

Title:

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Publication Date:

01-30-2002

Series:

[Other Recent Work](#)

Publication Info:

Other Recent Work, The Williams Institute, UCLA School of Law, UCLA

Permalink:

<http://escholarship.org/uc/item/5zw6d23j>

Abstract:

The purpose of this Article is to provide an empirical analysis of that presumption. The method I use has three steps. First, I place the actual number of filed sexual orientation complaints in the context of the total number of gay people in the workforce. If fifty workers file sexual orientation discrimination complaints, it is important to know whether those are fifty workers out of a total of 500 or 500,000 gay workers in the workforce. By expressing the number of gay complaints in terms of the presence of gay people in the workforce, I produce a measure of the prevalence of complaint-filing by gay workers, or a population-adjusted complaint rate ("PACR"). Second, I apply the same methodology to claims of race and sex discrimination in the same states for the same years. By expressing the actual number of claims filed by minorities and women as a percentage of their prevalence in the workforce, I generate populationadjusted complaint rates for these forms of discrimination as well. Finally, I compare the rate of complaint filing by gay workers with that of other protected groups. This places the number of sexual orientation complaints in some cross-category perspective.

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DO GAY RIGHTS LAWS MATTER?: AN EMPIRICAL ASSESSMENT

WILLIAM B. RUBENSTEIN*

INTRODUCTION

Do gays rights laws really matter? How often are claims of sexual orientation discrimination actually filed? Is there a demonstrated need for such laws? The answers to these questions have important public policy ramifications. A bill pending in Congress—the Employment Non-Discrimination Act (“ENDA”)¹—would amend federal civil rights law to bar sexual orientation discrimination in the workplace.

Opponents of the bill rely on two distinct, indeed contradictory, numbers-based arguments as support for their position.² The “flooders” argue that there are so *many* allegations of sexual orientation discrimination that ENDA will lead to a litigation explosion, swamping the Equal Employment Opportunity Commission (“EEOC”) and federal courts with a mass of novel claims and draining enforcement attention from more pressing

* Acting Professor, UCLA School of Law. This project would not have been possible without the assistance I received everywhere I turned at the UCLA School of Law. Law students helped enormously with the laborious work of gathering data. I am especially indebted to Jocelyn Sperling, who did an extraordinary job assisting in the collection, recording, and analysis of the data, and to Krishna Juvvadi, who provided superb assistance crunching the numbers. My thanks, as well, to Anthony Ly, Laura Godfrey, Jeremy Gladstone, Jennifer Durkin, and Ryan Lederman. UCLA’s Empirical Research Group, particularly Rick Sander and Joseph Doherty, helped immeasurably in framing the research and analysis. My colleagues Rick Abel, Sharon Dolovich, Laura Gomez, and Gillian Lester furnished very helpful comments on earlier drafts, as did many others at a faculty workshop in April, 2001. Finally, the UCLA Academic Senate and the UCLA School of Law Dean’s Fund provided financial support. Beyond UCLA, I am grateful for the many insightful comments that I received on earlier drafts from Lee Badgett, Chai Feldblum, Nan Hunter, David Kirp, Sam Marcossou, and Farrell Rubenstein. I am also very appreciative for the careful data checking undertaken by the editors of the *Southern California Law Review*, particularly Matthew Ferguson, Managing Editor.

1. Employment Non-Discrimination Act of 1999, H.R. 2355, 106th Cong. (1999); Employment Non-Discrimination Act of 1999, S. 1276, 106th Cong. (1999).

2. Opponents also rely on many non-numerical, more normative, arguments. I do not address these in this Article.

problems.³ By contrast, the “droughters” argue that there are so few cases of sexual orientation discrimination that a federal law is unnecessary.⁴ Neither the flooders nor droughters rely on empirical data to support these claims.

The General Accounting Office (“GAO”), pursuant to a request from Congress, conducted some limited empirical research relevant to these contentions. In 1997, the GAO gathered data concerning the utilization of state laws that prohibit sexual orientation discrimination.⁵ The GAO report provided Congress with three sets of numbers: the *total* number of annual employment discrimination complaints filed in each state; the number of these complaints that alleged *sexual orientation* discrimination; and finally, the number of sexual orientation complaints as a percentage of the total number of employment discrimination cases filed within that state that year.⁶

The GAO found that a small percentage—never more than about 3%—of state employment discrimination complaints were claims of sexual orientation bias. It concluded that, “relatively few formal complaints of employment discrimination on the basis of sexual orientation have been filed, either in absolute numbers or as a percentage of all employment discrimination complaints in the state.”⁷ Although it did not say so directly, the GAO report essentially settled the flood argument. The report concluded that “[w]e . . . found no indication that these laws have generated a significant amount of litigation.”⁸

The GAO’s study did not purport to address the drought argument. Nonetheless, the study could be read to credit it. The GAO found that the actual number of filed complaints in several states never exceeded ten per year and in most states never exceeded 100 per year.⁹ In most states, this amounted to a mere few percent of the total number of discrimination

3. See *infra* notes 23–24 and accompanying text.

4. See *infra* notes 25–26 and accompanying text.

5. Letter from Barry R. Bedrick, Associate General Counsel, to the Honorable James M. Jeffords, Chairman (Oct. 23, 1997) in U.S. GEN. ACCOUNTING OFFICE, SEXUAL-ORIENTATION BASED EMPLOYMENT DISCRIMINATION: STATES’ EXPERIENCE WITH STATUTORY PROHIBITIONS, (GAO/OGC-98-7R) (1997) [hereinafter 1997 GAO Report].

6. *Id. passim*. A subsequent 2000 report updated the 1997 report. Letter from Barry R. Bedrick, Associate General Counsel, to the Honorable James M. Jeffords, Chairman (Apr. 28, 2000) in U.S. GEN. ACCOUNTING OFFICE, SEXUAL-ORIENTATION BASED EMPLOYMENT DISCRIMINATION: STATES’ EXPERIENCE WITH STATUTORY PROHIBITIONS, (GAO/OGC-00-27R) (2000) [hereinafter 2000 GAO Report]. The update employed the same research methodology described in the text.

7. 1997 GAO Report, *supra* note 5, at 2.

8. *Id.* at 2.

9. *Id.* at 11–13.

complaints.¹⁰ As noted, the GAO therefore concluded that there were “relatively few” sexual orientation complaints.¹¹ Moreover, gay advocates themselves have expressed surprise at what seems to be under-utilization of protections that they fought hard to secure and, accordingly, they have attempted to explain why the numbers are so low.¹²

Hence the GAO, opponents of ENDA, and even the pro-ENDA lobby all appear to presume that the usage of gay rights laws in the states has in fact been sparse. The purpose of this Article is to provide an empirical analysis of that presumption. The method I use has three steps. First, I place the actual number of filed sexual orientation complaints in the context of the total number of gay people in the workforce. If fifty workers file sexual orientation discrimination complaints, it is important to know whether those are fifty workers out of a total of 500 or 500,000 gay workers in the workforce. By expressing the number of gay complaints in terms of the presence of gay people in the workforce, I produce a measure of the prevalence of complaint-filing by gay workers, or a population-adjusted complaint rate (“PACR”). Second, I apply the same methodology to claims of race and sex discrimination in the same states for the same years. By expressing the actual number of claims filed by minorities and women as a percentage of their prevalence in the workforce, I generate population-adjusted complaint rates for these forms of discrimination as well. Finally, I compare the rate of complaint filing by gay workers with that of other protected groups. This places the number of sexual orientation complaints in some cross-category perspective.

My findings belie the heretofore unexamined assumption that gay rights claims are rarely filed. Using a low-end estimate of the number of gay people in the workforce, I find that in six of ten surveyed states, the incidence of sexual orientation filings falls somewhere between the incidence of sex and race discrimination filings. In two other states, the prevalence of sexual orientation filings exceeds that of both race and gender. In only two states does the incidence of sexual orientation filings fall below both race and gender filings. Even assuming a high portion of gay people in the workforce, the frequency with which gay workers file claims of sexual orientation discrimination is far closer to the rates at which women file gender

10. The average annual rates were California (1.05%); Connecticut (1.36%); District of Columbia (2.52%); Hawaii (2.76%); Massachusetts (2.17%); Minnesota (3.10%); New Jersey (1.27%); Rhode Island (1.85%); Vermont (2.94%); and Wisconsin (1.1%). See *id.* at 11–13.

11. *Id.* at 2, 10.

12. See *infra* notes 31–32 and accompanying text.

discrimination claims and people of color file race discrimination claims than the raw numbers suggest.

I draw the following conclusions from the data:

- when considered in the context of the number of gay people in the workforce, gay rights laws are used with greater frequency than the raw numbers imply;
- the utilization of gay rights laws, per gay worker, is roughly equivalent to, if not slightly higher than, the utilization of sex discrimination laws by female workers; and,
- given the relatively small number of gay people in the workforce, even the relatively frequent filing of discrimination complaints by gay workers will not swamp government agencies.

This study thus provides empirical proof that, per capita, gay rights laws *are* regularly utilized by gay workers. There is no “drought.”

This type of empirical proof is not the only argument against the “drought” objection to ENDA. The drought argument may fail of its own logic. The fact that few claims are filed for a given type of prohibited discrimination could simply mean that the law is working well, fully deterring this form of bias. Alternatively, a drought could indicate that the form of bias is so deeply entrenched that workers fear filing complaints even when the prejudice is prohibited. Far from arguing against extending coverage to such a form of bias, this interpretation of a drought would suggest a more, not less, stringent legal regime. Further, some would argue that even one complaint of discrimination is too many, and that a mere drought does not imply the achievement of a fully just society. Finally, along the same lines, others could contend that a nondiscrimination norm is warranted even if relatively few complaints were to be filed because there would be little cost in maintaining such a norm but perhaps significant social symbolism.

Though I do not engage these arguments in this Article, any or all of them may be sound grounds for arguing against the drought objection. But given the empirical evidence I offer here, the drought objection to ENDA needs no other response because there is, in fact, no proof to support it.

I. BACKGROUND

A. SEXUAL ORIENTATION LAWS AND CONGRESS

Municipalities adopted ordinances barring sexual orientation discrimination for the first time during the 1970s. In 1983, Wisconsin became the first state to enact such a measure on a statewide basis. While no other state enacted a gay rights law until 1990, as of 2000, twelve states, the District of Columbia, and more than 100 municipalities have done so.¹³

For more than a quarter century, Congress has considered laws that would expand federal protections so as to ban sexual orientation discrimination.¹⁴ The first such bill, introduced in 1975, sought to amend Title VII to add “sexual orientation” as a protected category.¹⁵ Later bills would also have amended the public accommodations provisions of the Civil Rights Act of 1964 and the Fair Housing Act to prohibit sexual orientation discrimination in these settings as well.¹⁶ In 1994, proponents of these laws shifted tactics. Massachusetts Representative Gerry Studds introduced a new law, entitled the Employment Non-Discrimination Act (or “ENDA”), as a substitute for the earlier measures that had never achieved significant support.¹⁷

ENDA represents a new approach for several reasons. First, it is solely geared towards prohibiting discrimination in the employment setting. Second, rather than accomplishing this goal by amending Title VII of the Civil Rights Act of 1964, ENDA is a freestanding law.¹⁸ Third, ENDA contains various provisions meant to dampen opposition. For example, it

13. See, *SEXUAL ORIENTATION AND THE LAW* 469 (William B. Rubenstein ed., 2d ed. 1997 & 1999 Supp.). The twelve states that have enacted laws prohibiting workplace discrimination on the basis of sexual orientation are California, Connecticut, Hawaii, Maine, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin. The Maine law was repealed by the state’s voters before it ever went into effect. See *id.*, 1999 Supp. at 40 (citing A. Jay Higgins & Susan Kinzie, *Voters Repeal Gay Rights Law; Tally Splits Along Rural, Urban Line*, BANGOR DAILY NEWS, Feb. 11, 1998).

14. For a comprehensive overview of this twenty-five year history, see Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 149–87 (John D’Emilio et. al. eds., 2000).

15. See H.R. 166, 94th Cong. (1975).

16. See Civil Rights Amendment Act of 1991, S. 574, 102nd Cong. (1991); Civil Rights Amendment Act of 1991, H.R. 1430, 102nd Cong. (1991).

17. See Employment Non-Discrimination Act of 1994, H.R. 4636, 103rd Cong. (1994); Employment Non-Discrimination Act of 1994, S. 2238, 103rd Cong. (1994). See generally Feldblum, *supra* note 14, at 178–80.

