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A New York State of Mind: Reconciling Legislative Incrementalism with Sexual Orientation Jurisprudence

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A New York State of Mind

RECONCILING LEGISLATIVE INCREMENTALISM WITH SEXUAL ORIENTATION JURISPRUDENCE*

I. INTRODUCTION

The process of securing equal rights and protections under the law for traditionally marginalized groups is never an easy task. Likewise, securing the passage of anti-discrimination legislation and advancing progressive civil rights jurisprudence is difficult to achieve, particularly on the national level. Where the social and political climate is hostile to dramatic change, marginalized groups often seek gradual change through judicial and legislative remedies. It is a strategy of incrementalism – a process by which they slowly and methodically seek to secure individual rights and protections. The gay and lesbian civil rights movement in particular has adopted both a geographic and substantive incremental approach. The question is whether this approach is truly conducive to the movement's goals.

While incrementalism is generally accepted as a viable approach to securing equal rights, it has been criticized for essentially kowtowing to the theoretical game of granting specific rights to certain groups while excluding other groups.[1] While this analysis raises important questions about the viability of incrementalism from a theoretical perspective, a second analysis of incrementalism might provide even more insight into the viability of the incremental approach to

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[1] *See* James M. Donovan, *Baby Steps or One Fell Swoop?: The Incremental Extension of Rights is not a Defensible Strategy*, 38 CAL. W. L. REV. 1 (2001).

securing equal rights for the gay and lesbian community. This Note will analyze the incremental approach from a geographic perspective by using New York State as a model of what incrementalism can and cannot achieve through legislative action. Incrementalism narrowly constructed along substantive and geographic lines creates a useful but inconsistent patchwork of civil rights within the particular state while simultaneously diluting the impetus for change that accords with the needs of the minority community on a broader scale.

In order to critique incrementalism in New York State, the entire gay rights landscape requires analysis. Part II of this Note defines incrementalism and its applications. Part III then provides a brief history of the gay rights movement, its accomplishments in the United States and New York State, and the current agenda. Part IV analyzes the development of local gay rights initiatives and the patchwork of legal protection they create. With these results in mind, Part V focuses on the federal and state sexual orientation jurisprudence and how it impacts the everyday lives of gays and lesbians. Finally, Part VI considers the implications of incrementalism with regard to the future of the gay rights movement and ultimately concludes that incrementalism and broad scale change are interdependent strategies that must be employed simultaneously to truly advance the goals of the movement.

II. INCREMENTALISM DEFINED

What is incrementalism? In short, incrementalism describes the process by which social, political, or legal change is achieved one step at a time. The objective is to accumulate a series of small victories that ultimately create large-scale reform, but not necessarily coordinated legal doctrines or revolutionary change. It is an alternative to seeking broad judicial or legislative remedies. As an example, although not framed in the civil rights context, the environmental movement has been described as incrementalist, as it has largely employed gradual remedies to achieve its goals rather than a direct attack strategy.[2] In contrast, the movement to end racial segregation resulted in a far-reaching judicial remedy in *Brown*

[2] *See generally* Lincoln L. Davies, *Lessons for an Endangered Movement: What a Historical Juxtaposition of the Legal Response to Civil Rights and Environmentalism Has to Teach Environmentalists Today*, 31 ENVTL. L. 229 (2001).

v. Board of Education,[3] which abandoned the "separate, but equal" doctrine established by *Plessy v. Ferguson.*[4] Certainly, the effort to end school segregation involved a series of cases and internal debate within the movement regarding strategy.[5] However, the legal strategy ultimately focused on attacking the "separate, but equal doctrine" directly, which resulted in the ground-breaking decision.[6] Although traditionally hailed as a breakthrough, there is considerable debate about whether the decision actually secured the victory that history has granted it.[7] In order to give the ruling effect, courts instituted busing programs that were designed to create equal educational opportunities. However, rather than advancing principles of equal opportunity, the forced busing did little more than establish racial balance within the schools while the discrepancy in opportunity remained relatively constant.[8] In essence, the problem was greater than any court's ability to solve it in one fell swoop. In light of the challenges presented by radical attempts at change, modern civil rights movements have focused their efforts on what is perceived to be the more pragmatic approach – incrementalism.

On its face, incrementalism might appear as nothing more than a piecemeal approach to inducing change where the issues are complex and controversial. However, incrementalism is more than mere strategy. In fact, incrementalism springs from a philosophy of tradition, conservatism, and stare decisis. In the late eighteenth century, Edmund Burke introduced a philosophy that was the precursor to contemporary incrementalism.[9] For Burke and adherents to his views, "tradition has a place in constitutional interpretation simply because it is the past."[10] The authoritative force of tradition is nothing short of inherent and direct.[11] With regard to

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[3] 347 U.S. 483 (1954).

[4] 163 U.S. 537 (1896).

[5] *See generally* MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987).

[6] *See* Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CAL. L. REV. 787, 795 (1994).

[7] CLINT BOLICK, UNFINISHED BUSINESS: A CIVIL RIGHTS STRATEGY FOR AMERICA'S THIRD CENTURY 103-06 (1990).

[8] *Id.* at 104.

[9] *See generally* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (Thomas H.D. Mahnoey ed., Bobbs-Merrill Co. 1955) (1790).

[10] Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 212 (1993).

[11] *Id.*

constitutional interpretation, incrementalists argue that current judgments about the role of government under the Constitution must conform to societal traditions.[12] Rather than questioning the past, incrementalism suggests "blind obedience" to the past.[13] Although those who advance the incremental approach might not perceive the strategy or themselves as traditionalists or conservatives, the incremental approach is indeed rooted in the recognition that the past does dictate the future and, accordingly, should impact expectations. The incremental strategy is not about redefining the issues. Rather, it is about working within conventional frameworks and modifying them only when absolutely necessary.

The incremental strategy can be employed on an issue-by-issue basis or on a regional basis. For example, the movement to establish a broad principle of racial equality by ending racial segregation in public schools began with incremental litigation challenges on a state-by-state basis with the ultimate goal of achieving national results through the U.S. Supreme Court. The movement to secure equal rights for the gay and lesbian community has similarly taken a state-by-state approach. However, the gay rights movement has broken the incremental strategy down even further by developing an issue-by-issue strategy within the fifty states. Whereas the movement to end school segregation had one singular goal operating in targeted states, the gay civil rights movement has multiple goals in multiple states, thus creating a lack of coherence and continuity among and within the states. The fundamental question is whether this strategy coupled with isolated victories truly and adequately advances the interests of gays and lesbians. With this question in mind, the following section examines the history of the gay rights movement in order to place the current issues in broader context.

III. THE CURRENT STRUGGLE IN HISTORICAL CONTEXT

A. The Movement for National Reform

The birth of the modern gay rights movement is said to have occurred on June 27, 1969 at the Stonewall Riots in New

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[12] *Id.*
[13] *Id.*

York City.[14] After years of police raids on gay bars, the patrons at the Stonewall fought back and continued fighting for several days thereafter.[15] Following the riot, gays and lesbians began to mobilize with a new sense of pride, collective identity, and a determination to organize to attain basic civil rights.[16] In the early 1970s, gay activists demanded political attention for their concerns in ways similar to advocates of the black civil rights, antiwar, and women's movements.[17] Although largely successful in attaining the attention and support of sympathetic leaders in Congress in the 1970s, the gay and lesbian movement was unable to persuade Congress to pass legislation that would provide protection against anti-gay discrimination.[18] Similar legislation was introduced through the 1980s and 1990s, but anti-gay discrimination legislation did not make it to the floor for a vote of either the House or the Senate until 1996, when narrowly drawn anti-gay employment discrimination legislation was defeated in the Senate.[19] In fact, the only successful action ever taken by Congress remotely related to gay and lesbian civil rights came in the form of the Defense of Marriage Act (DOMA), which actually operates to further marginalize gays and lesbians by allowing states to deny recognition of same-sex unions established in other jurisdictions.[20]

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[14] *See generally* Kenneth Sherrill, *The Youth of the Movement: Gay Activists in 1972-1973*, *in* GAYS AND LESBIANS IN THE DEMOCRATIC PROCESS: PUBLIC POLICY, PUBLIC OPINION AND POLITICAL REPRESENTATION 269, 272 (Ellen D.B. Riggle & Barry L. Tadlock eds., 1999).

[15] *Id.*

[16] *Id.*

[17] Donald P. Haider-Markel, *Creating Change – Holding the Line: Agenda Setting on Lesbian and Gay Issues at the National Level*, *in* GAYS AND LESBIANS IN THE DEMOCRATIC PROCESS: PUBLIC POLICY, PUBLIC OPINION AND POLITICAL REPRESENTATION 242, 248-49 (Ellen D.B. Riggle & Barry L. Tadlock eds., 1999).

[18] *Id.* In May of 1974, Representatives Bella Abzug and Edward Koch, both Democrats from New York, introduced legislation that would revise the 1964 Civil Rights Act to include sexual orientation, but the bill failed in committee. *Id.* Representative Abzug reintroduced the bill in 1975, but again it failed to move. *Id.*

[19] *Id.*

[20] 28 U.S.C. § 1738C (2000). The Defense of Marriage Act states:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Id.

B. *The Movement for Reform in the State of New York: SONDA and Beyond*

Although considered the birthplace of the gay and lesbian civil rights movement, New York State has not been overwhelmingly responsive to the civil rights of gays and lesbians. In 1971, legislation was first introduced that would bar discrimination based on sexual orientation in the areas of employment, housing, public accommodations, education, and credit. Since then, the Sexual Orientation Non-Discrimination Act (SONDA) was repeatedly passed by the Assembly, but was never put to a vote in the Senate. After thirty-one years, there were indications that both the Assembly and the Senate would vote on SONDA and that Governor George Pataki would sign the bill during the 2002 legislative session. However, while Governor Pataki on two occasions publicly pledged his support for SONDA, he failed to follow through as the legislative session came to a close and election year politics came to the fore.[21] Some believe that Pataki backed down from his promise out of fear that he would lose the support of the Conservative Party in his reelection bid.[22] When the state legislature went into recess, it appeared quite likely that SONDA would again be shelved for the thirty-second time in as many years. In a surprise move, however, State Senator Joseph Bruno announced that he would send SONDA to the floor of the Senate for a vote during a special December 2002 legislative session.[23] The move came just days before the Empire State Pride Agenda (ESPA), New York State's largest gay rights organization, was to make its gubernatorial endorsement. Indeed, ESPA announced its endorsement of Governor Pataki's reelection bid only days later. Regardless of the political motivation for either putting the legislation aside or putting it

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[21] On October 4, 2001 at the Empire State Pride Agenda's Annual Fall Dinner, Governor Pataki promised to do "everything in [his] power" to pass SONDA. *See* Governor George E. Pataki, Remarks at Empire State Pride Agenda Tenth Annual Fall Dinner (Oct. 4, 2001), *at* http://www.prideagenda.org/sonda/patakiremarks.pdf. Governor Pataki reiterated his support on January 9, 2002 while giving the State of the State Address. *See* Governor George E. Pataki, State of the State Address (September 20, 2003), *at* http://www.prideagenda.org/sonda/patakistateof-stateremarks.html.

