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BABY STEPS OR ONE FELL SWOOP?: THE INCREMENTAL EXTENSION OF RIGHTS IS NOT A DEFENSIBLE STRATEGY

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INTRODUCTION

Rarely do new groups have their rights recognized without first enduring protracted struggles. We expect conflict between those who support the extension and those who do not. These are the battles of a clearly defined "right/good" and a contrary "wrong/evil." Less anticipated and much messier are the struggles among allies. Here the fights are not in defense of the ennobling *principle* on which they agree, but over the better *strategy* to apply that principle and achieve its goals.

Minority groups typically unite in the early efforts to have their rights recognized by the wider society. After initial successes, however, these groups begin to disagree among themselves about what should follow. Some advocate an all-out assault on the status quo as the only way to effect the desired change, a revolution of sorts against stubborn opposition. Others prefer more subtle, gradual processes intended less to defeat the opposition than to convert them.

Within the first generation of African American activists this tension pitted the moderate gradualism of Booker T. Washington against the militancy of W.E.B. Du Bois.[1] This conflict replayed in the next generation between the ideologies of Martin Luther King, Jr., and Malcolm X.[2] Within the gays' rights movement the same debate emerges in the contrast between the conservatism of Andrew Sullivan and the liberationist rhetoric of Urvashi Vaid.[3]

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1. Compare, for example, Du Bois, *The Souls of Black Folk* (1903) *with* Washington's *Up from Slavery* (1901), both *available in* THREE NEGRO CLASSICS (1965).

2. *See* ALEX HALEY, THE AUTOBIOGRAPHY OF MALCOLM X (1964).

3. The contrast is apparent upon a comparison of Andrew Sullivan's VIRTUALLY NORMAL (1995) (arguing that the government should be asked to remedy only *public* discrimination, limiting the foci of activism to the military exclusion and marriage issues) with Urvashi Vaid's VIRTUAL EQUALITY (1995) (arguing that the gays' rights movement should encompass racism and sexism, among other issues, rather than limiting the movement to merely "our" issues).

Every civil rights movement must, at some point, ask itself these same questions: Should we compromise on a matter of principle, settling for less than what we know is needed in order to get now what can be gotten, leaving the rest for later? That is, should we adopt a strategy of *rights incrementalism*?[4] Or should we reject a seemingly reasonable counteroffer and hold out for the total list of demands, accepting nothing if we cannot get everything, employing a strategy of *rights wholesale-ism*? Another pair of questions runs parallel to the first: Should we limit demands to "our" issues, or should we embrace a broader agenda defending the rights of all persons, refusing to accept any victory which limits its concessions to only "us"?

This article does not resolve these difficult issues. Instead, it challenges a basic assumption made by those participating in these debates: that incrementalist strategies are rationally defendable. Moreover, since incrementalism is equivalent to nonincrementalism in all but the short-term realities, the preference for one strategy over the other rests on merely subjective grounds of personal taste, style or expediency. The conclusion is that while incrementalism accurately describes historical processes, it has no foundation as a deliberate strategy. In other words, although in retrospect incremental progress may be achieved, that should never be the goal from the outset. While this observation applies to any struggle for rights, the illustrative case throughout this article will be that of gays' rights and the push for the Employment Non-Discrimination Act.[5]

The problem of incrementalism emerges from the common practice of limiting certain rights only to groups on certified lists.[6] Section I reviews this

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4. "Rights incrementalism," as will be made clearer in the following discussion, refers to a group's gradual movement toward attaining a new right by small steps. A current example would be the characterization of civil unions as a "step" on the way to full marriage for same-sex couples. The example that will be most closely examined in this article is the argument that employment discrimination protections for gays is a step toward the goal of universal human rights.

5. I continue here a terminological distinction introduced earlier. *See* James M. Donovan, *A Philosophical Ground for Gays' Rights: We Must Learn What is True in Order to Do What is Right*, 4 GEORGE MASON CIVIL RIGHTS L.J. 1, 2 (1993). The more common term "gay rights" can be too easily misconstrued as referring to rights restricted to gays, the "special rights" so energetically invoked by conservatives. That reading does seem to follow from using "gay" as an adjective to modify "rights."

To diffuse this false conclusion, I use the more accurate "gays' rights," to highlight the point that the issue is the ordinary rights *of* people who happen to be gay, and not the special or unique rights reserved *for* gay people.

I also use the noun "gay" to include both men and women unless otherwise specified. Particularly, "gay and lesbian" is eschewed because it connotes that "gay" is the masculine collateral term to "lesbian," when it should properly be "gay man." Trying to preserve the noun as an inclusive terms is admittedly a minority position, but then so too is being a gay man, so perhaps I simply have an affinity for minority causes.

6. Examples of "certified lists" in this article include those who are entitled to causes of actions for wrongful death and visitation of minor children. Other lists would be those attached to hate crime laws, enumerating those groups against whom certain acts can trigger additional criminal charges or enhanced penalties, and nondiscrimination laws generally, specifying those groups against whom it is illegal to discriminate in housing, employment,

problem of the list, and how the failure of lists to include gay men and lesbians profoundly impacts their daily lives. Possible strategic responses to this problem (such as doing nothing, interpreting the current list to include us, eliminating the list altogether, or expanding the list to include us explicitly) are considered in Section II, concluding by focusing on a special kind of gradualism, *list incrementalism*. *List incrementalism* occurs when a right is extended to new groups by merely adding them to the relevant list. Presumably, the longer and more detailed the list, fewer groups would be experiencing systematic discrimination on that particular issue. The addition of a new group is often justified in terms of taking a step toward realizing the ultimate goal of protections for all, thereby raising the issue of "human rights."

Subsequent sections scrutinize list incrementalism from three different perspectives: the formal, the practical, and the philosophical. The formal analysis (Section III) considers whether, given the inherent imprecision of language, the quest for legal exactitude may not make matters worse. I contend that the addition of details by creating new lists and expanding existing lists, although done with the intent to clarify the law, instead introduces uncertainty.

The practical analysis in Section IV balances the actual costs of implementing an incrementalist strategy against the benefits the strategy is expected to yield. In contexts where incrementalism seems most reasonable, the costs are demonstrably very high and the benefits few, so that society is worse off in the long run. Section IV discusses the prototypical example of the list of inclusion: the list of groups against whom employment discrimination should be expressly prohibited.

The two analyses address the first question regarding the prima facie validity or desirability of the incrementalist strategy. As usually presented, the choice between incrementalism and radical wholesale strategies can be influenced by many factors—political, economic, even psychological—but the options do not differ on their underlying concept of human rights, the purported end goal. This assumption is probably wrong. The philosophical analysis in Section V critiques the assumption that incrementalist and wholesale strategies are merely different paths directed toward the same objective of universal human rights.

These three analyses illustrate that the assumption that rights incrementalism is intellectually unproblematic and a reasonable alternative strategy is false. All things considered, incrementalism is extraordinarily difficult to justify as a deliberate strategy to effect rights reform. Perhaps it should not be justified at all. Section VI parries the objection that the rejection of incrementalism as a credible strategy will lead to destructive dogmatism in the political arena.

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and other contexts. Most organizations, including universities, have lists of their own within their nondiscrimination policies.

I. THE PROBLEM OF THE LIST

When asked about her position on gay marriage, then Senator-elect Hillary Clinton acknowledged that she did not support it, but that she did support legal protections such as domestic partnerships and same-sex civil unions.[7] She counseled that "it's important not to let the perfect be the enemy of the good."[8]

Clinton's reply captures nicely the problematic choice for advocates of any rights issue. Should they hold out for the "perfect" wholesale attainment of their envisioned goal, or should they accept the "good" compromise which will inch the issue gradually forward? Once the distinction has been made, other strategic options present themselves. Should they deliberately bid "high" at the outset, hoping that any subsequent compromise will more closely approximate their final objective? It is one thing to accept compromise as the only achievable goal at a particular time; it is surely quite another to go into the struggle intending to compromise. In most scenarios the goals of the perfect and the good are mutually exclusive. One cannot simultaneously aspire to both.

The alternatives of the wholesale and the incrementalist rights strategies have rarely been examined closely.[9] More typically, any apparent choice is recognized only in hindsight. If either is to be preferred at a gut level, it may be the gradual. We think ourselves a reasonable people, and tend to find strident dogmatism of any kind irrational and—perhaps even more unforgivable—uncouth.[10]

Incrementalism is both characterized and justified by the belief that the sum of small, achievable steps will have the same long-term outcome as a rare and more difficult single leap (i.e., a sea change). The explicit goal is claimed to be the same; only the route toward that end varies. Gradual progress can take at least two forms: step incrementalism and list incrementalism.[11] Hillary Clinton's stance on gay marriage is an example of step incre-

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7. David Kirby, *Hillary Up Close and Personal*, N° 823 THE ADVOCATE 38, 44 (Oct. 24, 2000).

8. *Id.*

9. One exception is a brief yet insightful essay that identifies the major themes argued in detail by this article. *See* David B. Mixner, *Knowing When (Not) to Compromise*, 7(3) THE GAY & LESBIAN REVIEW 9 (Summer 2000).

10. Aristotle echoes this opinion in the Nicomachean Ethics: "exaggerations are wearisome." *Nicomachean Ethics*, *in* THE BASIC WORKS OF ARISTOTLE 927, 999 (W.D. Ross trans., Richard McKeon ed., 1941). The translation by J.E.C. Welldon of the same passage captures the point even better: "all excesses are offensive." ARISTOTLE, THE NICOMACHEAN ETHICS 136 (J.E.C. Welldon trans., 1987).

11. Although spoken of as discrete alternatives, step incrementalism and list incrementalism are translatable one into the other. For example, employment non-discrimination is an example of *list* incrementalism when getting on the list of protected groups is justified in the pursuit of employment freedoms for all. The same act becomes an example of *step* incrementalism when viewed as one step further on the way to full civil rights for gay men and lesbians.

mentalism: if the real goal cannot be achieved, some kind of intermediary step will be taken, such as domestic partnerships. Our attention shall be directed toward the second, list incrementalism, as a rational response to the problem of the list.

The problem of the list arises because many of the rights granted by our society are extended only to groups on explicit lists. These lists take two forms: those intended to restrict rights to a specific class of claimant (lists of restriction), and those intended to assure explicitly that disenfranchised groups enjoy the basic rights of every citizen (lists of inclusion).

A. Lists of Restriction

Lists of restriction limit the universe of potential claimants to a particular right. Causes of action are one common context for lists of restriction. For example, the right to collect for injuries in survival actions, wrongful death actions, and bystander actions normally belong only to persons specifically enumerated by statute.[12]

The importance of being on a list of restriction is self-evident. The list deliberately privileges or favors some classes of individuals over others. In the case of bystander actions, presence on the list signifies the recognition by society that these are the relationships most likely to suffer detrimental impact from the injury to a victim, and that therefore they should have legal recourse to recover for their own injuries. But why limit tort actions to some relationships while denying others?

> I would not seek to limit the class by reference to particular relationships such as husband and wife or parent and child. The kinds of relationship [sic] which may involve close ties of love and affection are numerous, and it is the existence of such ties which leads to mental disturbance when the loved one suffers a catastrophe. They may be present in family relationships or those of close friendship, and may be stronger in the case of engaged couples than in that of persons who have been married to each other for many years. It is common knowledge that such ties exist, and reasonably foreseeable that those bound by them may in certain circumstances be at real risk of psychiatric illness if the loved one is injured or put in peril.[13]

List incrementalism views the immediate act as one of several of the same kind required to fully achieve the goal of extending that right to all; step incrementalism regards the immediate act as one among other different kinds necessary to fully achieve the goal of extending the full complement of rights to a specific group.

12. In Louisiana, the possible claimants are restricted to spouses, children, parents, siblings and grandparents. LA. CIV. CODE. ANN. arts. 2315.1, 2315.2, and 2315.6 (West 1997).

13. Alcock v. Chief Constable of the South Yorkshire Police, [1992] 1 A.C. 310, 397 (Lord Keith of Kinkel) (holding that the right to claim damages for nervous shock arising from injury to another was limited to persons of sufficiently proximate relationship with the direct victim, but that the measure of whether a relationship was sufficiently proximate was not to be limited by reference to particular relationships but by ties of love and affection which would be proved in each case).

American courts have been inconsistent in their decisions on whether relationships which are not on the list but which are de facto identical to those relationships should be similarly treated by the courts.[14] Gay men and lesbians are rarely included on lists of restriction and suffer when it is their partner who is a victim. The absence of this right has become the focus of public attention in two different contexts—wrongful death actions and visitation and custody rights.

1. Wrongful Death Actions

On January 26, 2001, Diane Whipple was mauled to death by two Presa Canario dogs with a combined weight of 230 pounds.[15] The tragedy is awash with dramatic embellishments bordering on the absurd: the dogs belonged to white supremacists serving time for murder and robbery, and were then in the possession of their attorneys. The full story includes numerous unattractive details concerning these attorneys, Marjorie Knoller and Robert Noel, who reveal themselves to be poor representatives of the legal profession, including adopting the convicted murderer soon after Whipple's death, and suggesting that because Whipple was an Olympic athlete in training, she might have been taking steroids that made her a target of the dogs' aggressive attacks.[16] Adding insult to injury, the puppies of the murdering dog have been advertised at the price of $1,200 each, with their murderous lineage proudly underscored to justify the price.[17]

"If Whipple had been married, her husband would be able to bring a wrongful death action against the dog's owners. But Whipple was a lesbian and her partner of seven years, Sharon Smith, may be left without any legal recourse."[18] Smith's legal battle to earn the right to file a wrongful death action may "draw attention to the Catch-22 many gay couples find themselves in when it comes to legal right for their partners."[19] Because the relationship

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14. Compare, for example, the dissimilar treatment given to unmarried but cohabitating heterosexual partners who view the death of their partners through the negligence of another: Dunphy v. Gregor, 642 A.2d 372 (N.J. 1993) (unmarried cohabitants should be afforded the protections of bystander liability for the negligent infliction of emotional injury) with Elden v. Sheldon, 758 P.2d 582 (Cal. 1988) (allowing unmarried cohabitants to recover damages for bystander emotional distress would undermine the state's interest in promoting marriage).