18. Congressman Towns introduced an additional law in 2001 that would amend Title VII to add sexual orientation. See H.R. 217, 107th Cong. (1st Sess. 2001).

explicitly disclaims that its enactment will lead in any way to “affirmative action” and it explicitly exempts religious organizations from its reach.¹⁹

Congress held formal hearings on ENDA in 1994,²⁰ 1996,²¹ and 1997.²² Some witnesses testified against ENDA on the basis of the “flood” argument.²³ Senators opposed to ENDA echoed these flood arguments in subsequent floor debate. For example, Senator Hatch stated on the Senate floor that ENDA would create a “litigation bonanza” and that it would “lead to scores of thousands of new law suits.”²⁴ The “drought” argument also surfaced at the Congressional hearings. Representative Poshard, for example, asked an ENDA-friendly witness to respond to this statement:

One of the refrains that I constantly hear from the people is that this isn't needed. There is really nothing going on in the workplace to the extent that the gay community is articulating to the American public, and so on, so we don't need all of these laws carved out for special populations²⁵

While Representative Poshard's question makes clear that the drought argument is a “constant refrain,” often it is articulated in a more nuanced fashion. Opponents of ENDA implicitly argue that not many complaints will be filed by explicitly stating that gay people are not discriminated against. Thus, Joseph Broadus, then a professor at George Mason University School of Law, testified in 1994 that:

19. Employment Non-Discrimination Act of 1999, S. 1276, 106th Cong. 8 (1999) (prohibiting quotas and preferential treatment on the basis of sexual orientation); *id.* at 9 (exempting religious organizations from the Act unless the employee's duties pertain solely to activities of the organization that generate unrelated business taxable income).

20. On July 29, 1994, the Senate Committee on Labor and Human Resources held a hearing on S. 2238, the Employment Non-Discrimination Act of 1994. *The Employment Non-Discrimination Act of 1994: Hearing on S. 2238 Before the Sen. Comm. on Labor and Human Res.*, 103rd Cong. (1994) [hereinafter *Hearing on S. 2238*].

21. On July 17, 1996, the House Subcommittee on Government Programs of the Committee on Small Business, held a hearing on ENDA. *The Employment Non-Discrimination Act: Hearing on H.R. 1863 Before the Subcomm. on Gov't Programs of the H.R. Comm. on Small Bus.*, 104th Cong. (1996) [hereinafter *Hearing on H.R. 1863*].

22. On October 23, 1997, the Senate Committee on Labor and Human Resources held a hearing on S. 869. *See Employment Non-Discrimination Act of 1997, Hearing on S. 869 Before the S. Comm. of Labor and Human Res.*, 105th Cong. (1997) [hereinafter *Hearing on S. 869*].

23. *See, e.g., Hearing on S. 2238 supra* note 20, at 92 (statement of Robert H. Knight, Dir. of Cultural Affairs, Family Research Council) (stating that “[t]his bill . . . will entangle businesses of all types in expensive litigation”).

24. 142 Cong. Rec. S10129 (daily ed. Sept. 10, 1996) (statement of Sen. Hatch). *See also* 142 Cong. Rec. S10129 (daily ed. Sept. 10, 1996) (statement of Sen. Lott) (stating that ENDA is “just a guarantee of multiple lawsuits”).

25. *Hearing on H.R. 1863, supra* note 21, at 21 (question of Rep. Poshard, Member, Subcomm. of Government Programs).

[Gay people are] not . . . a group in need of special civil rights legislation in order to participate in the economy or to have an opportunity to hold a decent job. [They constitute] an elite. An elite whose insider status has permitted it to abuse the political process in search, not of equal opportunity, but of special privilege and public endorsement. . . . Passage of this bill will not make our economy run better by including previously excluded talent. The most reliable indicators suggest that talent is already full employed. . . . Unlike Title VII, and other civil rights laws the ENDA does not address and attempt to correct gross disparities of opportunity based on class membership. . . . The ENDA is not designed to include the excluded.²⁶

Supporters of ENDA spent most of their time responding to the flood argument. Interestingly, though, in so doing, their testimony can be read to add some inadvertent support to the drought argument. For example, Michael Duffy, the Chair of Massachusetts' Commission Against Discrimination ("MCAD"), testified about his state's experience with its antidiscrimination law:

Judging from the numbers of cases that have been filed at the Commission, one can safely assume that gays and lesbians are not currently abusing the system. Only 2% of MCAD's current caseload involves the sexual orientation statute. If one considers that gays and lesbians represent 10% of the population, then this 2% figure is quite low.²⁷

Similarly, Senator Carol Moseley-Braun stated that ENDA would not "result in much litigation" noting that in the District of Columbia, "Out of the 435 complaints [filed in 1995], only twenty were based on sexual orientation."²⁸

Thus, the data ENDA supporters rely on to refute the flood argument appear to lend some credence to the drought argument. Raw numbers of reported discrimination filings in the states do seem, at first blush, surprisingly low. For example, returning to Michael Duffy's testimony: after pro-gay advocates fought for years to secure a gay rights law in Massachusetts,²⁹ only thirty-seven individuals in the entire state filed

26. *Hearing on S. 2238, supra* note 20 (statement of Joseph Broadus, Professor, George Mason Univ. Sch. of Law), available at 1994 WL392911.

27. *Hearing on H.R. 1863, supra* note 21, at 92 (statement of Michael T. Duffy, Chair Comm'r of the Mass. Comm'n Against Discrimination).

28. 142 Cong. Rec. S10129 (daily ed. Sept. 10, 1996) (statement of Sen. Moseley-Braun).

29. For an interesting history of this law, see Peter M. Cicchino, Bruce R. Deming, & Katherine M. Nicholson, Comment, *Sex, Lies, and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill*, 26 HARV. C.R.-C.L. L. REV. 549 (1991). See also, Joyce Cain, *Massachusetts' 1989 Sexual*

discrimination claims in the law's first year. Even half a decade later, only about 100 claims per year are filed out of nearly 5,000 discrimination filings statewide. In Vermont and the District of Columbia, the number of sexual orientation complaints has never even reached double digits.³⁰

Supporters of gay rights laws have developed several stories to make sense of these seemingly low numbers. First, they have explained that the sexual orientation laws are new and usage might increase as covered individuals become increasingly aware of their rights.³¹ Second, gay rights proponents have argued that the seemingly low numbers might be explained by the fact that gay claimants face a unique hurdle in filing sexual orientation complaints: they must, if they have not, essentially "come out" to combat the bias they face.³² While both of these stories might have explanatory value, they both start from the proposition that the data does reflect a low complaint filing rate among gay workers.

The only empirical attempt to examine the filing rates themselves—or the explanatory hypotheses—has been the GAO effort.

B. THE GAO STUDY

Charged by Senator James Jeffords of Vermont,³³ the General Accounting Office undertook its initial study of sexual orientation laws in 1997. The GAO examined the specific statutory regimes existing in the eleven states and the District of Columbia that prohibited sexual orientation discrimination. The agency also gathered "information concerning the

Orientation Nondiscrimination Statute, 1 LAW & SEXUALITY 285 (1991); Lorena Dumas, *The Sexual Orientation Clause of the District of Columbia's Human Rights Act*, 1 LAW & SEXUALITY 267 (1991).

30. For data, see *infra* app.A.

31. See, e.g., *Hearing on H.R. 1863, supra* note 21, at 28 (statement of Michael T. Duffy, Chair Comm'r of the Mass. Comm'n Against Discrimination) (stating that level of actual discrimination is higher than reported number of claims because "homosexuals are afraid . . . or unaware of the current protection"). The GAO report provides little support for this argument. The agency reported that there was not "evidence of large numbers of complaints immediately after the implementation of the sexual orientation statutes" and that "our analyses of the data obtained from the states generally did not show any trends in the number of these complaints over time . . ." 1997 GAO Report, *supra* note 5, at 10. It is possible that the first decade is too short a time period over which to measure such trends, but only time will tell.

32. See, e.g., *Hearing on H.R. 1863, supra* note 21, at 88 (statement of Michael T. Duffy, Chair Comm'r of the Mass. Comm'n Against Discrimination) (testifying that "It is my observation that . . . even victims of [gay] discrimination are reluctant to come forward and file complaints . . . because for many gays and lesbians filing involves coming out . . . [and exposing] intimate details of their lives.").

33. Senator Jeffords was the Chair of the Senate's Committee on Labor and Human Resources which had oversight of ENDA. That committee is now entitled the "Health, Education, Labor, and Pensions" (HELP) committee.

number of complaints filed with the states.”³⁴ The GAO collected its data by contacting the state agencies charged with enforcing the state laws in question. The data was collected from these officials between July and October 1997, and was not verified by the GAO in any manner.

The GAO reported its data in a table format, by year, setting the total employment discrimination complaints next to the sexual orientation employment discrimination complaints,³⁵ and then expressing the latter as a percentage of the former. For example, the GAO’s report on Connecticut looks as follows:

TABLE 1

1997 GAO REPORT—CONNECTICUT DATA

Fiscal Year	Total employment discrimination cases	Sexual orientation employment discrimination cases	Sexual orientation cases as a percentage of total employment discrimination cases
1993	2,035	20	1.0
1994	2,404	32	1.3
1995	2,668	23	0.9
1996	2,262	44	1.9
1997	2,355	41	1.7

The primary conclusion that the GAO drew about its data is evident from this Connecticut information: the agency stated that “*relatively* few complaints of [sexual orientation] discrimination have been made.”³⁶ The word “relatively” in that sentence appears to refer to the comparison of sexual orientation complaints to total complaints; relatively few of the total number of filed employment discrimination complaints alleged sexual

34. 1997 GAO Report, *supra* note 5, at 1.

35. Some of the GAO data was limited by the fact that state agencies did not differentiate employment complaints from housing or public accommodations complaints. These agencies could only estimate the subset of their total complaints to attribute to employment discrimination. *Id.* at 13 nn.c–d. This problem also affected my data. *See infra* notes 46–47 and accompanying text.

36. *Id.* at 10 (emphasis supplied). The agency also concluded that the “statistics do not show any trend in the number of complaints over time.” *Id.* at 10. *See also id.* at 13. In addition, the agency stated that “[t]he number of court cases brought under th[e]se laws has also been small.” *Id.* at 10. *See also id.* at 13–14.

orientation discrimination as the basis of their claim. Yet the agency also stated that “*relatively few complaints* of discrimination in employment on the basis of sexual orientation were filed annually, *whether measured in absolute numbers* or as a percentage of all employment discrimination complaints.”³⁷ This latter statement is more sweeping, suggesting that the agency found the raw numbers to be few in quantity “relative” to some other number, for instance, the number that might have been expected.

In a subsequent report dated April 28, 2000, the agency updated the information offered in the 1997 report. Again the agency concluded that: “While there has been some variation over time, both the number and the percentage of [sexual orientation employment discrimination] complaints as a portion of overall complaints of employment discrimination filed may still be characterized as relatively small.”³⁸ More specifically, the GAO noted that the data did not reflect “any obvious growth trend” nor did it find “evidence of large numbers of complaints filed immediately after a [new law] takes effect.”³⁹ The GAO’s complete data set through the 2000 report is set forth as Appendix A.

The GAO’s empirical data should end the flood argument. Although the agency does not say so directly, its data — and the manner in which the data are presented — demonstrate that the addition of sexual orientation to existing civil rights laws provides relatively little additional work for enforcement agencies. Indeed, analysis of the GAO data shows that the total number of filed complaints that state agencies receive fluctuates from year to year in quantities far exceeding the number of sexual orientation claims. In other words, the regular ebbs and flows of agency caseloads have a far more significant impact on their work than does the addition of sexual orientation to the statutory regime. Consider the GAO data from New Jersey.

37. *Id.* at 10 (emphasis added).

38. 2000 GAO Report, *supra* note 6, at 5.

39. *Id.* at 6.

TABLE 2

YEARLY FLUCTUATION IN EMPLOYMENT
COMPLAINTS: NEW JERSEY

Fiscal Year	Total Complaints	Change in Total from Previous Year	Total Sexual Orientation Claims
1992	2,712		17
1993	2,159	-553	20
1994	1,919	-240	25
1995	2,127	+208	30
1996	1,277	-850	20
1997	1,580	+303	35

The total number of filed complaints fluctuates by several hundred each year; indeed, the average annual change in total complaint filings is around 450. Throughout this same period the total number of sexual orientation claims in a given year never exceeds thirty-five. Responding to sexual orientation claims will never significantly affect the caseload of a human rights agency. The GAO data disprove the argument that sexual orientation complaints will swamp agencies and courts and divert resources from enforcement of other civil rights norms.