[22] *See generally* NY1 News, *Pataki Blasted for Inaction on Anti-Discrimination Law for Gays*, *at* http://www.ny1.com/ny/Search/SubTopic/index.html?&contentintid=22621&search_result=1 (last visited Apr. 10, 2004).

[23] James C. McKinley, Jr., *New York Bill on Gay Rights is Set for Vote*, N.Y. TIMES, Oct. 23, 2002, at A1.

back on the agenda, the fact remained that as of November 2002 New York had failed to join the list of twelve other states that had passed legislation protecting gays and lesbians against discrimination.[24]

Throughout the thirty-two year struggle to secure broad anti-gay discrimination legislation in New York State, the gay and lesbian movement successfully achieved incremental victories in a number of smaller and more specific contexts. For instance, in 1983, Governor Mario Cuomo issued an executive order that banned allotting public employee benefits on the basis of sexual orientation.[25] In 1996, Governor Pataki reissued the executive order, which remains in effect today.[26] However, Governor Pataki issued a subsequent order making it clear that although New York would not discriminate on the basis of sexual orientation as an employer, the state would continue to grant armed forces recruiters access to public college campuses despite the ban on homosexuals in the military.[27] Nevertheless, the state continued to make some progress on gay and lesbian issues when it included sexual orientation in the language of the Hate Crimes Act of 2000.[28] The same year, consensual sodomy was removed from the penal law as part of the Sexual Assault Reform Act of 2000.[29] However, the legislature's removal of consensual sodomy from the penal law came ten

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[24] The twelve states that provided anti-gay discrimination protection at the time were: California, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin. Washington, D.C. has also enacted similar non-discrimination laws. Empire State Pride Agenda, *SONDA: Answers to Common Questions*, *at* http://www.prideagenda.org/sonda/faq.html (last visited Apr. 10, 2004).

[25] N.Y. COMP. CODES R. & REGS. tit. 9, § 4.28 (1983).

[26] N.Y. COMP. CODES R. & REGS. tit. 9, § 5.33 (1996).

[27] N.Y. COMP. CODES R. & REGS. tit. 9, § 5.34 (1996).

[28] N.Y. PENAL LAW § 485.00 (Consol. 2004).

> The legislature finds and determines as follows: criminal acts involving violence, intimidation and destruction of property based upon bias and prejudice have become more prevalent in New York State in recent years. The intolerable truth is that in these crimes, commonly and justly referred to as "hate crimes", victims are intentionally selected, in whole or in part, because of their race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation...Current law does not adequately recognize the harm to public order and individual safety that hate crimes cause. Therefore, our laws must be strengthened to provide clear recognition of the gravity of hate crimes and the compelling importance of preventing their recurrence.
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> Accordingly, the legislature finds and declares that hate crimes should be prosecuted and punished with appropriate severity.

Id.

[29] 2000 N.Y. Laws Ch. 1 (S. 8238, A. 11538).

years after the New York State Court of Appeals struck down the law as violative of both the right to privacy and equal protection principles, making it largely a pro forma gesture.[30]

New York State's history illustrates the difficulty confronting the gay and lesbian community's efforts to incrementally secure rights in state legislatures. The gay rights movement in New York State has achieved a fair amount of success in the legislative arena in recent years, but the progress has been slow and counterbalanced by efforts to maintain the marginalized status of the gay and lesbian community. For example, anti-gay marriage legislation has been introduced for five consecutive years in either the Assembly, Senate, or both.[31] Meanwhile, the legislature repeatedly fails to agree on how to best protect students from sexual orientation harassment. The Assembly passed the Dignity for All Students Act in 2002, while the Senate chose instead to pass the watered-down Schools as Safe Harbors Act, which fails to truly deal with the issue of harassment of gay students.[32] The Senate and Assembly revisited the issue again in 2003, but again failed to resolve it.[33] Although sometimes hailed as symbolizing a breakthrough era for the gay and lesbian community in New York State, recent legislative sessions suggest a continued resistance to dealing with the issue of discrimination based on sexual orientation, as well as a resistance to dealing with the other needs of the gay and lesbian community.

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[30] People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936 (1980).

[31] Lambda Legal Defense and Education Fund, *State-by-State: New York State Law*, *at* http://www.lambdalegal.org/cgi-bin/iowa/states/record?record=32 (last visited Apr. 10, 2004).

[32] The Dignity for All Students Act, S. 1925, A. 1118, 226th Sess. (N.Y. 2003), would create safe, harassment-free school environments for all students, regardless of their actual or perceived race, national origin, ethnic group, religion, gender, gender identity, disability or sexual orientation. *See* Empire State Pride Agenda, *Dignity for All Students Act*, *at* http://www.prideagenda.org/briefingpackets/dignity/dignity.html (last visited Apr. 26, 2004). The Schools as Safe Harbors Act, S. 4023, 226th Sess. (N.Y. 2003), does contain a definition of bullying that delineates categories (such as race, disability, gender, sexual orientation and so forth), but it does not include specific language on gender identity and expression. It also does not provide protections against discrimination, prohibit harassment of students by school staff or provide for specific teacher training. *See* Press Release, Empire State Pride Agenda, 2002 Legislative Wrap-up: Advances Overshadowed by No Resolution on Gay Rights Bill (June 28, 2002), *available at* http://www.prideagenda.org/pressreleases/pr-6-28-02.html.

[33] Press Release, Empire State Pride Agenda, New York's Statewide Gay Rights Group Urges Lawmakers to Finish Work on Safe Schools Legislation (July 29, 2003), *available at* http://www.prideagenda.org/pressreleases/pr-07-29-03.html.

C. *SONDA Reborn*

After Governor Pataki handily won reelection to a third term in November 2002, SONDA once again emerged as a viable piece of legislation. As promised, Senator Bruno called back the Senate for a special session to vote on SONDA and several other holdover bills from the previous legislative session. On December 17, 2002, thirty-one years after the first gay rights bill was introduced in Albany, the New York State Senate passed the Sexual Orientation Non-Discrimination Act by a vote of thirty-four to twenty-six, and Governor Pataki signed the bill into law, thereby extending civil rights protections to gays and lesbians in New York State effective January 17, 2003.[34] The practical effect of SONDA's passage was to add "sexual orientation" to New York State's already existing civil rights law:

> 1. All persons within the jurisdiction of this state shall be entitled to the equal protection of the laws of this state or any subdivision thereof.
>
> 2. No person shall, because of race, creed, color, national origin, sex, marital status, *sexual orientation* or disability, as such term is defined in section two hundred ninety-two of the executive law, be subjected to any discrimination in his or her civil rights, or to any harassment, as defined in section 240.25 of the penal law, in the exercise thereof, by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state.[35]

Under the amended civil rights law, no state or private institutional actor can discriminate against a person on the basis of sexual orientation in housing, employment, credit, or public accommodations.

Although the passage of SONDA was overdue, it does signal some degree of progress for gay and lesbian civil rights in New York State and theoretically indicates an atmosphere of responsiveness and opportunity. At first glance, the inclusion of sexual orientation in any statute providing for equal protection of the laws is a significant achievement. Together with the legislative statement describing a history of discrimination and prejudice against gays and lesbians,[36] this inclusion creates a

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[34] Shaila K. Dewan, *Pataki Signs Law Protecting Rights of Gays*, N.Y. TIMES, Dec. 18, 2002, at A1.

[35] N.Y. CIV. RIGHTS § 40-c (Consol. 2003) (emphasis added).

[36] The legislature found that:

possibility that gays and lesbians could be considered a "quasi-suspect class" entitled to a more demanding level of scrutiny in equal protection challenges to state statutes that operate against the interests of that community.[37] Under certain circumstances, the New York State Constitution affords the individual greater rights than those provided by its federal counterpart.[38] However, the wording of the state Constitution's Equal Protection Clause[39] suggests that it is no broader in coverage than its federal prototype.[40] Further, the history of this provision shows that it was not adopted by any perceived inadequacy in the Supreme Court's delineation of the right.[41] Although the U.S. Supreme Court has yet to apply heightened scrutiny in the context of discrimination against homosexuals, one could reasonably argue that discrimination on the basis of sexual orientation is analogous to discrimination on the basis of race or sex and therefore should be tested by either the strict scrutiny applicable to racial classifications or the mid-level

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> [M]any residents of this state have encountered prejudice on account of their sexual orientation, and that this prejudice has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering. The legislature further recognizes that this prejudice has fostered a general climate of hostility and distrust, leading in some instances to physical violence against those perceived to be homosexual or bisexual.

Editor's Notes, § 1, N.Y. CIV. RIGHTS § 40-c (Consol. 2003).

[37] By invoking heightened scrutiny, the Court recognizes, and compels lower courts to recognize, that a group may well be the target of the sort of prejudiced, thoughtless, or stereotyped action that offends principles of equality found in the Fourteenth Amendment. "Where classifications based on a particular characteristic have [prejudiced groups] in the past, and the threat that they may do so remains, heightened scrutiny is appropriate." City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 472 (1985). For example, "rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women." *Id.* at 441. "A gender classification fails unless it is substantially related to a sufficiently important governmental interest." *Id.* An even higher standard of strict scrutiny applies when a statute classifies by race, alienage, or national origin. *Id.* at 440. These factors are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others." *Id.* "For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." *Cleburne*, 473 U.S. at 440. Rational basis review is appropriate in the absence of any such class, so that the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *Id.*

[38] Esler v. Walters, 56 N.Y.2d 306, 313-14, 437 N.E.2d 1090, 1094-95 (1982).

[39] N.Y. CONST. art. I, § 11.

[40] Esler v. Walters, 56 N.Y.2d at 313-14, 437 N.E.2d at 1094-95.

[41] *Id.*

scrutiny applicable to classifications based on sex.[42] This is a highly plausible argument based on the legislative history, and it has attracted some favorable attention from lower courts in a variety of contexts.[43]

Despite the progress suggested by the inclusion of sexual orientation in New York's civil rights law, the circumstances surrounding its passage portend trouble afoot. Accompanying the text of the amendment is an additional statement of the legislature's intent, which can only be viewed as alarming. The legislature closed its comments by stating that "[n]othing in this legislation should be construed to create, add, alter or abolish any right to marry that may exist under the [C]onstitution of the United States, or this state and/or the laws of this state."[44] Considering the gay and lesbian community's goal of obtaining equal relationship recognition rights, by including such language the legislature foreclosed any opportunity that the statute could be construed to advance any interests beyond the prohibition of anti-gay discrimination. In the midst of a civil rights victory, gays and lesbians were once again reminded of their subordinate status in New York and the distance yet to travel towards true equality.

D. September 11: Tragedy as an Impetus for Change?

Supporters of the incremental strategy to securing gay rights in New York State may point to the legislature's response to the events of September 11, 2001, particularly regarding the incorporation of same-sex partners into survivor benefits. However, these advances also foreshadow the ultimate challenge of local incrementalism. The power to truly advance the interests of gays and lesbians in same-sex relationships ultimately rests with the state government. Moreover, the "special" nature of these provisions underscores their exceptional character.

