"VISIBLE EQUALITY: EXAMINING THE ROLE AND IMPACT OF GAY AND LESBIAN MEMBERS OF THE JUDICIARY"

WASHINGTON COLLEGE OF LAW
AMERICAN UNIVERSITY

KEYNOTE ADDRESS

HON. MICHAEL R. SONBERG

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Nearly ten years ago, in April 1993, 25 judges and judicial officers from throughout the United States gathered across the Potomac in Crystal City and formed the International Association of Lesbian & Gay Judges. The convener of the meeting was Judge Stephen Lachs of the Los Angeles County Superior Court, the first openly gay or lesbian judge in the entire United States. He was appointed by California Governor Jerry Brown on September 18, 1979, so it's been less than 24 years that there have been any openly gay or lesbian judges in this country. In the less than 39 months between Governor Brown's appointment of Judge Lachs in September 1979 and the end of his term in early January 1983, Jerry Brown was responsible for appointing 4 gay men and one lesbian to the bench – they were, at that time, the only openly lesbian and gay judges in the United States.

That's not to suggest that Judge Lachs was the first lesbian or gay judge in the United States. My guess is that long before 1979, our federal and state courthouses – especially in major metropolitan areas – had a fair sprinkling of men and women whose attraction was to members of the same sex. But before Stonewall, and even in the decades that followed, letting the world know of that attraction might have meant – and, in some places, might still mean – the end of a judicial career.

I'm going to talk first about who the lesbian and gay members of the judiciary are and how they got there, by looking at the federal bench and at four states with various methods of judicial selection and relatively significant numbers of openly gay and lesbian judges: California, Massachusetts, New York and Oregon. Then I'll turn to examining what it all means.

But first, I have a personal recollection I'd like to share. In 1978 I was appointed to the Harvard University Overseers' Committee to Visit Harvard Law School, the lone thirty-something law firm associate among partners from major law firms, law school professors, former Cabinet secretaries, judges of state high courts and lots of federal judges, from the district courts, courts of appeal and, from the United States Supreme Court, Justice Harry Blackmun. I had not come out sexually at that point, but did in the fall of 1979, and was looking forward to my trip to Cambridge for our annual meeting in March 1980. I was primed to be a gay man in Boston. On the first night, after our dinner and post-dinner program, I made my way to the Paradise, the one gay bar in

Cambridge itself. It wasn't especially attractive nor was it particularly busy. I walked in and immediately spotted a Court of Appeals judge who was on the Visiting Committee with me. I thought it was rich – proof that we really are everywhere ¥ especially since I was in the early days of coming out and was regularly discovering people I knew from other parts of my life. He saw me and nearly had a heart attack; before I could say anything to him, he was out of there. It took him a couple of days before he stopped avoiding me and got up to the courage to say hello, in the men's room, ironically, after he had figured out that I wasn't about to tell his story to the world. Years later, I heard that he had become more comfortable, and had developed a group of gay lawyers of various ages with whom he regularly met socially.

Steve Lachs' appointment in 1979 didn't open the floodgates for anyone other than Californians, and that was more of a trickle than a flood. Governor Brown appointed Rand Schrader to the Los Angeles Municipal Court in 1980, Mary Morgan, the first open lesbian judge, to the San Francisco Municipal Court in 1981 and, in the last days of his term in January 1983, Herbert Donaldson to the San Francisco Municipal Court and Jerrold Krieger to the Los Angeles Municipal Court. Each of them had been visible members of the lesbian and gay community prior to their appointment, organizationally active, and were appointed with the community's strong backing. Judge Lachs had run unsuccessfully for the Municipal Court in 1978, the year before his appointment; he was probably the first openly gay or lesbian judicial candidate in American history.

I need to digress at this point to talk about varying methods of judicial selection. I'll get back to California's in a minute. As I assume all of you know, Article III federal judges are appointed for life by the President, with the advice and consent of the Senate. That probably explains why Judge Deborah Batts, the only openly lesbian or gay United States District Judge in the United States, was appointed by President Bill Clinton and confirmed in 1994, during the 103rd Congress; those two years, from 1993 through 1994, were the only time from 1981 through today that both the White House and Senate were in Democratic hands. That is not to suggest that either is a prerequisite for the appointment and confirmation of an openly LGBT federal judge. In 1995, during the 104th Congress, President Clinton nominated Joseph Gale to a 15-year term on the United States Tax Court, an Article I court. Judge Gale is openly gay; he had also been Chief Counsel to Senator Moynihan, then Chief Tax Counsel to the Senate Finance Committee, and was, in 1995, Chief Minority Tax Counsel. Tax court nominees go to the Finance Committee for confirmation, rather than to the Judiciary Committee, so whatever resistance there might have otherwise been to the appointment of an openly gay man were neutralized by the fact that Judge Gale was well known, personally, to the members of the committee. He was confirmed without any problem.