The GAO report does not purport to address the drought argument but, for reasons now apparent, its data could be seen to add credence to that argument. As described above,⁴⁰ if one simply examines the number of sexual orientation discrimination complaints that are filed, the numbers look very small. Yet something important is missing from that assessment—the number of gay people in the workforce is also very small. Perhaps the apparently small number of sexual orientation complaints actually reflects a relatively high filing rate by the few workers at issue. My goal was to analyze this hypothesis—to express the incidence of sexual orientation complaint-filing in terms of the number of gay people in the workforce and to compare that number with the incidence of similar types of bias that are presently covered by civil rights laws.

40. See *supra* notes 27–32 and accompanying text.

II. METHODOLOGY

To test the drought hypothesis, I aimed to express the actual number of complaints filed by a given group as a percentage of that group's presence in the workforce. This transforms the raw number of filed complaints for a group (its "complaint rate") into a PACR. To generate PACRs, I needed two types of numbers: the actual number of complaint filings by category (the numerator) and the number of members of that group in the state's workforce (the denominator). This section explains how I collected those numbers and calculated the PACRs.

A. NUMERATOR: QUANTITY OF COMPLAINTS FILED

I concentrated the study in the ten states that have data concerning implementation of their sexual orientation discrimination laws and on the years during which these norms have been in effect.⁴¹ For each state, I collected information directly from the state agency charged with tracking employment discrimination. Some states' data were publicly available in published reports. For other states, research assistants telephoned the relevant agency and obtained the information from agency officials.⁴² Using this methodology, I assembled data containing the total number of employment discrimination complaints filed in each state, in each relevant year, as well as specific data on the number of those complaints filed on the basis of race, gender, and sexual orientation.

The raw data raise four distinct problems for the research: how to account for the fact that race and gender complaints (but *not* sexual orientation complaints) can be filed under federal law with the federal EEOC, as well as with the state agencies from which I collected my data; how to limit the count of discrimination claims to those involving only *employment* discrimination; how to count "reverse discrimination" claims; and how to count "intersectional" claims. I discuss each problem in turn below and conclude that none of them detracts from the Article's ultimate conclusions.

1. EEOC Claims

The methodology of the study entails a comparison of the PACRs for different types (race, gender, sexual orientation) of discrimination. A

41. Nevada and Vermont are two additional states with sexual orientation laws, (*see* SEXUAL ORIENTATION AND THE LAW, *supra* note 13) but no data were available from these states when this study commenced. Throughout the remainder of the Article, I refer to the District of Columbia as a "state."

42. *See infra* app.C.

potential hurdle is that the various forms of discrimination give rise to differing ranges of remedies, creating the possibility that comparing state-filed complaints of race or sex discrimination with state-filed complaints of sexual orientation discrimination may be like comparing apples and oranges. For example, a San Francisco employee who perceives herself to be a victim of race discrimination can file a complaint under federal law with the EEOC, a complaint under state law with the California state agency, or a complaint under local law with the San Francisco human rights agency. A San Francisco employee who perceives herself the victim of sexual orientation discrimination, however, is limited to filing with the local agency or with the state. To compare the PACRs of state complaints, therefore, risks overcounting the sexual orientation complaints since these complainants have only two remedial fora while race and gender complainants have three. In short, the EEOC forum may siphon race and gender complaints out of the state agency.

There are two primary reasons why this proved to be relatively unproblematic. Most importantly, the state data actually capture most of the race and gender filings that are lodged with the EEOC. The EEOC is set up, for federalism reasons, to work cooperatively with state agencies. As part of this cooperative federalism, the EEOC is required to notify state agencies of federal filings and to give state agencies the opportunity to handle these filings first.⁴³ Although the state agencies rarely accept that invitation, the state agencies do routinely *count* these EEOC filings among their reported statistics. Thus, the state data on race and gender filings are not diminished because of the availability of the EEOC forum. The state data capture nearly all race and gender cases filed with the state *or* federal government.⁴⁴ The state race and sex data are therefore generally comparable to the sexual orientation data.⁴⁵

Second, it bears repeating that the point of the study is not to capture the total number of all remedial filings to determine whether sexual orientation discrimination is of the magnitude of these other forms of discrimination.

43. 42 U.S.C. § 2000e-5(c)-(d) (1994).

44. The only claims not included in the state data are those that are solely within the province of the EEOC—namely, those involving federal employees or involving bases not covered by the state.

45. Indeed, if anything, the counting of federal complaints in the race and sex data probably augments those counts in ways that make my conclusions about the sexual orientation filings conservative. Some complainants may feel comfortable filing with the federal government but not with their state government; and some attorneys may file federal complaints but not state complaints. For those experiencing race and sex discrimination, this is an available route *and* the complaint will nonetheless be counted in the state data. For the federally-inclined gay complainant or attorney, however, no federal forum exists and so nothing gets counted in the state data.

Rather, the study responds to the argument that there are insufficient filings with a particular agency to warrant that agency's time and interest. Even if the state agency race and gender PACRs do not capture all of the race and gender filings arising from that state (because some went directly to the EEOC), these PACRs nonetheless implicitly support the argument that filings at the rates that *do* exist warrant the existence of a legal regime and administrative agency to respond to them. If the sexual orientation filing rates are similar, then a fortiori they, too, are worthy of governmental attention.

A less significant wrinkle than the potential (but unrealized) EEOC siphoning effect is created by the presence in most states of local human rights agencies. Like the federal EEOC, these local agencies might, too, siphon off filings from the state agencies. Again, this is not a terribly significant problem for the core purpose of the study, which is simply to look at the utilization of the state agencies as state agencies. But this is also not a significant problem for my data because most of the local agencies that would siphon off some state race and gender filings are equally capable of siphoning off sexual orientation filings. This is true because most local laws, unlike the federal law, prohibit sexual orientation discrimination; indeed, all of the local agencies that exist in the states that I surveyed treat race, gender, and sexual orientation as equally prohibited. Thus, if the state data are depressed by local filings, they are depressed for all three forms of discrimination that are compared. If anything, we might surmise that state sexual orientation data are *more* depressed by these local laws than state race or gender data for the simple reason that these local laws have existed longer than the state law. They are therefore more familiar to local gay workers, and local agencies probably have more trained response mechanisms for gay complainants than those created under the newly established state laws. Thus, it would probably be fair to conclude that the presence of this competing local forum renders my data conservative in their implications.

2. Employment Claims

A primary imperfection in the data arises from the fact that several states' counting mechanisms do not distinguish between complaints of employment discrimination, housing discrimination, and public accommodations discrimination.⁴⁶ My interest was in measuring only employment discrimination, as the proposed federal sexual orientation law would cover only employment discrimination. In those states where the data were not so specific, the state agency was asked to provide an approximate

46. This is true of the data from Connecticut, Massachusetts, and New Jersey.

percentage of the total number claims that could be attributed to employment discrimination. I used the figure provided by the state official as my measure of employment discrimination.⁴⁷ These figures cannot be taken as precise measures of the quantity of filed employment discrimination complaints and are less reliable than the data from the states that utilize separate counting mechanisms for the various types of discrimination (employment, housing, etc.). In this sense, they caution against cross-state comparisons of the filing data. However, since my interest was in measuring the incidence of filing per population group, and in making intra-state comparisons among population groups, this form of imprecision is insignificant.⁴⁸

3. Reverse Discrimination Overcounting

In each category—race, gender, and sexual orientation—complaints could be filed not only by people of color, women, and gay people, but by whites, men, and non-gay people as well. Thus, the total number of race discrimination filings in a given state in a given year encompasses claims filed by non-whites and whites; the total number of gender discrimination filings encompasses claims by women and men; and the total number of sexual orientation filings encompasses claims by gay people and non-gay people. None of the data collected from any of the ten states distinguish the type of filing within each category.

The difficulty this presents is one of methodology, not theory. I do not maintain that reverse discrimination claims are unworthy of legal attention. While that assertion is defensible, I need not engage that debate.⁴⁹ The

47. For Connecticut and Massachusetts, 90% of the total claims were estimated to be employment related. The New Jersey authorities provided more specific annual percentages. *See infra* app.C. The GAO utilized the same methodology to address this problem. *See* 1997 GAO Report, *supra* note 5, at 13.

48. The California data suffered from a related, but more problematic, reporting problem. Until January 2000, California's sexual orientation antidiscrimination law was housed in a different statutory and enforcement regime from its race and gender antidiscrimination laws. The sexual orientation law was part of the Labor Code, *see* CAL. LAB. CODE § 1102.1 (repealed West Supp. 1992). The other laws were part of the Fair Employment and Housing Act. *See* CAL. GOV'T. CODE §§ 12920–12922. (West Supp. 2001). The enforcement mechanisms of the Labor Code are less well publicized and less encompassing than those of the FEHC. This created an additional barrier for those seeking to file complaints of anti-gay bias. Accordingly, the California sexual orientation data presented here are probably lower than they would have been had sexual orientation complainants been able to pursue the standard FEHC process available to race and gender complainants. The sexual orientation provisions were moved to the FEHC mechanism at the outset of 2000. *See* Act of Oct. 10, 1999, ch. 592, sec. 1.5, CAL. GOV'T. CODE, 1999 Stats., 3424, 3424–25 (1999).

49. The debate, as it appears in constitutional discourse, concerns whether antidiscrimination norms should embody a “colorblind” approach that protects both blacks and whites, or an “antisubordination” approach that protects only historically subjugated blacks. *Compare, e.g.,* William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775 (1979) (arguing that

problem for this Article is more succinct: when I take the number of gender discrimination complaints (which includes claims by men) and divide by the number of *women* in the workforce, my estimate of the prevalence of sex discrimination claim-filing by women is not exact. More specifically, to describe this number as the amount of discrimination faced by women overstates the measure, as the numerator incorporates discrimination cases faced by men, as well as women.

I concluded that the reverse discrimination claims do not damage the data in ways that are significant to the purposes of the research. To assess whether the frequency of gay discrimination complaint-filing is similar to that of race and gender complaint-filing does not require the development of absolutely precise measurements of the levels of complaint-filing. Moreover, it is fair to assume that the amount of complaint-filing by white people, men, and straight people is small relative to complaint-filing by people of color, women, and gay people. Further, the extra amount in each of the numerators was probably relatively similar across the various types of discrimination, suggesting that the relationships between the various covered categories are not skewed.⁵⁰ Indeed, if anything, the race and gender figures are probably higher than they should be due to this effect, while the sexual orientation data are probably not significantly altered. I am aware of only one case in which a claim of sexual orientation discrimination has been filed by a non-gay person,⁵¹ whereas white race discrimination claims and male gender discrimination claims are more easily identifiable.⁵² If this is correct, the incidence of sexual orientation discrimination may be even closer to that of race and gender than the data suggest, which means that the claims I make

constitution should encompass a color-blind approach), with, e.g., Laurence H. Tribe, "In What Vision of the Constitution Must the Law Be Color-Blind?," 20 J. MARSHALL L. REV. 201, 204 (1986) (arguing that the Fourteenth Amendment is intended to protect blacks) and Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1 (1991) (arguing the same point).

50. Due to recent developments, the quantity of gender discrimination claims attributed to women is probably the most overstated number. This is so because it is reasonable to presume that men more often file gender discrimination cases than whites file race cases, or non-gay people file sexual orientation cases. This presumption is based in part on the U.S. Supreme Court's 1998 holding that same-sex sexual harassment is actionable under Title VII. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998). *Oncale* has spurred a significant quantity of reported cases involving male victims of sexual harassment. See Rubenstein, *supra* note 13, 2000 Supp. at 41-43. This reported case law surely reflects an even greater quantity of filed discrimination complaints in state agencies. Much of this activity post-dates the years of this study, however, and the gender discrimination data is probably not greatly affected by it.

51. See *Hearing on S. 869*, *supra* note 22, at 71 (statement of Chai R. Feldblum, Assoc. Professor, Georgetown Univ. Law Ctr.) (discussing case filed by non-gay person).

52. See, e.g., *Martin v. Wilks*, 490 U.S. 755 (1989) (white firefighters reverse race discrimination case); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (male nurse reverse sex discrimination case). Most instances of formal discrimination against men have been abolished since the 1970s, but sex discrimination laws have increasingly been used by male victims of sexual harassment. See *supra* note 50.

about the data are probably conservative. Finally, to correct this negligible and consistent overcounting problem would require a refined methodology not worth the cost for this study's purposes.