New York State acknowledged the interests of gay and lesbian partners in several victim recovery programs related to the events of September 11, 2001. Governor Pataki, Attorney General Elliot Spitzer, Assembly Speaker Sheldon Silver, and State Senate Majority Leader Bruno introduced the September

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[42] Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994).

[43] *Id.*

[44] N.Y. CIV. RIGHTS § 40-c (Consol. 2003).

11th Victims and Families Relief Act, and the bill became law on May 21, 2002.[45] It included language in the legislative intent section of the bill specifying that the legislature desired to make domestic partners eligible for federal fund awards.[46] This provision was included to provide Special Master Kenneth Feinberg an additional basis in state law to award federal fund compensation to gay partners of 9/11 victims. Other related legislation included an amendment to the state's worker's compensation law to provide domestic partners of 9/11 victims, which includes same-sex partners of 9/11 victims, the same death benefits that spouses receive under the state's worker's compensation law.[47] Additionally, the legislature made domestic partners of 9/11 victims and their children eligible for the state's World Trade Center Memorial Scholarship Program.[48]

These measures raise the question of whether legislators have truly changed their thinking on same-sex relationships or whether legislators were conscious of the political ramifications of denying recovery to any victim of the attacks. The text describing the legislature's intent in passing SONDA suggests that legislators have not changed their thinking with regard to the rights due same-sex partners.[49] At best, the events of September 11, 2001 might operate to humanize gay and lesbian partners in a manner previously unthinkable. At worst, these benefits are essentially anomalies reserved for only the most extreme of circumstances. Countless numbers of gays and lesbians lose their partners under less cataclysmic circumstances, but the loss remains the same. Under ordinary circumstances, gays and lesbians have no guaranteed rights of recovery through tort actions or intestacy

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[45] Press Release, Empire State Pride Agenda, NY Assembly and Senate Unanimously Pass 9/11 Victims Bill (May 7, 2002), *available at* http://www.prideagenda.org/pressreleases/pr-5-7-02.html (last visited Apr. 10, 2004).

[46] S. 7356, A. 11290, 225th Sess. (N.Y. 2002). The relevant text reads:

> (7) that domestic partners of victims of the terrorist attacks are eligible for distributions from the federal victim compensation fund, and the requirements for awards under the New York State World Trade Center Relief Fund and other existing state laws, regulations, and executive orders should guide the federal special master in determining awards and ensuring that the distribution plan compensates such domestic partners for the losses they sustained.

Id.

[47] S. 7685, A. 11307, 225th Sess. (N.Y. 2002).

[48] S. 7792, A. 11812, 225th Sess. (N.Y. 2002).

[49] *See supra* note 44 and accompanying text.

law.[50] Therefore, advocates of incrementalism should be wary of placing too much stock in the effectiveness of the strategy until legislators demonstrate a consistently progressive approach to same-sex relationships by establishing real legal protection in the form of civil unions or equal access to marriage with all its accompanying rights and privileges.

E. Current Priorities

With the history of the gay rights movement in mind, what is it that gays and lesbians really want today? More importantly, what is it that gays and lesbians really need? The answers to these questions are by no means static. As gays and lesbians became increasingly open about their sexual orientation, their relationships similarly take on a more public persona. And as time goes by, private discrimination on the basis of sexual orientation against individuals arguably becomes less the issue. Instead, the primary obstacle to gay and lesbian equality is the discriminatory law and policy governing same-sex relationships.

If incidents of sexual orientation discrimination are on the decline as society becomes more willing to accept gays and lesbians into the mainstream, does SONDA become an irrelevant victory for gays and lesbians? Following SONDA's passage, an individual gay or lesbian person might escape discrimination in the workplace and in housing, while at the same time that person will experience the harsh consequences of disparate treatment when the government fails to recognize long-term, same-sex relationships. Perhaps gay rights are no longer about protection from private discrimination, but rather concern affirmative recognition of same-sex relationships.

If the contemporary gay rights movement is becoming more about relationship recognition than individual equality, then local advances are inherently limited. Policies regarding domestic relations have historically been within the purview of state governments,[51] although in recent years the federal

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[50] *See* Raum v. Restaurant Assocs., Inc., 252 A.D.2d 369, 675 N.Y.S.2d 343 (App. Div. 1st Dep't 1998) (holding same-sex partners are not considered spouses for wrongful death actions); *In re* Estate of Cooper, 187 A.D.2d 128, 592 N.Y.S.2d 797 (App. Div. 2d Dep't 1993) (holding that same-sex partners are not entitled to rights of election under current intestacy laws).

[51] Sosna v. Iowa, 419 U.S. 393, 404-09 (1975) (upholding state residency requirement in divorce action).

government has been increasingly vocal on those matters.[52] Localities are powerless to reshape domestic relations law and are thereby incapable of granting valid marriage certificates absent authorization by New York State law.[53] Therefore, incremental gains among a state's localities in the form of domestic partnership registries are illusory where specific rights and privileges turn on marital status. For example, local domestic partnership registries have no effect on New York State tax[54] and intestacy laws.[55] Although several municipalities are making efforts to create policies that support the increasing number of long-term same-sex relationships, the state government has generally refused to accord these relationships any legal significance.[56] The state's failure to grant recognition undercuts claims of local victories and ultimately destabilizes the legal status of same-sex relationships.

IV. THE BATTLEGROUND: ALL POLITICS ARE LOCAL

Because statewide results are mixed and the prospects for success are limited, the gay rights movement has developed a strategy of geographic incrementalism in the legislative arena. In other words, gay advocacy organizations are pushing for legislation on a county-by-county or municipality-by-municipality basis. Within each location, advocacy groups push for advances ranging from anti-gay discrimination ordinances to same-sex relationship recognition with varying degrees of emphasis depending on the political climate of the region.[57]

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[52] *See* Libby S. Alder, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197, 207-215 (1999) (discussing the Defense of Marriage Act, the marriage penalty, and the welfare laws as examples of federal intervention in domestic relations matters).

[53] The prerequisites and qualifications for a valid marriage are determined by Article 2 of the Domestic Relations Law. N.Y. DOM. REL. LAW §§ 5-7 (Consol. 2004). State law authorizes town and city clerks to issue marriage licenses pursuant to these regulations. N.Y. DOM. REL. LAW § 14 (Consol. 2004).

[54] Only married individuals are permitted to file joint personal income tax returns. N.Y. TAX LAW § 601 (Consol. 2004).

[55] Domestic partners are not recognized for the purpose of exercising the right of election against a decedent's will. N.Y. EST. POWERS & TRUSTS § 5-1.1 (Consol. 2004). *See also In re* Estate of Cooper, 187 A.D.2d 128 (App. Div. 2d Dep't 1993).

[56] With the exception of legislation responding to the events of September 11, 2001, New York State largely fails to legally recognize domestic partnerships and long-term same-sex relationships. *See* EMPIRE STATE PRIDE AGENDA FOUNDATION, STATE OF THE STATE REPORT 2003, VALUING OUR FAMILIES: LESBIAN, GAY, BISEXUAL AND TRANSGENDER NEW YORKERS 16-19 (2003), *available at* http://www.prideagenda.org/stateofstate/2003/legalstatus.pdf.

[57] *See generally* EMPIRE STATE PRIDE AGENDA FOUNDATION, *supra* note 56, at 18-19 (describing incremental progress among municipalities).

Although the current battle largely focuses on relationship recognition, localities have established special municipal ordinances that extend equal rights and provide protection against discrimination to the gay and lesbian community. Even before SONDA's passage, eleven counties had ordinances, policies, or proclamations prohibiting sexual orientation discrimination,[58] and twelve municipalities enacted similar ordinances.[59] These figures might appear encouraging at first glance. However, New York State comprises sixty-two counties and dozens of municipalities. Depending on where a gay or lesbian person resides, he or she may or may not have been protected prior to SONDA by anti-discrimination law in housing, credit, employment, and public accommodations. The results in the eleven counties that independently provided legal protection for gays and lesbians are encouraging, but they should not overshadow the fact that most of New York State remained fertile ground for sexual orientation discrimination until SONDA provided wider protection for the jurisdictions that had eluded incremental change.

On the domestic partnership front, New York City and several other communities are taking steps to extend broad domestic partnership registries and benefits.[60] Here again, localities have stepped in to fill the gaps left by state inaction. New York State does not have a domestic partnership registry, civil unions, or same-sex marriage. It did, however, extend benefits to domestic partners of most of its employees in 1995, but the move came through contract negotiations with the Civil Service Employees Association – not through legislation.[61] In

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[58] The following counties prohibited sexual orientation discrimination: Albany, Nassau, New York City (New York, Kings, Queens, Bronx, and Richmond Counties), Onondaga, Suffolk, Tompkins, and Westchester. Lambda Legal Defense and Education Fund, *Summary of States, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation*, *at* http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=217 (last visited Apr. 10, 2004).

[59] The following municipalities prohibited sexual orientation discrimination: Albany, Alfred, Brighton, Buffalo, East Hampton, Ithaca, Plattsburgh, Rochester, Southampton, Syracuse, Troy, and Watertown. *Id.*

[60] The following counties or municipalities offer domestic partner registries: Albany (municipality), Ithaca (municipality), New York City (including New York, Kings, Queens, Bronx, and Richmond Counties), and Rochester (municipality). Lambda Legal Defense and Education Fund, *Partial Summary of Domestic Partner Registry Listings*, *at* http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=403 (last visited Apr. 10, 2004).

[61] Paula Ettelbrick, National Gay and Lesbian Task Force, *Domestic Partner Benefits for State Employees: Family Policy Project Fact Sheet* (Oct. 2000), *available at* http://www.ngltf.org/pi/dpbstate.pdf.

fact, Majority Leader Bruno refused to extend domestic partner benefits to employees of the New York State Senate until 2001.[62] In contrast, Mayor David Dinkins established a New York City domestic partnership registry by executive order in 1993, which the City Council subsequently codified in 1998.[63] Later that same year, Mayor Dinkins settled a lawsuit that entitled domestic partners of city employees to equal benefits.[64] In response to the federal Defense of Marriage Act,[65] New York City also enacted an ordinance that extended full faith and credit to domestic partners and civil unions established in other counties.[66] Likewise, the City Council is set to consider the Equal Benefits Bill, which would forbid the city from contracting with companies that do not extend benefits to domestic partners on as equal a basis as married people.[67] Taken together, these measures signal a trend where localities are actively attempting to fill in the gaps left by the state in relationship recognition.[68]

The means by which localities are attempting to fill in the gaps are certainly useful and progressive, but the benefits they provide are inherently limited because localities are only empowered to create statutory rights for the specific jurisdiction. The rights and privileges are not rooted in constitutional law, which means they cannot stand for anything other than the particular issue they address. Consequently, at the end of the day, gays and lesbians remain virtually unchanged in the eyes of the state and federal courts

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[62] Press Release, Empire State Pride Agenda, Statewide Gay Rights Group Applauds Senate Majority Leader Bruno's Extension of Domestic Partnership Benefits for Senate Employees (Jan. 19, 2001), *available at* http://www.prideagenda.org/pressreleases/pr-1-19-01.html.

