV. 5 (1989); Conference of State Court Administrators, *Resolution I, Task Forces on Gender Bias and Minority Concerns* (adopted Aug. 4, 1988)).

3. *See* Vicki C. Jackson, *Empiricism, Gender, and Legal Pedagogy: An Experiment in a Federal Courts Seminar at Georgetown University Law Center*, 83 GEO. L.J. 461, 462 n.5 (1994) ("By 1994, task forces on gender bias had started in at least 38 state court jurisdictions, and 28 had issued reports."); *see also* Judith Resnik, *Ambivalence: The Resiliency of Legal Culture in the United States*, 45 STAN. L. REV. 1525, 1544-46 (1993) (listing 24 gender bias reports) [hereinafter Resnik, *Ambivalence*].

4. Title IV of the Violent Crime Control and Law Enforcement Act of 1994, codified at 42 U.S.C.A. § 14001 (West 1995), now encourages the circuit judicial councils to conduct studies of gender bias in their circuits and to implement recommended reforms, requires the Administrative Office of the U.S. Courts to serve as a clearinghouse for such reports, and authorizes the Federal Judicial Center to develop model programs on gender bias issues.

Jackson, *supra* note 3, at 464 n.11.

5. *See* Special Comm. on Race and Ethnicity, *Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 64 GEO. WASH. L. REV. 189, 198 n.12 (1996) [hereinafter *Special Report*] ("In addition to the D.C. Circuit, nine circuits currently have task forces operating."). On the reluctance of the federal courts to pursue studies of bias, *see* Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1685-89 (1991) [hereinafter Resnik, *"Naturally"*].

6. This is interesting because we tend to think of the 1970s women's rights movement efforts following on the heels of the black civil rights movement of the 1960s. It is less usual to uncover an area of progressive activity that has commenced

late 1980s.[7] By 1996, nineteen states had formed task forces devoted to studying racial and ethnic bias and nine studies had been completed.[8]

The sexual orientation bias studies not only follow from these earlier efforts, they often overlap with them. A lesbian fired from her job may find it difficult to determine whether her employer was sexist or homophobic.[9] More generally, homophobia, by forcing particular gender roles on individuals (e.g., women should sexually desire men), can be seen as a manifestation of sexism.[10] Thus, many individuals who fall at the intersection of these identity categories may find themselves the subjects of a number of different types of bias studies.

While sexual orientation, gender, and race studies arise out of similar concerns about bias in the legal profession, neither the bar nor the bench has been as quick to embrace studies of anti-gay bias.[11] Two factors may explain this disparity. By the time judiciaries embraced the study of gender and race bias, legal

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in the women's rights movement and then been replicated by race-based civil rights efforts.

7. *See Special Report*, *supra* note 5, at 197 n.6 ("The first state task force to study race and ethnicity was formed in Michigan in 1987; a final report was issued in 1989.").

8. *See id.* at 196-97. The Information Service of the National Center for State Court maintains a website containing a bibliography of "Materials from States and Individual Task Forces and Commissions on Racial and Ethnic Bias in the Courts." *See* Information Serv. of the Nat'l Ctr. for State Courts, *Racial and Ethnic Bias in the Courts Bibliography* (last modified April 1997) <http://www.ncsc.dni.us/is/Bib2_1.htm>.

9. For example, participants to one sexual orientation bias study stated:

> I had one highly negative evaluation that can probably be most directly attributed to my open feminist politics rather than homophobia (although the fact that as a female employee, I didn't act stereotypically toward supervisor complicates analysis).
>
> It's difficult to be a rainmaker without a husband to drag to dinner. On the other hand this is a problem for all single women, not just lesbians.

Committee on Lesbian and Gay Men in the Legal Profession, *Report on the Experience of Lesbians and Gay Men in the Legal Profession*, 48 REC. ASS'N B. CITY N.Y. 843, 855, 870 (1993) [hereinafter *ABCNY 1993 Report*].

10. *Cf.* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that gender role deviation constitutes sex discrimination). *See generally* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

11. *See* Reinhardt, *supra* note 1; *see also supra* text accompanying notes 3-8 (discussing 30 gender and 20 race/ethnicity bias studies performed by judicial systems, as compared to approximately 12 sexual orientation studies produced only by local bar associations).

norms outlawing such bias were an accepted part of the American legal landscape.[12] Laws prohibiting discrimination on the basis of sexual orientation have not yet achieved such widespread acceptance.[13]

A second factor that spurred judicial involvement in gender bias work was the institutional support for such studies. NOW Legal Defense and Education Fund made this a priority in the 1970s and devoted significant resources to making these studies happen.[14] Moreover, in 1985, the National Association of Women Judges (775 members-strong at that point) created a National Task Force on Gender Bias in the Courts "to encourage the formation of state task forces on gender bias throughout the country and to provide technical assistance to enable these task forces to perform their functions as efficiently and effectively as

12. These studies began proliferating in the 1980s, some two decades after Congress' enactment of the Civil Rights Act of 1964.

13. *See* WILLIAM B. RUBENSTEIN, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 469 (2d ed. 1997) (citing nine state sexual orientation bias laws and noting absence of federal law). New Hampshire enacted a gay rights law in 1997, thus bringing the current total to 10 states. *See New Hampshire Governor Signs Gay-Rights Measure*, L.A. TIMES, June 7, 1997, at A17, *available in* 1997 WL 2217897.

14. Lynn Hecht Schafran, long the director of NOW's efforts in these areas, writes:

> The catalyst for the gender bias task force movement was an effort, conceived in 1969 and formally inaugurated in 1980, to introduce information into state and national judicial education programs about the way gender bias affects decisionmaking and court interaction. In that year, the National Organization for Women Legal Defense and Education Fund (NOW LDEF) established the National Judicial Education Program to Promote Equality for Women and Men in the Courts (NJEP) and invited the newly organized National Association of Women Judges to become the project's cosponsor. The inspiration for NJEP came from women litigators whose personal experiences in the courts demonstrated that many judges were unaware of the social issues confronting women and that these judges were undermining the promise of the remedial legislation in areas such as domestic violence and divorce. . . . From its inception [NJEP] realized the importance of developing specific information about gender bias in the court of each state in which it was teaching. Local data was [sic] necessary to demonstrate that gender bias was in fact a problem in each jurisdiction and to minimize the denial that is an inevitable aspect of raising this sensitive issue.