4. Intersectional Claims

The filed discrimination complaints within each state's data encompass situations in which a person believes she has been discriminated against on multiple grounds. Assume, for example, a Latina lesbian is fired from her job. She might perceive her firing to be the consequence of race, gender, or sexual orientation discrimination—or of a particular combination of some or all of these factors. She might well feel that it is impossible to pick a box in which to fit her claim, as the law appears to require. Moreover, the states have different practices with regard to how to count such a situation.⁵³

The intersectional situation presents two distinct difficulties. Initially, there is an epistemological problem in considering how to characterize and categorize such a discrimination case. Counting it once, or counting it thrice, are two possibilities, but both exist within the governing civil rights paradigm. A different approach is to conceptualize the intersectional case as constituting its own category, its own particular form of bias, related to but uniquely distinct from the other categories described.⁵⁴ While I am

53. The GAO report noted that:

Generally, a [sexual orientation] complainant can allege other bases—sex, race, or religion, for example—in a complaint that also alleges employment discrimination on the basis of sexual orientation. [The GAO method was that a] case is counted as a sexual orientation case whether or not other bases are also alleged in the same complaint.

1997 GAO Report, *supra* note 5, at 13.

54. As my colleague Kimberlè Crenshaw has stated:

I argue that Black women are sometimes excluded from feminist theory and antiracist policy discourse because both are predicated on a discrete set of experiences that often does not accurately reflect the interaction of race and gender. These problems of exclusion cannot be solved simply by including Black women within an already established analytical structure. Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.

Kimberlè Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989). See also Kimberlè Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

A growing body of literature, building on intersectional theory, considers the relationships between race, class, gender, and sexual orientation. See, e.g., Darren Lenard Hutchinson, *Out Yet Unseen: A Radical Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257 (1997); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities & Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25 (1995). See also Francisco Valdes,

sympathetic to this argument, it was difficult to encompass it as a methodological matter in this study since only one of the agencies from which I collected data tracked information in ways which would enable the development of intersectional categories.⁵⁵ Thus, the more immediate problem was not the epistemological one, but the practical problem produced by the counting variations across state regimes.

My solution was simply to accept the state data at face value. As with the over-counting problem, to refine the data would have required significant additional investigation. This work would be inefficient in that it would be unlikely to yield significantly different results for the purposes of this study. This is true for two reasons. First, the goal of the study is to establish ranges, not point estimates, so double-counting a single case in one state and single counting a double case in another would have small effects on the general conclusions I draw. Second, the study does not purport to make comparisons across states. Hence, disparate counting methods across jurisdictions was of minimal importance. The intra-jurisdiction comparisons remain fully valid for the Article's purposes because each state uses a consistent methodology in counting different types of intersectional cases.

It bears emphasis that although the law requires complainants to categorize their claims into existing statutory categories, each of these categories encompasses significant diversity. Thus, complaints filed in the sexual orientation box include complaints of sexual orientation discrimination by whites and people of color, women and men. Complaints of race discrimination encompass race discrimination encountered by both non-gay and gay people of color, by both men and women of color. That limitations in the states' data force us to analyze filing-prevalence by covered

Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of "Sexual Orientation," 48 HASTINGS L.J. 1293 (1997).

55. This is the District of Columbia's agency. The District's intersectional counting separated claims into race, sex, and sexual orientation categories as the "regular bases;" the District also separately recorded "separate bases" of "race and other grounds," "sex and other grounds," "age and other grounds" and "other grounds." A claim filed by a black woman could be filed on multiple grounds. If it were, it would not be counted in the "race" or "sex" categories but rather would be counted as "race and other grounds." It was more difficult to assess how the District would categorize the Latina lesbian example provided in the text. The District does not have a "sexual orientation and other" ground; it seems as though this could be counted in "race and other" or in "sex and other" or in "other grounds" or in all three categories. Given these complications of the D.C. data, the data I use collapse "race" and "race and other grounds" into "race;" and collapse "sex" and "sex and other grounds" into "sex;" and count as "sexual orientation" claims only claims filed solely as sexual orientation claims. This undercounts sexual orientation claims in some instances at the expense of race and sex, but it makes the conclusions I draw about the incidence of gay discrimination somewhat more conservative than they need be.

category should not be read to obscure the overlapping nature of the categories themselves.

B. DENOMINATOR: QUANTITATIVE PRESENCE OF GROUP IN WORKFORCE

I sought to place the raw numbers of complaint filings in context by expressing them as a percentage of each group's presence in the state workforce. Thus, for example, the number of race discrimination complaints filed in California in 1993 is divided by the number of non-whites in the California workforce for that year. To determine the number of non-whites and women in each state's workforce, I utilized workforce population data from the 1990 U.S. census.⁵⁶

The biggest methodological hurdle came in estimating the total number of gay people in the workforce to utilize as the denominator for the sexual orientation complaints. This is complicated because sexual orientation is not visually identifiable and because there are no census-type data concerning the number of gay men and lesbians in the workforce. Moreover, there is no one meaning for "sexual orientation"—sexual orientation can be established by reference to desires, behaviors, identities, or combinations of these, and all three can fluctuate over the course of an individual's life. Yet the method of this Article's analysis required some meaningful way around these epistemological and practical counting problems.

I utilized the following process to address this hurdle. In each state, I began with the 1990 U.S. Census estimate of the total civilian workforce. I then expressed the number of gay people in the workforce as three different possible portions of this total: 10%, 5%, and a combined number consisting of the sum of 2.4% of the male workforce and 1.3% of the female workforce. I selected three different figures to provide a range for the findings. Given the impossibility of arriving at a single estimate of the number of heterosexual or gay people in society, presenting three points across a fair range of the possibilities seemed the most sensible way to proceed.

56. See U.S. Census Data, Database C90STF3A, at <http://venus.census.gov/cdrom/lookup/> (last visited Nov. 6, 2001). The workforce data was generated from the employment statistics available for each state. The *total workforce* was calculated by adding together the number of employed and unemployed males and females in the civilian labor force. The presence of *people of color* was generated in two ways, each yielding the same result. One method was to subtract the number of white men and women from the total civilian workforce, and then add to that result the number of those male and female Hispanics in the civilian work force (who were otherwise categorized as White). Alternatively, the race data could be generated by adding together all of the racial minority groups in the civilian workforce that the census identified, and then adding to that sum the number of Hispanics. As noted either method generated the same result. The presence of *women* in the workforce is the sum of the total number of employed and unemployed women in the civilian labor force.

These three figures were chosen for the following reasons. The 10% figure, often cited by gay advocates, evolves out of Alfred Kinsey's pioneering work of the mid-twentieth century.⁵⁷ What Kinsey actually found was that 10% of "males are more or less exclusively homosexual . . . for at least three years between the ages of sixteen and fifty-five."⁵⁸ Kinsey's study has long been a source of controversy.⁵⁹ The methodological questions

57. See ALFRED C. KINSEY, WARDELL B. POMEROY, & CLYDE E. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948) (hereinafter "KINSEY, MALE") ALFRED C. KINSEY, WARDELL B. POMEROY, CLYDE E. MARTIN, & PAUL H. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953).

58. KINSEY, MALE, *supra* note 57, at 651 (emphasis omitted). This figure was one of a list of statistics that Kinsey weaned from his data. It was presented by Kinsey as follows:

37 per cent of the total male population has at least some overt homosexual experience to the point of orgasm between adolescence and old age. . . . This accounts for nearly 2 males out of every 5 that one may meet. . . .

50 per cent of all males (approximately) have neither overt nor psychic experience in the homosexual [sic] after the onset of adolescence. . . .

25 per cent of the male population has more than incidental homosexual experience or reactions . . . for at least three years between ages the of 16 and 55. In terms of averages, one male out of approximately four has had or will have such distinct and continued homosexual experience . . .

10 per cent of the males are more or less exclusively homosexual . . . for at least three years between the ages of 16 and 55. This is one male in ten in the white male population. . . .

4 per cent of the white males are exclusively homosexual throughout their lives, after the onset of adolescence.

Id. at 650–51.

59. The core of the criticism is as follows:

[T]he major difference between Kinsey and recent research is that Kinsey did not use probability sampling. Kinsey's respondents were all purposefully recruited rather than sampled with known probabilities of inclusion. This means both that they were volunteers who may have differed in systematic ways from those who did not participate (e.g., by being more open and comfortable about their sex lives and perhaps more sexually active) and that there is no statistically sound way to generalize from his sample to a population. In fact, Kinsey roamed far and wide in selecting his subjects. He was not averse to using institutional settings, including prisons and reform schools, from which to recruit his subjects. Kinsey also purposely recruited subjects for his research from homosexual friendship and acquaintance networks in big cities. Kinsey combined fantasy, masturbation, and sexual activity with partners in some of his calculations (e.g., the 50 percent figure). Experiences were collected retrospectively over the whole lifetime and almost as a matter of course were reported to include activity since puberty or since age sixteen. These devices would all tend to bias Kinsey's results toward higher estimates of homosexuality (and other rare sexual practices) than those that he would have obtained using probability sampling. . . . There is one other fundamental difference between the Kinsey approach and contemporary surveys. Kinsey and a handful of highly trained colleagues conducted all the interviews. The structure of the Kinsey interview was a "sex history," and people were taken through their lifetime in segments. They were intensively questioned about a wide variety of forms of sexual activity, including fantasies. The focus seems to have been largely on numbers of orgasms achieved in various ways. Having no written and fixed questionnaire, the interviewers memorized the question order, and wording could be varied by the interviewer as he (or occasionally she) saw fit. These interviewers were not averse to challenging respondents who they believed were not admitting to stigmatized behaviors such as masturbation or homosexuality. The interview took respondents chronologically from their early childhood experiences to the time

about Kinsey's work all suggest that his numbers are too high. Most later studies, using more modern statistical techniques, have found a far lower incidence of homosexual behavior in the general population. Hence the Kinsey number stakes out one end of the range.

The combined 2.4/1.3% that I employ as the low end of the range is a number that emerges from a recent study undertaken at the University of Chicago. Most sexologists consider this 1994 Chicago study to be something of a "gold standard" in the field as it utilizes the most modern and most sound sampling techniques.⁶⁰ The Chicago study emphasized that there are three dimensions to sexuality—sexual behavior, sexual desire, and sexual identity. The researchers asked their subjects about each of these aspects of their sexuality and in turn generated data about the prevalence of same-sex behavior, desire, and identity. A primary contribution of the research is that it carefully identifies a subset of persons in whom these three aspects of (same-sex) sexuality are consistent—namely, individuals who have sexual desire for others of the same sex, primarily have sex with persons of the same sex, and identify themselves as gay or lesbian.⁶¹ The Chicago study concluded that:

While there is a core group (*about 2.4 percent of the total men and about 1.3 percent of the total women*) in our survey who define themselves as homosexual or bisexual, have same-gender partners, and express homosexual desires, there are also sizable groups who do not consider themselves to be either homosexual or bisexual but have had adult homosexual experiences or express some degree of desire.⁶²

The 2.4/1.3% low end of the range thus represents the "core group" of the Chicago participants who identify themselves as gay, as well as practicing and desiring same-sex sexuality.

The third figure that I used to estimate the number of gay people in the workforce was 5%, which was simply a number I selected as a mid-range between the two endpoints. The number does comport with some other important indicia, however. For example, the Chicago researchers state that

of the interview. It asked a lot about fantasy. The emphasis on ideation and the encouragement of subjects to describe homosexual thoughts and fantasies may have increased reports of other homosexual behaviors as well. It is possible that some of these techniques may have increased the disclosure and reporting of stigmatized activities.

EDWARD O. LAUMANN, JOHN H. GAGNON, ROBERT T. MICHAEL, & STUART MICHAELS, *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 289–90 (1994).

60. See, e.g., John Delamater, *Sex in America: A Definitive Survey*, 270 *SCIENCE*, Oct. 20, 1995, at 501 (stating that this survey's data "will provide a baseline against which the results of future studies will be compared").

61. LAUMANN ET AL., *supra* note 59, at 298–301.

62. *Id.* at 300–01 (emphasis supplied).

“about 5 percent of the men and women in our sample express some same-gender desire, but no other indicators of adult activity or self-identification.”⁶³ This mid-range thus captures a larger set than those who self-identify as gay, but not so large a set as all of those who have had some same-sex experiences that may, for example in adolescence, be more exceptional than indicative of their adult lives.

In the findings section, below, I suggest some reasons that the 2.4/1.3 number is the best number to use in examining the data.⁶⁴ My purpose here is simply to clarify the methodological decision of providing three gay workforce population estimates.