Back to California. Trial court judges in California are elected in non-partisan elections for six-year terms. When vacancies occur other than at the end of a term, the Governor has the power to appoint and fill the vacancy pending election. Although there is a Commission on Judicial Appointments which must confirm the governor's proposed appointees for the Supreme Court and Court of Appeals, the governor has unfettered discretion in appointments to the trial court. Applications for those appointments are made to the governor's judicial appointments secretary and the governor's proposed choices are sent to the State Bar's Committee on Judicial Nominations Evaluation for its comments.

In his second term as governor of California, from 1979 to January 1983, Governor Brown appointed 4 openly gay men and one open lesbian to judicial posts. After he left office and was succeeded, first by George Deukmejian and then by Pete Wilson, not a single open lesbian or gay man was appointed to the bench in California over that sixteen-year period. That didn't come as a great surprise to lesbian and gay judicial aspirants in California, but it took some time for them to come to grips with the new reality and learn how to deal with the judicial electoral process from the ground floor, without an assist from the governor.

In 1988, a little more than five years after he had been appointed to the Los Angeles Municipal Court, Jerry Krieger ran for an open Superior Court seat in Los Angeles County and was elected. Then, in 1990, Donna Hitchens was elected to an open seat on the Superior Court in San Francisco. Judge Hitchens was one of the founders and first directing attorney of the Lesbian Rights Project, the predecessor of the National Center for Lesbian Rights. Stephanie Sautner was elected to the Los Angeles Municipal Court in 1992 and Bonnie Dumanis to the San Diego Municipal Court in 1994 and to Superior Court in 1998. Others have followed. Just last year, two more lesbians were elected to Superior Court in San Francisco, Gail DeKreon and Nancy Davis. Judge Davis is Judge Hitchens' life partner, making them the third openly lesbian or gay judicial couple in the United States.

On December 29, 2000, two years into his term as governor, Grey Davis appointed Robert Sandoval to fill a vacancy on the Los Angeles Superior Court. In the intervening eleven months, leading up to his 2002 race for reelection, Governor Davis appointed three more openly gay men to the Superior Court bench: Charles Haines in San Francisco, Randolf Rice in Santa Clara County, which is San Jose, and Luis Lavin in Los Angeles. I know of 13 openly gay and lesbian judges in California: 3 in Los Angeles, 7 in San Francisco and one each in Alameda, San Mateo and Santa Clara Counties. There are, additionally, a significant number of closeted judges, including some appointed by Republican governors.

The federal method of judicial appointments was derived from the Massachusetts constitution, written by John Adams and adopted in 1780; as my colleagues in Massachusetts regularly remind me, it is the oldest functioning constitution in the world. In Massachusetts, the Governor makes his or her appointments with the advice and consent of the Governor's Council, a group of eight individuals, elected from districts for two-year terms, over which the Lieutenant Governor presides. In contrast to the federal system, Massachusetts has amended its constitution to provide that judicial life ends at seventy, at which time judges must retire. Governors have established judicial nominations commissions by executive order. They review applications and send the governor 3 to 6 nominees for each vacancy. Massachusetts has seven different trial courts, a Court of Appeals and the Supreme Judicial Court.

Contrary to the California experience, each of Massachusetts' governors since Michael Dukakis – all but Dukakis having been Republicans – have appointed openly lesbian and gay judges, all the more important in Massachusetts where a gubernatorial appointment is the only route to the bench. Governor Dukakis' first and only openly gay judicial appointee was Dermot Meagher, appointed to the Boston Municipal Court in 1989. Dukakis was succeeded by Governor William Weld, who, in 1991, appointed Massachusetts' first open lesbian judge, Linda Giles, also to the

Boston Municipal Court. In 1994, he appointed Bertha Josephson to the Superior Court; he had appointed her to the District Court in 1991, before she was publicly out. Governor Weld's final LGBT judicial appointment was Barbara Lenk, to the Appeals Court in 1995; he had appointed her to the Superior Court in 1993, before she was publicly out. Judge Lenk was one of fifteen individuals nominated to fill two vacancies on the Supreme Judicial Court, in 1999; although she was not chosen, it was, I believe, the first time that an open lesbian or gay person was proposed for a seat on a state high court.