Schafran, *Gender and Justice*, *supra* note 2, at 183-84 (footnotes omitted); *see also* LYNN HECHT SCHAFRAN & NORMA JULIET WIKLER, OPERATING A TASK FORCE ON GENDER BIAS IN THE COURTS: A MANUAL FOR ACTION (1986) [hereinafter NJEP MANUAL]; Norma Juliet Wikler, *On the Judicial Agenda for the 80s: Equal Treatment for Men and Women in the Courts*, 64 JUDICATURE 202 (1980).

possible."[15] These efforts were then embraced by established institutions of the bench and bar.[16] Similarly, in 1988, the National Consortium on Task Forces and Commissions on Racial and Ethnic Bias in the Courts was formed to coordinate the efforts of the state bias commissions.[17]

The initial examinations of sexual orientation bias within the legal profession are a consequence of a growing awareness of such bias at the bar, but they are occurring without significant, centralized, institutional support.[18] Awareness of sexual orientation bias commenced in the late 1970s, following the formation of the first gay law student groups. In the early 1980s, law schools began adopting policies prohibiting discrimination on the basis of sexual orientation. By 1990, the AALS had adopted a policy that member schools not discriminate on this basis nor allow on-campus recruiting by employers who discriminate on the basis of sexual orientation.[19] Typically, law firms that recruit at law schools must sign pledges agreeing to comply with these requirements. It is probably fair to assume that, as of this writing, nearly all medium and large size law firms in the United States have signed such a pledge. An increasing number of firms also offer same-sex partner benefits.[20]

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15. NJEP MANUAL, *supra* note 14, at [introductory page from The Nat'l Ass'n of Women Judges].

16. Evidence of this is contained in guidebooks published by such institutions. *See, e.g.*, MOLLY TREADWAY JOHNSON, FEDERAL JUDICIAL CTR., STUDYING THE ROLE OF GENDER IN THE FEDERAL COURTS: A RESEARCH GUIDE (1995); NAT'L CTR. FOR STATE COURTS AND THE STATE JUSTICE INST., ESTABLISHING AND OPERATING A TASK FORCE OR COMMISSION ON RACE AND ETHNIC BIAS IN THE COURTS (1993).

17. *See* Todd D. Peterson, *Studying the Impact of Race and Ethnicity in the Federal Courts*, 64 GEO. WASH. L. REV. 173, 174 n.4 (1996) (citing Arline S. Tyler & Steven Montano, *State Panels Document Racial, Ethnic Bias in the Courts*, 78 JUDICATURE 154 (1994)).

18. The following information is extracted from William B. Rubenstein, *In Community Begins Responsibility: Obligations at the Gay Bar*, 48 HASTINGS L.J. (forthcoming 1998).

19. *See* Gene P. Schultz, *The Inclusion of Sexual Orientation in Nondiscrimination Policies: A Survey of American Law Schools*, LAW & SEXUALITY, Summer 1992, at 131, 140. The ABA also requires law schools to have such policies as a condition of accreditation.

The AALS Directory of Law Teachers now also includes a list of "Gay, Lesbian and Bisexual Community Law Teachers." *See* ASS'N OF AM. LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS 1997-98 1335-36 (1997).

20. *See, e.g.*, COMM. ON SEXUAL ORIENTATION ISSUES, B. ASS'N OF SAN FRANCISCO, BASF REP. ON EMPLOYMENT POLICIES FOR GAY AND LESBIAN ATTORNEYS 45 (1996) (reporting that 28% of the 64 San Francisco law firms that responded to

Gay-oriented legal institutions also expanded rapidly in the late 1980s and early 1990s. For example, between 1985 and 1995, Lambda Legal Defense and Education Fund grew from one lawyer in a one-room office into a nationally-renowned legal institution with offices in New York, Chicago, Los Angeles, and Atlanta. By the late 1970s, small private law firms dedicated to serving the lesbian and gay community also started to dot the legal landscape. By the late 1980s, they had proliferated. For example, the Los Angeles Gay and Lesbian Yellow Pages contains forty-two pages of attorney listings that includes sixty different law firms.[21] The growth of the gay bar is reflected in the growing number of local lesbian and gay bar associations as well as the expanding National Lesbian and Gay Law Association. In 1988, the latter group held its first national law conference, Lavender Law I, in San Francisco. Five Lavender Law conferences have followed, each generally attracting hundreds of practicing attorneys from across the United States.

Notwithstanding the growth and accomplishments of the gay bar, the major gay legal organizations have not yet had the opportunity to devote the kind of serious attention to the bar association bias work that NOW Legal Defense Fund did in the 1980s. With few laws or cases protecting against sexual orientation discrimination itself, these groups' attention has understandably been trained elsewhere. Further, there are only two small organizations of gay judges in the United States, both only five years old, and each with only a few dozen judges on their mailing lists.[22] No organization acts as a clearinghouse for these studies. No established institutions of the bar or bench have underwritten guidebooks to help others undertaking them. Such institutional constraints, coupled with the nascent character of pro-gay legal norms, have limited the pace at which sexual orientation bias studies have been undertaken.

Not only is the quantity of sexual orientation bias studies limited, the reports have come from relatively few geographic locations. Four of the eleven studies undertaken to date come from California, one from the state, two from San Francisco, and

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the survey offered health benefits to partners of lesbian/gay employees) [hereinafter BASF REPORT].

21. *See* 98 Gay & Lesbian Community Yellow Pages 47-90 (1998).

22. E-mail from Judge Michael R. Sonberg, President, *Association of Lesbian & Gay Judges*, to William Rubenstein, Acting Professor, *UCLA School of Law* (Jan. 30, 1998) (on file with author); *see also ABCNY 1993 Report*, *supra* note 9, at 863 n.24.

one from Los Angeles. Another three emanate from New York City. The remaining three were conducted by organizations in Seattle, Minneapolis/St. Paul, and Boston. That the studies commenced in these places is not surprising, given the concentration of lesbians, gay men, and bisexuals in major metropolitan areas. What is more surprising is that these efforts have spread so slowly to other areas. After the first gay civil rights laws were passed by municipalities in the early 1970s, and the first domestic partnership ordinances were enacted in the early 1980s, such efforts quickly were adopted in localities widely dispersed throughout the United States.[23] Indeed, today, gay activism is quite diffuse, with important efforts raging from Hawaii to Maine, and most places in between. In light of the fact that other gay rights issues have aroused interest across the country, the short list of cities where studies of sexual orientation bias in the legal profession have been conducted is striking.