One other aspect of the difficulty of this estimate should be discussed. So far, the analysis has presumed that the population of people most at risk for sexual orientation discrimination are those who identify as gay. These people are more likely to be open in the workplace and hence more likely to be identified and subject to adverse employment decisions. The assumption of that analysis is that the more gay-identifiable one is, the more likely one is to face anti-gay bias. There is a group of people, however, who are often identified by others to be gay regardless of their own chosen identity. These are people who perform their gender in ways that challenge stereotypes: weak and effeminate men, strong and masculine women are both groups that people often presume to be gay. If such individuals were to face adverse job actions based on an employer's assumption of their homosexuality, they could file claims of discrimination under the “perceived as” protections of the state laws at issue, whether they self-identified as gay or not.⁶⁵ (To do so is not without risks, of course, because this will tend to identify the complainant as gay even if the complaint is filed under the “perceived as” heading.) Although this enlarges the group of people likely to face and somewhat likely to file sexual orientation discrimination claims, this group is not fully captured in my denominator since some in this group exhibit none of the three selected indicia of homosexuality (behavior, desire, or identity). Exclusion of gender-nonconforming subjects from my denominator tends to enlarge the prevalence factors I report. However, I believe the effect is negligible. It is small because it encompasses only those few people who file sexual orientation claims yet fall fully outside the definition of “gay” developed by the Chicago study.

63. *Id.* at 301. See also KINSEY, MALE, *supra* note 57, at 651 (stating “4 per cent of the white males are exclusively homosexual throughout their lives, after the onset of adolescence” (emphasis omitted)).

64. See *infra* Part III.E.

65. The GAO report sets forth the various “perceived as” provisions in existing state laws. See 1997 GAO Report, *supra* note 5, at 3.

C. POPULATION ADJUSTED COMPLAINT RATES (“PACRS”)

Using the data collected according to the methods described above, I generated population adjusted complaint rates on a state-by-state basis. I generated PACRs only for those years in which I had raw data concerning all three types of discrimination complaints. The years vary from state to state as the sexual orientation laws came into effect at different times in each state and as the comprehensiveness of the data for all types of filed complaints varied from state to state. The fact that the data cover different time periods in each of the state presentations cautions against making any state-to-state comparisons.⁶⁶

Within in each state, I averaged the available data to generate annual complaint rates. I did this because I was interested in taking a snapshot of each state and because the data did not support longitudinal analysis.⁶⁷ Accordingly, I aggregated the number of filings for all of the years for which I had comprehensive data and divided that by the number of years to come up with average annual complaint rates.

I then divided these annual complaint rates by the workforce presence of each group to yield PACRs. As set forth below, the PACRs are the number of discrimination complaints for each 10,000 workers in that portion of the workforce. The PACR is the bottom line figure that is the key to the analysis that follows. The PACR represents the number of complaints filed per ten thousand workers (of that category) in the workforce.

If the drought hypothesis is correct, the PACRs for sexual orientation filings ought to be significantly smaller than the PACRs for other types of discrimination. This would provide the strongest support for the hypothesis that there is very little complaint filing by gay people and thus no empirically-verified need for ENDA.

III. FINDINGS

The primary claim of the research is that the quantity of sexual orientation complaints filed in states that have gay rights laws, when adjusted for the per capita presence of gay people in the workforce, is in the same general range as the quantity of race and gender complaints. The data support this conclusion.

66. There are several other reasons the data are of limited value in making such cross-state comparisons. *See supra* Part II.A.

67. The data generally spanned fewer than ten years within any state and did not appear to vary significantly within this time period. *See supra* note 31.

Assuming the smallest presence of gay people in the workforce:

- the PACR for sexual orientation discrimination is higher than the PACR for gender discrimination in eight of ten states surveyed;
- the PACR for sexual orientation discrimination is higher than that of race discrimination in two of the ten states;
- in those states where race and gender PACRs are higher than those for sexual orientation, the differences are usually not large.

Even assuming the highest conceivable percentage of gay people in the workforce:

- adjusting the raw data to account for the size of the gay workforce suggests rates of complaint filing much closer to those of race and gender than the small number of actually filed sexual orientation complaints might imply.

These findings are presented as follows. Part A compares data concerning sexual orientation discrimination to those of gender discrimination and Part B compares the sexual orientation data to those of race discrimination. Part C assumes the highest number of gay people in the workforce and thus the lowest levels of population-adjusted complaint filing. Under these assumptions, the PACRs for race and gender are higher than sexual orientation in every state. Nonetheless, Part C demonstrates that adjusting the raw data to account for the relatively small number of gay people in the workforce still helps place the sexual orientation figures in a clearer comparative context. Part D provides one final nationwide snapshot of the data. Part E then suggests some reasons that the presence of gay people in the workforce is probably quite small. If my argument in this section is convincing, it lends support to the claim that the level of complaint filing by gay workers is at the high end of the range I offer. In Part F, I conclude by discussing the limitations of the data and the of claims that can be made from them.

A. SEXUAL ORIENTATION CLAIMS ARE FILED MORE FREQUENTLY THAN GENDER CLAIMS IN EIGHT OF TEN STATES

In eight of ten surveyed states, gay workers file claims of sexual orientation discrimination more often than women file claims of gender bias. These states are Connecticut, District of Columbia, Hawaii, Massachusetts, Minnesota, New Jersey, Rhode Island, and Wisconsin. In two other states—California and New Hampshire—female workers file gender discrimination claims more often than gay workers file sexual orientation

discrimination claims, though in California the population adjusted filing rates are quite close.

The raw data mask the similar filing rates of these different types of discrimination. In Massachusetts, for example, MCAD receives an annual average of 822 complaints of gender discrimination and 111 complaints of sexual orientation discrimination. A quick glimpse at this data would imply that there are roughly eight times as many gender complaints as there are sexual orientation complaints. However, there are about 1.5 million women in the workforce. The number of gay workers is much smaller. At the lowest level of my range, there are about 61,000 gay workers in the workforce, while at the highest possible level, there are about 325,000.

When the raw data are placed in the context of the workforce population for each group, the errant sense that gender claims are filed eight times more often than sexual orientation claims disappears. The population-adjusted data demonstrate that about eighteen gay workers per ten thousand file complaints of discrimination, while about five female workers per ten thousand file gender discrimination complaints. What that means is that if one assumes the lowest number of gay people in the population, the filing rate for sexual orientation claims is not eight times less than gender claims, but in fact, more than three times greater.⁶⁸

Table Three demonstrates how placing the average annual number of complaints in the context of the group's population creates PACRs which provide a better basis for analyzing how much discrimination filing actually occurs in each state. Moving down the first column of Table Three shows that placing the average annual gender discrimination complaints (822) in the context of the number of women in the workforce (1.5 million) generates a PACR of about five gender complaints for every ten thousand women in the workforce. The second column of Table Three assumes that gay people constitute a small portion of the workforce. Placing the average annual sexual orientation complaints (111) in the context of this small number of gay workers (61,000) generates a PACR of about eighteen sexual orientation complaints for every ten thousand gay workers. The third and fourth columns of Table Three then repeat the sexual orientation calculation but using mid-level (162,000) and high-level (325,000) estimates of the number of gay workers. If the number of gay workers is assumed to be a mid-range, 5% figure, then about seven gay workers for every ten thousand file

68. Even assuming the highest possible number of gay people in the workforce, about three gay workers in ten thousand file discrimination complaints, compared to five female workers who file gender discrimination complaints. This 5:3 ratio is much smaller than the 8:1 ratio suggested by the raw data.

discrimination complaints (still larger than the five per ten thousand gender filings). Finally, if the number of gay workers is assumed to be quite high (10% of the workforce), then 3.4 gay workers per ten thousand file discrimination complaints.

TABLE 3

ADJUSTING RAW GENDER AND SEXUAL ORIENTATION DATA
FOR POPULATION DENSITY: MASSACHUSETTS

	Gender	Sex/O Low # Gays in Workforce	Sex/O Mid # Gays in Workforce	Sex/O High # Gays in Workforce
Average Annual Employment Complaints Filed	821.78	111	111	111
Presence of Group in Workforce	1,530,983	61,062	162,298	324,595
Population- Adjusted Complaint Rate PACR (complaints per 10,000 workers)	5.37	18.18	6.84	3.42

The data from the other nine states similarly show that if gay people constitute a small portion of the workforce, the number of discrimination complaints they file is generally greater than the number of gender discrimination complaints filed by female workers. Table Four compares the PACRs for sexual orientation (assuming the smallest percentage of gay people in the workforce) and gender discrimination in each of the study's ten states.

TABLE 4

COMPARISON OF POPULATION-ADJUSTED
SEXUAL ORIENTATION AND GENDER COMPLAINT RATES
(NUMBER OF COMPLAINTS PER 10,000 WORKERS)

	Gender	Sexual Orientation
Connecticut	8.05	9.56
District of Columbia	4.20	10.99
Hawaii	5.73	10.82
Massachusetts	5.37	18.18
Minnesota	3.17	6.23
New Jersey	2.81	3.16
Rhode Island	4.06	8.48
Wisconsin	10.02	12.74
California	12.47	5.37
New Hampshire	4.53	2.16

In each of the first eight states in Table Four, more gay workers file sexual orientation discrimination claims on an annual basis than female workers file gender discrimination claims. In the last two states, more women file gender discrimination claims.

In sum, gay workers utilize state sexual orientation discrimination laws at rates that are generally similar to the rates at which women workers utilize gender discrimination laws.

B. SEXUAL ORIENTATION CLAIMS ARE FILED AS FREQUENTLY AS RACE
CLAIMS IN FIVE OF TEN STATES

In two of ten surveyed states, gay workers file claims of sexual orientation discrimination more often than people of color file race discrimination claims. These states are the District of Columbia and Hawaii. In the other eight states—California, Connecticut, Massachusetts, Minnesota, New Hampshire, New Jersey, Rhode Island, and Wisconsin—race discrimination claims are filed more often than sexual orientation discrimination claims. In three of these states (California, Massachusetts, and Rhode Island) the numbers are quite close. Thus in about half of the states, gay workers take advantage of sexual orientation protections at rates similar to those at which people of color utilize race discrimination laws.

The raw data mask how relatively similar the filing rates of these different types of discrimination actually are. Again, take Massachusetts: MCAD receives an annual average of 783 complaints of race discrimination and 111 complaints of sexual orientation discrimination. A quick glimpse at this data would imply that there are roughly seven times as many race complaints as there are sexual orientation complaints. However, there are about 400,000 people of color in the workforce. The number of gay workers is much smaller. At the lowest level of my range, there are about 61,000 gay workers in the workforce, while at the highest possible level, there are about 325,000.

When the raw data are placed in the context of the workforce population for each group, the errant sense that race discrimination claims are filed seven times more often than sexual orientation claims disappears. The population-adjusted data demonstrate that eighteen gay workers per ten thousand file complaints of discrimination, while about twenty people of color per ten thousand file race discrimination complaints. What that means is that if one assumes the lowest number of gay people in the population, the filing rate for sexual orientation complaints is not one seventh that of race complaints, but about the same.

Table Five demonstrates how placing the average annual number of complaints in the context of the group's population creates PACRs which provide a better basis for analyzing how much discrimination filing actually occurs in each state. The first column of Table Five shows that placing the average annual race discrimination complaints (783) in the context of the number of people of color in the workforce (388,000) generates a PACR of about twenty race complaints for every ten thousand people of color in the workforce. The second column of Table Five assumes that gay people constitute a small portion of the workforce. Placing the average annual sexual orientation complaints (111) in the context of this small number of gay workers (61,000) generates a PACR of about eighteen sexual orientation complaints for every ten thousand gay workers. The third and fourth columns of Table Five then repeat the sexual orientation calculation but using mid-level (162,000) and high-level (325,000) estimates of the number of gay workers. If the number of gay workers is assumed to be a mid-range, 5% figure, then about 6.84 gay workers for every ten thousand file discrimination complaints. Finally, if the number of gay workers is assumed to be quite high (10% of the workforce), then 3.42 gay workers per ten thousand file discrimination complaints.

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TABLE 5

ADJUSTING RAW RACE AND SEXUAL ORIENTATION DATA
FOR POPULATION DENSITY: MASSACHUSETTS

	Race	Sex/O Low # Gays in Workforce	Sex/O Mid # Gays in Workforce	Sex/O High # Gays in Workforce
Average Annual Employment Complaints Filed	782.67	111	111	111
Presence of Group in Workforce	388,469	61,062	162,298	324,595
Population- Adjusted Complaint Rate PACR (complaints per 10,000 workers)	20.15	18.18	6.84	3.42

The data from the other nine states similarly show that if gay people constitute a small portion of the workforce, the number of discrimination complaints they file is generally closer to the number of race discrimination complaints filed by people of color than the raw data suggest. Table Six compares the PACRs for sexual orientation (assuming the smallest percentage of gay people in the workforce) and race discrimination in each of the study's ten states.