15. John Gallagher, *Looking for Meaning in Tragedy*, N° 836 THE ADVOCATE 45 (Apr. 24, 2001).

16. *Id.*

17. *See* Mubarak Dahir, *Lesbian's Death Becomes Selling Point for Dogs*, 14(26) SOUTHERN VOICE 20 (Aug. 9, 2001).

18. Tamsen Love, *Mauling May Lead to Lawsuit by Gay Partner*, 14(2) SOUTHERN VOICE 12 (Feb. 22, 2001).

19. *Id. See also* Deb Price, *Tragedy Meets Inequity*, THE TIMES-PICAYUNE (New Orleans), May 8, 2001, at B5. This dilemma is technically not a Catch-22. A more fitting example occurs in the military's claim that they cannot protect their gay service people from harassment unless they report the harassment. But to report the harassment is to violate the "don't ask, don't tell" military policy on homosexuality. Therefore, they can either silently

was not officially recognized by California, Smith lacked established legal standing to bring the wrongful death action. In other words, because she was not on the "list," she presumptively could not bring this kind of suit, leading the defendants to respond with a demurrer to her claim. She therefore challenged the law in court, seeking to have persons in her position put on this list of restriction. In a ruling heralded as "the first decision of this kind, not only in California but anywhere in the country,"[20] the Superior Court judge agreed that failing to extend the surviving-spouse rule to same-sex couples would violate the equal protection clause of California's constitution.[21] An appeal can be expected.

2. Visitation and Custody Suits

Custody and visitation suits provide a second example of lists of restriction, and further illustrate the important life issues that hinge on whether one is or is not "on the list." The case of A.B. will be referred to often in subsequent discussion.

In a recent Illinois decision on child visitation, A.B., the former lesbian partner of eleven years with H.L., petitioned for visitation privileges with C.B.L., the minor child that H.L. had conceived and delivered in 1993. A.B. "was dutifully involved in all of the preparations prior to the birth [and] was also equally involved in the care of C.B.L. for the next year-and-a-half" before the relationship ended in 1995.[22] A.B. argued that by virtue of her status as the former lesbian life partner of the respondent she should be recognized as a common law de facto parent of C.B.L. and allowed visitation with the child.

The appellate court rejected this reasoning. "A statute which concerns an area formerly covered by the common law, such as section 607 of the Marriage Act,[23] 'should be construed as adopting the common law unless there is clear and specific language showing a change in the common law was intended by the legislature.'"[24] Since its enactment in 1977, Section 607 had been extensively revised and expanded, such that it could no longer be understood as "a simple, straight-forward codification of the common law of parental visitation."[25] Instead, it must be understood "as a statutory provision intended by our General Assembly to supersede and supplant the common

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endure the harassment and not tell, or tell and be subjected to further harassment in the form of forcible discharge.

20. Peter Hartlaub, *Same-Sex Partner can Sue for Damages*, SAN FRANCISCO CHRONICLE, July 28, 2001, at A1 (quoting Shannon Minter, Smith's attorney).

21. *Id.*

22. *In re* the Matter of Visitation with C.B.L., 723 N.E.2d 316, 317 (Ill. App. Ct. 1999)

23. 750 IL. COMP. STAT. 5/607 (1998).

24. *C.B.L.*, 723 N.E.2d at 318 (quoting Proud v. W.S. Bills & Sons, Inc., 255 N.E.2d (Ill. App. Ct. 1970)).

25. *C.B.L.*, 723 N.E.2d at 319.

law of visitation of Illinois. Consequently to contend that the common law affords her standing to petition for visitation with C.B.L., as petitioner does, is without merit."[26]

The problem for A.B. was that the text of Section 607 explicitly lists those relatives of a minor child who are entitled to visitation privileges: parents, grandparents, great-grandparents, siblings, and step-parents.[27] Since "lesbian life partner"[28] falls into none of these categories, A.B. was precluded by the overt language of Section 607 from requesting visitation privileges; hence her attempt to expand the list via her failed resort to the claim of "common law de facto parent."[29] Her argument that "lesbian life partner" contains essential emotional elements identical to "parent" or at least "step-parent" could not defeat the literalist stance that only the formal relationship was important; in Illinois form trumps substance.

B. Lists of Inclusion

Lists of restriction privilege some groups over others. The opposite is intended by lists of inclusion, which are designed to equalize the grant of rights between the privileged and the disadvantaged. The goal of these lists is to correct the shortfall in the natural distribution of social rights. "Getting on the list" can be very important to any group that views itself as somehow disadvantaged relative to other groups identified within society.

The prototypical example of the list of inclusion involves employment discrimination. Employment discrimination is expressly prohibited against those groups that have made it to the list. The contention is that those not on the list are not in special need for protection. Evidence supporting the need for these protections to be extended to gays is easily found.[30] The most pub-

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26. *Id.* at 320.

27. 750 IL. COMP. STAT. 5/607(a), (b) (1998).

28. Gay men and lesbians have experimented with a variety of terms with which to refer to their significant other (including "significant other"). "Lover" tends to overemphasize the sexual component of the relationship. "Friend" or "companion" underemphasizes the physically expressive element. All these terms, and others besides, are currently in use. "Partner" may perhaps be the most prevalent label today. Used alone, however, it can cause confusion, as one scene in the movie *American Beauty* underscored: Those "out of the loop" presume the person is a *business* partner. "Life partner" removes that ambiguity, and emphasizes the most important dimension of the relationship, the mutual commitment for "life."

29. *C.B.L.*, 723 N.E.2d at 318.

30 *See generally* ANNETTE FRISKOPP & SHARON SILVERSTEIN, STRAIGHT JOBS, GAY LIVES (1995). For example, a 1987-88 survey of employers in Anchorage, Alaska, found that 18% would fire a known homosexual, 27% would not hire a known homosexual, and 26% would not promote a known homosexual. BENNETT L. SINGER & DAVID DESCHAMPS, GAY & LESBIAN STATS (1994) (citing JAMES D. WOODS & JAY H. LUCAS, THE CORPORATE CLOSET: THE PROFESSIONAL LIVES OF GAY MEN IN AMERICA (1993)). Seventeen percent of lesbian, gay, and bisexual physicians "were refused medical privileges, fired or denied employment, educational opportunities, or a promotion because of their sexual orientation." Sen. Comm. on Labor & Human Resources, *Employment Non-Discrimination Act of 1994: Hearings on Sen. 2238*, 103rd Cong. 64 (July 29, 1994) (prepared statement of Mary Frances Berry) (citing a

lic example arose when Senate Republicans blocked James Hormel's confirmation as the U.S. Ambassador to Luxembourg because he was an openly gay man.[31]

A different incident has achieved folk status due perhaps to the combination of its wide publicity, early occurrence, and blatant bigotry. In 1991 the Cracker Barrel restaurant chain "adopted a hiring policy that . . .it would no longer employ homosexuals."[32] In pursuit of this policy the company fired at least nine employees, including Cheryl Summerville.[33] Elaborating on this policy William A. Bridges, Cracker Barrel's vice president, described the company as one "found[ed] on a 'concept of traditional American values,' [and that] employment of homosexuals appeared to be inconsistent with those values and the 'perceived values of our customer base.'"[34] This sentiment is more common than many suppose. Cracker Barrel was exceptional only in its forthright expression. Summerville's "separation notice from Cracker Barrel read: 'This employee is being terminated due to violation of company policy. This employee is gay.'"[35] Although Cracker Barrel later rescinded the policy, it did not rehire the employees fired under it.[36] The public response of boycotts and sit-ins which this overt bigotry prompted has been retold in a recent HBO documentary.[37]

The inclusion of gay men and lesbians on a list of those to whom employment protections are extended would make cases such as Hormel and Summerville rare, and grant the victims legal redress currently unavailable to them.

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survey by the American Association of Physicians for Human Rights).

The Los Angeles County Bar Association reported that "one in seven attorneys reported that his or her employer engaged in some form of anti-gay discrimination in the recruitment and hiring of attorneys" and that "gay attorneys are less likely to become law firm partners. *Id.* at 66. The same report found that among heterosexual lawyers with 10 or more years in practice, 41 percent earn over $125,000 per year and only 25 percent earn under $75,000, while among their gay peers, the numbers are almost reversed, with only 27 percent earning over $125,000, but 44 percent earning under $75,000. *Id.*

The National Commission for Employment Policy estimates that every year an estimated 42,000 individuals suffer from employment discrimination because of their sexual orientation. *Id.* at 69. Appendix I to this hearing, provided by Chai Feldblum, summarizes the leading court cases on the issue of employment discrimination against gay men and lesbians.

31. Chris Bull, *A Philanthropist's Trial by Fire*, N° 768 THE ADVOCATE 22 (Sept. 15, 1998); Philip Shenon, *Senator Blocks All Clinton's Nominees: Oklahoman Blasts Gay Ambassador*, THE TIMES-PICAYUNE (New Orleans), June 9, 1999, at A9.

32. Ronald Smothers, *Restaurant Rescinds Ban on Hiring Gays*, SAN FRANCISCO CHRONICLE, Mar. 4, 1991, at B6.

33. *Id.*

34. *Id.*

35. Sen. Comm. on Labor & Human Resources, *Employment Non-Discrimination Act of 1994: Hearings on Sen. 2238*, 103rd Cong. 6 (July 29, 1994) (testimony of Cheryl Summerville).

36. Smothers, *supra* note 32.

37. *Out at Work* (Anderson Gold Films, 1998)(videotape).

II. THREE ALTERNATIVE RESPONSES TO THE PROBLEM OF THE LIST

Regardless of which type of list is involved, the struggle for gays' rights in the legal realm often founders on this problem of "the list." Each list undoubtedly has its own rationale for existing at all, and for taking the particular form that it does. Many of these, examined in isolation, might seem reasonable and justified. Excluding gay men and lesbians was probably the goal of only some of them. Those who formulated other lists simply lacked the vision to allow for the expansion of law into new areas, to address new problems and incorporate excluded categories. Whatever the genesis of a particular list, the immediate question for rights strategists is how to respond to it.

A. Strategy 1: Do Nothing

One possibility is simply to hunker down and hope that the judicial system, given an adequate occasion, will construe the law in a way that generates a favorable outcome. But this tactic is highly capricious and unreliable. For example, the Illinois court was not unsympathetic to A.B., noting that it was "not unmindful of the fact that our evolving social structures have created non-traditional relationships."[38] Yet it still refused to take the step necessary to permit A.B. to visit the child.[39] By contrast, on an almost identical set of facts, the Massachusetts Supreme Court reached the opposite conclusion.[40] In that case, a lesbian couple of thirteen years artificially conceived, birthed, and raised Baby O.M., but separated three years later. Working within a slightly more flexible legal context, the Massachusetts Supreme Court upheld the woman's right to visit her ex-partner's son due to her status as a "de facto" parent, precisely the status the Illinois court refused to recognize in A.B.

While the particulars of the Massachusetts legal code permitted this outcome[41] they did not demand it. Indeed, the dissenting opinion points out that

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38. *In re* the Matter of Visitation with C.B.L., 723 N.E.2d 316, 321 (Ill. App. Ct. 1999).

39. A California court declined to grant visitation to a former lesbian partner in these words: "Plaintiff continues, '[T]he judiciary's function is to confront controversy. With or without appropriate legislation, the courts [must] resolve disputes regarding the care of children in non-traditional families. . . .' Plaintiff misconstrues the role of the judiciary as an innovator of social policy." Curiale v. Reagan, 222 Cal. App. 3d 1597 (1990).

40. E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999). *See also* V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000) (former lesbian partner was a "psychological parent" and as such "stands in parity with the legal parent" on matters of visitation). This case is reviewed and contextualized by Eric K.M. Yater, *V.C. v. M.J.B.: The New Jersey Supreme Court Recognizes the Parental Role of a Nonbiological Lesbian "Mother" but Grants Her Only Visitation Rights*, 10 TUL. J.L. & SEXUALITY 299 (2001). This case prompted a legislative attempt to overturn the New Jersey State Supreme Court. Kathleen Cannon, *Bill Overturning Supreme Court Lesbian Custody Ruling Stalls in Assembly*, Associated Press (Sept. 21, 2000).

41. "Jurisdictions that have reached the opposite result differ from ours because their statutory law supplants the equitable powers of their courts." E.N.O. v. L.M.M., 711 N.E.2d at 893.

"[a]lthough the law of the Commonwealth has never recognized [the de facto parent], and indeed in [an earlier case] in effect rejected it, the court discusses its application here as though it were neither new nor remarkable."[42] The judges' disagreement sprang wholly from the fact that while the dissent deems it determinative that the woman was "legally a stranger to the mother-child relationship," the majority judged pivotal the fact that she was not *actually* a stranger to that relationship; the boy, in fact, called her "Mommy." In Massachusetts substance triumphed over form.

The opinion of the dissenter is cold but not unreasonable, and the outcome could have easily been other than it was. The point is that if gay leaders do *nothing*, simply trusting in the system to grope its way toward the (from our perspective) correct outcome, that end may never be achieved, and even if it does we will suffer massive personal casualties along the way.