These bar efforts may have spread more slowly than legislative efforts for another important reason: there has been relatively little empirical investigation of sexual orientation discrimination anywhere in the United States.[24] Efforts to enact a federal gay rights law have been hampered by, among other factors, this absence of empirical data. Moreover, in places where gay rights laws have been enacted, they have not produced large numbers of reported discrimination complaints.[25] The dearth of efforts to examine sexual orientation bias makes these bar studies more meaningful than they might otherwise be. Not only do they document bias against gay people in the legal system, they also provide some of the most important existing information about sexual orientation discrimination occurring anywhere. In this sense, the studies may contribute not only to bettering the situation of gay attorneys, but also to the promulgation of wider societal antidiscrimination principles.

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23. For a listing, see NAN D. HUNTER ET AL., THE RIGHTS OF LESBIANS AND GAY MEN: THE BASIC ACLU GUIDE TO A GAY PERSON'S RIGHTS 204-08 (3d ed. 1992).

24. *See* M.V. Lee Badgett, *Vulnerability in the Workplace: Evidence of Anti-Gay Discrimination*, ANGLES: POL'Y J. INST. FOR GAY & LESBIAN STRATEGIC STUD., Sept. 1997, at 1, 1-4 (summarizing results of a national survey and twenty local studies but concluding that "little systematic research exists").

25. *See generally* GENERAL ACCOUNTING OFFICE, SEXUAL-ORIENTATION-BASED EMPLOYMENT DISCRIMINATION: STATES' EXPERIENCE WITH STATUTORY PROHIBITIONS (1997).

III. SOURCES OF SEXUAL ORIENTATION BIAS STUDIES

All of the sexual orientation bias studies to date have been conducted by state or local bar associations. Not a single sexual orientation bias study has been completed by the judiciary.[26] By contrast, gender and racial bias studies have largely been undertaken by courts, not bar associations. Most data on sexual orientation discrimination outside the bar has been collected by lesbian and gay political organizations, usually in efforts to persuade legislators to enact civil rights protections.[27] The bar association studies of sexual orientation discrimination are an important step forward because they represent efforts to study this problem by non-gay institutions, although often it is the gay members of such institutions who have pushed for the studies to be undertaken. That these efforts have been conducted by non-gay institutions indicates growing acceptance of the principle that sexual orientation discrimination is wrong. While this alone is encouraging, a final report published by the judiciary itself would place the state's imprimatur on efforts to uncover sexual orientation bias. Judith Resnik has characterized such official sponsorship of gender bias studies as "radical,"[28] writing that the bias report conclusions,

> are officially authored by chief justices and leading jurists and lawyers (and not "only" by academic lawyers and social scientists, and not "only" by members of the group against whom the discrimination runs) and are published in reports literally stamped with a court's seal.[29]

Judicial reports on sexual orientation bias would similarly send a strong message that the government acknowledges that such bias

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26. The Chief Justice of the Supreme Court of New Jersey has convened a Task Force on Gay and Lesbian Issues that is currently in the process of undertaking such a judicially-sponsored study of sexual orientation discrimination. *See* Letter from Deborah T. Poritz, Chief Justice, *Supreme Court of New Jersey*, to Ruth E. Harlow, Esq. (June 30, 1997) (on file with author). Similarly, the Judicial Council of California, the chief policy making agency of the California judicial system, is currently conducting a study through its Sexual Orientation Fairness Subcommittee. *See* Donna J. Hitchens, *California Studies Sexual-Orientation Bias*, FAM. ADVOC., Summer 1997, at 29.

27. *See* LEE BADGETT ET AL., NATIONAL GAY & LESBIAN TASK FORCE POL'Y INST., PERVASIVE PATTERNS OF DISCRIMINATION AGAINST LESBIANS AND GAY MEN: EVIDENCE FROM SURVEYS ACROSS THE UNITED STATES (1992). *See generally* MATTHEW A. COLES, TRY THIS AT HOME!: A DO-IT-YOURSELF GUIDE TO WINNING LESBIAN AND GAY CIVIL RIGHTS POLICY 200-02 (1996) (discussing the benefits of discrimination surveys in efforts to enact civil rights laws).

28. Resnik, *Ambivalence, supra* note 3, at 1529.

29. *Id.* at 1533.

is unacceptable and that it is willing to take the initial steps toward ending it.

IV. COMMON METHODOLOGIES OF SEXUAL ORIENTATION BIAS STUDIES

The abstracts of sexual orientation bias studies printed herein demonstrate that the strategies for conducting this work have been fairly uniform. Most of the reports follow from the distribution and collection of survey instruments; some involve the use of focus groups; other studies simply analyze previously-collected data and reports.

Most of the surveys were aimed at lesbian, gay, and bisexual members of the legal community and sought information about their individual experiences. Some of the studies took a broader focus. For example, one done by the Association of the Bar of the City of New York surveyed all Legal Aid attorneys, only 12% of whom were gay, to ascertain their sense of the barriers that lesbian, gay, and bisexual attorneys might confront in the courts, and hence the profession. The California State Bar included questions about sexual orientation in a demographic survey of more than 14,000 randomly-chosen members. In both San Francisco and Los Angeles, law firms were surveyed about the presence of bias in their workplaces and about any steps they had undertaken to address such bias.

The methods employed to date raise several interrelated concerns. The first involves the scope of the studies.[30] Studies of gender and race bias have examined at least three relatively distinct phenomena: (1) judicial bias in substantive legal rulings concerning women and minorities; (2) discriminatory animus expressed by court officials (attorneys, paralegals, courthouse employees, jurors, litigants, etc.) against court users (attorneys,

30. One interesting note about the scope of all of these types of studies is their use of neutral language — thus, the study of "gender bias" in the courts rather than "sex discrimination." One explanation of this is linguistic — that employment of the term "gender" is meant to indicate that what is being studied are the socially constructed, not natural, differences between the treatment of men and women. *See* Judith Resnik, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195, 2201 (1993). A second aspect is that the term is meant to capture bias against men as well as women, though perhaps "sex discrimination" is traditionally thought of as applicable only to harms women face. *See* NJEP MANUAL, *supra* note 14, at 7. Most generally, though, the term "gender bias" is employed because these studies are meant not simply to document the discrimination women (or men) face in the legal profession or court system, but rather how *gender* affects justice at all levels.

witnesses, litigants, etc.); and (3) bias within the legal profession that impedes professional opportunities. Gender and racial bias studies have therefore often extended beyond the bar to consider the experiences of users of the penal and legal systems, and they have looked at the lives of law students. They have also considered how substantive law embodies gender and race bias.[31] By contrast, the sexual orientation studies have generally attempted to analyze only one thing: bias faced by attorneys (and sometimes law students). These studies have not typically looked at bias throughout the legal system (including, for instance, police forces) nor analyzed the content of judicial decisions.