TABLE 6

COMPARISON OF POPULATION-ADJUSTED SEXUAL
ORIENTATION AND RACE COMPLAINT RATES
(NUMBER OF COMPLAINTS PER 10,000 WORKERS)

	Race	Sexual Orientation
District of Columbia	6.30	10.99
Hawaii	2.03	10.82
California	5.74	5.37
Connecticut	22.48	9.56
Massachusetts	20.15	18.18
Minnesota	20.29	6.23
New Hampshire	11.22	2.16
New Jersey	4.94	3.16
Rhode Island	10.74	8.48
Wisconsin	66.03	12.74

In each of the first two states in Table Six, more gay workers file sexual orientation discrimination claims on an annual basis than people of color file race discrimination claims. In the next eight states, more people of color file race discrimination claims. In several of those states, the difference is relatively high. For example, in New Hampshire and Wisconsin, the number of people of color who file race discrimination complaints is about five times greater than the number of gay workers who file sexual orientation complaints; in Minnesota, about three times greater; and in Connecticut, about two times greater. Yet in several other states where race claims are filed with more frequency than sexual orientation claims, the numbers are relatively similar. In California there are about 5.74 race claims per ten thousand workers of color and about 5.37 sexual orientation claims for every ten thousand gay workers. Similarly, in Rhode Island there are about 10.74 race claims and about 8.48 sexual orientation claims, and as already discussed (in Table Five) the numbers in Massachusetts are relatively similar.

In sum, in about half the states surveyed gay workers use sexual orientation discrimination laws at rates higher than or generally similar to the rates at which people of color utilize race discrimination laws. In the other five states, the race filings are significantly higher than the sexual orientation filings.

C. POPULATION-ADJUSTED COMPLAINT RATES PROVIDE AN IMPORTANT
CONTEXT IN WHICH TO ANALYZE THE RAW COMPLAINT DATA

So far most of the claims that I have made have been based on utilizing the lowest offered percentage of gay people in the workforce. Using the lowest estimate of gay workers produces the highest complaint filing rate per gay worker. Thus, PACRs based on this low-end population estimate compare most favorably to race and gender PACRs. Conversely, if we assume that there are more gay workers in the workforce, the filing rate per gay worker will decrease. The data show that if 10% of the workforce is gay, gay workers file sexual orientation complaints at rates lower than that at which women file gender discrimination complaints and people of color file race discrimination complaints in all ten states.

Thus, the data generated by assuming 10% of the workforce is gay produce the weakest claims for this study, but these numbers nonetheless provide some helpful insight. The population-adjusted data are important because they provide an appropriate context for assessing the raw data. In every instance, the raw data standing alone will suggest that the number of complaints filed by gay workers pales in comparison to the number of complaints of race and gender discrimination. But even the lowest gay PACRs significantly decrease the differences suggested by the raw data.

Let me demonstrate how even the weakest data in the study can help put the raw data in perspective. Again take the example of Massachusetts. Start by looking at the raw data alone. On a yearly basis, about 800 people of color file race discrimination claims and about 800 women file gender discrimination claims. By contrast, only about 100 gay people file sexual orientation claims. The raw data suggest that race and gender claims are filed eight times as often as sexual orientation claims. Now put these data in the context of the relevant population size for each group. About twenty of every ten thousand people of color in the workforce file race discrimination complaints and about five of every ten thousand female workers file gender discrimination complaints. Already we can see that adjusting for population size changes the relationship between race and gender claims; what looks like a similar number of raw claims actually translates into four times more race discrimination claims than gender discrimination claims. When we assume that a small portion of the workforce is gay, about eighteen gay workers in ten thousand file discrimination complaints. Thus, adjusting for population density and assuming a small number of gay workers demonstrates that the number of sexual orientation claims actually outstrips the number of gender claims about 3:1 and is close to the number of race

discrimination filings. When we assume that 10% of the workforce is gay, however, then only about three gay workers in ten thousand file discrimination complaints. This demonstrates how an increase of gay people in the workforce decreases the filing rate per gay worker. But even at this lowest possible filing rate for gay workers—three for every ten thousand—our understanding of the raw data has changed. The raw data suggested race and gender claims were about eight times more prevalent than gay claims. But the population-adjusted data show race claims to be about seven times greater than sexual orientation claims and gender claims to be less than two times as great. While assuming a high percentage of gay people in the workforce means that the gay filing rate will be lower than both race and gender, the difference is significantly less dramatic than that of the raw data standing alone.

This point is brought home in Table Seven. For each state, it first shows the ratio of the raw number of filed race discrimination complaints to the raw number of sexual orientation complaints. It then shows the ratio of population-adjusted race discrimination complaints to sexual orientation discrimination complaints. Each row then repeats this information for gender discrimination. Looking across the first row containing data for California, the raw data suggest that there are twenty-nine times as many race discrimination complaints as sexual orientation complaints; the population-adjusted data, however, show that there are only 5.6 times as many race complaints as gay complaints—and this is assuming that 10% of the workforce is gay. Proceeding across the table, the raw data for California suggest that there are fifty-three times as many gender discrimination complaints as sexual orientation complaints, but the population-adjusted data show that there are, at most, only twelve times as many gender complaints.

TABLE 7

HOW POPULATION-ADJUSTED DATA BETTER EXPRESS
THE RELATIONSHIP BETWEEN COMPLAINT FILING RATES

	Race:Sex/O (10% of workforce gay)		Gender:Sex/O (10% of workforce gay)	
	Raw	Population-Adjusted	Raw	Population-Adjusted
California	29.2 to 1	5.6 to 1	53.4 to 1	12.1 to 1
Connecticut	20.5 to 1	12.4 to 1	20.8 to 1	4.4 to 1
District of Columbia	21.9 to 1	3.1 to 1	10.7 to 1	2.1 to 1
Hawaii	7.4 to 1	1.0 to 1	13.4 to 1	2.8 to 1
Massachusetts	7.1 to 1	5.9 to 1	7.4 to 1	1.6 to 1
Minnesota	8.7 to 1	17.2 to 1	12.5 to 1	2.7 to 1
New Hampshire	7.6 to 1	27.4 to 1	51.6 to 1	11.0 to 1
New Jersey	23.6 to 1	8.2 to 1	21.6 to 1	4.7 to 1
Rhode Island	7.6 to 1	6.8 to 1	12.0 to 1	2.6 to 1
Wisconsin	19.7 to 1	27.4 to 1	19.2 to 1	4.2 to 1

D. GAY WORKERS UTILIZE SEXUAL ORIENTATION LAWS IN ALL TEN STATES COMBINED AT RATES QUITE SIMILAR TO THE UTILIZATION OF RACE AND GENDER DISCRIMINATION LAWS IN THOSE STATES

One final way of considering the data is to consider all of the data together in one composite snapshot. To accomplish this, I aggregated the average annual complaint rates for race discrimination from each state. I then added together the number of people of color in the workforce in each state. I then calculated a ten-state PACR by dividing the aggregate numbers of complaints by the total number of people of color in the workforces of all ten states. This method was repeated for each type of discrimination. What this shows is that gay workers throughout the ten states file sexual orientation discrimination complaints at a rate quite similar to the rate that people of color file race discrimination complaints and women file gender complaints.

TABLE 8

POPULATION ADJUSTED COMPLAINT RATE FOR ALL STATES
(PER 10,000 WORKERS)

Race	Gender	Sex/O (2.4%/1.35%)	Sex/O (5%)	Sex/O (10%)
7.72	8.69	7.45	2.83	1.42

E. THE PRESENCE OF GAY PEOPLE IN THE WORKFORCE IS PROBABLY ON THE LOWER END OF THE RANGE PRESENTED

If it is assumed that gay people constitute less than 5% of the workforce, they file sexual orientation complaints at rates relatively similar to those at which women and people of color file gender and race discrimination claims. There are good reasons to believe that the presence of gay people in the workforce is, in fact, at this low end of the range.⁶⁹ First,

69. I am cognizant of the anomaly my methodology presents. To mark higher levels of discrimination filings, pro-gay advocates will tend to claim that a small portion of the workforce is gay. Conversely, opponents of ENDA might be provoked to claim that 10% (or more) of the workforce is gay so as to lower the prevalence of bias-filings about gay workers. Each of these positions contradicts the generally held belief of the contending forces. Gay advocates tend to use the Kinsey data as a shorthand measure of the gay population. Anti-gay writers tend to claim that gay people constitute a very small portion of the population; they have led a long crusade against the reliability of Kinsey, for this reason. For

the sexuality studies that indicate this prevalence of gay people in the population are considered the most reliable studies.⁷⁰ Second, this is confirmed by some other occasional data on the incidence of gay people in the population.⁷¹ Third, it is fair to assume that a certain quantity of gay men, in particular, opt for jobs outside the portion of the workforce that is typically covered by non-discrimination laws, hence lowering the prevalence of gay people in the workforce that can file legally-cognizable claims of discrimination.⁷² Finally, assuming a lower presence of gay people in the workforce accounts, to some extent, for the “closet” effect—that is, that gay people have to “come out” to file discrimination complaints. There are therefore good reasons to embrace this lower number of gay-identified people for this workforce analysis, while remaining aware of the fact that the incidence of same-sex sexual *behavior* is probably much higher than this 2.4/1.3% figure.

The strongest argument for using a higher percentage to calculate PACRs is this: Gay-identified people tend to congregate in certain geographical areas of the United States.⁷³ It would be fair to assume that gay rights laws are more likely to be enacted where gay people congregate. This is a reasonable set of hypotheses, but as applied to this data it is not that

example, a Westlaw search <Kinsey and AU(Buchanan)> will uncover columns written by Patrick J. Buchanan in 1988, 1990, 1993, and 1994 attacking Kinsey and alleging that gay people constitute a minute portion of the population. See, e.g., Patrick Buchanan, *Frauds of the Century: Debunking the Work of Freud, Keynes, Kinsey, Marx, and Other Big 'Thinkers'*, PITTSBURGH POST-GAZETTE, Feb. 7, 1994, 1994 WL 8256737.

70. See *supra* notes 57–62 and accompanying text.

71. See, e.g., Bettina Boxall, *Statistics on Gays Called Unreliable Demographics*, L.A. TIMES, May 1, 1994, at A3, available at 1994 WL 2160794 (reporting that exit pollers at 1992 election found that 3% of population identified themselves as gay or lesbian).

72. Civil rights laws generally apply only to employers with more than fifteen or so employees, thus exempting small employers from their reach. Gay men tend to be overrepresented in small, independent places of employment. As anecdotal evidence of this, I offer the following. At the outset of the AIDS crisis, there was no widely available HIV screening test by which insurers could determine whether someone was infected with the virus that causes AIDS. Yet the virus was associated with gay men. Some insurers sought to limit their liability by decreasing their coverage of employers of gay men:

One health insurance company, for example, distributed an “AIDS Profile,” which required its agents to segregate applications from “single males without dependents that are engaged in occupations that do not require physical exertion.” The occupations named—“restaurant employees, antique dealers, interior decorators, consultants, florists, and people in the jewelry or fashion business”—were evidently those stereotyped as the professional interests of gay men.

Benjamin Schatz, *The AIDS Insurance Crisis: Underwriting or Overreaching?*, 100 HARV. L. REV. 1782, 1787 (1987). The jobs stereotypically associated with gay men—restaurant employees, antique dealers, interior decorators, consultants, florists, and people in the jewelry or fashion business—would often fall outside the coverage of state antidiscrimination laws.

73. See LAUMANN ET AL., *supra* note 59, at 307 (identifying New York, San Francisco, Los Angeles, and Chicago).

convincing. While gay-identified people tend to congregate in large urban areas, only a few of the jurisdictions in this study—California and the District of Columbia in particular—encompass large gay-saturated urban centers; there are strong gay communities in several of the other states (Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, and Wisconsin) but they are not known as meccas for gay-identified people, nor do they constitute the areas in which the Laumann study suggests that gay people will be over-represented. Moreover, even in California, the data are distributed on a statewide basis. While gay-identified people are overrepresented in San Francisco and in parts of Los Angeles, in a state of thirty-three million citizens, the effect of this is fairly negligible. I conclude that there is a good case for utilization of the lower range of gay population data in analyzing the data presented.

In sum, I find that gay people utilize non-discrimination laws at rates that will not swamp enforcement systems, but that are generally similar, per capita, to the rate of usage of gender discrimination protections, and in many places, of race discrimination protections as well.