After Governor Weld resigned, his successor, Paul Cellucci, continued in the Dukakis-Weld tradition. While he was still acting Governor, in 1998, he elevated Linda Giles to the Superior Court, and, after he was elected in his own right, he appointed Angela Ordoñez to the Probate and Family Court. After Governor Cellucci resigned to become Ambassador to Canada, he was succeeded by Acting Governor Jane Swift. The Appeals Court had been enlarged and Governor Swift filled those newly created seats. Among her appointments, in 2001, was an openly gay man, David Mills. Whether the new Republican governor, Mitt Romney, will continue in the Dukakis-Weld-Cellucci-Swift tradition, is an open question.

New York currently has more openly lesbian and gay state court judges – sixteen – than any other state, I'm proud to say. New York also has, I believe, more types of trial courts – eleven – than any other state in the nation.

The methods of judicial selection are as confusing as are the number of courts. All trial court judges are elected, with three exceptions. Judges of the Court of Claims, a state-wide court for claims against the State, are appointed by the Governor, with the advice and consent of the Senate, for nine-year terms. Judges of the Family Court, but only those in New York City, and judges of the New York City Criminal Court, my court, are appointed by the Mayor, for terms of up to ten years. The Mayor can also fill vacancies on the Civil Court until the next election. None of the Mayor's selections are subject to review either by the local legislature, by a commission or by the electorate. Since 1978, each mayor has, by executive order, established a judicial selection committee which sends three names for every vacancy on the Family and Criminal Courts. Judicial terms range from 6 years for some limited jurisdiction courts to ten years for many courts, to 14 years for Supreme Court, the inaptly named general jurisdiction trial court.

Even election does not mean the same thing for all courts in New York. While candidates for all elected courts other than the Supreme Court may have to run in partisan primaries to get their party's nomination, there are no primaries for Supreme Court. Instead, at party primaries, the voters chose delegates to a judicial nominating convention. Most delegates run unopposed, having been chosen by political party leadership, and as a result, their names don't even appear on the ballot; even where there is a contest, it generally occurs within the context of a larger intra-party battle. Candidates for delegate do not pledge to support particular judicial candidates prior to their election. The delegates meet within two weeks of the primary and chose the party candidate or candidates for Supreme Court. Those are the names that appear on the ballot. Only officially recognized parties can field candidates; you can't file petition signatures to make it onto the ballot or run as an independent, as you can for any other office in the State.

So, the politics for Supreme Court nominations are entirely within the party hierarchy except in New York County – Manhattan – where the Democratic party, the only relevant political party in the County for elective purposes, annually creates an independent screening panel. The panels report out up to 3 names for every vacant Supreme Court position and the rules of the nominating convention in Manhattan restrict consideration to those names reported out. Similar screening panels have been organized in Manhattan for county-wide Civil Court vacancies and some district vacancies, although direct ballot access is available for Civil Court, and candidates who were not reported out have run for and been successful in obtaining the Democratic nomination.

The first openly gay man on the bench in New York was William Thom, who was appointed by Mayor Ed Koch to fill an interim vacancy on the Civil Court in Manhattan in 1984. He was one of the founders of the Lambda Legal Defense and Education Fund. Judge Thom received a number of subsequent interim appointments from Mayor Koch and, as was the expectation at the time, attempted to gain election to that court, but was twice defeated in primary elections. In fact, it wasn't until Marilyn Shafer and Marcy Friedman won contested district primaries for Civil Court in Manhattan nine years later, in 1993, that an openly lesbian or gay candidate would gain election to the bench in New York through a truly contested election. And it wasn't until 1996, when Paul Feinman won his Greenwich Village district Civil Court primary election by 24 votes, that an openly gay man would win a contested judicial election in New York. That same year, Eileen Rakower also won a contested district primary for Civil Court, hers against an incumbent judge running for reelection.