[63] Mayor Dinkins established the registry by Exec. Order No. 49 (1993). City Council codified the registry by enacting NEW YORK CITY, N.Y., CODE § 3-240 (2001).

[64] Slattery v. City of New York, 266 A.D.2d 24, 697 N.Y.S.2d 603 (App. Div. 1st Dep't 1999).

[65] *See supra* note 20.

[66] New York City, N.Y. Local Law No. 24 of 2002, Council Int. No. 114-A, *available at* http://www.council.nyc.ny.us/pdf_files/bills/law02024.pdf (last visited Apr. 26, 2004).

[67] New York City, N.Y. Bill Int. 0271-2002 (introduced Sept. 25, 2002), *available at* http://www.council.nyc.ny.us/textfiles/Int%200271-2002.htm. *See also* Gay and Lesbian Independent Democrats, *Elected Officials: City Hall Update* (Sept. 2002), *at* http://www.glid.org/electedupdates.htm (last visited Apr. 10, 2004).

[68] Recent reports indicate that at least forty municipalities throughout the United States have established some form of domestic partner registration. Lambda Legal Defense and Education Fund, *Partial Summary of Domestic Partner Registry Listings* (Aug. 1, 2001), *at* http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=403.

unless they fall within the specific language of a specific statute affording them specific relief.

V. SEXUAL ORIENTATION JURISPRUDENCE

A. *The Long Shadow of the U.S. Supreme Court*

One cannot adequately analyze the legal status of gays and lesbians in New York without considering the impact of the Supreme Court's interpretation of the federal Constitution. Specifically, the Supreme Court's jurisprudence has influenced the New York State Court of Appeals' interpretation of the state's rights to privacy and equal protection. When the Court of Appeals struck down New York's law prohibiting sodomy,[69] the Court of Appeals relied heavily, if not exclusively, on the substantive due process right to privacy under the Fourteenth Amendment of the federal Constitution.[70] Similarly, the Court of Appeals relied on the right to equal protection under the Fourteenth Amendment when it struck down a New York City executive order that prohibited awarding city contracts to organizations that discriminated on the basis of sexual orientation.[71] In so doing, the Court of Appeals also expressly declined consideration of whether discrimination based on sexual orientation required a higher level of scrutiny and instead deferred to federal cases.[72] Accordingly, given the congruence between the jurisprudence of New York and the United States, it is essential to consider the implications of the Supreme Court's cornerstone cases adjudicating the privacy and equal protection rights of gays and lesbians.

Prior to the Supreme Court's landmark decision in *Lawrence v. Texas*,[73] homosexuality had the dismal distinction

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[69] People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936 (1980).

[70] Under substantive due process, the privacy rights that have previously been recognized by the Court are those which are "fundamental or implicit in the concept of ordered liberty." Bowers v. Hardwick, 478 U.S. 186, 191 (1986). The right of privacy has been recognized with regard to child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510 (1925); contraception for married people, Griswold v. Connecticut, 381 U.S. 479 (1965); choice of a spouse, Loving v. Virginia, 388 U.S. 1 (1967); contraception for unmarried people, Eisenstadt v. Baird, 405 U.S. 438 (1972); abortion, Roe v. Wade, 410 U.S. 113 (1973); and family relations, Moore v. City of East Cleveland, 431 U.S. 494 (1977).

[71] Under 21, Catholic Home Bureau for Dependent Children v. City of New York, 65 N.Y.2d 344, 360 n.6, 482 N.E.2d 1, 8 n.6 (1985).

[72] 65 N.Y.2d at 364, 482 N.E.2d at 10.

[73] 539 U.S. 558, 123 S. Ct. 2472 (2003) [hereinafter *Lawrence*].

of being among those "behaviors" that the United States Supreme Court rebuked as unworthy of constitutional protection within the "penumbra" of the right to privacy.[74] Homosexuality shared company with the likes of incest and bigamy.[75] In 1986, the U.S. Supreme Court crystallized federal sexual orientation jurisprudence when it found in *Bowers v. Hardwick*[76] that Georgia's sodomy statute enforced only against homosexuals violated no constitutional rights.[77] The Court explicitly held that the fundamental right of privacy outlined in a series of previous cases did not reach the issue of homosexual sodomy.[78] In so holding, the Court not only validated the Georgia statute, but also established a legal basis for discrimination against gays and lesbians outside of the same-sex sodomy context by attaching a criminal stigma to behavior intertwined with the homosexual identity. Sodomy laws went on to be frequently invoked in civil cases related to child custody, employment, and education.[79] In one fell swoop, the Court essentially constructed a barrier to gay and lesbian equality that would be challenged incrementally in the legislative arena for years to come, with mixed results.

Homosexuality emerged from the dark shadows of history to overcome judicial condemnation when the Court decided *Lawrence v. Texas* in June 2003. John Lawrence and Tyron Garner were arrested in Lawrence's Houston home and jailed overnight after police officers, responding to a false report from an acquaintance, found the men engaged in private, consensual sex.[80] Once convicted, they were forced to pay fines and were subsequently considered sex offenders in several states.[81] After a series of appeals in the state courts, Lambda Legal Defense and Education Fund filed a petition for

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[74] *See Griswold*, 381 U.S. 479 (1965).

[75] *See* Zablocki v. Redhail, 434 U.S. 374, 399 (1978) (Powell, J., concurring) (describing various state regulations that place bans on certain relations).

[76] 478 U.S. 186 (1986).

[77] *Bowers*, 478 U.S. at 189-90.

[78] *Id.* at 190.

[79] Joseph Landau, *Sodomy Statutes as Weapons: Ripple Effect*, NEW REPUBLIC, June 23, 2003, at 12.

[80] Press Release, Lambda Legal Defense and Education Fund, U.S. Supreme Court Will Hear Lambda Legal's Challenge To Texas 'Homosexual Conduct' Law (Dec. 2, 2002), *at* http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1176.

[81] *Id.*

certiorari with the U.S. Supreme Court, which it granted in December 2002.[82]

The Supreme Court's decision to hear the case forecasted a major turning point in sexual orientation jurisprudence. Indeed, the Court had the opportunity to remedy the problems created by its decision in *Bowers,* which crippled the movement to secure equal rights for gays and lesbians through the courts.[83] Lambda argued that *Bowers* was wrongly decided because Texas's prohibition of sodomy between same-sex partners[84] violated both the rights to privacy and equal protection under the Fourteenth Amendment of the federal Constitution. Given the Court's long history of strictly defining the right to privacy within the scope of those things that are "deeply rooted in our nation's history and tradition,"[85] it seemed unlikely that the Court would reverse *Bowers* on privacy grounds. In order to do so, the Court would seemingly be required to reposition the right of privacy in its entirety and disturb portions of the relatively well-settled body of law in that arena.[86]

Despite stare decisis principles that might have weighed against overruling *Bowers*, the Supreme Court removed homosexuality from the constitutional closet by overruling its previous decision and declaring that prohibitions against private same-sex sodomy violated the right to privacy under the Due Process Clause.[87] In the process of doing so, the Court revisited and reevaluated the historical basis for legal and moral condemnation of same-sex sodomy and determined that *Bowers* relied too heavily on ambiguous historical judgments concerning homosexuality.[88] The Court also reasoned that the issue before it was less about same-sex sodomy and more about

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[82] Lawrence v. Texas, 41 S.W.3d 349, 355 (Tx. Ct. App. 2001), *cert. granted*, 123 S.Ct. 661 (Dec. 2, 2002) (No. 02-102).

[83] *See* Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531 (1992).

[84] The statute criminalizing "homosexual conduct" states that a "person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex" and an "offense under this section is a Class C misdemeanor." TEX. PENAL CODE ANN. § 21.06(a)-(b) (Vernon 2003). "Deviate sexual intercourse" is defined in Texas as "any contact between any part of the genitals of one person and the mouth or anus of another person; or the penetration of the genitals or the anus of another person with an object." TEX. PENAL CODE ANN. § 21.01 (Vernon 2003).

[85] Bowers v. Hardwick, 478 U.S. 186, 194 (1986).

[86] *See supra* note 70.

[87] Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003).

[88] *Id.* at 2478-80.

the liberty afforded by the Constitution that enables adults to make individual choices concerning their intimate relationships without government interference.[89] Finally, the Court pointed to legal developments both within and outside of the United States that indicated an outright rejection or at least serious erosion of the reasoning employed in *Bowers*.[90]

Although *Bowers* was ripe for judicial evisceration, there were other options at the Court's disposal that would have provided an equally reasonable basis to declare the Texas statute unconstitutional. Moreover, the other vehicles might have provided gays and lesbians with a powerful tool to effect future change. In particular, the Court could have turned to *Romer v. Evans*[91] and reevaluated the appropriate standard of review for classifications based on sexual orientation in the context of equal protection challenges.

In *Romer*, the Court found that a Colorado constitutional amendment that barred anti-discrimination measures intended to protect gays and lesbians violated the Equal Protection Clause by subjecting one group to a disadvantage that no other group suffered.[92] After various Colorado municipalities passed ordinances banning discrimination based on sexual orientation in housing, employment, education, public accommodations, health and welfare services, and other transactions and activities, Colorado voters adopted by statewide referendum "Amendment 2" to the state constitution. The amendment precluded all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their homosexual or bisexual orientation, conduct, practices, or relationships.[93] The primary rationale the state offered for "Amendment 2" was "respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality."[94] The State also asserted its "interest in conserving resources to fight discrimination against other groups."[95] Ultimately, the Court decided *Romer* on two

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[89] *Id.* at 2478.
[90] *Id.* at 2483.
[91] Romer v. Evans, 517 U.S. 620 (1996).
[92] *Id.*
[93] *Id.*
[94] *Id.* at 635.
[95] *Id.*

grounds. First, the Court held that the amendment failed even the most deferential rational basis test.[96] Second, the Court found that absent a rational basis, the amendment could have no other purpose than to effectuate animosity by inflicting an injury on a specific class of people.[97]

Although *Romer* is encouraging at first glance, it is important to recognize that the Court did not take an affirmative stance towards the rights of gays and lesbians in the equal protection context. While the Court could have identified gays and lesbians as a quasi-suspect class entitled to heightened scrutiny in equal protection challenges to classifications based on sexual orientation, the Court steered clear of the issue by limiting its holding to the context of a state referendum and the attendant political process. The Court specifically held that states could not intentionally target gays and lesbians with laws designed to limit their ability to attain protection from discrimination through ordinary legislative processes.[98] Moreover, the Court was silent with regard to what special privileges states could grant certain groups and withhold from other groups, such as marriage or equal recognition of same-sex relationships. In other words, *Romer* limits what states can take away from gays and lesbians as a political group, but it does not indicate what states must provide gays and lesbians under the Equal Protection Clause, nor does it indicate whether a court should categorize homosexuals as a quasi-suspect class.[99]

By invoking and amplifying *Romer* to resolve *Lawrence*, the Court would likely have been required to extend *Romer* beyond the meaning it has held to date. However, the argument is viable based on the Court's previous delineations of quasi-suspect classes.[100] More importantly, a ruling based on

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[96] *Romer*, 517 U.S. at 632.