F. LIMITATIONS

It is important to bear in mind what I am not claiming in this study. The data should not be read to represent the actual incidence of discrimination. They reflect only the filings of complaints with state human rights agencies. While the latter may be an indication of the former, they cannot fully substitute for actual incidences of discrimination. There are a multitude of reasons that people who face discrimination may or may not file complaints with state agencies. Some of these reasons vary across the types of discrimination discussed. For example, my colleague Rick Sander has recently demonstrated that blacks and Hispanics in Los Angeles County demonstrate different patterns in filing housing discrimination complaints.⁷⁴ Similarly, I have discussed reasons why gay people who face discrimination might be hesitant to file complaints as doing so puts them in a double bind—not only identifying them as complaint-filers, but perhaps identifying them publicly, for the first time, as gay.⁷⁵ What I have been able to assess with the data I collected from state agencies is simply the use of these agencies. More sophisticated, second generation studies will have to develop

74. See Richard H. Sander, *The Comparative Dynamics of Latino and African-American Housing Discrimination* (Feb. 23, 2000) (unpublished manuscript, on file with author).

75. See *supra* note 32 and accompanying text.

methods for examining the actual rates of discrimination and for assessing what barriers keep people from utilizing existing anti-discrimination norms.

A corollary of this first limitation is that my data cannot be read to suggest that “minorities face more discrimination than women” or that gays face more or less discrimination than women. I am able to say within one state over certain periods of time that claims of race or gender or sexual orientation discrimination are filed more or less often with state agencies. But I can neither take that as a reflection of the actual levels of discrimination (my earlier point) nor use these data to compare groups to one another. Not only will the data not support a comparison such as “blacks face more discrimination than women,” but such a statement is conceptually flawed. Race discrimination claims are filed by men and women, gender discrimination claims by people of color and whites. Similarly, sexual orientation claims are filed by whites and nonwhites, women and men. The prevalence of such claims is best expressed as a factor of the number of gay people in the workforce, rather than as a relationship to other forms of, often overlapping, bias.

Some less significant, but nonetheless important limitations mentioned throughout the Article bear repeating: the data cannot be compared across states, nor do the data account for changes over time, as they represent averaged annual figures.

VI. CONCLUSION

The quantity of sexual orientation complaint-filing has importance in current public policy debates about the necessity for gay rights protections. This Article demonstrates that the utilization of such laws by gay workers in those states that have enacted them has been in the same general range that race and sex-discrimination laws are used by people of color and women. Some advocates for gay rights protections do not base their arguments in support of these laws on empirical evidence such as this, nor is all opposition to ENDA premised upon empirically-ascertainable evidence. This Article does not directly address the range of more normative arguments for or against such protections. However, to the extent that the ENDA is opposed on the grounds that state gay rights laws are infrequently used, this Article refutes that basis of opposition. It demonstrates that state gay rights laws are used and that, per capita, there is no complaint-filing drought.

APPENDIX A

GAO DATA
STATES' EXPERIENCE WITH SEXUAL ORIENTATION
EMPLOYMENT DISCRIMINATION COMPLAINTS

Fiscal year	Total employment discrimination complaints	Sexual orientation employment discrimination complaints	Sexual orientation complaints as a percentage of total employment discrimination complaints
California (law effective 1993)			
1993	13,362	159	1.2
1994	15,730	159	1.0
1995	16,206	161	1.0
1996	17,164	173	1.0
1997	18,752	151	0.8
1998	18,892	127	0.7
1999	18,644	154	0.8
Connecticut (law effective 1991)			
1993	2,035	20	1.0
1994	2,404	32	1.3
1995	2,668	23	0.9
1996	2,262	44	1.9
1997	2,355	41	1.7
1998	2,107	48	2.2
1999	2,100	28	1.3
District of Columbia (law effective 1977)			
1992	214	7	3.3
1993	304	9	3.0
1994	344	3	0.9
1995	337	8	2.4
1996	230	7	3.0
1997	277	6	2.1
1998	295		
Hawaii (law effective 1991)			
1992	555	12	2.2
1993	364	6	1.6
1994	367	13	3.5
1995	396	15	3.8

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1996	415	11	2.7
1997	483	10	2.0
1998	537	6	1.1
Massachusetts (law effective 1989)			
1990	3,232	43	1.3
1991	3,496	83	2.3
1992	3,225	73	2.2
1993	4,372	135	3.0
1994	4,592	142	3.0
1995	5,144	146	2.8
1996	4,990	155	3.1
1997	5,173	148	2.9
1998	4,558	169	3.7
1999	4,180	113	2.7
Minnesota (law effective 1993)			
1995	886	34	3.8
1996	980	24	2.4
1997	1,436	34	2.3
1998	1,299	26	2.0
1999	1,268	32	2.5
Nevada (law effective October 1, 1999)			
New Hampshire (law effective 1998)			
1998	220	2	0.9
1999	241	8	3.3
New Jersey (law effective 1992)			
1992	2,712	17	0.6
1993	2,159	20	0.9
1994	1,919	25	1.3
1995	2,127	30	1.4
1996	1,277	20	1.6
1997	1,580	35	2.0
1998	1,495	27	2.0
1999	1,202	21	2.0
Rhode Island (law effective 1995)			
1996	317	2	0.6
1997	449	14	3.1
1998	428	5	1.1
1999	337	5	1.4
Vermont (law effective 1991)			
1993	139	4	2.9

1994	136	5	3.7
1995	152	2	1.3
1996	129	2	1.6
1997	115	6	5.2
1998	200	6	3.0
1999	150	4	2.7
Wisconsin (law effective 1982)			
1996	3,653	43	1.2
1997	4,619	61	1.4
1998	4,073	64	1.6
1999	3,598	65	1.8

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APPENDIX B

PACR COMPUTATIONS—STATE BY STATE

CALIFORNIA
ANNUAL COMPLAINT RATE
(AVERAGE OF 1995–98 DATA)

	Total	Race	Gender	Sex/O 2.4%/1.3% 5% 10%
Employment Complaints Filed	28,173	4,505.25	8,232	154.25
Presence of Group in Workforce	14,992,811	7,852,096	6,598,822	287,240 749,641 1,499,281
Number of Complaints per 10,000 Workers	18.79	5.74	12.47	5.37 2.06 1.03

CONNECTICUT
ANNUAL COMPLAINT RATE
(AVERAGE OF 1992–98 DATA)

	Total	Race	Gender	Sex/O 2.4%/1.3% 5% 10%
Employment Complaints Filed	3660.43	661.86	670.43	32.29
Presence of Group in Workforce	1,788,693	294,392	832,431	33,772 89,435 178,869
Number of Complaints per 10,000 Workers	20.46	22.48	8.05	9.56 3.61 1.81

DISTRICT OF COLUMBIA
ANNUAL COMPLAINT RATE
(AVERAGE OF 1993-97 DATA)

	Total	Race	Gender	Sex/O 2.4%/1.3% 5% 10%
Employment Complaints Filed	291.8	144.8	70.6	6.6
Presence of Group in Workforce	327,436	229,744	168,290	6,007 16,372 32,744
Number of Complaints per 10,000 Workers	8.91	6.30	4.20	10.99 4.03 2.02

HAWAII
ANNUAL COMPLAINT RATE
(AVERAGE OF 1992-98 DATA)

	Total	Race	Gender	Sex/O 2.4%/1.3% 5% 10%
Employment Complaints Filed	441	82.14	149.14	11.14
Presence of Group in Workforce	548,347	404,112	260,137	10,299 27,417 54,835
Number of Complaints per 10,000 Workers	8.04	2.03	5.73	10.82 4.06 2.03

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MASSACHUSETTS
ANNUAL COMPLAINT RATE
(AVERAGE OF 1990-98 DATA)

	Total	Race	Gender	Sex/O 2.4%/1.3% 5% 10%
Employment Complaints Filed	3,945.56	782.67	821.78	111
Presence of Group in Workforce	3,245,950	388,469	1,530,983	61,062 162,298 324,595
Number of Complaints per 10,000 Workers	12.16	20.15	5.37	18.18 6.84 3.42

MINNESOTA
ANNUAL COMPLAINT RATE
(AVERAGE OF 1994-98 DATA)

	Total	Race	Gender	Sex/O 2.4%/1.3% 5% 10%
Employment Complaints Filed	1,347.6	235.8	340	27.2
Presence of Group in Workforce	2,311,336	116,243	1,071,549	43,685 115,567 231,134
Number of Complaints per 10,000 Workers	5.83	20.29	3.17	6.23 2.35 1.18

NEW HAMPSHIRE
ANNUAL COMPLAINT RATE
(AVERAGE OF 1998-99 DATA)

	Total	Race	Gender	Sex/O 2.4%/1.3% 5% 10%
Employment Complaints Filed	217	19	129	2.5
Presence of Group in Workforce	612,345	16,931	284,929	11,562 30,617 61,235
Number of Complaints per 10,000 Workers	3.54	11.22	4.53	2.16 0.82 0.41

NEW JERSEY
ANNUAL COMPLAINT RATE
(AVERAGE OF 1994-98 DATA)

	Total	Race	Gender	Sex/O 2.4%/1.3% 5% 10%
Employment Complaints Filed	2774.6	581.4	530.8	24.6
Presence of Group in Workforce	4,104,673	1,176,396	1,885,641	77,770 205,234 410,467
Number of Complaints per 10,000 Workers	6.76	4.94	2.81	3.16 1.20 0.60

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RHODE ISLAND
ANNUAL COMPLAINT RATE
(AVERAGE OF 1996-98 DATA)

	Total	Race	Gender	Sex/O 2.4%/1.3% 5% 10%
Employment Complaints Filed	398.67	63.33	100.33	8.33
Presence of Group in Workforce	522,603	58,975	246,932	9,826 26,130 52,260
Number of Complaints per 10,000 Workers	7.63	10.74	4.06	8.48 3.19 1.59

WISCONSIN
ANNUAL COMPLAINT RATE
(AVERAGE OF 1996-98 DATA)

	Total	Race	Gender	Sex/O 2.4%/1.3% 5% 10%
Employment Complaints Filed	5,064	1,196	1,164.67	60.67
Presence of Group in Workforce	2,517,238	181,128	1,162,129	47,630 125,862 251,724
Number of Complaints per 10,000 Workers	20.12	66.03	10.02	12.74 4.82 2.41

APPENDIX C

RAW DATA—STATE BY STATE

California

	1995	1996	1997	1998
Sex/O	160	171	152	134
Sex	7772	8360	8654	8142
Race/Color	3888	4630	4722	4781
National Origin/ Ancestry	2155	2331	2411	2353
Religion	423	506	512	493
Mental Disability	1133	1499	1748	1652
Physical Disability	2592	3171	3209	3603
Age	2957	3297	3358	3031
Marital Status	399	422	384	340
Family Care	282	476	496	586
Retaliation	2585	3226	4102	3786
Association (must include another basis)	255	315	343	265
Other	24	87	106	213
TOTAL	24625	28491	30197	29379

These data come from two sources. The data for sexual orientation claims are from the California Division of Labor Standards Enforcement ("DLSE"), which had authority over this form of discrimination until January 2000. All other data are from the California Department of Fair Employment and Housing ("DFEH").

The DLSE provided data on computer printouts listing cases one by one. The sexual orientation figures were compiled by sorting through the complete DLSE printouts and computing a sum of the sexual orientation filings. Each claim had a "date assigned," which apparently reflects the date that the complaint was assigned to an investigator. In compiling this data chart, each claim was assigned to the year of the "date assigned" designation.

The DFEH provided calendar year statistics. CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT & HOUSING, EMPLOYMENT CASES—COUNT OF BASES (Mar., 1999) (on file with author); Letter from Sandy Draper, Staff Services Analyst, California Department of Fair Employment & Housing (Mar. 3, 1999) (on file with author). The non-sexual orientation data presented here are the DFEH data. DFEH's statistics also included complaints filed on the basis of "sexual orientation." While the DFEH catalogued such complaints in its data set, it had no jurisdiction to remedy this form of discrimination during the years in question. Thus these complaints are not encompassed in the sexual orientation data presented.