While Judge Thom failed in the elective process, he, as well as others, had success in the appointive process. Mayor Koch continued in his commitment to add lesbians and gay men to the bench with the appointment of the late Richard Failla to the Criminal Court in 1985, of Mary Bednar to the Family Court in 1986 and of Marcy Kahn to the Criminal Court in 1987. Dick Failla had been an openly gay Manhattan Assistant District Attorney and then was the City's Chief Administrative Law Judge under Mayor Koch.

Despite Bill Thom's disappointments in the 1984 and 1985 primaries, elective success wasn't too far away. As in California at the same time, community activists were learning how to negotiate the elective process. In September 1988, in quick succession, Dick Failla received the Democratic nomination for the Supreme Court in New York County at the judicial nominating convention and Joan Lobis received the Democratic nomination for a county-wide Civil Court seat in New York County. In 1992, Judge Lobis received a Supreme Court nomination; she was followed by Judge Kahn in 1994.

Meanwhile, on the appointive front, things changed with the election of David Dinkins in 1989. Mayor Koch broke ground but had appointed only four openly lesbian or gay judges during the course of his twelve years in office. In March 1990, Mayor Dinkins spoke at the annual dinner of LeGaL, the Lesbian & Gay Law Association of New York, said he wanted to appoint more lesbians and gay men to the bench and was true to his word. His first group of four judicial appointments, in August 1990, included Rosalyn Richter to the Criminal Court and Paula Hepner to the Family Court; Karen Burstein, who was also appointed to the Family Court that day, publicly came out at the induction ceremony. Judge Richter had been Lambda's first staff attorney.

Subsequent appointments by Mayor Dinkins, during his single, four-year term, included Stewart Weinstein and Cira Martinez to the Family Court and yours truly to the first of a series of interim vacancies on the Civil Court. Mayor Giuliani, during the 8 years of his administration, only appointed two openly gay men, both to the Criminal Court – me in 1995 and Joseph Dawson in 1999. Mayor Bloomberg has made few appointments so far in his 15 months in office, none to openly lesbian or gay people as of yet. A significant effort to persuade him to include an open LGBT person on his judiciary committee was unsuccessful.

Success has continued on the electoral front, however. In 1998, Debra Silber, the first openly lesbian or gay judicial candidate outside of Manhattan, was elected to the Civil Court in Kings County – Brooklyn – receiving the Democratic nomination with no primary opposition. Last year, 2002, Judge Richter was elected to the Supreme Court in Manhattan and Ellen Yacknin was elected a judge of the Rochester City Court, the first openly lesbian or gay full-time judge outside of New York City.

Oregon's system is similar to California's. The Governor fills unexpired vacancies on the trial courts after a preference poll among members of the Oregon State Bar in the relevant circuit, and the appointee remains in office until the next election, at which time the judge runs in a non-partisan election for a six-year term. Positions which become vacant at the end of a term are filled by the voters, also in a non-partisan election.

Oregon is a relative newcomer to openly lesbian and gay judges. The first one, Janice Wilson, was appointed by Governor Barbara Roberts in 1991 to the District Court in Multnomah County – Portland. Governor Roberts appointed the first openly gay man, David Gernant, to that same bench in 1993; she subsequently appointed a second lesbian judge. Judge Wilson was elevated to the Circuit Court by Governor Roberts less than two years after her initial appointment. Governor Roberts' successor, John Kitzhaber, appointed six more lesbians and gay men. Two more judges were elected in contested races. There's a new governor as of this year, Ted Kulongoski, and every expectation is that he will continue to appoint qualified gay and lesbian candidates to the bench.

There are eleven quietly open lesbians and gay men on the Oregon bench, out of 185. That's a higher percentage than any other state in the nation. Six of the 37 judges on the Multnomah County Circuit Court are gay or lesbian. But they're very low-keyed about it, because Oregon is very different from California, Massachusetts or New York. All of the eleven know each other and are known within those parts of the LGBT movement and legal communities which care about such things. But Oregon has the Oregon Citizens Alliance, a virulently anti-gay group responsible for a number of ballot propositions similar to the one that passed in Colorado and was declared unconstitutional by the Supreme Court in *Romer v. Evans*. Even though few judges face opposition for reelection, there is a consensus that high visibility isn't worth the risk. In preparing these remarks, I was told by more than one of my Oregon colleagues that it would be advisable not to go into too many details.