The fact that it is often difficult to know who "is" gay leads to a second methodological concern about sexual orientation bias studies — the randomness of sampling methods and the statistical significance of responses.[32] There is no fixed definition of what constitutes sexual orientation,[33] and even those individuals

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31. For example, Vicki Jackson writes:

> These reports looked into how women attorneys were treated by judges and other lawyers, and how women parties — especially (i) women in family court cases involving divorce, custody, support and alimony, (ii) women as victims of crime including domestic violence and sexual assault, and (iii) women as criminal defendants — were treated. Some task forces looked at the awards of civil damages and tort recoveries, for women and men. Many looked at the employment and appointment of women and men in court systems and the legal profession as a whole. Some considered legal education and its impact on women and men. Even for studies limited to the courthouse, there are many different participants whose treatment and behavior can be and have been studied — lawyers, parties, courthouse employees, witnesses, jurors, and judges.

Jackson, *supra* note 3, at 462 n.5; *see also* 42 U.S.C.A. § 14001(b) (1994) (outlining 12 areas of study for federal court undertaking gender bias reports); COMMISSION TO STUDY RACIAL AND ETHNIC BIAS IN THE COURTS, SUPREME JUDICIAL COURT OF MASS., EQUAL JUSTICE: ELIMINATING THE BARRIERS (1994) (considering, inter alia, jury composition, sentencing, appointment of judges, and employment in the courts); JUDICIAL COUNCIL OF CAL., FINAL REP. OF THE CAL. JUDICIAL COUNCIL ADVISORY COMM. ON RACIAL AND ETHNIC BIAS IN THE COURTS (1997) (considering, inter alia, treatment of counsel, language and cultural barriers in the courts, sentencing); *Special Report*, *supra* note 5 (discussing, inter alia, the composition of the courthouse work force, including judges, law clerks, ADR panels, and the racial composition of the judicial conference).

32. *See generally* Los Angeles County Bar Ass'n Ad Hoc Comm. on Sexual Orientation Bias, *The Los Angeles County Bar Association Report on Sexual Orientation Bias*, 4 S. CAL. REV. L. & WOMEN'S STUD. 295, 377-79 (1995) [hereinafter *LACBA Report*].

33. *See* EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 292-93 (1994) (discussing construction of a study of homosexuality into three distinct dimensions: behavior, desire, and identity).

who identify as lesbians, gay men, and bisexuals are not visually identifiable as such.[34] The ambiguity of sexual orientation and its apparent invisibility present unique problems for those attempting to define what actions evidence bias and to assess the precise quantity of such bias. Given such a starting point, it is difficult, if not impossible, to conduct random population "sampling" because a surveyer can never know what constitutes the proper population to be "sampled" nor what a good "sample" of that population would consist of.

Not surprisingly, then, few of the sexual orientation bias studies even attempted to collect information through random sampling methods. Most of the studies have gathered information by targeting their surveys to people known to be openly gay, such as members of gay bar associations.[35] Nearly all the studies rely on voluntary responses and most of these responses were of "self-reported" instances of bias which are "inherently subjective."[36] These approaches inevitably skewed the studies' empiric reliability. However, in the absence of some accepted index, the ways in which the results are inaccurate is difficult to ascertain. On the one hand, many people who have experienced sexual orientation bias are not members of gay organizations and thus are rarely reached by these surveys. Thus, there might be underreporting of the magnitude of bias.[37] On the other hand, those who are members of these gay organizations are probably openly gay, and therefore may be more likely to face overt discrimination, creating a risk of the incidence of bias being over-represented.[38] In addition, organizations that are identified as "gay" often consist of more men than women, more whites than people of color.

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34. *See* COMM. ON LESBIAN AND GAY ISSUES, B. ASS'N OF SAN FRANCISCO, CREATING AN ENVIRONMENT CONDUCIVE TO DIVERSITY: A GUIDE FOR LEGAL EMPLOYERS ON ELIMINATING SEXUAL ORIENTATION DISCRIMINATION 1 n.1 (1991) [hereinafter BASF REPORT] ("It is important to note that collection of data documenting this form of discrimination is particularly problematic because many gay and lesbian law students and attorneys are reluctant to reveal their sexual orientation, and many legal organizations are reluctant to collect data on the numbers of openly gay and lesbian law students and employees.").

35. The L.A. County Report collected information from a large cross section of bar association members, thus leading it to conclude that the data it received from the *heterosexual* attorneys were drawn from a random sample. *See LACBA Report*, *supra* note 32, at 377.

36. *Id.* at 378.

37. *See ABCNY 1993 Report*, *supra* note 9, at 851.

38. Of course, those who are closeted are more likely to face the discriminatory attributes of forced hiding, characteristics which may be underreported given the methodologies employed by the studies.

Thus, one would expect that the responses to bias surveys distributed through such organizations would be skewed along these divides.[39]

Indeed, a third methodological issue concerns the fact that none of the studies to date has looked separately at bias affecting gay men and bias affecting lesbians, nor considered sexual orientation bias in the context of race or class.[40] Traditionally, most of the gender studies did not distinguish the treatment of white women from that of women of color,[41] but recently some have begun to do so.[42] Of the nine reports from race and ethnic bias task forces, two looked specifically at issues concerning minority women.[43] Unless studies are designed to account for the effect of gender, race, and class, sexual orientation bias studies might be thought to have as their only subject white gay men.[44] As noted above, this concern begins with the fact that surveys are often

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39. *See ABCNY 1993 Report*, *supra* note 9, at 851.

40. The ongoing California judicial study states as one of five of its guiding principles that it "will identify and address the interests and needs of lesbians and gay men who have historically suffered from multiple biases such as race, gender, and disability." Hitchens, *supra* note 26, at 29.

41. The NJEP Manual acknowledged that "race, ethnicity, economic status and age certainly affect the treatment of women in the courts and compound the effects of sexism" and urged that task forces "reflect awareness of how these additional factors interrelate with gender." NJEP MANUAL, *supra* note 14, at 6. Yet the Manual warns that "attempting simultaneously to investigate all forms of racism and other kinds of bias in addition to sexism at an appropriate level of detail would be impossible within the constraints imposed on a Task Force," *id.*, and thus concludes that *separate* task forces on racial bias are necessary. *Id.* at 8.