[97] *Id.* at 632-35.

[98] *Id.* at 635-36.

[99] *Id.* at 632.

[100] The Court has articulated four criteria that seem to indicate whether heightened scrutiny is appropriate for a given classification:

> (a) an immutable trait that is a product of factors beyond a class member's control; (b) unique disabilities based on "incorrect stereotypes" of abilities and merit; (c) a history of discrimination against the class; and (d) the class is a politically powerless minority.

Harris M. Miller II, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 812 (1984).

> None of the factors standing alone indicates whether a particular classification should receive heightened scrutiny. Yet, these criteria, taken

heightened scrutiny would have placed gay rights squarely in the positive law and public arenas, as opposed to the bedrooms of consenting adults within the penumbra of privacy. If the Court had applied heightened scrutiny while engaging in an equal protection analysis of the statute at issue in *Lawrence,* the Court would have arguably opened the door for future challenges to laws regarding issues ranging from marriage to adoption to homosexuals in the military. However, the Court's actual ruling on privacy grounds fails to create similar opportunities. Indeed, the Court specifically pointed out that its reading of the issues presented by *Lawrence* did not "involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[101] Whereas the ruling based on privacy considerations operated to inform state governments as to where not to go, a ruling based on equal protection grounds would have operated to inform state governments of where they ought to go.

By considering the Court's approach to overruling *Bowers*, while also bearing in mind the subsequent limited interpretations of *Romer* to its particular facts,[102] observers would be well advised to remember that even the most promising cases can be rendered impotent by limiting readings of their ultimate holdings. Nevertheless, *Bowers* reminds us to remain cognizant of the impact that one landmark case can have on an entire legal landscape. *Bowers* served to undermine the legal interests of gays and lesbians, while at the same time prompting local legislative incremental action to remedy the harm done. One might reasonably argue that these incremental developments created an atmosphere in which the Supreme Court could overrule itself in a relatively short period of time. However, these incremental developments gain little traction without a broad legal doctrine to support the reasoning behind them. By unraveling the flawed reasoning of *Bowers*, *Lawrence* reverses the anti-gay momentum both created and sustained by *Bowers* and sets the stage for advances beyond

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together and applied in light of the normative theories from which they are derived, yield a test that helps determine which classifications need special judicial protection.

Id.

[101] *Lawrence*, 123 S. Ct. 2472, 2484 (2003).

[102] *See* Robert D. Dodson, *Homosexual Discrimination and Gender: Was* Romer v. Evans *Really A Victory for Gay Rights?*, 35 CAL. W. L. REV. 271 (1999).

the scope of a fragmented incremental approach to equal rights for gays and lesbians.

B. *New York State Sexual Orientation Jurisprudence*

Without consistent substantive progress in the state legislature and federal courts, it would be logical for the gay community to take its case to the state courts. But like most courts throughout the United States, the New York State Court of Appeals has struggled to answer the unique legal questions presented by homosexuality and has mimicked Supreme Court sexual orientation jurisprudence.[103] Although often considered a political minority group, the gay and lesbian community has failed to achieve legal status as a suspect class that would prompt heightened scrutiny of discriminatory legislation in New York and elsewhere.[104] Courts often refuse to recognize gays, lesbians and bisexuals as a discrete minority group on the basis that the community is defined by conduct, not an immutable trait.[105] Without heightened scrutiny, courts easily uphold discriminatory practices against the gay and lesbian community through rational basis review.[106] Although the New York State Appellate Division was, on one occasion, willing to consider heightened scrutiny for state action against gays and lesbians on the basis of sexual orientation,[107] the Court of Appeals backed away from such consideration when it modified and affirmed the decision.[108] Since then, there has not been a successful challenge in the New York State Court of Appeals to broad discriminatory practices against gays and lesbians. Instead, recent litigation on behalf of the gay community has mirrored local legislative activity in that it has focused on specific facets of relationship recognition, rather than broad equality principles. The trend is either a reaction to the current state of sexual orientation jurisprudence or the product of

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[103] *See supra* notes 70-72 and accompanying text.

[104] *See, e.g.*, Under 21, Catholic Home Bureau for Dependent Children v. City of New York, 65 N.Y.2d 344, 364 482 N.E.2d 1, 10 (1985). *See generally* Miller, *supra* note 100.

[105] *See, e.g.*, Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987) (holding that homosexuality, defined by conduct, is subject to rational basis test).

[106] *See, e.g., id.*; Lawrence v. Texas, 41 S.W.3d 349, 355 (Tex. Ct. App. 2001).

[107] Under 21 v. City of New York, 108 A.D.2d 250, 488 N.Y.S.2d 669 (App. Div. 1st Dep't 1985).

[108] *Under 21*, 65 N.Y.2d 344, 482 N.E.2d 344 (1985).

deliberate incremental strategy to secure small but consistent victories.

C. *Issues Raised by Cornerstone Cases in New York State*

New York State's sexual orientation jurisprudence has appeared progressive and promising at times, but a complete or consistent set of legal precedents favoring equality for gays and lesbians as individuals and as partners now appears foreclosed without legislative encouragement. In a series of cases, the courts have both extended and denied legal protection to the gay and lesbian community. In one exceptional case, the Court of Appeals defined "family" in the real estate law context to allow a same-sex partner to remain in a rent-stabilized apartment after the death of one partner.[109] Yet in another case, a same-sex partner was not allowed to recover for the wrongful death of his partner.[110] In a similar case, a same-sex partner was not allowed the right of election against the will of his deceased partner.[111] On the other hand, in the Domestic Relations Law context, the court interpreted adoption law to allow for same-sex second-parent adoption.[112] In yet another case, this one involving visitation rights, the court denied standing to a lesbian woman who functioned as the co-parent of her former partner's biological child.[113] At once recognizing gay and lesbian interests while simultaneously denying them access to legal protections and privileges, the following cases demonstrate the schizophrenic approach the courts take towards gay rights in New York State.

1. Sexual Practices: *People v. Onofre*

In 1980, the Court of Appeals addressed the issue of coupling when it found New York's sodomy law unconstitutional in *People v. Onofre*.[114] In the consolidated case, five defendants were charged and convicted under New York penal laws prohibiting certain sexual acts between non-

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[109] Braschi v. Stahl Assocs., Inc., 74 N.Y.2d 201, 543 N.E.2d 49 (1989).

[110] Raum v. Restaurant Assocs., Inc., 252 A.D.2d 369, 675 N.Y.S.2d 343 (App. Div. 1st Dep't 1998).

[111] *In re* Estate of Cooper, 187 A.D.2d 128, 592 N.Y.S.2d 797 (App. Div. 2d Dep't 1993).

[112] *In re* Dana, 86 N.Y.2d 651, 660 N.E.2d 397 (1995).

[113] Alison D. v. Virginia M., 77 N.Y.2d 651, 572 N.E.2d 27 (1991).

[114] 51 N.Y.2d 476, 415 N.E.2d 936 (1980).

married persons.[115] The defendants included both heterosexuals and homosexuals.[116] The defendants claimed the law was unconstitutional based on both equal protection and privacy principles.[117]

Striking down the law, the court held that there was no rational relationship between the proscribed acts and the classification, as the statute only applied to non-married individuals.[118] The state failed to make any showing as to how the statute banning consensual sodomy between persons not married to each other preserved or fostered marriage.[119] However, the thrust of the court's decision was that the statute violated the defendants' right of privacy under the federal Constitution, as expressed by the U.S. Supreme Court's series of holdings outlining the right.[120] The Court found that the state failed to demonstrate how government interference with the practice of personal choice in matters of intimate sexual behavior out of view of the public and with no commercial component would serve to advance the cause of public morality or do anything other than restrict individual conduct and impose a concept of private morality chosen by the state.[121] In essence, the court found that there was not even a rational relationship between the sodomy statute and government interests.

Although celebrated by the gay and lesbian community, *Onofre* simply fails to translate into meaningful precedent for establishing an equal protection doctrine or privacy rights that advance the interests of gays and lesbians. By finding that the statute violated federal equal protection principles, the court did not rest its decision on the basis of its particular impact on gays and lesbians. The classification and the encroachment on the right to privacy were both unconstitutional because the State failed to establish a link between its interests in preserving public morality and preventing unmarried individuals from engaging in sodomy.[122] Importantly, the decision did not turn on the gender and sexual orientation of

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[115] 51 N.Y.2d at 484, 415 N.E.2d at 938.

[116] *Id.*

[117] *Id.*

[118] 51 N.Y.2d at 485, 415 N.E.2d at 938.

[119] *Onofre*, 51 N.Y.2d at 490, 415 N.E.2d at 941.

[120] 51 N.Y.2d at 485-86, 415 N.E.2d at 939-940.

[121] 51 N.Y.2d at 492, 415 N.E.2d at 943.

[122] 51 N.Y.2d at 490-492, 415 N.E.2d at 941-943.

the parties engaging in the activity. There is no question that gays and lesbians benefited from the decision, but the benefit was incidental and not a statement about New York State's privacy or equal protection jurisprudence as it relates to the gay and lesbian community itself.

2. Alternative Routes to Relationship Recognition: In re *Adoption of Robert Paul P.*[123]

In this rather unusual and clever case, the appellants were two men who lived together for over twenty-five years.[124] The older of the two men, who was fifty-seven years old, submitted a petition to adopt the younger man, who was fifty years old.[125] The two shared a same-sex, long-term relationship and sought an adoption for social, financial, and emotional reasons.[126] After a hearing where both partners testified, and following receipt of a probation investigation that supported the position asserted by the two men, the family court denied their petition.[127] The family court concluded that the parties were attempting to utilize the adoption process as a substitute for marriage, wills, and business contracts, and that the two men "lacked any semblance of a parent-child relationship" for which the adoption statute was designed to accommodate.[128] Affirming the decision, the Court of Appeals nevertheless indicated some willingness to entertain the possibility that a same-sex legal relationship would be legally viable in a different context.[129] The difficulty regarded the appellant's efforts to manipulate the adoption law in a manner inconsistent with legislative intent.[130] The court held that:

> If the adoption laws are to be changed so as to permit sexual lovers, homosexual or heterosexual, to adopt one another for the purpose of giving a non-matrimonial legal status to their relationship, or if a separate institution is to be established for the same purpose, it is for the Legislature, as a matter of State public policy, to do so. Absent any such recognition of that relationship coming from the

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[123] 63 N.Y.2d 233, 471 N.E.2d 424 (1984).
[124] 63 N.Y.2d at 235, 471 N.E.2d at 425.
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Robert Paul P.*, 63 N.Y.2d at 239, 471 N.E.2d at 427 (1984).
[130] *Id.*

> Legislature, however, the courts ought not to create the same under the rubric of adoption.[131]

Here, we see the emergence of what ultimately became a trend in New York's same-sex relationship jurisprudence. Where issues of sexuality and same-sex relationships come into play, the court refers back to the legislature. Clearly, this case tested the bounds of what a court theoretically could do in light of clear statutory language and legislative intent. Had this case stood alone with regard to deference to the state legislature, one might easily dismiss it from the same-sex relationship debate. However, subsequent cases demonstrated the court's reluctance to interpret state law in a manner consistent with the needs of gays and lesbians in domestic relations law until the state legislature itself so signals.[132]

To be fair, the Court of Appeals would have run afoul of judicial restraint had it gone any further in its opinion than to highlight the absence of same-sex relationship recognition. Adoption is not the appropriate mechanism to recognize long-standing committed adult relationships. However, this case illustrates the lengths to which gays and lesbians will go in pushing for some degree of state recognition of their relationships within the context of already existing law. Other than the spousal relationship, the guardian-adoptee relationship is the only other state-recognized relationship characterized by family intimacy. If not marriage and if not adoption, then what remains for same-sex couples who seek nothing more than traditional recognition of their relationship, a relationship that comports with all the traditional dynamics of spouses other than their respective genders? The Court of Appeals told gays and lesbians to look to the legislature for the answer. Yet this is the same legislature that failed to pass anti-gay discrimination legislation for decades. And when SONDA was ultimately passed in 2002, it was the legislature that foreclosed any possibility that same-sex couples will be allowed to marry on the strength of that bill.[133]

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[131] *Id.*

[132] *See In re* Estate of Cooper, 187 A.D.2d 128, 592 N.Y.S.2d 797 (App. Div. 2d Dep't 1993) (intestacy rights); Raum v. Restaurant Assocs., Inc., 252 A.D.2d 369, 675 N.Y.S.2d 343 (App. Div. 1st Dep't 1998) (standing in tort actions); Alison D. v. Virginia M., 77 N.Y.2d 651, 572 N.E.2d 27 (1991) (parentalrights).