That brings me to one of the central issues of today's program: What does it mean to be an openly lesbian or gay judge in the United States in 2003? When the International Association of Lesbian & Gay Judges was founded ten years ago, our first task was to identify our purpose. It still

amazes me that the twenty-five of us reached consensus on the issue with virtually no discussion and with no dissent. Twenty-five gay people, lawyers and judges, with no dissent – wow! We identified our purposes to be:

To provide an opportunity for judicial officers to meet and exchange views, and to promote education among its members and among the general public on legal and judicial issues related to the gay and lesbian community.

To increase the visibility of lesbian and gay judicial officers so as to serve as role models for other lesbian and gay people, and to bring to the attention of the general public the prominence of these judicial officers.

To aid in ensuring the equal treatment of all persons who appear in a courtroom, as a litigant, attorney, juror, staff person or in any other capacity.

To coordinate the sharing of information between lesbian and gay judicial officers and others in the gay community or the general community.

And to serve as a resource for other lesbians and gay men who are interested in seeking judicial office.

Only one of these goals can be achieved without being open, that of ensuring equal treatment of all. Many states, in their codes of judicial conduct, require judges to ensure that their courtrooms are bias-free, with sexual orientation bias specifically included among the prohibited biases. And many of my sensitive and understanding straight colleagues do their job and are quick to stop inappropriate comments and reactions, whether directed at lawyers, litigants, jurors, witnesses or court staff. I can only hope that they would be equally sensitive if they didn't have openly gay colleagues. As compared to a decade ago, I can tell you that court staff in New York City has become more comfortable with people who present as lesbians, gay men or transgendered, and that there is no snickering or smirking when a female-appearing defendant with a male name appears before the court. That is not to suggest, however, that our courts are bias-free, only that biased people have learned that it is not acceptable to display those biases in open court.

But the other purposes for which the IALGJ stands can only be met if lesbian and gay judges are open, open among their colleagues, among the bar, among the general LGBT community and among the community in general. That's easy to say, but let me tell you as a very publicly gay judge, it's far from easy to accomplish, even if you want to. The first – to be open among colleagues – is the easiest. In most courts, judges spend some time together, whether over lunch, in meetings, at judicial continuing education classes, or in the hallway, waiting for an elevator. When you first come on the bench, if you've been out in your appointment process or election, all of your judicial colleagues will know. As for the ones who join after you, it's a little more difficult. You hope that one of your straight colleagues will give them a head's up or you mention your partner if the context makes it appropriate. But you really don't want to sound like the "Queer Duck" cartoon character, constantly telling everyone, "I'm gay" and there's a limit to the number of lavender shirts and ties, or scarves, blouses, skirts and dresses, that any one person should own. I did have a straight and very sympathetic colleague who had a set of lavender robes – choir robes and judicial robes are

interchangeable – but none of my gay or lesbian colleagues or I asked to borrow them from her, and she never offered.

The IALGJ has provided a mechanism for lesbian and gay judges to know each other and, over the course of our ten years, 105 judicial officers have been dues-paying members. There are four Canadians and one Englishman in the group, but the other 100 are American, from 15 states, the District of Columbia and from Guam, the former Chief Justice of its Supreme Court. I've learned a lot from those from outside New York whom I would never have met but for their having attended organizational functions. And I know that those of us in New York make an effort to be resources for one another.

Another way in which I and many of my colleagues throughout the United States, Canada and Britain bring LGBT issues before our colleagues is through judicial education. Many state court systems have internal continuing education programs which historically have ignored LGBT issues. In California, Mary Morgan became involved in their judicial college and was its dean. The California judiciary has been the leader in confronting and dealing with issues of sexual orientation discrimination. In Florida, Mark Leban, my successor as President of the IALGJ, persuaded the judicial education hierarchy to permit him to structure a full-day mandatory program for county court judges, one-half dealing with examination of an expert witness in a lesbian custody dispute and the other half dealing with *Batson* issues in a gay-bashing prosecution. While the topics may not have been shocking to judges from Miami or Ft. Lauderdale, you can bet that it was an eye-opener to those from rural or Deep South parts of the State. Judge Leban has continued to work in the area, has taught his class to other groups of judges in Florida, and now teaches a course at the National Judicial College in Reno on the issue. In New York, there was a concerted effort about six years ago to include LGBT judges on each of the curriculum committees. Court administrators agreed. We've managed to include LGBT problems in family law, criminal law and jury selection contexts; one year, we even managed to import Judge Leban and his program.