B. Strategy 2: Seek Coverage under the Existing List

With so much at stake, we can ill-afford the *laissez-faire* attitude of the first strategy given its uncertain outcome and high personal costs. Active prodding is probably a better response in the long run to these important issues, and accordingly strategic alternatives 2 and 3 adopt a more interventionist posture.

Strategy 2 endeavors to make it easier for gay men and lesbians to fulfill the terms for inclusion within the categories already on the list. For example, the Supreme Court of Vermont has ruled that homosexual couples could not be denied rights and benefits afforded heterosexual couples, leaving it to the legislature to decide how such parity should be achieved.[43] On April 26, 2000, the Vermont Legislature responded by approving the recognition of same-sex "civil unions."[44] "While a system of civil unions does not bestow

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42. E.N.O. v. L.M.M., 711 N.E.2d at 896 (Fried, J., dissenting).

43. Baker v. Vermont, 744 A.2d 864 (Vt. 1999).

44. An Act Relating to Civil Unions, Act No. 91, H. 847 (April 26, 2000). Although a praiseworthy and courageous step, the establishment of civil unions may not completely satisfy the judicial mandate. The Court ruled that

> the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel "domestic partnership" system or some equivalent statutory alternative, rests with the legislature.

Baker, 744 A.2d at 867.

Certainly "common benefits" in ordinary parlance have a greater extension than legal benefits. One of the nonlegal common benefits of marriage is the social approval and support extended to the married couple. *See* Andrew Sullivan, *Why "Civil Union" Isn't Marriage*, THE NEW REPUBLIC, May 8, 2000, at 18 (marriage is not merely an accumulation of benefits. It is a fundamental mark of citizenship). This social support is demonstrated in innumerable little gestures, all of which instantiate the presumption that the couple is a *couple* and that their couplehood is presumed to be permanent. *See also* James M. Donovan, *An Ethical Argument to Restrict Domestic Partnerships to Same-Sex Partners*, 8 TUL. J.L. & SEXUALITY

the status of civil marriage, it does satisfy the requirements of the Common Benefits Clause [of the Vermont Constitution]."[45] If such a scheme had been available in Illinois, and had A.B. and H.L. participated in it, conceivably the existence of that civil union would have satisfied the criteria for at least step-parent status and thereby entitled A.B. to visitation with C.B.L.

The implementation of Strategy 2 requires three steps: (1) if the targeted status (in A.B.'s case, that of step-parent) is not already recognized in visitation law, that option must be established; (2) the creation of a domestic partnership scheme which endows full and complete legal equality between homosexual couples and their heterosexual counterparts; and (3) the judicial or legislative recognition that the entering into a domestic partnership endows status (e.g., as a step-parent) entitling the holder to visitation privileges even against the biological parent's wishes. Steps two and three are particularly contentious in today's society. Indeed, forces have mobilized to rescind the Vermont civil union law.[46] Although unsuccessful, the attempt warns that not only can progress be slow, requiring many years to achieve were this strategy pursued, but also that what little success is achieved will be tenuous and uncertain.

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649 (1998).

Even the most generous "domestic partnership" solution could only provide all the legal benefits of marriage in Vermont. The couple would still be deprived of the common benefit of cultural encouragement. An analogy might be helpful: It is as if a law had been passed proclaiming that bastards are not to suffer for that fact. On the one hand it extends protections to the illegitimate so it can be claimed to be a unifying law; on the other, it ensconces "bastard" as a legitimate social category. Such laws remove the overt legal penalties for being a second-class citizen while reinforcing the social stigma of being second-class.

Likewise, civil unions may remove much of the economic costs of being unable to marry. But the mere fact that sectors of society are so exercised to keep heterosexual couplings distinct from homosexual couplings demonstrates that they are not the same. *See* The Editors, *Separate but Equal?* THE NEW REPUBLIC, Jan. 10, 2000, at 9; Deb Price, *Separate but Equal Policy is Never Fair*, DETROIT NEWS, Feb. 28, 2000; Steve Bryant & Demian, *Marrying Apartheid*, Partners Task Force for Gay & Lesbian Couples, May 1999, *available at* www.buddybuddy.com/mar-apar.html; Carol Ness, *"Domestic Dilemmas,"* SAN FRANCISCO EXAMINER, Jan. 9, 2000, at A1.

Members of the Vermont House expressed similar reservations: "Saying that anything other than marriage was inadequate, [Progressive Rep. Steve Hingtgen] said that domestic partnerships would validate hate. 'It institutionalizes the bigotry and affirmatively creates an apartheid system of family recognition in Vermont.'" Barbara Dozetos, *Vermont DP Measure Should be on House Floor by March 7*, BAY WINDOWS, Feb. 17, 2000.

Baker's dissenting opinion notes that the Vermont Court has previously acknowledged that "damage" resulting from invidious classification can extend the economic and legal and into the symbolic and psychological. *Baker*, 744 A.2d at 899 n.2 (Johnson, J., concurring in part, dissenting in part). Anything short of inclusion within the Vermont marriage laws, then, would fall short of extending to same-sex couples the full complement of common benefits attached to marriage, contravening the *Baker* court's mandate.

45. Summary of H.847 as Passed by the General Assembly, House of Representatives, Vermont State House, *available at* http://www.leg.state.vt.us/baker/h-847sum.htm.

46. Ross Sneyd, *Repeal of Vermont Civil Unions Law Gains*, THE RECORD (Bergen County, NJ), May 24, 2001, at A15.

C. *Strategy 3: Eliminate or Expand the List*

A second proactive strategy that rights advocates could pursue as the more secure approach is to campaign to have the list eliminated or changed, rather than to seek inclusion under its present form. If Strategy 2 seeks ways to massage "non-traditional relationships" so that they legally look like traditional relationships (i.e., "lesbian life partner" becomes translated into "step-parent"), Strategy 3 hopes to revise laws to recognize these relationships in all their non-traditional glory. In other words, that same-sex couples possess intrinsic value, and not merely social instrumental value by virtue of their analogy with opposite-sex couples: "lesbian life partner" is accorded rights and recognition on its own merits, and not because it "looks like" heterosexual step-parenthood.

Two paths toward achieving Strategy 3 easily present themselves. The first option fundamentally rewrites the relevant laws so that they delete explicit lists, substituting nominal categories with administrative guidelines in the form of principles and characteristics. The second option is less subtle, striving merely to have gay men and lesbians included explicitly on preexisting lists.

1. Reframe the List in Abstract Terms

Lists are appended to laws to guide in their application. They function to bring the intangibles expressed in the laws down into the "real world." These laws are commonly expressed in terms of values and principles (e.g., equal protection, fair treatment, etc.), while the list provides exemplars of the real world beneficiaries of those values and principles.

The first option toward achieving Strategy 3 reconceptualizes the list from one of examples to one of indicia. The revised list would not itemize by name the groups embraced by the law, but instead would describe or characterize the attributes of the intended beneficiaries of the law. As applied to the custody scenario, the better law describes the relevant traits that characterize visitation-worthy relationships without taking note of or enumerating any specific forms which may embody those traits.

This option was applied in a Washington State visitation law which "permits anyone, without any defined relationship to the child, to petition for visiting rights and to succeed if that family court concludes that visitation would be in the child's best interest."[47] Opponents of the law argued before the United States Supreme Court that such sweeping visitation violates

> "a parent's constitutionally protected right to rear his or her children without state interference." In the absence of any indication that visitation was

47. Linda Greenhouse, *Case Prompts Debate over What 'Family' Is*, TIMES-PICAYUNE (NEW ORLEANS), Jan. 5, 2000, at A3. *See also* Joseph P. Shapiro, *The Right to Be a Relative*, 128(2) U.S. NEWS & WORLD REPORT 46 (Jan. 17, 2000).

> necessary to prevent harm to the child, the parents' rights were "fundamental" and should not be overridden, the [Washington Supreme Court] said,[48] adding that "the parents should be the ones to choose whether to expose their children to certain people or ideas."[49]

Each side of this debate invoked a different standard: Proponents of the law said that anyone should be able to visit over the custodial parent's objections if it is to the child's (state-determined) *good*; opponents argued that visitation should be denied unless the denial clearly inflicts on the child a (state-determined) *harm*. The United States Supreme Court sided with the latter.[50]

While some might expect gay men and lesbians to favor the broad visitation scheme of the Washington law because it clearly encompasses the needs of former gay partners such as A.B., the primary voice of our interests within the courts, the Lambda Legal Defense and Education Fund, sided with those who felt the Washington statute was unconstitutionally broad. Even if some ex-partners of same-sex couples could claim privileges under this code section, so too could it be used by those opposed to children being in the care of homosexuals to insert themselves into these otherwise happy families.

Lambda Legal desired a middle ground that was on the one hand flexible enough to accommodate the visitation needs of nontraditional family units, but rigid enough to distinguish between those who have a genuine interest in this regard from those who do not. The "entry-level test" suggested by Lambda Legal collapsed the four indicia articulated in the earlier case of *Custody of H.S.H.-K.*:

> To demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing toward the child's support, without expectation of future financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.[51]

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48. *See In re* Smith, 969 P.2d 21 (Wash. 1998).

49. Greenhouse, *supra* note 47 (quoting the Washington Supreme Court).

50. Troxel v. Granville, 120 S. Ct. 2054 (2000). The background and details of the case are described in C.P. Dominic Ayotte, *Troxel v. Granville: Parental Power to Determine Associational Interests of Children*, 52(4) BAYLOR L.R. 997 (2000).

51. Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995). Compare this four point standard with the following offered by Lambda Legal:

> One way this may be accomplished would be to require petitioners to demonstrate (1) the curtailment of a significant relationship with the children of a quality and depth that sets petitioners apart from the many people, even blood relatives, with whom children have positive, loving relationships, coupled with 92) a showing of

The lesson from *Troxel* is that a textually-minimalist approach that eschews lists, as did this Washington statute, presents its own kinds of uphill battles for the gays' rights strategist and incurs costs for the community as a whole. Flexibility can be a double-edged sword.

Lambda Legal's reaction to the statute also illustrates a second point. Lists remove ambiguity, telling people from which direction potential trouble might come.[52] Lambda Legal would exchange a chaotic ambiguity for a list, although one which specifies indicia of applicability rather than a rigid typology of recognized social categories. The lesson seems to be that the predilection for predictability will tend to generate lists even when the law originally lacked them. For example, although the requirement that strict scrutiny be applied in cases of potential discrimination does not include a list of the characteristics which trigger this level of scrutiny, the list of cases in which it *has* been applied is typically read as the exhaustive list of situations when it *should* be applied. This restricted reading implies that if a trait is not

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> prior parental knowledge and fostering of the relationship that allowed it to grow in importance to a child.

Troxel v. Granville, Brief of Lambda Legal Defense and Education Fund and Gay and Lesbian Advocates and Defenders as amici curiae in support of respondent.

The Supreme Court in *Troxel v. Granville* did not address the question of the criteria justifying a third party's successful suit for visitation. The language of the decision presumes that the custodial adult is a biological parent, and that the request for visitation comes from a non-parent who had no significant ongoing parental responsibilities for the child. Despite the wish of Lambda Legal that *Troxel* render a result that would be beneficial in some way to gays and lesbians, very little here seems pertinent. Supportive dicta, albeit by inference, occur in the dissent by Justice Stevens: "The almost infinite variety of family relationships that pervade our ever-changing society strongly counsels against the creation by this court of a constitutional rule that treats a biological parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily." *Id.* at 2073. Justice Kennedy, in his dissent, expresses similar reservations:

> the holding seems to proceed from the assumption that the parent or parents who resist visitation have always been the child's primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child. . . . Cases are sure to arise—perhaps a substantial number of cases—in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto."

Id. at 2077.

52. *See* Wolfgang Holdheim, *A Hermeneutic Thinker*, 16(6) CARDOZO L.R. 2153, 2155 (1995): "The urge for an obsessive minuteness and a total precision expresses the vain desire to prejudge everything, to leave no gaps, to catch all of reality in the web of a comprehensive system, so that interpretation may be avoided and conclusions simply 'read off.'"

According to at least one commentator, exactly this problem afflicts the 1996 Immigration Act: "It sets out to eliminate all judgment, all weighing of individual factors, making deportation automatic." This decision is reached mechanically by consulting a "long list of crimes" which, if the alien has committed one, require deportation. As with other instances of list incrementalism, this combination of attempted exhaustiveness and mechanical application has generated counterintuitive outcomes. Anthony Lewis, *Unjust Law Gives No Second Chances*, THE TIMES-PICAYUNE (NEW ORLEANS), Feb. 22, 2000, at B5.

on the list (e.g., sexual orientation) then presumptively it is not entitled to that level of scrutiny against discrimination. What is actually only an historical fact (e.g., sexual orientation *has not* been subjected to strict scrutiny) is invoked as an ethical prescription (sexual orientation *should not* be subjected to strict scrutiny) and enforced as a practical limit (sexual orientation *cannot* be subjected to strict scrutiny). The "is" has become an "ought," with all the philosophical trouble that that slippage triggers. In practice this shortcut reveals itself when lawyers approaching new situations tend to examine the interpretive list rather than the statute that incidentally generated the list.

The simple fact is that many people are comfortable with lists, preferring them to the uncertainty a more open-ended approach creates.[53] Quite possibly persons would prefer to know with certainty that they are *not* included on important lists, so that they can plan accordingly, than to live in

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53. An interesting tension between incrementalist and nonincrementalist strategies can be pieced together from several rights debates. On the one hand, some jurisdictions seek to expand the list of protected traits. The "Dignity for All Students Act" in fact does not apply to all students, but only to those targeted because of "real or perceived race, ethnicity, national origin, religion, sex gender, sexual orientation, or mental or physical disability." *Dignity for All Students Act Clears New York State Legislative Committee*, NEW YORK BLADE, May 26, 2000.