42. *See, e.g.*, JUDICIAL COUNCIL ADVISORY COMM. ON GENDER BIAS IN THE COURTS, ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS, REPORT OF THE JUDICIAL COUNCIL ADVISORY COMMITTEE ON GENDER BIAS IN THE [CALIFORNIA] COURTS 14 (1990). *See generally* Resnik, *Ambivalence*, *supra* note 3, at 1539 n.65 ("Of the 24 reports on gender considered here, only a few discuss, sometimes briefly, the distinctive status of being both a woman and of color.").

43. *See Special Report*, *supra* note 5, at 198 n.15 (*citing* WASHINGTON STATE MINORITY AND JUSTICE TASK FORCE, FINAL REPORT 63-75 (1990); 2 REPORT AND RECOMMENDATIONS OF THE FLORIDA SUPREME COURT RACIAL AND ETHNIC BIAS STUDY COMMISSION, "WHERE THE INJURED FLY FOR JUSTICE" 49-60 (1991)).

44. As the historian Lisa Duggan has written:

> *any* gay politics based on the primacy of sexual identity defined as unitary and "essential," residing clearly, intelligibly and unalterably in the body or psyche, and fixing desire in a gendered direction, ultimately represents the view from the subject position "twentieth-century, Western, white, gay male."

Lisa Duggan, *Making It Perfectly Queer*, *in* SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE 155, 162 (Lisa Duggan & Nan D. Hunter eds., 1995). *See generally* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (demonstrating how race discrimination law is constructed with black men in mind, sex discrimina-

distributed through organizations that may not be representative of women and people of color.[45] Further, the questions posed in such surveys might be skewed along race or gender lines. Finally, as will be noted below, the written reports issued from the studies may only be able to discuss the particular features of these distinct intersectional biases if the survey methodology is, at the outset, sensitive to them.

Given all of these limitations, it would be a mistake to attempt to draw definitive conclusions about the quantity of sexual orientation bias in the legal profession from these reports. They are most helpful in providing support for the argument that such bias exists[46] and in giving voice to the nature of that bias.[47]

V. FINDINGS OF SEXUAL ORIENTATION BIAS STUDIES

Not surprisingly, the studies paint a disheartening portrait of the professional lives of lesbian and gay attorneys. The statistics indicate that many lesbians, gay men, and bisexuals have suffered discrimination. Nearly half remain closeted at work, anxiously micro-managing the performance of their sexual identities to their colleagues, supervisors, clients, and judges. Many lack mentors and support systems and feel excluded from the social network of the bar and firm life by their forced single status, if not by their sexual orientation. Almost no gay attorneys receive equal pay for equal work, as their benefit packages do not extend to their partners and partners' children. These factors typically combine to impede progress in the profession in various ways including job satisfaction; progress to partnership; pay equity; firm and bar leadership positions; and elevation to the bench. The California demographic study[48] provides concrete data about pay differentials between gay and non-gay attorneys. The

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tion law around white women, and hence how the situation of women of color — those at the intersection of these subjects — is neglected).

45. *See supra* text accompanying notes 36-39.

46. *See, e.g.*, Badgett, *supra* note 24, at 1-2 ("Identifying a precise level of discrimination is impossible given [the self-reporting survey] method, but such consistent findings across time and region reflect gay employees' beliefs that their workplaces are unfair or hostile.").

47. The limitations of survey analysis in these settings are summarized in the NJEP MANUAL, *supra* note 14, at 35-37.

48. SRI INT'L, 1991 DEMOGRAPHIC SURVEY OF THE STATE B. OF CAL.: COMPARISONS OF GAY AND NON-GAY STATE B. MEMBERS (1994) [hereinafter CAL. STUDY]. Given the size and random nature of this study, this data is among the more reliable quantitative information contained in any of the studies. Compare *supra* text accompanying notes 32-39.

study shows that 50% of non-gay attorneys over forty make more than $100,000 per year, compared with only 25% of gay attorneys. After ten years in the profession, 54% of non-gay attorneys earn more than $100,000 while only 33% of gay attorneys earn that much. After ten years in the profession, 38% of non-gay attorneys were law firm partners while only 26% of gay attorneys were.[49]

It is worth noting that there are some encouraging findings in this data, as well. Approximately 15% of those polled in New York believe that being gay was a positive factor in the hiring process: "[E]mployers affirmatively told applicants that they seek diversity in the workplace and welcome a gay and lesbian perspective."[50] This finding is in stark contrast with the fact that only a decade ago, a gay fundraising event held at a major New York law firm could not be photographed by the *New York Times* because of the fears of those present.[51]

There are three aspects of these results that bear comment. First, the primary site of concern for most queer law students and attorneys is the closet. While this is not surprising, it suggests the unique dynamics of sexual orientation discrimination.[52] A major component of the suffering that lesbian, gay, and bisexual attorneys endure is the emotional anxiety that attends the performance of their sexual orientation.[53] They must constantly scrutinize how much to reveal and how much to conceal of their

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49. *See* CAL. STUDY, *supra* note 48, at 3; COMM. ON SEXUAL ORIENTATION DISCRIMINATION, THE STATE B. OF CAL., REP. AND RECOMMENDATIONS REGARDING SEXUAL ORIENTATION DISCRIMINATION IN THE CAL. LEGAL PROFESSION 2 (1996). These distinctions might be due in part to different career paths voluntarily chosen by gay attorneys. For example, lesbian/gay identified attorneys are more likely to provide legal services to indigent clients and to spend more hours on pro bono work than are non-gay attorneys. *See* CAL. STUDY, *supra* note 48, at 4-5. Still, the different earning levels could reflect the fact that openly gay attorneys feel compelled to pursue different career paths, even if they do so in what appears to be a voluntary fashion.

50. *ABCNY 1993 Report*, *supra* note 9, at 853; *see also* Special Comm. on Lesbians and Gay Men in the Profession, *Rep. on the Experience of Lesbians and Gay Law Students in New York Metropolitan Area Law Schools*, 51 REC. ASS'N B. CITY N.Y. 145, 148 (1996) (discussing how being openly gay can "have a positive impact on success in [law] school").

51. *See* E.R. Shipp, *Concern Over AIDS Helps Rights Unit*, N.Y. TIMES, May 3, 1987, at 43, *available in* LEXIS, News Library, Nyt File.