[133] *See supra* note 44 and accompanying text.

3. The Definition of Family: *Braschi v. Stahl Associates, Inc.*[134]

Several years after gays and lesbians were precluded from adopting one another as a substitute for marriage, the Court of Appeals determined that there were circumstances that allowed for some degree of legal recognition of long-term same-sex relationships. Following the death of his partner, Miguel Braschi sought judicial relief granting him the right to remain in the apartment they had shared for eleven years.[135] Because his name was not on the lease, Stahl Associates, the building owner, threatened to evict Braschi, whom he claimed was merely a licensee.[136] Braschi initiated an action for a permanent injunction and a declaration of entitlement to occupy the apartment under New York City Rent and Eviction Regulations,[137] which blocked the eviction of family members who had lived with the deceased tenant.[138] The Supreme Court found in favor of Braschi, but the Appellate Division reversed, finding that protection from eviction applied only to "family members within traditionally legally recognized familial relationships."[139]

Reversing the lower court, the Court of Appeals reasoned that the legislative intent when defining "family" in the real estate and succession context was to describe a functional family.[140] It held that the intended protection against sudden eviction "should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life."[141] The court further held that "in the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence."[142] The court

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[134] 74 N.Y.2d 201, 543 N.E.2d 49 (1989).

[135] 74 N.Y.2d at 206, 543 N.E.2d at 50-51.

[136] 74 N.Y.2d at 206, 543 N.E.2d at 51.

[137] NEW YORK CITY, N.Y., CODES, RULES & REGULATIONS, tit. 9, pt. 2204.6 (1984). At the time of litigation, the regulation provided that upon the death of a rent-controlled tenant, the landlord may not dispossess "either the surviving spouse of the deceased tenant or some other member of the deceased tenant's family who has been living with the tenant." *Braschi*, 74 N.Y.2d at 206, 543 N.E.2d at 51.

[138] *Braschi*, 74 N.Y.2d at 206, 543 N.E.2d at 51.

[139] 74 N.Y.2d at 207, 543 N.E.2d at 51.

[140] 74 N.Y.2d at 211-12, 543 N.E.2d at 53-54.

[141] 74 N.Y.2d at 211, 543 N.E.2d at 53.

[142] 74 N.Y.2d at 211, 543 N.E.2d at 53-54.

concluded that "this view comports both with our society's traditional concept of 'family' and with the expectations of individuals who live in such nuclear units."[143]

Given the court's liberal interpretation of "family," this case continues to be noteworthy as gays and lesbians focus on relationship recognition. Although encouraging on its face, the case did not have the broad impact anticipated. Instead, the court's holding has subsequently been limited to the real estate context.[144] It is difficult to reconcile how the family and spousal relationships at issue in this case were categorized "traditional" while the same relationships fail to gain equal footing in other settings, including actions for wrongful death, inheritance rights, and child visitation. Aside from the inexplicable denial of these statutory rights from gays and lesbians, it is even more difficult to reconcile the court's use of "tradition" in this context with the court's adherence to previous Supreme Court due process jurisprudence finding that homosexuality was anything but "traditional" in the privacy context.[145] One cannot escape the conclusion that there is substantial divergence between incremental statutory enactment and the essence of current sexual orientation jurisprudence. When limited to specific statutory regulations and entitlements, same-sex relationships are "traditional." However, same-sex relationships are anything but "traditional" in the broader context of sexual orientation jurisprudence, which is where such a finding would have the greatest impact on the rights of gays and lesbians.

4. Spousal Intestacy Rights: In re *Estate of Cooper*

The limits of *Braschi* were soon tested in In re *Estate of Cooper*.[146] In that case, the question was whether the survivor of a same-sex relationship, alleged to be a "spousal relationship," was entitled to a right of election against the decedent's will, pursuant to New York's right of election statute.[147] William

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[143] *Braschi*, 74 N.Y.2d 201, 211, 543 N.E.2d 49, 54 (1989).

[144] *See In re* Estate of Cooper, 187 A.D.2d 128, 592 N.Y.S.2d 797 (App. Div. 2d Dep't 1993) (intestacy rights); Raum v. Restaurant Assocs., Inc., 252 A.D.2d 369, 675 N.Y.S.2d 343 (App. Div. 1st Dep't 1998) (standing in tort actions).

[145] *See supra* note 85 and accompanying text.

[146] 187 A.D.2d 128, 592 N.Y.S.2d 797 (App. Div. 2d Dep't 1993).

[147] N.Y. EST. POWERS & TRUSTS § 5-1.1 (Consol. 1993). The relevant text states that "the elective share of the surviving spouse is one-third of the net estate if the decedent is survived by one or more issue and, in all other cases, one-half of such net estate." *Id.*

Thomas Cooper died on February 19, 1988.[148] He died testate, leaving everything to his partner of four years as a specific and residuary legatee, with the exception of certain real estate, allegedly constituting over eighty percent of the value of the estate, which was left to a partner with whom Cooper had previously been in a relationship.[149] Prior to his death, Cooper and the surviving partner kept a common home, shared expenses, considered themselves spouses, and had a physical relationship.[150] In accordance with the definition of "family" set forth in *Braschi*,[151] the surviving partner argued that he should be considered a "surviving spouse" in the right of election context.[152] Additionally, the surviving spouse argued that a narrow definition of "surviving spouse" is unconstitutional as it violated the Equal Protection Clause of the state Constitution.[153] Specifically, he argued that this unconstitutional definition directly derives from and compounds the state's unconstitutional conduct in interpreting the Domestic Relations Law as prohibiting same-sex partners from obtaining marriage licenses.[154]

Going to great lengths to explain why the definition of "family" set forth in *Braschi* did not apply to this case, the Appellate Division concluded that the surviving partner was not a spouse for right of election purposes.[155] In particular, the opinion emphasized the legislature's intent in defining "surviving spouse" as a husband or wife in a separate section of the relevant law.[156] Moreover, the Appellate Division pointed to *Alison D. v. Virginia M.*,[157] where the Court of Appeals declined to extend the *Braschi* definition of "family" to a lesbian who sought visitation rights to the biological child of her former same-sex partner.[158] With regard to the equal protection argument, the Appellate Division relied heavily on existing

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[148] *Cooper*, 187 A.D.2d at 129-30, 592 N.Y.S.2d at 797-99.

[149] *Id.*

[150] *Id.*

[151] *See Braschi*, 74 N.Y.2d at 211, 543 N.E.2d at 53-54; *see also supra* note 141-43 and accompany text.

[152] *See Cooper*, 187 A.D.2d at 129-30, 592 N.Y.S.2d at 797-98; *see also supra* note 147.

[153] 187 A.D.2d at 132, 592 N.Y.S.2d at 799.

[154] *Id.*

[155] 187 A.D.2d at 131-32, 592 N.Y.S.2d at 799.

[156] 187 A.D.2d at 131, 592 N.Y.S.2d at 798.

[157] 77 N.Y.2d 651, 572 N.E.2d 27 (1991).

[158] *Cooper*, 187 A.D.2d at 132, 592 N.Y.S.2d at 799.

interpretations of the Fourteenth Amendment of the federal Constitution and determined that rational basis review was the appropriate standard to apply to classifications based on sexual orientation.[159] Under rational basis review, the state's interest in marriage's procreative function was reasonable.[160] The court also went beyond the equal protection argument, holding that contemporary concepts of marriage and societal interests would not justify the "use of the due process clause of the Fourteenth Amendment [as] a charter for restructuring [marriage] by judicial legislation."[161]

The surviving partner and Cooper's estate eventually settled the case, which prevented review by the Court of Appeals. However, it is safe to say that the decision was by no means aberrant. A similar result occurred in *Raum v. Restaurant Associates, Inc.*,[162] which also never made its way to the Court of Appeals. Moreover, the Court of Appeals has not subsequently applied an expanded view of "family"[163] even where the reasoning behind *Braschi* would seem to apply in the particular context.[164] Therefore, the Appellate Division's reliance on *Alison D. v. Virginia M.* in *Cooper* is not unfounded. Until the Court of Appeals issues a new decision extending a flexible definition of "family" to a broader gay rights context, lower courts are likely to limit *Braschi* to cases with very similar facts in much the same way that *Romer* has been applied conservatively in the lower federal courts.[165]

5. Standing in Tort Actions: *Raum v. Restaurant Associates, Inc.*[166]

In the *Raum* case, the surviving partner of a same-sex relationship attempted to sue for the wrongful death of his partner. The case raised similar issues to those raised in In re

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[159] 187 A.D.2d at 134, 592 N.Y.S.2d at 800.

[160] 187 A.D.2d at 133, 592 N.Y.S.2d at 799-800.

[161] 187 A.D.2d at 134, 592 N.Y.S.2d at 800 (quoting Baker v. Nelson, 191 N.W.2d 185, 186-87 (Minn. Ct. App. 1971)).

[162] 252 A.D.2d 369, 675 N.Y.S.2d 343 (App. Div. 1st Dep't 1998) (holding that same-sex partners are not considered spouses for wrongful death actions).

[163] *See supra* notes 141-43 and accompanying text.

[164] *See supra* notes 110, 111, 113 and accompanying text.

[165] *See* Dodson, *supra* note 102. *But see* Langan *ex rel.* Estate of Spicehandler v. St. Vincent's Hosp. of N.Y., 765 N.Y.S.2d 411, 196 Misc. 2d 440 (Sup. Ct. Nassau County 2003) (holding that a surviving partner of a Vermont civil union is entitled to sue for wrongful death under full faith and credit principles).