The list is even longer in the proposal made in Royal Oak, Michigan. City commissioner Laura Harrison "would like to see an ordinance in Royal Oak similar to one being considered in Ferndale. Ferndale's proposal makes it illegal for employers, merchants and local groups to discriminate on the basis of race, color, religion, gender, age, height or weight, marital status, sexual orientation, familial status, national origin or physical or mental disability." Nicole Bondi, *Royal Oak Considers Rights Law*, DETROIT NEWS, Nov. 17, 1999. Again, the purported goal is to ensure "equal treatment for everyone," although the law in fact applies only to those categories on the list. After a long and contentious public struggle, voters rejected the measure by a 2-to-1 margin. Bill Laitner, *Voters Defeat Human-Rights Proposal*, DETROIT FREE PRESS, May 16, 2001.

In Dayton, city officials balked at expanding the list of protected groups to include gays and lesbians, and instead offered an alternative resolution "stating the city's opposition to all discrimination, including that against gays." James Hannah, *Dayton Rejects Proposed Law for Gay Rights*, ASSOCIATED PRESS, Dec. 23, 1999. Here the incrementalist/nonincrementalist strategies are not balanced: The incrementalist list which excludes gays is law, while the nonincrementalist universal prohibition is only "an informal resolution."

This contrast is more meaningfully played out when Maryland state education officials similarly rejected new incrementalist inclusions on the list of protected groups, instead offering an alternative regulation which bans "harassment of all students, without specifying any individual groups." "Department officials and board members ended up questioning the wisdom of specifying that some particular groups, and not others, were to be protected from harassment." Amy Argetsinger, *Outcry Stalls Schools' New Anti-Harassment Policy*, WASH. POST, Aug. 26, 1999, at M6.

The irony is that this all-inclusive policy was "stalled" not by conservatives who thought it was too broad, but by liberals who felt it was too vague. "If you don't have the guts to put the words 'sexual orientation' in there, we don't believe you'll have the guts to protect us." Amy Argetsinger, *Harassment Policy under Attack*, WASH. POST, Oct. 27, 1999, at B9. So the confusing outcome can be that incrementalist strategies are pressed under the banner of universal inclusion, yet when universal inclusion is aimed at directly, incrementalists demand that the whole be parsed into identified subgroups. We see here the first hints that incrementalism is *not* a different route to the same end of equality even though it claims that it is; instead, incrementalism is a method to achieve an entirely different result.

doubt about whether the protections of the lists extend to them.[54] The point, easily summarized, is that lists, for reasons of human psychology, have a tendency to sprout up even when overtly excluded. A rights strategy that aimed toward the elimination of lists in legislation would therefore only be temporarily effective because lists would develop anyway, in interpretation and application of the law if no longer in the law itself.

2. Extend the List Explicitly to Include Gay Men and Lesbians

We have yet to identify an adequate response to the problem of the list. It is too important and costly to ignore, and against the grain of human psychology to hope to permanently eliminate. The final strategic option works to amend the laws or judicial precedents. This approach accepts the inevitability of the list, and simply aims to have gay men and lesbians explicitly added to it. To many this strategy is self-evidently the most reasonable course of action. This strategic response to the problem of the list—to work to have our names directly appended—is immensely compelling if it can claim at least prima facie feasibility. Since the alternative strategies we have reviewed are meager options right out of the gate, we are especially eager for this final one, so attractive at first glance, to survive scrutiny.

A recent effort of this sort from a hopeful for the 2000 Democratic Presidential nomination, Bill Bradley, received wide public attention. He proposed, as a way to "support [. . .] all of us, [to support] broadening our humanity" that we "should add sexual orientation to the 1964 Civil Rights Act. That would clearly indicate that discrimination against gays is in the same category as discrimination against other protected groups."[55] This suggestion was energetically rejected by civil rights leaders, including Barney Frank, the gay Congressman from Massachusetts.[56] A primary objection to Bradley's proposal was that if this important list can be amended for good, it can also be amended for ill.[57] Better in the long run, then, to leave the list inviolate and not set a precedent by re-opening the discussion on civil rights at such a fundamental level.

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54. John Bowen provides a vivid example of this principle. The Puritans believed that the elect of God were preordained, but also that no one knew if he or she were included in that number. "Even the most highly placed church member could not easily escape gnawing doubts as to the reliability of his or her own certainty. One story has it that a woman in a Boston congregation, tormented by her uncertainty, threw her child into a well to seek relief of certain damnation." JOHN R. BOWEN, RELIGIONS IN PRACTICE: AN APPROACH TO THE ANTHROPOLOGY OF RELIGION 95 (1998). The certainty of hell is often better endured than doubts about heaven.

55. Chris Bull, *Bill Bradley Wants You!*, N° 796 THE ADVOCATE 26, 31 (Oct. 12, 1999).

56. Anne E. Kornblut, *A Bradley Plan for Gays Irks Rights Leaders*, BOSTON GLOBE, Sept. 21, 1999, at A14; Barney Frank, *Letter to the Editor*, LESBIAN & GAY NEW YORK ONLINE, Feb. 6, 2000.

57. An additional objection is that inclusion on this particular list is tantamount to asking for quotas and special considerations accorded racial minorities. The gays' rights movement, however, aims toward non-discrimination, not toward "special rights."

The real problem of this strategy lies deeper. Although society may not be able to swallow whole the bitter pill of true equality, the argument goes, it can eventually achieve this goal if the pill is parsed into more manageable bits.[58] The realist adapts to this need to turn the ship of state slowly. It is all good and well to be a high-principled idealist, the advocates of this option maintain, but there are practical forces afoot. High aspirations should be no excuse for doing nothing at all if you cannot get everything you want right away: recall Clinton's advice that the perfect not become the enemy of the good. The real world, they urge, runs on mundane compromise, not grand gestures. Taking what you can get at each moment allows the movement to *move*, so that over time it arrives at the ideal place toward which society aspires.

At this pragmatic level, an appeal to add homosexuals to a list will rarely succeed when argued in its own name. People frankly do not care that much about us or what happens to us. Success comes when the addition of gays to a list is seen as part of the completion of a broader vision of "equality" for all. In this light, the inclusion of gay men and lesbians becomes merely the current phase in the gradual fulfillment of our society's self-proclaimed commitment to these broader principles. As expressed by one community member, "Many Americans do not understand that gay and lesbian rights are part of a larger human rights equation."[59] List incrementalism is a viable strategy only if it indeed furthers this larger goal of universal equality.

The remainder of this article demonstrates that list incrementalism does not, in fact, further this goal, and may in fact make it harder to realize. As judged by the standard of advancing the goal of equality for all, incrementalism is both self-defeating and counterproductive. Even were that not the case, list incrementalism is undesirable because it creates a different kind of social environment than efforts to move *en masse*. One cannot be offered as a reasonable alternative to the other. They are two contradictory visions of the final result, not alternative strategies toward the same end.

The remaining sections elaborate the general themes already described. First, theoretical apparatus in the form of Francis Lieber's legal hermeneu-

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58. The Vermont civil unions have been argued to be acceptable in just these terms.
I feel that, as bitter a pill as it is, the Vermont legislature should be encouraged to pass its Jim Crow domestic-partner law (and it should be characterized as such, so that there is no doubt that it isn't anything but separate and unequal) which gives the intolerant and disappointingly ignorant majority a little time to become accustomed to the idea that yes, our relationships are as important, viable, worthy, and lasting as their own. Mark Ritzenhein, "Re: *M*: Startegy," March 1, 2000 (a contribution to the MARRIAGE internet discussion group). THE ADVOCATE's ReaderForum reflects this ambivalence toward the Vermont unions. While both sides invoke the "separate but equal" image, proponents argue that "at least we're on the same ride," while opponents declaim the move as unconstitutional: "As a gay man, I'm offended by this law." N°814 THE ADVOCATE 6 (June 20, 2000).

59. Tim Newcomb, *Winning Initiatives*, 8(3) THE GAY AND LESBIAN REVIEW 46 (May/June 2001).

tics gives formal content to the idea that too much precision actually fosters malicious ambiguity. If the list is intended to clarify this ambiguity, then it is necessarily self-defeating. To expand the list to include gay men and lesbians consequently obfuscates the general principle behind the list and is therefore a step away from the goal of equality for all. Second, the divergent and incompatible implications of an incrementalist strategy and a non-incrementalist (or wholesale) strategy are underscored by an examination of the practical debate on employment non-discrimination. Third, the kinds of rights that are philosophically defensible differ according to whether they can be promoted piecemeal or wholesale, meaning that incrementalist and nonincrementalist strategies inherently work toward different ends.

The argument that incrementalism is an alternative and progressive approach toward the same final outcome as that produced by "wholesale-ism" is demonstrably false. This last response to the problem of the list is as flawed as the others, and a fourth, nonincrementalist strategy must be sought.

III. LIST INCREMENTALISM IS SELF-DEFEATING: THE FORMAL ANALYSIS

Proponents justify incrementalism by asserting that it advances larger goals through discrete smaller steps. This strategy presumes that, as a list expands incrementally, the list's increased detail clarifies the underlying principles, such that its appropriate applications become more exhaustively enumerated. As the meaning of the principles become more detailed and thus better illustrated, their complete realization looms more immediately. As a result, the better law is the more exhaustively explicit one.[60]

This section demonstrates that not only is this outcome unlikely, but in fact, everything known about both human language and psychology leads us to anticipate the opposite. Expanded lists in the name of precision do not lead to clarity, but rather necessarily lead to greater confusion and vagueness. While the extension of civil rights to gay men and lesbians is predicated on an argument that these rights belong to all people and that granting these basic rights to gays is but one step in that wider civic endeavor, list incrementalism inherently decreases the likelihood of achieving that end.

60. One original proponent of this position was Aristotle: "Well-drawn laws should themselves define all the points they possibly can and leave as few as may be to the decision of the judges." *Rhetoric*, *in* THE BASIC WORKS OF ARISTOTLE 1317, 1326 (W. Rhys Roberts trans, Richard McKeon ed., 1941). Aquinas later quotes this passage approvingly in his *Summa Theologica*, Question 95, Reply to Objection 2, *reprinted in* GEORGE C. CHRISTIE & PATRICK H. MARTIN, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW 165 (2d ed. 1995). Legal theorists who identify as intellectual descendents of either Aristotelian or Aquinan jurisprudence, therefore, are vulnerable to this criticism.

A. Francis Lieber's Legal Hermeneutics

According to Francis Lieber's influential *Legal and Political Hermeneutics*,[61] precision and clarity are mutually exclusive. Lieber applied the textual scrutiny typically reserved for philology and theology to the law. Common to several revolutionary writings, Lieber begins with extraordinarily pedantic observations about language and communication. From these meager seeds grow powerful and counterintuitive implications.

Lieber first argued that "every single [statute], without exception" is in need of interpretation and construction.[62] This necessity arises from two considerations. The first consideration comes from the nature of language itself. The "very nature and essence of human language, being, as we have seen, not a direct communication of the minds, but a communion by intermediate signs only, renders a total exclusion of every imaginable misapprehension, in most cases, absolutely impossible."[63] Lieber's point is that all communication is *necessarily* imperfect, contrary to the opinions of others that only unskilled or careless communication exchanges contain flaws.[64] Lieber denies communicative perfection even as a theoretical possibility. Some minimal amount of interpretation is *always* required, where "interpretation" is defined

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61. FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS, WITH REMARKS ON PRECEDENTS AND AUTHORITIES (William G. Hammond ed., 3d ed. 1880), *reprinted in* 16 CARDOZO L.R. 1901 (1995).

62. While this insight is not original to Lieber, he was perhaps the first legal scholar to consider in detail its significance. A much earlier observation of this fact was made by James Madison in the Federalist Papers:

> Besides the obscurity arising from the complexity of objects, and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. Perspicuity, therefore, requires no only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as to include many equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, *the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined.* When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.

THE FEDERALIST NO. 37, at 229-30 (James Madison) (Modern Library, 1937).

63. LIEBER, *supra* note 61, at 1903.

64. The argument for necessarily imperfect communication is made in more technical terms by James M. Donovan and Brian A. Rundle, *Psychic Unity Constraints upon Successful Intercultural Communication*, 17(3) LANGUAGE & COMMUNICATION 219 (1997).

as "the discovery of the true sense of words."[65] Hermeneutics is the study of the rules and principles of "true and safe interpretation."[66]

Even were perfect communicability possible between two interlocutors, this would not remove the need for legal interpretation. Language is time-sensitive, and this time sensitivity makes interpretation necessary. For example, as any student of Shakespeare knows, a perfectly communicated statement in Elizabethan England (even if that were possible) would require interpretation today.[67] Because societal assumptions[68] and word meanings change over time, what was once clear gradually becomes obscure:

> [T]he state of human society is continually changing, and ought to change, according to its very principles of existence. This is a rule so well established that statesmen and lawyers are now agreed upon the wisdom of pointing out principles and drawing general outlines in a clear and easily understood language.[69]

By "clear and easily understood" Lieber refers to the meaning of whatever language, if any, which depends relatively less upon the peculiarities of its specific temporal context. For example, the interpretation of "religion" has varied significantly in our constitutional history,[70] although perhaps less so than an understanding of "marriage."[71] But even restricting statutory language to those terms and phrases which have been historically stable (and this explains the continued reliance upon Latin in law, which, because it lacks daily speakers, changes its meanings only very slowly) provides no assurances that semantic drift will not occur in the due course of time.