Being visible in the LGBT community isn't as easy. We can join LGBT bar associations, but many of the activities, such as CLE and pro bono legal clinics, are directed at practitioners. Showing up at an annual dinner may be the extent of what you can do practically, but if your association event attracts straight judges too, the organizers may not want to differentiate between the gay and non-gay judges when introducing the dignitaries in the audience. So, the people who already know who you are will applaud, but that doesn't do much in a noisy room of three to four hundred people, most of whom don't have a clue as to which judges are gay and which are not.

It's even more difficult to be visible in the general LGBT community. If and when you run for your judgeship or for reelection, the local gay press may be interested, but the national gay press won't be – I don't think that The Advocate has ever run a story on a judicial contest before the election, and there have been very few reports of post-election victories or appointments, except for California judges. Once you're elected or appointed, visibility is nearly impossible unless it also comes with notoriety. You may be able to remain active in the LGBT organizations in which you were active before ascending the bench, provided you don't do fund-raising and the organization isn't an advocacy group dealing with issues that may come before you. People may resent it if they

perceive you're constantly reminding them that you're a judge, since they will assume it's your ego, rather than your efforts at visibility.

As a lawyer, I was always impressed when I met judges outside the courthouse, but I've learned that most lay people in the LGBT community don't think about judges as public officials and aren't impressed when they find out what you do. I've been in a committed relationship for nearly 23 years, but my single friends tell me that it's a bomb as a pickup line. While in some communities, gay pride parade officials put the judges in the front of the line of march, our New York organizers give us the choice of marching with the politicians or with the professional groups. One year, they put us behind a float for an Off-Off-Broadway show called "Co-Ed Prison Sluts." We moved. Massachusetts judges aren't even permitted to march.

I had two remarkable opportunities for visibility in the past few years. In March 2000, Newsweek ran a cover story called "Gay Today" and I was invited to attend the photo shoot. I was somewhat relieved not to have ended up on magazine covers in airports around the world, but a full-length picture of me appeared on the first page of the inside spread, identified only as Judge Michael Sonberg – no mention of locality or court. Although people I knew saw it and commented to me, no one stopped me on the street or in the subway, both to my disappointment and to my relief.

Then in 2001, I was one of thirty-five men profiled in a book by Dan Woog titled "Gay Men, Straight Jobs." Although it's real easy to Google me and find my e-mail address, I heard from about three friends who happened to read it.

Visibility in the straight legal community is not very different from visibility in the LGBT legal community. I served three one-year terms as Secretary of the Association of the Bar of the City of New York, and each time the election material included my involvement in the IALGJ. I don't recall a single person commenting to me about it. Of course, it was an opportunity for those few people who actually read the election material in our uncontested elections to read about an openly gay judge and I hope that it had some impact. And I was pleased when my colleague, Judge Lobis, was elected to the City Bar's Executive Committee – our Board of Directors – last year; her bio included her IALGJ membership as well.

How can an LGBT judge be visible in his or her courtroom, however? And would he or she want to be? And would it be appropriate? I'm not wearing those lavender robes and I can't switch the American flag for a rainbow one. After eleven years in my courthouse, the long-time staff members all know that I'm gay, as do the long-time members of the District Attorney's Office and the institutional defenders, but the rank and file of courtroom staff change almost as frequently as new lawyers join the District Attorney's office and the institutional defenders. So, I make a point of talking about my partner, Andy, just as my straight colleagues would talk about their spouses and lives with their staff. On the other hand, is it important whether the lawyers in the DA's Narcotics Bureau, who are now the only assistants I deal with, know that I'm gay, other than the general importance of them knowing that there are lesbian and gay judges? After all, there aren't special drug treatment programs for LGBT addicts.

My sexual orientation has made a difference on a few occasions. In cases of same-sex domestic violence, when prosecutors were advocating that defendants attend standard batterers' programs, it probably took lesbian and gay judges and their enlightened colleagues to advocate for something else, both with prosecutors and with providers. I'm pleased that New York's Lesbian and Gay Anti-Violence Project now offers counseling to same-sex batterers, giving courts an appropriate program alternative for the perpetrators of same-sex domestic violence.