[166] 252 A.D.2d 369, 675 N.Y.S.2d 343 (App. Div. 1st Dep't 1998).

Estate of Cooper, this time examining four provisions of the wrongful death statute and the definition of spouse contained within them.[167] The surviving partner argued that his marital status should not be a barrier to recovering tort damages because he is barred from marrying the partner of his choosing.[168] He also suggested that an entity could have a different legal status in different contexts for public policy reasons.[169] Essentially, the surviving partner was urging application of the *Braschi* definition of "family" to tort actions.

Here again, the Appellate Division declined to apply a more flexible definition of "spouse" or "family" to accommodate same-sex relationships. It held that the statute "does not give individuals not married to the decedent (other than certain blood relatives) a right to bring a wrongful-death action, operates without regard to sexual orientation in that unmarried couples living together, whether heterosexual or homosexual, similarly lack the right to bring a wrongful-death action, and, as such, the statute does not discriminate against same-sex partners in spousal-type relationships."[170] It also found that there was no merit to the plaintiff's argument that the word "spouse" should be read to include such same-sex partners.[171] Moreover, the Appellate Division relied on *Cooper* to support its conclusion that "[s]ince it is not within the judicial province to redefine terms given clear meaning in a statute, plaintiff's sole recourse lies in legislative action."[172] But as the gay and lesbian community knows, the New York State legislature is not poised to act on behalf of same-sex partnerships in any meaningful way. There was no indication that the legislature would do so at the time of the decision, nor is there any indication that it is now willing to do so[173] absent exceptional circumstances.[174]

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[167] N.Y. EST. POWERS & TRUSTS LAW §§ 5-4.1, 1-2.5, 4-1.1, 5-1.2 (Consol. 1998).

[168] *Raum*, 252 A.D.2d at 372, 675 N.Y.S.2d at 346.

[169] *Id.*

[170] 252 A.D.2d at 370, 675 N.Y.S.2d at 344.

[171] *Id.*

[172] *Id.*

[173] *See supra* note 44 and accompanying text.

[174] *See supra* Part III.D.

6. Parenting: *Alison D. v. Virginia M.*

The Court of Appeals continues to adhere to a conventional view of family even where it appears that the best interests of a child would be advanced by a more flexible definition. In *Alison D. v. Virginia M.*,[175] Alison sought visitation with a child she had raised with her former same-sex partner pursuant to state domestic relations law.[176] Three years after commencing their relationship, Alison and Virginia decided to have a child and agreed that Virginia would be artificially inseminated.[177] Together, they planned for the conception and birth of the child and agreed to share jointly all rights and responsibilities of child rearing.[178] Virginia gave birth to a baby boy, who was given Alison's last name as his middle name and Virginia's last name as his last name.[179] Alison shared in all birthing expenses and continued to provide for his support.[180] The couple also jointly cared for and made decisions regarding the child.[181] Two years later, Alison and Virginia terminated their relationship and agreed to a visitation schedule whereby Alison continued to see the child a few times a week.[182] Alison also agreed to continue to pay one half of the mortgage and major household expenses.[183] By this time, the child had referred to both Alison and Virginia as "mommy."[184] Alison's visitation with the child continued for three years, at which time Virginia bought out Alison's interest

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[175] 77 N.Y.2d 651, 572 N.E.2d 27 (1991).

[176] N.Y. DOM. REL. LAW § 70(a) (Consol. 1990). The relevant text states:

> Where a minor child is residing within this state, either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly.

Id.

[177] 77 N.Y.2d at 655, 572 N.E.2d at 28.

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Alison D.*, 77 N.Y.2d at 655, 572 N.E.2d at 28.

[183] *Id.*

[184] *Id.*

in the house and then began to restrict visitation with the child.[185] One year later, Alison moved to Ireland to pursue career opportunities, but continued her attempts to communicate with the child.[186] Thereafter, Virginia terminated all contact between Alison and the child and returned all of her gifts and letters.[187] There was no dispute that respondent was a fit parent.[188]

While acknowledging that the child in this particular case would probably benefit from visitation with Alison, the Court of Appeals held that Alison lacked standing to assert visitation rights.[189] Specifically, the court rejected Alison's argument that the definition of "parent" should be expanded to include "de facto" parents, a definition that would have provided standing for Alison to assert visitation rights.[190] The court reasoned that tradition dictated that only the mother or father has the right to the care and custody of a child, even in situations where the non-parent has exercised some control over the child with the parent's consent.[191] Furthermore, the court pointed out that the legislature granted a specific exception to the rule for grandparent[192] and sibling[193] visitation rights, but did not create a similar exception for a "third person" or "de facto" parent like Alison.[194] In other words, absent an express exception created by the legislature, the court simply would not grant Alison standing to seek visitation even if it were to serve the child's best interests, and even though she had played an integral role as one of the child's "mommies."

Although it is reasonable to exercise caution when allowing non-parents to seek visitation, the outright denial of Alison's request produced an absurd result that is uniquely detrimental to the gay and lesbian community. Same-sex partners often turn to alternative methods of childbearing to

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[185] *Id.*
[186] *Id.*
[187] *Alison D.*, 77 N.Y.2d at 655, 572 N.E.2d at 28.
[188] 77 N.Y.2d at 655, 572 N.E.2d at 29.
[189] 77 N.Y.2d at 657, 572 N.E.2d at 29.
[190] *Id.*
[191] *Id.*
[192] N.Y. DOM. REL. LAW § 72 (Consol. 1989).
[193] *Id.* § 71.
[194] *Alison D.*, 77 N.Y.2d at 656-57, 572 N.E.2d at 29-30.

become parents.[195] Although these couples plan to raise the child together, these methods usually require the biological involvement of only one partner. Regardless of the parent-child relationship that develops over time, courts regularly view the non-biological parent as a stranger to the child.[196] In the case of Alison and many others, nothing could be further from reality. If the Court of Appeals is willing emphasize reality over statutory language in the real estate context for the sake of apartment succession,[197] then it should follow that rigid statutory interpretation should give way to the best interests of a child in the visitation context. Here again, the absence of a consistent approach to the rights of gays and lesbians produces irreconcilable results.

7. Adoption: In re *Jacob and Dana*

The decision in *Alison D.* is particularly striking in light of the earlier case of In re *Jacob and Dana*,[198] where the Court of Appeals determined that New York's adoption laws[199] are gender neutral and permit second-parent adoption without the termination of another's parental rights. In this consolidated case, one unmarried heterosexual couple and one homosexual couple sought second-parent adoptions without termination of the biological parent's rights, which was contrary to how adoption ordinarily operated with regard to the rights of a biological parent in the absence of marriage.[200] Although court-ordered reports indicated that the adoptions would benefit the children, the lower courts determined that Jacob could not be adopted absent marriage between the heterosexual couple and that Dana could not be adopted without terminating her natural, homosexual mother's parental rights.[201]

In reversing the lower court's decision, the Court of Appeals went to great lengths to explain why its interpretation

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[195] Jane E. Brody, *Gay Families Flourish as Acceptance Grows*, N.Y. TIMES, July 1, 2003, at F7.

[196] *See, e.g.*, Curiale v. Reagan, 272 Cal. Rptr. 520 (Cal. App. Ct. 1990); Liston v. Pyles, No. 97APF01-137, 1997 WL 467327 (Ohio Ct. App. Aug. 12, 1997); *In re* Thompson, 11 S.W.3d 913 (Tenn. Ct. App. 1999); Titchenal v. Dexter, 693 A.2d 682 (Vt. 1997).

[197] *See supra* notes 140-43 and accompanying text.

[198] 86 N.Y.2d 651, 660 N.E.2d 397 (1995).

[199] N.Y. DOM. REL. LAW §§ 110, 117 (1991).

[200] 86 N.Y.2d at 656-57, 660 N.E.2d at 398-99.

[201] 86 N.Y.2d at 656-57, 660 N.E.2d at 398.

of the relevant statutes comported with both their text and the underlying purpose of adoption.[202] Although the court has consistently declined to apply the *Braschi* functional definition of family[203] in other contexts, it did so here without hesitation.[204] In fact, the court even suggested that its proper function was to infuse the statute with practical meaning even if it were outside of the legislature's original intent.[205] The court stated that "the Legislature that last codified [the statute] in 1938 may never have envisioned families that 'include[] two adult lifetime partners whose relationship is . . . characterized by an emotional and financial commitment and interdependence,' [but] it is clear that [the statute], designed as a shield to protect new adoptive families, was never intended as a sword to prohibit otherwise beneficial intrafamily adoptions by second parents."[206]

The question prompted by the court's reasoning is whether any statute is intended to prohibit legal accommodation of otherwise beneficial relationships. Indeed, previous decisions suggest that the answer is in the affirmative.[207] One is hard-pressed to identify the reasoning behind accommodating same-sex relationships in real estate and adoption, but not in tort or intestacy rights. A possible explanation for the court's willingness to do so in the adoption context is the benefit the state stands to gain from granting adoptions by same-sex partners. The state is interested in providing stable and secure homes for children. However, if the qualities of a same-sex relationship warrant state recognition and accommodation for adoption purposes, should not those same qualities lead the court to extend its recognition of the relationship even absent a child? Moreover, if the court is capable of manipulating the legislature's intent here, then the court's claim that it cannot do so in other contexts rings hollow. When this case is considered with others, the need for a clear and consistent approach to the rights of gays and lesbians in

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[202] 86 N.Y.2d at 657-59, 660 N.E.2d at 398-400.

[203] *See supra* notes 140-43 and accompanying text.

[204] 86 N.Y.2d. at 668, 660 N.E.2d at 405.

[205] 86 N.Y.2d at 668-69, 660 N.E.2d at 405-06.

[206] 86 N.Y.2d at 668-69, 660 N.E.2d at 405 (quoting Braschi. v Stahl Assocs., Inc., 74 N.Y.2d 201, 211, 543 N.E.2d 49, 54 (1989)).

[207] *See In re* Estate of Cooper, 187 A.D.2d 128, 592 N.Y.S.2d 797 (App. Div. 2d Dep't 1993) (intestacy rights); Raum v. Restaurant Assocs., Inc., 252 A.D.2d 369, 675 N.Y.S.2d 343 (App. Div. 1st Dep't 1998) (standing in tort actions); Alison D. v. Virginia M., 77 N.Y.2d 651, 572 N.E.2d 27 (1991) (parental rights).

New York becomes readily apparent. The piecemeal approach taken by the courts ultimately operates to undermine the progress made by gays and lesbians in other arenas and thereby exacerbates the instability of gay rights in New York.

VI. THE IMPLICATIONS OF INCREMENTALISM

It is indeed difficult to reconcile the incremental progress gays and lesbians have achieved in the legislative arena with the largely dismal sexual orientation jurisprudence in New York State. Although now armed with statewide protection from anti-gay discrimination, gays and lesbians continue to confront an inconsistent patchwork of legal rights and recognition that operates to compromise their social and political position. The patchwork is primarily constructed of bits and pieces of local ordinances along with a few fragments of state law randomly sewn in throughout the overall composition. Like most patchwork compositions, the gay rights landscape in New York is only as strong as the ties that bind it. Without well-developed federal law supporting the rights of gays and lesbians, the New York Court of Appeals' failure to set forth progressive sexual orientation jurisprudence undermines the political and legal interests of gays and lesbians.