In sum, the ubiquitous need for interpretation and construction is overdetermined by both synchronic and diachronic causes.[72]

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65. LIEBER, *supra* note 61, at 1901.

66. *Id.* at 1912.

67. It is impossible to word laws in such a manner as to

> absolutely exclude all doubt, or to allow us to dispense with construction, even if they be worded for the time for which they were made, with absolute (mathematical) distinctness; because things and relations change, and because interests conflict differently with each other at different times.

Id. at 2000.

68. The importance of background assumptions is illustrated by Lieber's example of the misleadingly simple directive from the housekeeper to the domestic, "fetch some soup meat." *Id.* at 1904. The implicit knowledge required to understand and execute this command escapes exhaustive detailing. "Lieber's particular point is that it is at best unnecessary, perhaps misleading, and in any event impossible to be comprehensive." Michael Herz, *Rediscovering Francis Lieber: An Afterword and Introduction*, 16(6) CARDOZO L.R. 2107, 2129 (1995).

69. LIEBER, *supra* note 61, at 2027.

70. *See* James M. Donovan, *God is as God Does: Law, Anthropology, and the Definition of 'Religion,'* 6(1) SETON HALL CONST. L.J. 23 (1995).

71. *See generally* LAWRENCE STONE, THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800 (1979).

72. This same general point has been argued as long ago as Plato's Laws:

What cannot be avoided, however, can be minimized. One goal of good laws should be to frame them so as to require the least amount of interpretation to discern the "true sense" of the language. The insight that is of most concern here is that *there is an inverse relationship between the effort to be precise and the clarity of the product.*[73] In other words, utilizing more explicit language actually "increase[s], in fact, the chances of sinister interpretation."[74] On the contrary, the path to clarity is through plain speech,[75] not precise speech:[76]

> Men have at length found out that little or nothing is gained by attempting to speak with absolute clearness and endless specifications, but that human speech is the clearer, the less we endeavor to supply by words and specifications that interpretation which common sense must give to human words.[77]

> Another balance [Plato] strikes is between fidelity to the letter of the law and discretion in its application. Magnesia is a "law state," and laws as instruments of government are imperfect: They cannot meet the peculiar circumstances of every case, and need interpretation and application by persons acting according to their spirit rather than their bare wording. Hence although Plato is emphatic that the Magnesians should give the laws unconditional obedience, he is well aware that they will have to exercise enlightened flexibility in their day-to-day enforcement.

Trevor J. Saunders, *Plato's Later Political Thought*, *in* CAMBRIDGE COMPANION TO PLATO 464, 477 (1992).

73. Joseph Kimble, a leader in the Plain Language Movement for legal writing, disagrees. He deems it a

> stubborn myth that precision is incompatible with plain (or clear language. . . . The truth is that drafters usually do not have to choose between one or the other: "the instances of actual conflict are much rarer than lawyers often suppose." What's more, by aiming for both, the drafter will usually improve both.

Joseph Kimble, *Answering the Critics of Plain Language*, 5 SCRIBES JOURNAL OF LEGAL WRITING 51, 53 (1994-95).

There is of course a sense in which both Lieber and Kimble are right. While evading a detailed examination of the genuine points of agreement and disagreement, we can note that while Lieber is more concerned with underscoring the implications of the inherent vagueness of terms (which Kimble recognizes), Kimble's strongest attacks are against unintended, unnecessary and preventable ambiguity and stultifyingly obtuse jargon. *Id.* at 79. This difference of emphasis accounts in part for their seemingly contradictory conclusions.

74. LIEBER, *supra* note 61, at 1907.

75. Or more accurately, through *relatively* plain speech, since the claim that no speech or text is ever actually plain in any absolute sense.

76. I have elsewhere argued that if laws are to be obeyed, legal language must be comprehensible to the persons expected to obey. The broader or more general the law, the more ordinary should be the terms used within the law. "One should not have to go to law school to be a law-abiding citizen." Donovan, *God is as God Does*, *supra* note 70, at 25 n.3.

77. LIEBER, *supra* note 61, at 1905. Other scholars have commented on the detrimental impact of excess precision: "I do not believe that exactness or precision are intellectual values in themselves; on the contrary, we should never try to be more exact or precise than the problem before us requires." KARL R. POPPER, OBJECTIVE KNOWLEDGE 58 (1972).

Rather than through excruciating detail that invites misunderstanding over instances which are not explicitly specified and that may even defeat the purported purpose of the legislation, identification of the "true sense" of legal statutes must be through "common sense and good faith."[78] Any attempt to control for the fluidity of language by pinning down the meaning with explanatory or illustrative details only introduces additional language that fluctuates in its own turn. Either an infinite regress is begun, wherein each compensatory addition requires corrections of its own, or else the evolving semantics of the appended language overwhelms the meaning of the original core statute.

As a result, because language is inherently vague or ambiguous, succumbing to the temptation to remove that vagueness or ambiguity results in either of two undesirable outcomes. Either the additional detail minimizes another desirable quality, clarity,[79] or the effort to be more precise leads paradoxically to even greater imprecision.[80-81] Lieber believes that both these

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78. LIEBER, *supra* note 61, at 1945. The legal corpus is replete with examples where more harm than good has been done by attempts to define terms which previously lay within the common understanding of culture participants. For example, "Courts have . . . interpreted the word 'exclusively' to mean 'substantially.'" Church of the Chosen People v. United States, 548 F. Supp. 1247, 1253 (D. Minn. 1982). If "exclusively" means *substantially*, what word means *exclusively*? In another example of perverse overspecification to the point where the original term now bears a legal sense at odds with the common understanding, is the Tennessee law which defines "nudity" to include covered parts of the male body if they are "in a discernibly turgid state." TENN. CODE ANN. § 39-13-511(a)(2)(A) (1994).

79. For another example of the way one seemingly desirable goal can preclude another, see FRANK ANECHIARICO & JAMES B. JACOBS, THE PURSUIT OF ABSOLUTE INTEGRITY: HOW CORRUPTION CONTROL MAKES GOVERNMENT INEFFECTIVE (1996). The authors' thesis is that efforts to eliminate the possibility of political graft and corruption among public officials has undermined the ability of those officials to perform their designated functions: "in making it difficult to steal the public's money, we made it virtually impossible to *manage* the public's money." *Id.* at 186 (quoting David Osborne and Ted Gaebler). Anechiarico and Jacobs believe that

> while corruption is never "acceptable" in a moral sense, some level of corruption is a sociopolitical fact of life in all organizations—public, private, educational, or philanthropic. Just as retailers consider some amount of "shrinkage" (theft) a cost of doing business, the public and the public sector need to realize that every instance of corruption does not require another layer of corruption-proofing.

Id. at 194. Not only do such attempts at "corruption-proofing" inevitably fail, but in the process they remove from government the flexibility it needs to achieve socially desirable goals in an efficient way.

80. Some goals, it seems, cannot be aimed at directly. Three examples follow. First, Aristotle argued that pleasure is not something one successfully pursues in its own right. ARISTOTLE, THE NICOMACHEAN ETHICS 342 (J.E.C. Welldon, trans., Prometheus, 1987). Rather fun is "any unfrustrated activity that exercises our natural capacities." D.S. Hutchinson, *Ethics*, *in* THE CAMBRIDGE COMPANION TO ARISTOTLE 195, 211 (1995). Pleasure (or "fun") is what accompanies the doing of something worth the doing, and is not something that can be sought in its own right.

Second, to perform an act "for the sake of friendship" implicitly devalues the other party of that relationship: "if I act for the sake of friendship. . .then my aim in acting is to get, sustain, strengthen the friendship, rather than to act for the sake of the friend." Michael Stocker,

problems can be avoided if the drafter relies upon the common sense and good faith brought to the text by the reader, rather than to aspire vainly to compose self-contained nuggets of meaning to whose comprehension the reader contributes nothing.

B. Hermeneutic Implications for List Incrementalism

The relevance of Lieber's hermeneutics to the present problem should be obvious. List incrementalism employs a belief that explicitly articulated detail in law is, if not an optimal strategy, at least a helpful one. Lieber would deny both of these assumptions.[82] Lists are neither good nor helpful. Gays should think twice before rushing to add themselves to any legal list.

To illustrate this point, one can examine the difficulties of defining the ethnic label "Hispanic." This demographic category has become increasingly contested but is of great significance in our administrative law.[83] Below are three attempts to define the noun:

Values and Purposes: The Limits of Teleology and the Ends of Friendship, in FRIENDSHIP: A PHILOSOPHICAL READER 245, 253 (1993). To aim at friendship, even if it is commendable by other standards, is inherently unfriendly. And third, Nathan Glazer has concluded that "Our efforts to deal with distress are themselves increasing distress." NATHAN GLAZER, THE LIMITS OF SOCIAL POLICY 3 (1988).

81. As I employ the terms, *clarity* and *precision* are related but distinguishable traits. Clarity relates to the effort needed to discern what is in the text itself. Precision refers to the congruency between what the text says and what it is meant to say. A text loses clarity when its meaning requires more work to find. A text loses precision to the extent that less of its meaning is in the text to begin with. More detail can lead to either reduced clarity or increased imprecision.

82. A contemporary advocate of this position is Philip K. Howard. In exasperated tones he recounts the rise since 1970 of the legal ethos that "the highest art in American lawmaking is precision.... By the crafting of words, lawmakers will anticipate every situation, every exception." PHILIP K. HOWARD, THE DEATH OF COMMON SENSE 29 (1994). One articulated defense of that position can be found in Jack Stark, *Should the Main Goal of Statutory Drafting be Accuracy or Clarity?*, 15 STATUTE L.R. 207 (1994). His own answer to the title's question is that concerns for accuracy, or precision, should predominate over clarity.

This pursuit for the holy grail of perfectly precise statutory language, Howard feels, has "become almost a religious tenet." PHILIP K. HOWARD, THE DEATH OF COMMON SENSE 10 (1994). The goal is that "The words of the law will tell us exactly what to do. Judgment is foreclosed not simply by the language of the words. It is also foreclosed by the belief that judgment has no place in the application of law." *Id.* at 18. He illustrates the practical outcome by noting that the forestry rules which could once be carried in a shirt pocket now consume seven volumes, and the thirty-three page long specification for a "hammer." *Id.* at 11, 68. "The more precise the rule," he concludes, "the less sensible the law seems to be." *Id.* at 15. The reason for this dismal state is that "we have constructed a system of regulatory law that basically outlaws common sense." *Id.* at 11.

In other words, the very elements Lieber identifies as necessary to the just interpretation and application of the law, "common sense and good faith," are exactly those expectations which have been unfashionable if not illegal.

83. Policy Monitor, *Who is Hispanic?*, 41(9) ANTHROPOLOGY NEWS 23 (Dec. 2000).

> Hispanic: a usually Spanish-speaking person of Latin American origin who lives in the U.S.[84]
>
> In our usage of the term we are referring to all people of Spanish Speaking/Surname origin residing in the United States or Puerto Rico. Accordingly, Hispanic is a generic term which includes Cuban Americans, Mexican Americans, Puerto Ricans, and other Central or South American origin groups.[85]
>
> HISPANIC. A person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.[86]

Notable differences distinguish these definitions. According to the first two, Hispanics must live in the United States; the third does not contain this requirement. Does a person cease to be Hispanic simply by moving to Canada? Would not a native American English speaker expect the word to apply to a European as well as to an American?

The first two definitions also require that an Hispanic be Spanish-speaking. Again, this distinguishes them from the third definition, which may allow for Brazilians, who do not speak Spanish, to qualify as Hispanic depending upon how one relates "other Spanish culture" to "South American." The first two definitions unquestionably exclude Portuguese speakers, although it would be difficult to think of instances when we would want to invoke the category of "Hispanic" without wishing also to include Brazilians (especially since many people do not even realize that Brazilians do not speak Spanish).[87] These variations demonstrate that the idea behind "Hispanic" has been difficult to articulate. Consequently, many people doubt the usefulness of the "Hispanic" category at all.[88]

Our primary interest, however, relates to the different structures of each of these definitions. The first standard identifies a modal attribute of the category (Spanish speaking) and elevates that trait to the definitional. The second definition also identifies modal attributes (language and surname), which it then uses to generate a nonexhaustive list of predominant exemplars. Finally, the third definition dispenses with the generic qualities of the category, and simply lists the category members without trying to explain *why* these classes are included. According to Lieber's argument, the more the definition depends upon a list to do its work, the less satisfactory the

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84. WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 639 (3rd College ed. 1988).

85. FRANK COTA-ROBLES NEWTON ET AL., HISPANIC MENTAL HEALTH RESEARCH: A REFERENCE GUIDE 1 (1982).

86. 18 C.F.R. § 1302.4(a)(2) (2000).

87. *But cf.* Jefferson M. Fish, *What Anthropology Can Do For Psychology*, 102 AMERICAN ANTHROPOLOGIST 552, 559 (2000) (commenting that it is a mistake to classify Brazilians as Hispanics).

88. Lisette E. Simon, *Hispanics: Not a Cognizable Ethnic Group*, 63 UNIV. CIN. L. REV. 497 (1994).

definition becomes, suggesting that the three definitions become increasingly flawed.

An initial appraisal, however, might conclude the opposite. The comparison between the three definitions seems to intimate that the third is the best of the lot. But this outcome is misleading due to the incidentals of the example. The possible universe of all Hispanics is finite, and, hence listable in principle. Hispanics can include all the members of Central and South American heritage, and Spanish-descendants in the Caribbean, and possibly all European populations of the Iberian Peninsula and their colonies. If the potential for unique members of the group were significantly larger, it is apparent that the list strategy collapses under its own weight. An exhaustive list becomes incomprehensible and unwieldy. The limits become clear when applying the same approach to define "vegetable," a category with many more types than "Hispanic."