Connecticut

	FY 1992	FY 1993	FY 1994	FY 1995	FY 1996	FY 1997	FY 1998
Sex/O	19	20	32	23	44	41	47
Sex	672	590	712	725	670	657	667
Race	613	590	617	725	635	710	743
Color	588	550	545	626	459	491	525
National Origin	217	215	228	311	269	187	248
Ancestry	202	203	212	281	178	188	120
Religious Creed	30	37	42	48	58	60	55
Physical Disability	352	402	497	562	473	491	455
Mental Disability	56	48	85	85	94	101	116
Age	465	452	562	602	534	482	482
Marital Status	26	25	30	39	42	25	40
Familial Status	21	14	13	17	14	21	39
Alienage	2		2				
Source of Income	16	17	19	13	10	13	18
Other/None	91	81	82	229	162	166	215
TOTAL	3370	3244	3678	4286	3642	3633	3770

These data come from the Connecticut Commission on Human Rights and Opportunities ("CHRO"). The data for 1998 and 1997 can be found in CONN. COMM'N ON HUM. RTS. AND OPPORTUNITIES, 1998 ANNUAL REPORT 2 (1998) (on file with author). The data for 1996 and 1995 can be found in CONN. COMM'N ON HUM. RTS. AND OPPORTUNITIES, 1996 ANNUAL REPORT 15 (1996) (on file with author). The data for 1994 and 1993 can be found in CONN. COMM'N ON HUM. RTS. AND OPPORTUNITIES, 1994 ANNUAL REPORT 7 (1994) (on file with author). The data for 1992 come from a telephone interview with James Jedziewski, Human Rights and Opportunities Representative, Connecticut Commission on Human Rights and Opportunities.

CHRO collects data for employment, housing, and public accommodations discrimination. The CHRO estimates that 90%–93% of the complaints are employment related. The statistics presented here are estimates of employment-related complaints; these numbers were calculated by taking 90% of the actual number of complaints filed.

CHRO has separate categories for "race" and "color" and the agency permits complaints to be filed in more than one category. The number of complaints of "race" discrimination is strikingly similar to the number filed alleging discrimination due to "color." In compiling PACRs for race discrimination in Appendix B, therefore, I utilized only the number of "race" complaints. I did so based on the assumption that most of the "color" complaints are accounted for in the "race" category and simply reflect dual filings of the same complaint.

District of Columbia

	FY 1993	FY 1994	FY 1995	FY 1996	FY 1997
Sex/O	9	3	8	7	6
Sex (includes Sex + Other Grounds)	70	78	88	59	58
Race/Color (includes Race + Other Grounds)	150	178	150	121	125
National Origin	19	25	9	7	6
Religion	3	4	0	1	3
Disability	24	23	27	14	7
Age (includes Age + Other Grounds)	10	21	24	5	14
Family and Medical Leave			4	4	
Family Responsibilities	3	1	2	2	1
Personal Appearance	5	7	2	3	1
Political Affiliation		0			1
Marital Status			2		
Place of Business	2				
Retaliation	2	1	4	1	8
Other Grounds/Other Combinations	7	3	17	6	14
TOTAL	304	344	337	230	244

These data come from the DISTRICT OF COLUMBIA DEPARTMENT OF HUMAN RIGHTS AND LOCAL BUSINESS DEVELOPMENT. DIST. OF COLUMBIA DEP'T OF HUM. RTS AND LOCAL BUS. DEV., 1997 ANNUAL ACTIVITY REPORT 12-14 (1998) (on file with author); DIST. OF COLUMBIA DEP'T OF HUM. RTS AND LOCAL BUS. DEV., 1996 ANNUAL ACTIVITY REPORT 12-14 (1997) (on file with author); DIST. OF COLUMBIA DEP'T OF HUM. RTS AND LOCAL BUS. DEV., 1995 ANNUAL ACTIVITY REPORT 9-11 (1996) (on file with author); DIST. OF COLUMBIA DEP'T OF HUM. RTS AND LOCAL BUS. DEV., 1994 ANNUAL ACTIVITY REPORT 11-13 (1995) (on file with author); DIST. OF COLUMBIA DEP'T OF HUM. RTS AND LOCAL BUS. DEV., 1993 ANNUAL ACTIVITY REPORT (1994) (on file with author); Letter from Winona M. Lake, Associate Director, District of Columbia Department of Human Rights and Local Business Development (Apr. 22 1999) (on file with author). D.C. permits complaints to be filed on a single basis ("race") as well as on multiple bases ("race and gender"). In its data, the D.C. agency records separately single-basis complaints and multiple-bases complaints. The race and sex data presented here were calculated by adding race's regular base together with complaints categorized as "race and other grounds" and adding sex's regular base data together with "sex and other grounds."

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Hawaii

	FY 1992	FY 1993	FY 1994	FY 1995	FY 1996	FY 1997	FY 1998
Sex/O	12	6	13	15	11	11	10
Sex	186	127	123	131	149	157	171
Race	144	53	60	70	60	98	77
Color	0	2	2	2	4	1	2
Ancestry/Natl. Origin		44	45	35	38	43	28
Religion		5	6	5	9	5	10
Disability	62	45	50	53	51	65	84
Age	50	39	34	36	42	89	47
Marital Status		11	5	4	5	4	5
Child Support		0	1	0	0	3	0
Arrest & Court	15	9	7	21	19	17	17
Natl. Guard		3	3	1	0	3	
Retaliation	36	20	18	23	27	61	32
TOTAL	505	364	367	396	415	557	483

These data come from the Hawaii Civil Rights Division of the Department of Labor and Industrial Relations. CIVIL RIGHTS DIVISION, HAWAII DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, EMPLOYMENT STATISTICS BY YEAR, 1-8 (1998) (on file with author). In calculating the PACRs for "race" in Appendix B, complaints of "race" and "color" discrimination were added together.

Massachusetts

YEAR (TOTAL FILINGS)	1990 (3232)	1991 (3496)	1992 (3225)	1993 (1993)	1994 (4592)	1995 (5144)	1996 (5339)	1997 (5173)	1998 (4558)
Sex/O	38	76	67	122	128	130	139	135	164
Sex (21%)	611	661	610	826	868	972	1009	978	861
Race (20%)	582	629	581	787	827	926	961	931	820
Ancestry (10%)	291	315	290	393	413	463	481	466	410
Religion (1%)	29	31	29	39	41	46	48	47	41
Disability (21%)	611	661	610	826	868	972	1009	978	861
Age (13%)	378	409	377	512	537	602	625	605	533
Children (1%)	29	31	29	39	41	46	48	47	41
Welfare (1%)	29	31	29	39	41	46	48	47	41
Retaliation (10%)	291	315	290	393	413	463	481	466	410
TOTAL	2889	3159	2912	3976	4177	4666	4849	4700	4182

These data come from the Massachusetts Commission Against Discrimination (“MCAD”). MASS. COMM’N AGAINST DISCRIMINATION, 1997 ANNUAL REPORT 21–24 (1998) (on file with author); Telephone Interview with John Ahearn, Assistant Director, Massachusetts Commission Against Discrimination (Feb. 17, 1999) (on file with author). MCAD supplied statistics identifying the total number of complaints filed each year from 1990 through 1998; these are noted in the year boxes above. MCAD’s 1997 Report reported the percentage of complaints attributable to the various forms of discrimination (race, gender, etc.); these percentages are noted in the boxes identifying the forms of discrimination above. Multiplying the total number of complaints in a given year by these bias-type percentages generated the yearly number of total complaints for each type of bias. According to MCAD’s report, 90% of the total claims were attributable to employment discrimination. Thus, after breaking the total number of claims into bias type, the resulting sum was multiplied by 90% to capture the number of *employment* claims attributable to that form of bias.

One important alteration was made in this methodology. The 1997 annual report attributed 1% of the total number of complaints to sexual orientation bias. However, MCAD supplied more precise data specifically identifying the percentage of the total claims attributable to sexual orientation bias for each of the years 1990–98. These are 1990 (1.3%); 1991 (2.4%); 1992 (2.3%); 1993 (3.1%); 1994 (3.1%); 1995 (2.8%); 1996 (2.9%); 1997 (2.9%); 1998 (4%). In generating the numbers in this table, I employed these more precise percentages in place of the general 1% figure in the 1997 annual report. This latter methodology yielded data that closely track the data generated by the GAO.

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Minnesota

	1/2 1994	1995	1996	1997	1998
Sex/O	23	27	26	34	26
Sex	304	370	307	377	342
Race	208	247	209	257	247
Color	2	3	1	3	2
National Origin	58	85	52	101	95
Religion	20	16	17	15	13
Creed				1	
Disability	302	330	279	332	311
Age	194	234	200	181	178
Marital Status	23	24	36	39	34
Public Assistance Status	1		3	3	3
Retaliation	96	161	144	93	49
TOTAL	1231	1497	1274	1436	1300

These data come from the Minnesota Department of Human Rights. Letter from Melissa Rosenbaum, Legal Analyst, Minnesota Department of Human Rights (Mar. 23, 1999) (on file with author). The 1994 statistics are marked as "7/1/94-12/31/94." However, the data for that half of 1994 so closely approximate the data for the other full years, I assumed that these numbers actually reflect filings throughout 1994; hence I treated 1994 as a full year in calculating the PACRs in Appendix B. In calculating the PACRs for "race" in Appendix B, complaints of "race" and "color" discrimination were added together.

New Hampshire

	FY 1998	FY 1999
Sex/O	0	5
Sex	114	144
Race/Color	20	18
National Origin	2	5
Religion	2	2
Disability	34	27
Age	26	33
Marital Status	1	1
TOTAL	199	235

These data come from the New Hampshire Human Rights Commission. Telephone Interview with Cheryl Coombs, Administrative Specialist, New Hampshire Human Rights Commission.

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New Jersey

	FY 1994	FY 1995	FY 1996	FY 1997	FY 1998
Sex/O	24	26	16	32	25
Sex (includes harassment)	634	588	459	521	452
Race	651	720	430	520	553
Color	4	12	5	11	1
National Origin	318	415	166	242	202
Ancestry	5	31	5	0	1
Creed	38	45	25	35	26
Physical Disability	314	421	175	208	242
Mental Disability	38	40	24	22	45
Drug Disability	16	11	4	5	3
Age	302	250	185	246	227
Family with child	0	5	3	5	8
Marital status	36	25	13	18	13
Family leave	18	15	19	14	17
Armed forces	7	1	4	2	4
Guide dog	2	0	0	2	0
Multiple	603	744	384	541	477
Retaliation	183	195	168	182	149
TOTAL	3193	3544	2085	2606	2445

These data come from the New Jersey Division on Civil Rights: Bureau of Prevention & Citizen's Rights. Letter from Deborah Edwards, Assistant Director, Division on Civil Rights, New Jersey Department of Law and Public Safety (May 5, 1999) (on file with author); Letter from Roberto Rodriguez, Administrative Analyst, Division on Civil Rights, New Jersey Department of Law and Public Safety (Mar. 12, 1999) (on file with author). New Jersey provided statistics that break down filings according to the types of discrimination listed above; separately, the agency breaks down filings according to whether they involved discrimination in employment, housing, or public accommodations. From the latter data, I calculated what percentage of each year's complaints were *employment* related: 1994 (91.6% of complaints were employment related); 1995 (81.5%); 1996 (94.2%); 1997 (92.3%); 1998 (91.6). The numbers in this table were generated by multiplying the total bias-type (race, gender, etc.) filing data by these employment percentages, thereby generating an estimate of the employment complaints by bias type. In calculating the PACRs for "race" in Appendix B, complaints of "race" and "color" discrimination were added together.

Rhode Island

	FY 1995	FY 1996	FY 1997	FY 1998
Sex/O		1	14	10
Sex (including sexual harassment)	120	81	122	98
Race	88	38	73	79
Ancestry	25	15	23	26
Religion	3	5	3	11
Disability	92	86	123	126
Age	75	69	69	81
Retaliation	14	5	22	16
TOTAL	417	300	449	447

These data come from the Rhode Island Commission for Human Rights. Letter from Joanne L. Goulet, Senior Compliance Officer, Rhode Island Commission for Human Rights (May 6, 1999) (on file with author). The Commission records complaints of "sex discrimination" and "sexual harassment" separately. In generating this table, and the PACRs in Appendix B, these numbers were added together to provide a single measure of complaints of sex discrimination.

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Wisconsin

	FY 1996	FY 1997	FY 1998
Sex/O	67	53	62
Sex	1163	1188	1143
Race/Color	1165	1278	1145
National Origin/Ancstry	138	131	153
Religion	52	80	55
Handicap/Disability	830	873	903
Age	574	631	594
Marital Status	65	55	55
Conviction Record	122	188	162
Arrest Record	105	114	119
Military Status	4	6	4
Honesty Testing	2	1	1
Use of Lawful Products	4	8	10
Genetic Testing	0	0	0
Fair Employment Retaliation	476	645	637
Labor Standards Retaliation	47	35	49
TOTAL	4814	5286	5092

These data come from the Wisconsin Department of Workforce Development, the Equal Rights Division. Letter from LeAnna Ware, Director of the Civil Rights Bureau, Wisconsin Equal Rights Division (Feb. 25, 1999) (on file with author). Although Wisconsin's prohibition on sexual orientation discrimination was enacted in 1982, the agency's computer system could only generate statistics starting in 1996.