If incremental progress creates a false sense of progress or security within the gay community, inconsistent or inadequate laws are arguably worse than no laws whatsoever. If one segment of the community experiences or even perceives advances, the overall community begins to lose its common legal trait of disparate treatment. Without the common trait, or where one segment of the community determines it can best advance its interests independently, the community stands to be divided and effectively conquered. For example, the "divide and conquer" phenomenon emerged as SONDA was poised for passage.[208] Although typically allied with the gay and lesbian community in New York, the transsexual community was outraged when "gender identity and expression" was not included in the language of SONDA.[209] Although some leaders of the gay community and several lawmakers asserted that transsexuals were already covered by the existing law's

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[208] *See supra* section Part III.B-C.

[209] *See* Dewan, *supra* note 34.

prohibition discrimination based on gender,[210] leaders of the transsexual community considered that the failure to fight for inclusion of the specific language amounted to outright abandonment stemming from a political cost-benefit analysis.[211] In effect, the passage of statewide anti-gay discrimination law actually served to create a schism in an otherwise fairly unified community of minorities defined by sexual orientation or identity.

Inconsistencies with regard to varying levels of legal rights and recognition along geographic lines also threaten to create divisions within the gay community and further marginalize gays and lesbians who require the most protection. When localities establish legal protections for the gay and lesbian community, "gay ghettos" develop and thereby diminish the perceived need for broad legal recognition beyond city limits. Gays and lesbians are encouraged to cluster in certain jurisdictions because of their gay-friendly laws and political climates, while those in more obscure localities lack the resources and political clout to advance their rights.[212] For example, of all lesbians and gay men in the United States, 45.1% and 52.7% live in urban areas, respectively, while 33.1% and 31.7% live in the suburbs, respectively.[213] If New York demographics follow this pattern, then approximately one in five gay and lesbian people resides outside of the localities most likely to establish progressive ordinances.[214] As a consequence, gay rights become urban rights rather than civil or human rights. Civil rights should not be contingent on where a person chooses to live, yet this is precisely the position in which gays and lesbians find themselves in New York under the purely incremental approach.

Although the incremental approach certainly is burdened by legal limitations and political drawbacks, it might well sow the seeds for future widespread action advancing gay and lesbian civil rights in New York. For example, many supporters of the incremental approach suggest that SONDA's

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[210] *See supra* note 35 and accompanying text.

[211] *See* Dewan, *supra* note 34.

[212] There is a clear correlation between the density of the gay and lesbian population in a particular jurisdiction and the number of legal protections afforded the community. *See* THE POLITICS OF GAY RIGHTS 298-99 (Craig A. Rimmerman et al eds., 2000).

[213] *See* GAY AND LESBIAN STATS: A POCKET GUIDE OF FACTS AND FIGURES (Bennett L. Singer & David Deschamps eds., 1994).

[214] *See supra* notes 58-60 and accompanying text.

passage was due in large part to increasing numbers of localities passing anti-discrimination statutes of their own. Because of growing local support for gay civil rights, many state legislators determined that a vote for SONDA would not translate into a political liability in future reelection campaigns.[215] Furthermore, SONDA might well pave the way for the Court of Appeals to apply a heightened standard of scrutiny to same-sex challenges of state marriage.[216] Viewed in the most favorable light, incrementalism might ultimately provide the raw materials for more substantive civil rights developments in New York State.

Recent developments in the national gay and lesbian civil rights landscape further suggest that incrementalism is indeed capable of providing the raw materials for broader social, political, and legal change. Most notably, the U.S. Supreme Court's decision in *Lawrence* recognized that recent developments among the states pertaining to same-sex relationships warranted reconsideration of discriminatory practices against gays and lesbians.[217] Further, the Court went on to note that the doctrine of stare decisis did not weigh against overruling *Bowers* because there was no substantial individual or societal reliance on its holding.[218] Although the Court certainly did not ground its decision in *Lawrence* on legal and social changes among the various states,[219] the Court's reasoning does suggest a certain degree of cognizance of incremental advances and lends support to the argument that small steps can lead the way to broader change.

Although incremental gains arguably laid some of the groundwork for overruling *Bowers*, it is the actual *Lawrence* decision that serves to coalesce those gains into meaningful

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[215] Press Release, Empire State Pride Agenda, New York Outlaws Anti-Gay Discrimination: Bi-Partisan State Senate Vote Breaks 31-Year Impasse, *available at* http://www.prideagenda.org/pressreleases/pr-12-17-02.html (last visited Apr. 10, 2004).

[216] *See supra* notes 36-37 and accompanying text. *See also* Baker v. State of Vermont, 744 A.2d 864, 885 (Vt. 1999) (holding that the history of discrimination based on sexual orientation prompted heightened scrutiny in a state equal protection challenge of Vermont marriage law, and thereby mandating rights be afforded same-sex couples on an equal basis with traditional married couples pursuant to the creation of alternate statutory scheme).

[217] In overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court noted that "the 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct." Lawrence v. Texas, 123 S. Ct. 2472, 2481 (2003).

[218] *Lawrence*, 123 S. Ct. at 2483.

[219] *See supra* notes 87-90 and accompanying text.

progress and provides the momentum for even more widespread advances. Within months of the Court's decision, the tremendous impact of *Lawrence* became clear when the Supreme Judicial Court of Massachusetts ruled that the denial of civil marriage to individuals of the same sex lacked a rational basis and violated state constitutional equal protection principles.[220] In *Goodridge v. Public Health*, same-sex couples that were denied marriage licenses filed an action for declaratory judgment against the Department and Commissioner of Public Health, alleging that the department policy and practice of denying marriage licenses to same-sex couples violated a number of provisions of the Massachusetts state constitution.[221] Although the decision was based on state constitutional principles, the Supreme Judicial Court relied on *Lawrence* to support the proposition that the denial of civil marriage infringed on personal autonomy, intruded on expressions of intimacy and ultimately violated basic principles of equality.[222] It was with these principles at the fore that the Supreme Judicial Court ordered the state legislature to open the doors of civil marriage to same-sex couples.[223]

Coupled with *Lawrence*, the *Goodridge* decision set off a firestorm of activity among both supporters and opponents of gay rights, particularly with regard to same-sex relationship recognition.[224] Armed with two key court rulings, municipalities returned to the forefront of the battle by issuing marriage licenses to thousands of same same-sex couples that resulted in thousands of same-sex marriages.[225] Eventually, state courts intervened to block the further issuance of marriage licenses, setting the stage for full-fledged court battles over the legality of prohibitions on same-sex marriages.[226] Meanwhile, an

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[220] Goodridge v. Dep't of Public Health, 798 N.E.2d 941 (Mass. 2003).

[221] *Id.* at 949-50.

[222] *Id.* at 948-49.

[223] *Id.* at 969-70.

[224] Carolyn Lochhead, *Same-Sex Marriage Momentum Stuns Both Its Backers and Foes*, S.F. CHRON., Mar. 5, 2004, at A19.

[225] San Francisco, California (3,955 marriages); Multnomah County, Oregon (3,000 marriages); Sandoval County, New Mexico, (66 marriages); New Paltz, New York (21 marriages); Asbury Park, New Jersey (1 marriage). Human Rights Campaign Foundation, *Statistics: Number of Same-Sex Couples Married* (2004), *at* http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=17420&TEMPLATE=/ContentManagement/ContentDisplay.cfm.

[226] Bog Egelko, *Court Halts Gay Vows / Surprise Ruling: Newson Says the City Will Make a Strong Case, State Justices Take S.F. Case on Narrow Constitutional Issue, Promise Quick Decision*, S.F. CHRON., Mar. 12, 2004, at A1.

apparent backlash against gay rights emerged as opponents of gay marriage renewed their efforts to secure state and federal constitutional amendments prohibiting gay marriage.[227] Based solely on the events triggered in large part by the *Lawrence* decision, it is quite clear that the stakes could not be any higher for the gay rights movement or its opponents.

Despite these high stakes, gay rights advocates in New York State and elsewhere should avoid focusing on a strategy of pure incrementalism and the sense of relative security and stability it provides. It is a false sense of security and stability. If history is any guide in New York,[228] a purely incremental strategy will not resolve the problems gays and lesbians face with regard to intestacy, standing in tort actions, or parental rights within a reasonable timeframe.[229] On the federal level, there is similarly little hope that a purely incremental strategy could level the playing field for same-sex partners with regard to the 1,049 federal laws in the United States Code in which marital status is a factor.[230] A purely piecemeal incremental approach will largely maintain rather than dismantle the instability inherent in the current patchwork of rights and privileges afforded same-sex partners. On the other hand, a broad judicial holding requiring equal access to civil marriage or the equivalent could remedy these problems in one fell swoop just as *Lawrence* did away with the criminalization of certain forms of intimacy and the resulting collateral consequences.[231] Although direct challenges of discriminatory practices run the risk of energizing opponents of equal rights, the risks were certainly worth taking in *Lawrence* and will be worth taking again. In the end, advocates of equal rights must remember that gays and lesbians rarely, if ever, achieve personal or legal progress by muzzling their voices in an effort to avoid social and political discord.

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[227] Carolyn Lochhead, *Big Fights Rage in State Capitols; Foes, Proponents of Ban Working Overtime*, S.F. CHRON., Mar. 11, 2004, at A1.

[228] *See* discussion *supra* Part III.B.

[229] *See* discussion *supra* Part V.C.4-6.

[230] Letter from Barry R. Bedrick, Associate General Counsel, United States General Accounting Office, to Henry J. Hyde, Chairman, Committee on the Judiciary, House of Representatives (Jan. 31, 1997), *available at* http://www.marriageequalityny.org.

[231] *See supra* note 79 and accompanying text.

VII. CONCLUSION

Even if it appears that there are avenues to capitalize on the incremental approach to securing civil rights for the gay community, history shows that these avenues evolve slowly and are difficult to navigate. The risks associated with pursuing an aggressive strategy that presses the controversial and difficult issues affecting the gay and lesbian community should not be overlooked, but they should not dictate the overall strategy employed by the movement. Instead, the increasingly intense public discourse on sexual orientation and the looming constitutional amendments prohibiting same-sex marriage should suggest that gay rights have finally made their way onto the national agenda and settled into the national consciousness. Rather than backing away from the national debate by quietly taking cover and exclusively pressing for equality in local city halls, the gay rights movement should utilize incremental strategies to primarily create the building blocks that support and compliment legal action that achieves large-scale reform. As *Lawrence v. Texas* aptly demonstrates, incremental change makes progress possible, but only by pressing the fundamental questions will progress and equality become the reality for gays and lesbians in New York and throughout the United States. Until these fundamental questions are pressed, the gay and lesbian community will be forced to live under the patchwork of rights created by legislative incrementalism and current sexual orientation jurisprudence. As long as the composition remains structurally unsound, the gay community must remain cognizant of the inherent limitations of a patchwork design as it continues to struggle towards equality in New York State and beyond.

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