In principle, the best strategy is that used by the first definition: to decline to identify anything other than the "usual" category member. Any attribute specified is understood to be sufficient but not necessary. The definition correctly reflects how the term is ordinarily used without falsely conveying more precision than the term actually has for that community of users. In contrast, each of the subsequent definitions reduces clarity for the sake of precision. The second definition speaks not in terms of the "usual," but in terms of "all people." Because the list here is subordinate to the generating principle, exclusions from the list are not necessarily confounding. That is not the case with the third definition. Neither the second nor the third definition includes Spanish speakers from Caribbean nations, such as the Dominican Republic. This oversight is only problematic in the third definition because only this list is intended to be a definitive and exhaustive list of all Hispanics, as opposed to the illustrative nature of the second list. We do not know why Caribbean Spanish speakers are excluded from the third definition's category of Hispanics; the list only tells us that they are so excluded. Is this exclusion the unexpected outcome of a sound principle, or merely the unfortunate oversight of a bad list? We cannot tell. Cynics will notice that governmental regulation, where rationality is critical, utilize the flawed strategy of the third definition.

It appears that Lieber was right. The only contexts where lists might be a workable strategy are limited to those cases where the entire universe of category members can be conveniently named or readily identified.[89] When

89. Another possible context would involve scenarios where the items on the list are not natural instances of a kind. That is to say, there is no generalizable relationship linking the members other than their shared presence on that particular list. Otherwise a list would be required only if it can be taken as inescapable that persons will fail to interpret the law with "common sense and good faith."

The popularity of the list, in this light, might be taken as an indicator of the soured relations between the law and its citizenry. Philip Howard documents this strain in THE DEATH OF COMMON SENSE 29 (1994). The "death of common sense" (and, we might add, the lack of Lieber's other specified element, "good faith") have resulted, according to Howard, in the bal-

the rationale for why these items belong together requires an explanation (as it usually does), the list reduces to a supportive illustration of this more general principle. Otherwise an irrational tension develops between a principle of broad scope and a purportedly exhaustive list of all its embodiments that is actually much narrower. Finally, because a list of examples may inadvertently import irrelevant variables into the equation and thereby even contradict the principle it is intended to illustrate,[90] the principle alone would consistently be the superior approach than any "principle plus list" strategy.

Better, Lieber might say, for lists and the like not to exist in the first place because where they are not redundant they are self-defeating. This policy has the additional virtue of not penalizing groups who, on principle, should be included but who fail to appear on the appended list. The "true sense" of a law can be safely couched in brief but clear terms which are best

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looning of regulations and process requirements to ludicrous extremes.

Although the problem Howard identifies is real enough, he discusses only one side (the government's) of a dialectical relationship between government and the public. People no longer view the law as a guide to do the "right" thing, but as an obstacle to be gotten around in quest of personal advantage. The public, it can be said, has become a society of "end-runners." An example here would be Vice-President's Gore pointing to "the lack of controlling legal authority" to explain why he did nothing wrong in using his office to make telephone solicitation calls. If it is not explicitly forbidden, then it is permitted.

In response to such attitudes, legislators must work overtime to corral the public back into legal observance, and hence the excruciatingly precise descriptions and details in laws and regulations. Feeding into this process is the person's eagerness to sue both other persons and the government should any item under their control adversely impact him or her. To preclude such suits, governments must enforce stricter controls.

Consequently, both governmental and personal attitudes will have to be changed if the problem of over-regulation is to be improved. Once the public again begins to display "common sense and good faith," government can assume as much when they write laws and regulations.

90. For an example of an illustrative list contradicting its generating principle, see Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). Until that time it was assumed that the U.S. Constitution contained protections for the free exercise of religion. This decision held otherwise when it ruled that religious actions are not protected from otherwise neutral and generally applicable laws. Justice Scalia reasoned that the list of cases purportedly supporting the protection of religious actions from legislative acts "involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the right of parents. . .to direct the education of their children." *Id.* at 881. In other words, these were all "hybrid situations." Consequently any claim to Free Exercise Clause as a shield against generally applicable laws (i.e., laws which do not target religious acts specifically) which are not also claims based on other constitutional protections, must be denied. The Free Exercise Clause alone affords no protection, and because the other claims are already protected, it adds nothing to the defendant's argument. *Smith* will one day join another list, that of embarrassing Supreme Court decisions, headed by *Dred Scott* and *Plessy v. Ferguson*, and most of the decisions designed to dismantle the Mormon church.

More to the immediate point, the result of *Smith* is certainly a conclusion based upon the accidental attributes of the members of the list of Free Exercise cases, rather than upon their primary attributes. The exceptions have not merely swallowed the rule, but thoroughly digested and excreted it as well.

interpreted by "common sense and good faith" and construed to adequately reconcile new fact situations with the established intent.[91]

> Sophisticated language users realize this historicity and contextuality of language and often frame their injunctions to the future broadly, inviting future interpreters to use their good sense. The impulse to control future interpreters through elaborate and precise instructions bespeaks dictatorial egoism and foolish naiveté. Over time these superfluous instructions will become contradictory; they will hobble well-meaning interpreters with arbitrary absurdities, or license unforeseen mischief.[92]

This system would be vastly more flexible than one which requires list-keeping, and its responsiveness to new contexts cannot help but work to everyone's long-term advantage.

Objections to this approach would certainly invoke the fear of chaos. Without explicit limits or guidelines, "anything goes," and the very foundations of our political system would crumble. The few words here will do little to assuage this paranoia, but they should suffice at least to extricate Lieber from any such charges. Central to the prevention of anarchy in the absence of painfully exacting detailings would be Lieber's reliance upon "good faith," defined as a conscientious "desire to arrive at truth . . . it means that we take the words fairly as they were meant."[93] Good faith interpretation will not always, of course, work in one's favor, and an unfavorable interpretation would certainly increase one's burden at the next step of construction; there are even situations when it is appropriate to disregard interpretation altogether.[94] But the integrity of the system overall requires that the first step

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91. In several places Lieber underscores the organicity of the law: "A code is not a herbarium, in which we deposit law like dried plants. Let a code be the fruit grown out of the civil life of a nation, and contain the seed for future growth." LIEBER, *supra* note 61, at 1915.

"[R]elations change with the progress of time, so that, after a long lapse of time, we must give up either the letter of the law, or its intent, since both, owing to a change in circumstances, do not any longer agree." *Id.* at 1969.

92. Guyora Binder, *Institutions and Linguistic Conventions: The Pragmatism of Lieber's Legal Hermeneutics*, 16 CARDOZO L.R. 2169, 2186 (1995).

93. LIEBER, *supra* note 61, at 1947.

> Faithful interpretation implies that words, or assemblages of words, be taken in that sense, which we honestly believe that their utterer attached to them. We have to take words, then, in their most probable sense, not in their original, etymological, or classical, if the text be such that we cannot fairly suppose that the author used the words with skill, knowledge, and accurate care and selection.

Id. at 1952.

94. We have seen that interpretation means nothing more than

> finding out the true sense and meaning. But it is not said that interpretation is all that shall guide us, and although I believe the remarks in the preceding section to be correct, still there are considerations which ought to induce us to abandon interpretation, or in other words to sacrifice the direct meaning of a text to considerations still weightier; especially not to slaughter justice, the sovereign object of laws, for the law itself, the means of obtain it.

be an accurate interpretation of the statute.[95] Where one moves from there is a separate question. While construction affords much "wiggle room" to achieve a desired end,[96] it has limits, beyond which lies what Lieber terms "extravagant construction."[97] If properly respected, these structural safeguards suffice to prevent the descent into utter barbarism that some imagine a reliance on the readers' good faith might entail.

From the perspective of Lieber's hermeneutics, incrementalism offers dubious rewards, even if successful. Its attempt can be expected to result in either reduced clarity or increased imprecision, exactly the opposite effects intended. Even the mere indulgence in the strategy encourages a legal system in which "sinister interpretations" proliferate, moving the rights advocates even further from their goal of universal protections. The default assumption about incrementalist legislative approaches should be that they are inferior at best, and self-defeating at worst. The burden falls to the incrementalist to demonstrate that these weaknesses would not apply in a specific application, especially when the avowed aim of the extension of the list is to bring clarity to a broader principle.

IV. LIST INCREMENTALISM IS COUNTERPRODUCTIVE: THE PRACTICAL ANALYSIS

Some readers may be unconvinced by the hermeneutic analysis in the preceding section. Considerations of how language works, and how language interacts with psychology, may be insufficient to refute the prima facie attractiveness of list incrementalism. But the limitations of incrementalism do not end there. The strategy to get gays explicitly on the list is not merely self-defeating, but also counterproductive. By this I mean that over and above any logical inconsistencies that might arise from pursuit of the policy, it does not even do a very good job of accomplishing its short-term objectives.

Id. at 1962.

95. Lieber's identification of framer's intent as the *first* step in legal construction should be contrasted with other contemporary legal theorists who argue that this is the *last* step, that is, the framers' intent is binding, without change or expansion.

96. Most promising here is "transcendent construction," whereby the construction of a statute is "founded upon a principle superior to the text" at issue. LIEBER, *supra* note 61, at 1937. Again taking the case of same-sex marriage, a transcendent construction could perhaps take this form: While the legislators believed that the list in the first scenario was an accurate reflection of the principles behind civil marriage, the case of same-sex marriage shows this not to be so, and thus the principles of marriage will override the legislative specifications for it. The construction overrides the legislators' intent about the list, but not their understanding of the higher marriage principles. Because the result is still based upon the wider intents of the lawmakers, the outcome is not "extravagant." Actual legal strategies defending same-sex marriage utilize transcendent construction when they argue that restricted marriage criteria should be overturned due to their conflict with higher constitutional principles such as equal protection guarantees, or non-discrimination clauses.

97. *Id.* at 1939.

The rationale behind the adoption of this strategy is that if civil liberties cannot be extended to *all simultaneously*, we will at least make sure that they are given to *us now*. This immediate parochialism, even if shamefully self-centered, is not politically irrational if at worst it delays, but does not deny, other groups the same privileges. But the inclusion of a new group on the list detrimentally impacts those left behind beyond mere inability to enjoy the new protections.[98] Eric Heinze offers a good example. He argues that the failure to include sexual orientation within the United Nations human rights agenda results not merely in the exclusion of sexual orientation, but a further mystification of it, which in turn is used to justify its continued exclusion.[99] He describes more generally this problem of "inclusion-as-exclusion":

> One might maintain that "a rising tide raises all ships": the progressive recognition of ever more specialized interests must surely promote an overall climate of tolerance and broad-mindedness that will benefit sexual minorities in the long run.
>
> Yet the trend toward special instruments is a double-edged sword. It indeed represents progress, for those who get one. At the same time. . .it raises the stakes for those who have no realistic hope of getting one. . . . Each new instrument has the—perhaps inadvertent, but nevertheless pernicious—effect of underscoring the fact that sexual minorities still do not have one. The longer sexual minorities fail to get one, the greater the suspicion that there must be some good reason. In short, the increasing inclusion of certain issues itself serves to highlight the continued exclusion of sexual minorities.[100]

Because of the existence of international conventions which do not include the transgendered, Heinze specifically identifies the transgendered as worse off than they would otherwise be if those conventions did not exist at all.[101]

Therefore, as the list becomes ever more extensive, the pressure increases to justify why your group is *not* on it, encouraging a more frantic rush to be included.[102] Hate crimes laws, one author has suggested, "fuel a

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98. That this concern is real enough can be illustrated by the fact that the ninth amendment to the U.S. Constitution explicitly seeks to deny any negative connotation for rights not explicitly enumerated in the Constitution. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

99. Eric Heinze, *Sexual Orientation and International Law: A Study in the Manufacture of Cross-Cultural "Sensitivity,"* 22 MICH. J. INT'L L. 283, 284 (2001).

100. *Id.* at 296-97.

101. *Id.* at 298.

102. *See* Sharon Carton, *Book Review: Punishing Hate*, 92(3) LAW LIBRARY J. 353, 357 (2000) (quoting Frederick M. Lawrence):

> [T]he state makes a normative statement about the treatment of gays and lesbians when it frames its bias crime law: Failure to include sexual orientation implies that gays and lesbians are not as deserving of protection as racial, religious, or ethnic minorities, and that sexual orientation is not as serious a social fissure line as race,

wretched and divisive competition for victim-group status."[103] If the list of groups against whom it is illegal to discriminate is long, the inference can be drawn that discrimination against unlisted groups is thereby acceptable.[104]

A pragmatic outlook concludes that on the whole incrementalism exacerbates the problem it is intended to solve. Even if it solves the problem for one group, that very success will create either new or greater problems for other groups not already on the list. These problems are *in addition to* their lack of participation in the benefits of that list, a decidedly negative result if one espouses the goal of incrementalism in the name of advancing the rights of all. Incrementalism is at best sometimes a private good, but it is always a public ill. The question becomes to what extent one is willing to harm the larger society in pursuit of short-term personal benefits.

A. ENDA as Incremental Progress toward Employment Non-Discrimination

The courts have upheld the ability of legislatures, "for reasons of pragmatism or administrative convenience . . . to address problems incrementally."[105] A prominent arena for legislative incrementalism concerns protections against employment discrimination. Our society has demonstrated a commitment to the belief that irrelevant personal traits should not bar one from participation in the workplace. Even groups convinced that homosexuality is unacceptable and that it should be criminalized nonetheless believe that gays should be protected from job discrimination.[106] Groups historically

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religion, and ethnicity.