52. *See generally* EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET (1990).

53. *See, e.g.*, *LACBA Report*, *supra* note 32, at 337-43 (discussing dynamics of closet); *ABCNY 1993 Report*, *supra* note 9, at 847 (discussing the "psychological" impact of sexual orientation discrimination).

personal lives in their myriad day-to-day interactions. The closet is meant to render gay attorneys invisible and where it does so successfully, the resulting anxiety harms their productivity, undermines their ability to network with one another, and thwarts their career trajectory.[54] The absence of openly gay persons also "serve[s] to suppress discussion of sexual orientation bias generally and to suppress complaints about sexual orientation discrimination in particular."[55] Measures aimed at easing sexual orientation bias must address these particular features of that discrimination if they are to have a meaningful impact.

A second conclusion to draw from these reports is counterintuitive: concerns that keep attorneys closeted may be *less* pervasive than is commonly acknowledged. It is true that an individual's coming out often continues to have negative ramifications. For example, even where anti-gay bias may be perceived as wrong, coming out is simply reconceptualized as "bad judgment" and then the error in "judgment," rather than the coming out itself, is used as the explicit basis of termination.[56] However, a particularly invidious aspect of the closet is how it succeeds precisely because it operates as a site of fear. Thus, even irrational fears of coming out are rendered real because an isolated lawyer, ignorant about how her coming out might be received, simply remains closeted. Interestingly, queer attorneys' fears about coming out in fact may actually be undermined by some of the statistics found by these studies. Although 70% of the participants in a New York City study stated that they were not out on their resume, nearly 88% reported that at no time during the hiring process "did an interviewer or employer's representative ever make statements or pursue lines of inquiry which had or could have had the effect of excluding gay and lesbian applicants."[57] Further, nearly 60% of the participants in that survey were out to most of their coworkers, 88% to some coworkers, and nearly 90% reported that they were never asked to conceal their sexual

54. *See LACBA Report*, *supra* note 32, at 337-38.

55. *Id.* at 337.

56. One report states:

> Despite the easy acceptance of heterosexual relationships, the routine introduction of a gay attorney's same-sex domestic partner is still viewed by many as "flaunting" one's "sexuality." One gay attorney wrote, "I have been the object of critical statements about 'dragging in' my 'personal' life because I mentioned my life partner."

Id. at 347; *see also* Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 693 (1998).

57. *ABCNY 1993 Report*, *supra* note 9, at 885.

orientation in the workplace.[58] The Los Angeles study suggests that non-gay participants think the consequences of coming out are less significant than gay participants do.[59] Because heterosexual participants create the consequences of coming out, this finding might be read to provide comfort to gay lawyers. Nonetheless, a rational lawyer might not rely on statistics alone as a basis for risking a job or even a career. The cruel quality of fear is that it prevails simply by existing.

The perception that there will be negative consequences if a lawyer comes out is also evident in responses of employers when they are asked about having lesbian, gay, and bisexual attorneys in their firms. Just as a gay attorney contemplating coming out generally anticipates that her employer will react negatively, employers, in turn, often automatically assume that clients, judges, and other third parties, will behave poorly. One study found that, "[w]hen it comes to matters relating to a gay or suspected gay colleague, heterosexual attorneys often act on the assumption that clients, judges, and others will have a problem with that attorney's sexual orientation."[60] At times, the employer's projection may be valid. The Los Angeles study demonstrates that "approximately 15% of the . . . participants said that clients of their office have expressed a preference not to work with gay attorneys."[61] Yet some of the employers' concern is just fear itself. This same statistic also suggests that 85% of firms report that their clients have *not* expressed anti-gay sentiments. Indeed, some clients are themselves gay. Others, particularly corporate clients, may be struggling with these same issues and might be relieved if their counsel proved knowledgeable about them. But within the regime of the closet, employers, like their employees, enforce silence, constantly fearing, whether correctly or not, that open discussion will provoke negative reactions.

Beyond noting how the closet is a central figure in these texts, and examining some of the dynamics of how the closet operates here, a third reflection on these documents concerns their style. One of the most dramatic aspects of these reports is how boring they are to read. Judith Resnik has observed that the gender bias reports constitute a "howl of pain" that nonetheless has

58. *See id.* at 886-87.

59. *See LACBA Report, supra* note 32, at 340-42.

60. *Id.* at 321.

61. *See id.* at 320 & n.78.

not resulted in "profound transformation."[62] While the sexual orientation bias studies represent a howl of pain, they present something different. The humanity of their narratives is lost in the dry, clinical presentation of the material, replete with repeated statistics and flat bureaucratic language:

> A troubling degree of sexual orientation discrimination exists in the employment of attorneys in Los Angeles County.[63]
>
> Many interviewees reported that private law firm partners consider same-sex sexual orientation an undesirable factor.[64]
>
> All legal employers, especially private firms and corporations, risk losing employees and potential employees by failing to take strong affirmative steps to eradicate both the perception and the underlying reality of discrimination.[65]

These reports provide a cathartic opportunity for their subjects by furnishing a forum in which the lawyers can tell their stories.[66] But after identities have been stripped and stories have been transcribed, analyzed, and placed within the dispassionate framework of a "sexual orientation bias study report," the human pain is gone, the entreaty to the heart buried. What remains are intellectual appeals containing only traces of real lives. It is nearly impossible to reconstruct from these ashes the slights, the unfulfilled expectations of ruined careers, the anguish.

VI. RECOMMENDATIONS OF SEXUAL ORIENTATION BIAS STUDIES

The recommendations derived from these studies fall into four broad categories:[67] (1) recommendations concerning general employment policies (e.g., firms should adopt written policies affirming their opposition to sexual orientation discrimination); (2) specific recommendations concerning recruitment and hiring (e.g., firms should send recruitment letters to gay student groups at local law schools); (3) recommendations concerning retention, advancement, and compensation (e.g., firms should provide men-

62. Resnik, *Ambivalence*, *supra* note 3, at 1534.

63. *LACBA Report*, *supra* note 32, at 297.

64. LESBIAN AND GAY ISSUES SUBCOMM., HENNEPIN COUNTY B. ASS'N, LEGAL EMPLOYERS' BARRIERS TO ADVANCEMENT AND TO ECONOMIC EQUALITY BASED UPON SEXUAL ORIENTATION 15 (1995).

65. *ABCNY 1993 Report*, *supra* note 9, at 873.