A few years ago, there was a rash of men engaging in group sexual conduct on subway platforms in the Bronx, during evening rush hours. I'm told that these locations were listed on a Web site. Others on the platforms and on passing trains saw the conduct and, not surprisingly and, to my mind, justifiably, complained and complained loudly. They were the kind of cases that cause prosecutors to search for appropriate remedies, sometimes responding more to the complaints than to the crime itself. Although most anti-social conduct, whether drug possession, criminal trespass, shoplifting or fare beating, results in a non-criminal disposition if a first arrest, the District Attorney's office was seeking misdemeanor convictions unless a defendant was prepared to enter counseling. But since the sex offenders' counseling available is aimed at men who have inappropriate sexual contact with women, the District Attorney instead was insisting that these men enter psychotherapy, without any limitation as to time other than the one year duration of the suspended sentence.

My colleagues, led by my other gay colleague and I, balked. While the conduct was inappropriate, the punishment didn't fit the crime; neither a year's therapy nor a criminal conviction was the proper response. Thankfully, an openly gay institutional defense lawyer agreed with our evaluation and took it upon himself to design a half-day program which focused on appropriate settings for sexual conduct, as well as safer sex issues. After much negotiation with the hierarchy in the District Attorney's office, and the patience of my colleagues, who would not ordinarily permit cases to linger for months, agreement was reached, saving these men from the choice of a criminal record or a year of therapy, which most of them could not have afforded.

The only times I've talked about my sexual orientation in court, on the record, have been at sentencing in same-sex domestic violence cases. Unfortunately, in those cases, the only person I've ever seen is the batterer; victims only come to court when there's a trial, and trials rarely happen in our Court — we tried only two-tenths of one percent of all cases in 2001. But I have told those few same-sex batterers I've sentenced about my relationship and held it up to them as a relationship based on love and respect, not hitting and hurting. On those times I've had that conversation, I've detected a reaction – although maybe it's only self-delusion – and, once, I know that I evoked tears from a very macho African-American man, who, like his battered boyfriend, was HIV positive and drug addicted. I had him in front of me on three or four different cases, and I'm happy to say that the last time it was because of his drug addiction and inability to stay in treatment, and not because he had beaten up his boyfriend again.

There's one other project I've been involved in of which I'm very proud and which promotes the goal of visibility. There's an organization in New York called the Fund for Modern Courts. Together with its lobbying and advocacy arm, it's been the primary court reform advocate in New York since 1955. For many years, starting in the mid-1970's and continuing until 1995, its associate

director and, later, executive director, was Milton Lyman Henry, Jr., known to all as Hank Henry. I first met him when I was doing court reform work for another civic organization in 1977. Hank was a very out and proud gay man; in fact, he was the first gay man I came out to. He was also devoted to seeing qualified gay men and lesbians on the bench and provided invaluable advice to many of us in New York. After he died of AIDS¥related causes in 1995, the LeGaL Foundation established the Hank Henry Judicial Internship Program, designed to encourage lesbian and gay law students to consider a judicial career. Since 1997, we have chosen a first or second year student who spends 10 weeks working for an assortment of gay and lesbian judges, Judge Batts' chambers generally being the primary assignment. I've been on the selection committee from the inception and have hosted most of the interns for a week's exposure to Bronx Criminal Court. We've already picked this year's intern, but I would encourage the first-year students among you to consider applying next year, and urge you to pass the word to next year's 1L's. The stipend is only $3,500, but the experience is invaluable. I can't claim any credit for the idea of the internship, but I wish I could – it's the perfect example of the LGBT legal and judicial communities working together for visibility and effect.

I'm not sure that lesbian and gay judges have been around long enough to have a significant impact, other than by the fact of our existence. And that all depends on where you are. For example, there's not a single open LGBT judge in all of New England, with the exception of Massachusetts, or in New Jersey, Pennsylvania or Ohio, to say nothing of Virginia or the Carolinas. There are closet cases, but even where they're known in the community, what does that say to the young lawyer deciding whether to be out in his or her practice? In fact, the absence of openly gay and lesbian judges probably has as large an impact as does their presence. So, it becomes the duty of each of us to encourage openly LGBT lawyers to seek judgeships; that's probably a better use of energy than trying to pry open some of those closets. And it is today's LGBT students, entering a less homophobic world than we faced ten, twenty or thirty years ago, who will be tomorrow's openly LGBT lawyers and the next decade's openly LGBT judges. I can't wait to have you join us!

Thank you.