103. Stuart Taylor Jr., *Let's Make the Federal Hate Crimes Law Broader—Much Broader,* 32 NAT'L J. 2851, 2852 (Sept. 16, 2000).

104. This is the canon of construction called *expressio unius, exclusio alterius* (expression of one thing excludes another). "*Expressio unius* is applied to mean that if a statute expressly mentions what is intended to be within its coverage, then the statute excludes that which is not mentioned." HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW, FOURTH EDITION 69-70 (1999). The Tenth Amendment, for example, brings the U.S. Constitution within the scope of this canon: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

105. Baker v. Vermont, 744 A.2d 864, 883 (Vt. 1999). In this case Justice Johnson (concurring in part and dissenting in part) cites Canadian authorities to the effect that legislative incrementalism should not be an option in the realm of civil rights: "'[G]roups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time.'" *Id.* at 904.

106. In the 1998 National Survey of Americans on Values, 53% of all respondents believed that gay sex is "unacceptable," 34% that "public" homosexuality should be illegal, but 87% that job discrimination against gays was wrong. By contrast, these same figures for Traditional White Protestant Evangelicals are 74%, 64%, and 74%. John C. Green, *Religion and Politics in the 1990s: Confrontations and Coalitions, in* RELIGION AND AMERICAN POLITICS: THE 2000 ELECTION IN CONTEXT 19, 29 (2000). *See also* Alan Yang, FROM WRONGS TO RIGHTS, 1973 TO 1999 (National Gay and Lesbian Task Force Policy Institute, 1999): "While the trends in legal equality have been toward acceptance and majority support, cultural and moral attitudes toward homosexual behavior have historically shown less change." *Id.* at 24.

subjected to such bars have been the target of special legislation intended either to criminalize discrimination on those grounds, or to mandate positive actions that would redress prior exclusions. Not all personal traits receive this special legislative attention, but only those that are primarily irrelevant to job performance (such as ethnicity and religious affiliation) and that have historically been the target of systemic discrimination.

Spokespersons for gay men and lesbians argue that sexual orientation is an irrelevant consideration for employment decisions,[107] that its discovery nonetheless can negatively impact a person's career path,[108] and that the best solution to this problem is legislative. Despite the popular support for such employment protections, and their conformity to established equity principles, no protection at the federal level exists against employment discrimination based on sexual orientation.[109] Legal protections against private employment discrimination based on sexual orientation have been recognized in only eighteen states and the District of Columbia, as well as over one hundred cities and eighteen counties.[110] The Employment Non-Discrimination Act [ENDA], in both state and federal versions, is the push to have "sexual orientation" added to lists which provide these protections wherever they exist in federal, state, and local laws.

The mere act of trying to get on a list, any list, raises the issue of incrementalism. In this instance, the problem centers on the question of whether gay men and lesbians can enjoy a safe and fair environment if all persons are not similarly protected, or, failing all persons, that at least we and our closest allies are protected. Can we advance our own social welfare while leaving behind other sexual minorities (e.g., transgenders) or ignoring the battles of the similarly underrepresented such as women, the poor, and the culturally marginalized? If so, we are entitled to restrict our energies to problems which narrowly focus on our own well-being; if not, our movement would necessarily have to position itself on a plethora of divergent issues in the name of enlightened self-interest.[111] The polar evils here are those of paro-

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One indication of the general acceptance of employment protections for gays occurs in the 1997 Congressional hearing on ENDA. Although in 1994 several persons were willing to testify against ENDA, the Senate Committee could identify no one willing to publicly argue against ENDA's enactment. Sen. Comm. on Labor & Human Resources, *Employment Non-Discrimination Act of 1997: Hearings on Sen. 869*, 105th Cong. 2 (Oct. 23, 1997).

107. Antigay activists, of course, argue the opposite, that job performance is not the only consideration in employment decisions, and that sexual orientation is not irrelevant. *See* Sen. Comm. on Labor & Human Resources, *Employment Non-Discrimination Act of 1994: Hearings on Sen. 2238*, 103rd Cong. 29 (July 29, 1994) (testimony of Joseph E. Broadus).

108. *See, e.g.*, Pedeira v. Ky. Baptist Home for Children, Inc., No. 3:00CV-210-S, 2001 U.S. Dist. LEXIS 10283 (W.D. Ky. July 23, 2001) (plaintiff fired because her lesbianism became public knowledge).

109. Bibby v. Philadelphia Coca Cola Bottling, 260 F.3d 257 (3d Cir. 2001).

110. WAYNE VAN DER MEIDE, LEGISLATING EQUALITY 4 (2000).

111. Two letters in an issue of the *Southern Voice* illustrate the broad sweep of issues this reasoning can force the gays' rights movement to embrace. The first letter argues that abortion is necessarily a gay issue. The second maintains that because "no one is free while

chialism or of dissipation, of becoming guilty of the same myopia that has caused general society to ignore our problems or of spreading our efforts too thinly to be effective.

At every crossroads requiring a choice, parochialism has carried the day. Where goals can be parsed, they will be, and usually to the detriment of even more marginal groups than ourselves. As implemented in practice, incrementalism is an invidious strategy.

This problem made manifest concerns whether ENDA should be written so as to encompass gender identity as well as sexual orientation. Adequate reasons exist to adopt this language. First, the explicit goals of ENDA cannot be achieved without addressing gender identity issues as well. Consider an ENDA law that protects against employment discrimination based upon sexual orientation alone. Such a law would not protect against discrimination stemming from gender role infractions. Bluntly put, I may not be able to fire a man because he sleeps with men, but perhaps I can fire him if he is a "bottom" when he does it. Every man who has ever been accused of being a "sissy," and every woman taunted for being a "tomboy" is guilty of such infractions of the gender code. "Passive" homosexuals and effeminate men of any orientation, homo or hetero, transgress the stereotypical gender boundaries demanded of "real" men, and could be discriminated against on that basis without violating ENDA.

Transgenders may be at the extreme end of the gender role transgressors, but their issue is also a gay issue. By one report, "of 80 [gay men and lesbian] respondents, 61% had experienced employment discrimination, with 76% of that group citing gender expression [and *not* sexual orientation] as a basis."[112] "What this means is that employers would continue to discriminate against at least 76% of the GLB [gay, lesbian, bisexual] population even under ENDA."[113] ENDA without gender identity protections offers no protections against this prejudice. Recall Cheryl Summerville, the woman fired from Cracker Barrel because she was lesbian. She had this to say about her experience: "They said they didn't really want to fire me because the policy was really aimed at effeminate men and women who have masculine traits who might be working as waiters or waitresses."[114] In other words, although the Cracker Barrel incident may be considered the case *par excellence* highlighting the need for ENDA, at best it can be said that the law might have

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others are still being oppressed," and because "we have been based and discriminated against" ourselves, we should be especially reluctant to do the same to someone else. These noble principles, the writer holds, commits the movement to the cause of *animal* rights. *Letters*, 13(43) SOUTHERN VOICE 19 (Dec. 7, 2000).

112. Sarah D. Fox, *Gender Expression as a Basis for Employment Discrimination in Gay, Lesbian, and Bisexual Populations*, *available at* http://www.iwaynet.net/~sarahfox/employ.htm.

113. Angie Bolin, *Three Quarters of Gays and Lesbians Dumped by ENDA*, Gender Advocacy Internet News, Sept. 1, 1999 (quoting Sarah Fox).

114. Ronald Smothers, *Restaurant Rescinds Ban on Hiring Gays*, SAN FRANCISCO CHRONICLE, Mar. 4, 1991, at B6.

protected Summerville but not have discouraged Cracker Barrel from pursuing its true goal of purging its ranks of gender nonconformists. Enacted without gender identity language, ENDA would achieve no real protections for gay men and lesbians, but would allow politicians to claim they had done their bit for the gay community, discouraging their receptivity to taking more substantive action on its behalf.

Also favoring inclusion of gender identity within ENDA is the historical reality that transgenders have been the natural allies of gay men and lesbians at least since the beginnings of the modern gays' rights movement. While it is commonly recognized that this movement commenced with the Stonewall Riots in 1969, it is less widely realized that this action was spearheaded by "the drag queens [who had come] to the end of their patience with the police raids on Greenwich Village gay bars."[115] The movement we claim as our own was in many ways created and gifted to us by the transgenders.

Unfortunately, many have rewritten events. Transgenders are often accused of trying to "hijack" "our" movement. In an *Advocate* poll asking "Should transgendered people be a part of the gay rights movement," 48% said No.[116] The inclusion of transgenders in ENDA, then, could be expected to meet resistance for no other reasons than that many gays are not comfortable with them and do not consider them part of our community.

This early convergence between the interests of homosexuals and of transgenders is not to say that the two groups cannot reasonably differ on important issues.[117] Possibly ENDA is one of these. But while significant differences will always distinguish these as two separate groups, on a more general level they are both sexual minorities trying to live lives of dignity in the midst of sometimes crushing condescension, rejection, and even abuse. These broader shared concerns suggest that the coalition should be presumed

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115. Lillian Faderman, *The Big Bang*, in LONG ROAD TO FREEDOM 19 (1994). *See also* SUSAN FALUDI, STIFFED 502 (1999).

116. *Advocate Poll*, N° 788 THE ADVOCATE 8 (June 22, 1999).

117. One issue on which homosexuals and transgenders are likely consistently to disagree relates to the utility of psychological diagnosis. Homosexuals long fought to have homosexuality removed from the Diagnostic Manual. *See* RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS (1981). There is no conceivable circumstance in which it is desirable to have "homosexuality" as a medical diagnosis warranting treatment.

However, certification under a "gender identity disorder" has often been judged desirable for transgenders. Such a diagnosis makes it easier to convince insurance agencies to pay for expensive sex-change operations, and a threshold of proof of this kind relieves employers' concerns about rampant and capricious "drag" in the work environment. For example, the New Orleans Gender Identification Ordinance (18,794 M.C.S., June 18, 1998), passed with significant input from transgender leaders, does not protect "cross-dressing" in the work environment unless the employee or applicant provides the employer with the written statement of a licensed doctor or other health care professional certifying that the employee or applicant presents the characteristics of gender identification disorder or another similar status or condition.

intact unless there are clear, articulable reasons that warrant fission on any particular issue.[118]

The Human Rights Campaign [HRC] is our principle lobbyist for the federal ENDA. The original version of ENDA included "protections based both on sexual orientation and gender expression. HRC convinced [Mass. Rep. Barney] Frank to remove gender-based language before the bill's introduction and has worked very hard since then to ensure the language is not amended back in."[119]

Frank's openness to HRC's request to exclude language covering transgenders was blatantly pragmatic: ENDA "would have 'no chance whatsoever' of passage if it included" such language.[120] Graham Segroves, speaking on behalf of the National Gay and Lesbian Task Force, agreed that the fear exists that "including protection for the transgender community will kill the bill."[121] This perception is certainly widespread, and actual experience in other contexts suggests that it is not wholly unreasonable.[122]

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118. Transgenders may also prove an important wedge on the issue of same-sex marriage. While all states currently follow the "one man, one woman" marriage rule, they differ on when the determination of sex is to be made. For some states, the criterion is sex at birth, while for others it is sex at marriage. And no state to my knowledge routinely nullifies a marriage in which one partner changes sex *after* marriage. So while a state will say that it is staunchly against same-sex marriages, its neighbors might perceive its practices otherwise. Once these practical results become more widely known, that in fact same-sex marriages are not unheard of in our country, the argument that we should do overtly what is being done covertly becomes more convincing.

119. Sarah Fox, *Frankly Transphobic*, QUILL OP/ED RELEASE, June 22, 1999.

120. *Frank Angers Transgendered Community*, WASHINGTON BLADE, July 2, 1999. Frank goes further: "It's not as if this is a truck moving along at 60 miles-per-hour and they are asking us for a ride. This is an uphill climb. We can win, but it irks me that fighting for this bill has become less important than amending it." Loren King, *Task Force Drops Support for Federal Anti-Bias Bill*, BAY WINDOWS, June 10, 1999.

121. Jennifer Coleman, *Transgendered Community Speaks Up*, Associated Press, July 20, 2000. Ultimately the NGLTF withdrew its support for ENDA because of its failure to include gender identity issues:

> Without the inclusion of transgendered people, NGLTF cannot endorse ENDA. We do not oppose ENDA, but advocate adding language that is more inclusive. WE intend to do no harm to ENDA or to the cause of [gay, lesbian, bisexual] equality. But just as our African American colleagues in several states have refused to more forward on hate crimes legislation that covers race but not sexual orientation, we too feel obligated to more forward together.

NGLTF, *NGLTF Supports Trans Inclusion in Employment Non-Discrimination Act*, Press Release (June 16, 1999).

122. In the 2001 session of the Louisiana legislature, Senate bill 862, a state version of the federal ENDA bill, was introduced. The original text banned employment discrimination based on "actual or perceived sexual orientation and gender identity." Mike Fleming, *LA Sees Employment Anti-Bias Bill*, SOUTHERN VOICE (Apr. 12, 2001). The bill ultimately failed. Before it passed out of committee, however, SB 862 was amended to eliminate the gender identity language. LAGPAC, *Press Release* (May 11, 2001). This experience does suggest that for legislatures gender identity is a topic even more controversial than sexual orientation, as the strategists behind the federal ENDA have argued.