66. On the psychological values of participatory story-telling, see, for example, E. Allan Lind et al., *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings*, 71 MICH. L. REV. 1129 (1973).

67. These are drawn from BASF REPORT, *supra* note 20, at 8.

tors or permit employees to work on gay pro bono cases); and (4) recommendations concerning employee benefits (e.g., firms should provide benefits for the partners of their lesbian and gay employees). Some of the reports' recommendations were remarkably concrete, others strikingly vague. Perhaps the most impressive work in the remedial area is the longitudinal work done by the Bar Association of San Francisco. In 1991, the Association published a report with twenty-three specific recommendations. In 1995, the Association undertook a follow-up survey to assess whether its recommendations had been adopted. Only 20% of the firms responded to the follow-up study, and these firms were likely to be those that had made the most progress. Yet importantly, the Association did not consider its work done with the completion of its initial report and recommendations. The follow-up survey, even where not returned, served as a reminder to firms of the Association's earlier recommendations and served to shame noncompliant firms.

An initial reflection on the recommendation aspects of these reports flows from this San Francisco experience: that effort demonstrates that the recommendations, and their enforcement, are perhaps more important than information gathering. The documentation phase of these studies does, arguably, serve important purposes. The statistical data provides some rare empirical evidence of sexual orientation bias, the studies offer a forum for subjects to tell their stories, and sometimes the evidence that is gathered provides crucial support for calls for change. However, as discussed above, the surveys suffer from methodological problems, are often difficult to read, and may not be persuasive to those who do not want to be persuaded. Anti-gay bias may be so obvious, and the recommendations so normatively appropriate, that the importance of surveying pales in comparison to the significance of enforcement. At the very least, the Bar Association of San Francisco's work demonstrates that an initial bias study is just a start. True change comes through continued pressure over time.

True change in the legal system also requires an enlightened judiciary. NOW Legal Defense Fund's efforts in the gender bias studies grew out of the experiences of women attorneys confronting sexist judges.[68] NOW identified these judges as an ob-

68. *See* Schafran, *Gender and Justice, supra* note 2, at 183-84; *see also* NJEP MANUAL, *supra* note 14, at Author's Preface.

stacle to women's equality and sought a method to teach the judges when and how they were being sexist. The gender bias studies were seen as instrumental to this end — by demonstrating that bias existed in the court system, women's advocates could establish that training programs were needed to educate judges about sexism.[69]

By contrast, few of the sexual orientation bias reports have linked their explicit findings to recommendations for judicial education. While this goal may animate some of the sexual orientation bias work, most of it reads as an indictment of the private bar. Judges are surprisingly absent here. Yet although judges are ethically barred from discriminating on the basis of sexual orientation,[70] few of them are familiar with sexual orientation issues. There is probably not a sitting judge in the entire United States who took a course on sexual orientation law in law school. And there are few developed programs of judicial education on sexual orientation issues.[71] Perhaps because these reports have not been issued by the judiciary, they lack a judicial focus in their recommendations.

A final reflection on the reports' recommendations is more theoretical. These recommendations can be seen as suggestions about what gay people want. In that sense, they provide a particular image about what constitutes queer equality. Building from the explicit recommendations made in these reports, the image of equality that emerges is one in which (1) gay people couple as heterosexuals do and seek to be recognized in the same ways (e.g., listed in the company's directory with their partner's names; encouraged to bring a partner to firm social events, etc.); (2) gay people exist as a distinct identity-based group, with their own bar associations to which firms are urged to underwrite dues; and (3) gay people are seen to have unique perspectives such that we should be represented on hiring committees and firm newsletters should include "items of particular interest to lesbian and gay employees." That such recommendations would follow from reports that grow out of an identity-based political movement in the first place is unsurprising. Nonetheless, the confident tone

69. Schafran, *Gender and Justice, supra* note 2, at 183-84.

70. *See* ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(5)-(6) (1990).

71. *See* Nancy D. Polikoff, *Educating Judges About Lesbian and Gay Parenting: A Simulation*, LAW & SEXUALITY, Summer 1991, at 173, 175 (reporting knowledge of only two judicial education programs in history that address lesbian and gay parenting issues).

with which these goals are expressed contrasts rather starkly with debates among lesbians, gay men, and bisexuals about who we are and what we want.[72] The reports and their recommendations, therefore, raise interesting questions about whether sexual orientation bias will, ultimately, be ameliorated by embracing gay identity, or whether the goal should be a world in which the distinction between heterosexuality and homosexuality simply does not exist.[73] Those who espouse the latter goal might take an entirely different approach to making recommendations to end sexual orientation bias.

VII. LESSONS FOR THE FUTURE

My review of the studies of sexual orientation bias has led to the following recommendations for those involved with such efforts:

1. *Establish a clearinghouse.* Community institutions should take a leadership role in coordinating sexual orientation bias studies. NOW LDF's work in the field of gender bias studies provides a valuable model of community organizing that produces concrete, verifiable results — not only for women within the legal profession, but for women in the justice system generally. Lambda Legal Defense Fund has begun to devote some staff resources to these efforts and, specifically, to the development of judicial education programs. The National Lesbian and Gay Law Association, the new associations of gay judges, or both, might consider how they can actively encourage, coordinate, and perpetuate this work. By providing continuity over time, such institutional support could help enable a wider geographic distribution of this work; the development, refinement, and employment of better empirical investigative techniques; and more systematic long-term implementation of recommendations, including judicial education.

2. *Aim higher.* First, gay attorneys and their allies should seek studies sponsored by the judiciary itself. Second, the studies

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

73. *See, e.g.*, Judith Butler, *Imitation and Gender Insubordination*, *in* INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES 13 (Diana Fuss ed., 1991); John D'Emilio, *Making and Unmaking Minorities: The Tensions Between Gay History and Politics*, *in* MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS, AND THE UNIVERSITY 181 (1992).

ought to cast a broader net. For example, the studies might consider how lesbians and gay men are treated when they are victims or defendants in the criminal justice system,[74] what happens to lesbians and gay men in custody disputes, and why so few gay people are on the bench.

3. *Address the multiple identities of subjects.* The studies should grapple more explicitly in their methodology, summary, and recommendations with the multiple identities of many of their subjects. The ongoing California bench study that promises to "identify and address the interests and needs of lesbians and gay men who have historically suffered from multiple biases such as race, gender, and disability"[75] is encouraging because it identifies as a goal this multidimensional analysis. This effort may yield models that can be replicated in future studies or at least provide information for the continued refinement of these efforts.

4. *Increase the professionalism of the studies.* Methodologically, those producing these reports should strive for the fewest surveying problems possible. To this end, social science experts must be employed. Such experts should carefully evaluate earlier studies of gender, race, and sexual orientation bias. Again, this is an instance where a clearinghouse could provide vital coordination. Given the effort that goes into these studies, and the care that should be given to their methodology, they would benefit enormously by more professionally-written final reports. This is not meant to disparage the attempts of the existing studies. But lawyers and social scientists are trained to present dispassionate arguments in cold type. Bias studies that are deftly drafted and substantively engaging might be considerably more effective.

5. *Emphasize positive findings.* Reports should highlight good stories as well as bad. Given the layers of quiet fear that sustain the closet, real life narratives with positive outcomes could have a beneficial effect in raising the courage of gay and non-gay lawyers alike.

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74. *See, e.g.*, Florida Supreme Court Racial and Ethnic Bias Study Comm'n, *Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission*, 19 FLA. ST. U. L. REV. 591, 634-44 (1992) [hereinafter *Florida Report*] (discussing the interaction of law enforcement officers with racial minorities).

75. Hitchens, *supra* note 26, at 1.

6. *Study employer compliance.* Judges and bar associations should study employer compliance efforts as much as they study employee problems. Studying what employers have or have not done to ameliorate sexual orientation bias appropriately centers attention on the locus of discrimination. This approach also rewards firms that have made strides at alleviating bias and thus presents models for others. Finally, studying compliance publicly shames those that have not addressed these problems. Longitudinal studies are especially helpful as they raise the levels of pressure and humiliation by demonstrating continued noncompliance.

7. *Involve and educate the judiciary.* The point of these studies should not solely be to analyze and make recommendations concerning the professional lives of queer lawyers. Their purpose must also be to help produce more justice for lesbians and gay men. If they are to have such an effect, more systematic judicial education programs must follow from their publication. Lambda's initial efforts at developing and implementing model judicial education programs that can follow from, and secure the gains realized by, these efforts are encouraging. A single pioneering, sympathetic, state Supreme Court justice could make an enormous difference by taking the initiative and giving judicial imprimatur and resources to developing such a model program.

8. *Change the make up of the judiciary.* While judicial education is helpful, gay and lesbian judges are also vital. Only one Article III judge in the entire United States is openly gay, federal district court judge Deborah Batts, and her sexual orientation was probably unknown to the senators who confirmed her. While there is no exact count of gay and lesbian state court judges, there are approximately 30,000 state court judges in the United States[76] and the gay judges' association has only a few dozen members. This suggests that roughly one in every 1,000 state court judges is gay.[77]

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76. Resnik, "*Naturally*," *supra* note 5, at 1705 n.91.

77. Of course, some gay judges might not be part of the gay judges association, yet that underrepresentation would only slightly diminish this rough estimate. By way of comparison, consider Judith Resnik's analysis on the quantity of women judges:

> As of April 1, 1990, senior and active article III judges — on all levels of the federal courts — numbered 978. Of the 9 who serve on the United States Supreme Court, 1 was a woman (11.1%). Of the 216 who served at the appellate level, 198 (91.7%) were men and 18 (8.3%) women. All 69 of the senior appellate judges were men. At

This is an appalling statistic. The gay bar and its allies ought to invest more time and effort into preparing gay attorneys to be judges and into pushing for the nomination and appointment of lesbian and gay jurists. Too little attention has been paid to this issue. A single editorial piece written five years ago by Judge Stephen Reinhardt of the United States Court of Appeals for the Ninth Circuit is the full extent of the literature.[78]

9. *Continually reappraise the goal.* Having made these recommendations from a position of identity-based politics, it is, finally, interesting to consider whether society would be better were there no recognizable sexual orientation categories. Many of the identity-based recommendations that have issued from these reports seem necessary to the short term goal of ensuring protection for lesbian, gay, and bisexual attorneys. But would it make more sense, in the long run, if benefit plans did not turn on the nature of one's sexual relationship or if it could not be assumed that there were certain luncheon speakers who would be of particular interest to gay employees? These identity-based efforts strive to change the conditions under which we all live. Yet the constant questioning of strategies and tactics — particularly at these sites of confrontation — may prove valuable, even if alternative approaches are ultimately rejected.

VIII. CONCLUSION

Interest in sexual orientation bias within the justice system is appropriate, important, and compelling. The Florida Supreme Court prefaced its study of racial and ethnic bias with one of Aesop's fables that captures the essence of this point well:

> A swallow had built her nest under the eaves of a Court of Justice. Before her young ones could fly, a serpent gliding out of his hole ate them all up. When the poor bird returned to her nest and found it empty, she began a pitiable wailing. A neighbor suggested, by way of comfort, that she was not the first bird who had lost her young. "True," she replied, "but it is not only my little ones that I mourn but that I should have

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> the trial level there were 753 article III judges, of whom 702 (93.2%) were men and 51 (6.8% women). Of the 223 senior trial judges, 219 (98.2%) were men and 4 (1.8%) women. Twelve (92.3%) of the 13 judges who sit on the Court of International Trade were men; 1 (7.7%) was a woman. Data from state courts may produce a helpful context in which to read these numbers. Woman are estimated to be about 8% of all state court judges.

Id. at 1705-06 (footnotes omitted).

78. *See* Reinhardt, *supra* note 1.

> been wronged in that very place where the injured fly for justice."[79]

With some important exceptions, courts have not been a refuge providing justice to lesbian, gay and bisexual Americans. As NOW Legal Defense Fund recognized three decades ago, the potential that bias studies provide is the potential to reform the judiciary. Sexual orientation bias studies can educate judges about the lives and experiences of lesbians, gay men, and bisexuals and can inspire them to dispense more justice. These are, therefore, important efforts that should be perpetuated and perfected.

79. *Florida Report, supra* note 74, at 608 (*quoting* M. FRANCES MCNAMARA, 2000 FAMOUS LEGAL QUOTATIONS 129-30 (1967)).

— Sandra Cavazos presented her Article, "Harmful to None: Why California Must Recognize Hawaii Same-Sex Marriage Under the Doctrine of Comity and Full Faith and Credit Clause," at the *UCLA Women's Law Journal* Symposium, "Queer Matters: Emerging Issues in Sexual Orientation Law," on March 7, 1998. This Article will appear in Volume 9.