This excision has been particularly unproblematic for HRC because its mission statement has, until very recently, restricted its concerns to "lesbian and gay people," communicating the organization's self-perception that it owes no formal allegiance to transgenders.[123] This exclusion contrasts with the inclusiveness of the other large national gays' rights organization, the National Gay and Lesbian Task Force, which amended its mission statement in 1997 "to include the struggle for equal rights for transgendered people. . . . We believe that there is one movement for gay, lesbian, bisexual and transgender equality."[124]

In response to these criticisms, HRC promised support to amend ENDA to include protections for the transgendered, after it is first passed without them.[125] This strategy is not unprecedented. A New Orleans local hate crimes ordinance[126] did not originally include gender identity. After its passage, there was the expressed hope that the term "sexual orientation," which was in the ordinance, would embrace transgenders as well.[127] When a formal opinion advised otherwise, a campaign was undertaken to insert this specific language. The 1997 Hate Crimes Ordinance was thereafter amended, with

123. HRC, *Working for Gay and Lesbian Equal Rights*, Oct. 8, 2000. The mission statement was amended in March of 2001 to include "gender expression and identity." Elizabeth Birch, *Speaking about Gender Expression and Identity*, HRC Press Release (Mar. 23, 2001). Despite this cosmetic change forced by grassroots pressures described below, Birch goes on to say that the new language "will not change substantially in form or substance" the ENDA bill. *Id.* "[I]t is our assessment that many congressional members are invested in the bill in its current form and that any changes would not be well-received on Capitol Hill." *Id.* For these reasons, the March change to the mission statement alters nothing in the analysis by this Article.

124. NGLTF, *NGLTF Supports Transgender Inclusion in Employment Non-Discrimination Act*, Press Release, June 16, 1999. BiNet USA, "the largest national bisexual organization," and GenderPAC also withdrew their support for ENDA for this reason. *See* BiNet, *BiNet USA Rescinds Support of ENDA in Current Form*, Press Release, July 25, 1999; GenderPAC, *Position Paper: Including Gender Protection in ENDA*, Aug. 6, 1999.

Again, noting the recent language change to the HRC mission statement, a contrast can be made between the action supporting the transgender-inclusive language from these other organizations, and the explicit disavowal by HRC that its new language will impact any of its ongoing projects.

125. Laura Brown, *Dems Say No Chance on ENDA, Hate Crimes Till 2001*, SOUTHERN VOICE, June 3, 1999. This strategy has been criticized as placing transgender people in "a holding zone outside of the mainstream lesbian and gay political movement." Courtney Sharp, *Gender Protections Benefit All*, PFLAG POLE, Spring 2001, at 5.

126. New Orleans City Ordinance 18,303 M.C.S., June 5, 1997, to ordain Section 54-380 of the City Code.

127. The hope is that transgenders can be protected under already existing laws, eliminating the necessity of a new and protracted political battle to amend the laws with new, inclusive language. For example, a decision by the Connecticut Commission on Human Rights and Opportunities ruled that "state laws prohibiting sex discrimination include transgender people within those protections." Gay & Lesbian Advocates & Defenders, *Connecticut Human Rights Commission Rules in Favor of Transgender People*, Press Release (Nov. 15, 2000). For a discussion outlining the difficulties confronting any expectation that transgenders can be protected by existing non-discrimination language, see Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37 (2000).

surprisingly little opposition, by Ordinance 18,794 M.C.S., June 18, 1998, to extend its protections to this category.

Where the NGLTF sees a single movement, HRC sees many,[128] but HRC has promised to be cooperative and generous. Some doubt that HRC would itself undertake a project to subsequently amend the statute, instead leaving that job to unnamed others.[129] Its assurances of aid are widely considered to be disingenuous. No other gay and lesbian organization possesses the clout or budget of the HRC. Any relevant federal bill that the HRC does not aggressively endorse is unlikely to pass. Few people within the community have expressed confidence that HRC would actually commit significant resources to amend ENDA after its primary constituency had been safely protected.[130] This failure of HRC to live up to its self-denominated claim of striving for "human rights" instead of merely "gay and lesbian" rights has generated sporadic protests.

In 1995, seven New Orleans recipients of an HRC award "For Outstanding Leadership and Dedicated Community Service" publicly expressed being "appalled at the [HRC] decision to cut loose a significant portion of our community for perceived political expedience."[131] On the same day, the local chapter of P-FLAG (Parents and Friend of Lesbians and Gays) notified Elizabeth Birch, Executive Director of HRC, that its Board of Directors had "voted unanimously to advise [her] that it felt that the [HRC] should reverse its policy in this regard. . . . For an organization operating under the name "Human Rights Campaign Fund" to seek such an exclusion is in our opinion sheer hypocrisy that no amount of political expediency can excuse."[132] In reply, Michael Roybal, Chief Legislative Counsel for HRC, intimated that the decision to exclude transgenders was made by a civil rights coalition "of some 185 organizations," and denied that HRC possessed the ability to make unilateral decisions about the substantive content of ENDA.[133] He did not

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128. Some have questioned that there exists even the identifiable constituency HRC does recognize. "I no longer believe in a collective queerness," writes William Mann.

> The great queer collective consciousness was a myth our gay parents taught us, like our blood parents taught us about Santa Claus. We needed to believe it once, and we can treasure its memory and what it gave us forever, but there comes a time when we have to let the myth go.

William J. Mann, *Shredding the Rainbow: Separate and Equal: Letting Go of the Idea that Gay is Enough to Keep Us Together*, 18(2) FRONTIERS NEWSMAGAZINE, May 14, 1999. Once one has, like HRC, decided to draw the lines of exclusion, there is perhaps no principled reason to stop drawing them at all.

129. For an easily accessible, if cursory, overview of the troubled relationship between HRC and the transgender community, see Mubarak Dahir, *Whose Movement Is It?*, 786 THE ADVOCATE 50 (May 25, 1999).

130. "[T]ransactivists simply have no faith in this portion of HRC's policy." GenderPAC, *Position Paper: Including Gender Protection in ENDA*, Aug. 6, 1999.

131. Stewart P. Butler et al., *Statement of Louisiana Human Rights Campaign Fund Committee Honorees*, Sept. 14, 1995.

132. Sandra Pailet, *Letter to Elizabeth Birch*, Sept. 14, 1995.

133. Michael R. Roybal, *Letter to Sandra Pailet*, Jan.11, 1996.

suggest that this coalition action was made over the objection of HRC, but repeated the mantra of HRC's intention "to assist transgender representatives with an amendment strategy in the context of ENDA."[134]

After two years and little action by HRC, three signers of the first letter from the local HRC award recipients, plus one new one, again expressed their skepticism that HRC was seriously addressing their concerns, and their conviction that HRC was "not likely to fully include transgenders in [its] agenda in the foreseeable future unless [its] failure to do so were to result in a large scale withdrawal of financial support."[135] Consequently these community leaders immediately withdrew their personal financial support of HRC, and promised a boycott of the next year's HRC Louisiana fundraising dinner unless "substantial progress" was made.[136] Several members of the local executive committee responsible for the dinner—by far HRC's largest fundraiser in the state—resigned in protest.[137] This and similar letters received no formal reply.[138]

The boycott went on as planned. There is no indication that it significantly impacted the amount of funds raised. Either the long list of persons committed to the boycott was not likely to have attended the expensive ($125 per person) dinner in the first place, or the threat of a boycott energized HRC to recruit replacement participants. While at the time there were indications that the boycott might spread to other states, the intense activism on this issue has since dissipated. The boycott effort has not been repeated, and persons who were "appalled" at the transgender-exclusion of ENDA in 1998 are very comfortable advocating for its passage in 2000, even though the text had not changed.[139]

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134. *Id.*

135. B. Skip Ward et al., *Letter to Elizabeth Birch*, May 17, 1997.

136. *Id.*

137. [Letters from Toni Pizanie and Rick Cosgriff], AMBUSH MAG, Jan. 23, 1998, at 33.

138. B. Skip Ward et al., *Letter [to the community at large]*, Mar. 23, 1998.

139. *See* Laura Brown, *Atlanta to Ban Transgender Discrimination*, SOUTHERN VOICE, Jan. 20, 2000 ("Despite fierce outcry from transgender organizations, those fighting for ENDA—including the Human Rights Campaign, the Washington-based gay rights lobby—have argued that adding 'gender identity' to the bill would make it too controversial, hampering efforts to pass protections for gay men and lesbians.").

In other words, in the last five years absolutely nothing has changed relative to HRC's recalcitrant refusal to extend ENDA protections to transgenders, or even to believe that as an organization it owes any regard for their concerns.

On July 31, 2001, ENDA was introduced for the fifth time into Congress. Early indicators show that little has changed on either side of the debate. Co-sponsors like Joseph Lieberman again touts the bill as "extend[ing] the bedrock American values of fairness and equality to a group of our fellow citizens," and of "progress" in rights. 147 CONG. REC. S8480 (daily ed. July 31, 2001). On the right, ENDA is claimed to "give homosexual pressure groups enormous power in the workplace" that "threatens the rights of conscience." Culture and Family Institute, *ENDA is Back, with a Kiss*, THE CULTURE AND FAMILY REPORT, Aug. 1, 2001. On the left, transgender activists split between directing their ire at the organizations such as HRC which push for the gender-identity exclusive ENDA, and those who go so far as to actively work against the passage of ENDA itself so long as it "drop[s] in the grease" trans-

The piecemeal implementation of employment non-discrimination legislation has proven to be problematic, to say the least. Yale law professor Kenji Yoshino has suggested that "[t]he idea that civil rights... 'trickle down'" from one group to another "is bad for both groups."[140] Certainly the example before us supports his conclusion. In the rush to get ourselves onto the lifeboats of legal protection we have proven our willingness to disgrace ourselves by pushing our closest allies out of the way, possibly becoming so engrossed in petty squabbles that we all go down with the ship. The attempt exposes a greater commitment to political expediency than to principled advocacy when the language of unity and equality is used to effect greater divides and marginalizations. But even assuming the best of intentions and the most sensitive of executions, as a practical matter have we any reason to expect that this incrementalist strategy would yield the claimed desired results of a prejudice-free workplace?

B. The Pragmatic Outlook Generally

The argument could be offered that the failure of ENDA proponents to successfully employ an incrementalist strategy should not be generalized to other cases; the strategy itself is sound even if unsuccessful in any particular instance. But is this a valid position? Is the counterproductivity of incrementalism limited to the incompetent execution of the strategy rather than to its inherent properties? Probably not.

Nathan Glazer, considering the issue of economic equality and the multitudinous programs designed to effect that result, makes the following observation:

> [Because] of these conflicting and competing values it is literally not possible for government, at any rate democratic government, to move to more equality in income as a *general* and overriding goal. It must move toward more equality in more piecemeal and concrete ways—for the aged, the sick, the handicapped, women, the young, students, the low-income farmers, the unemployed, and on and on. It turns out, not for any reason that I can find written in the heavens, that the battle for more *different* kinds of equality, whatever satisfaction it may give one group or another, does not lead, or has not lead, to any *overall* movement toward equality.[141]

Consider what he is saying: We are precluded from enforcing economic equality at a stroke due to our democratic system, so we tinker with different bits of the population hoping to effect that same outcome. But the end result

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gender persons. *See* sample letter to Senators posted distributed by transgenderlegal.com.

Events subsequent to the September 11, 2001 terrorist attack on the World Trade Center have removed ENDA, along with most non-terrorist and non-appropriation legislation, from likely consideration in the current Congress.

140. Kristin Eliasberg, *Making a Case for the Right to be Different*, N.Y. TIMES, June 16, 2001, at B11.

141. NATHAN GLAZER, THE LIMITS OF SOCIAL POLICY 18 (1988).

of all that piecemeal tinkering has *not* been to bring us any closer to the real goal of an *across-the-board* improvement. Glazer explains that this is not because the individual programs have been ineffective. On the contrary, they may be taken to be doing the jobs for which they were designed. He finds instead "that the social programs have had a dynamic impact, which creates new classes of poor that take up the bottom position as those assisted by social programs rise out of poverty."[142] The piecemeal approach to economic equality has not changed the overall distribution of income, but only altered the characteristics of those at the bottom of the ladder. The list of those groups economically benefited grows even as new groups are added to the ranks of the poor. Like a bump in a rug, to correct the problem in one spot only causes it to arise in another. If the goal was to get rid of the bump in that particular spot, the strategy has been effective. But if the intent was to correct the overall bumpiness of the rug, it has been and will continue to be a failure. The bumpiness must be rectified wholesale, by re-laying the rug, or not at all. Incrementalism will not render the same result.

What Glazer gives us, then, is one example where a broad goal dissected into separate bits leads not to ever closer approximations to the goal, but instead to an altered demographic profile with no change in the overall picture.[143] Have we any reason to think that a broad goal in other contexts similarly sectioned will yield better results? Will doling out employment protections in increments bring us closer to the final goal of protection for all (as HRC presumes when it says that it will fight for sexual orientation now, gender identity later), or will new protections for one group merely shift the discriminatory practices onto a new targeted group, and perhaps heightened discrimination against those left behind?

This question cannot be answered with certainty beforehand in any specific case. But Glazer's analysis forces upon us the conclusion that the best evidence favors the latter outcome. That would seem to make sense, given the history of our own movement. The struggle to secure gays' rights was in part inspired by the earlier actions of blacks and women. As one group achieves some level of sociolegal security, another traditionally steps in to take the vacated bottom rung. There seems to be as much discrimination and

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142. *Id.* at 163. For example,

> Social security permits more old people to live alone rather than with their children. Thus [it] encourages independence while also reducing the incomes of the households it makes it possible to maintain. A program giving assistance to elderly people permits them to move out of a household and set up their own. The two new households have more income than the one old household (they also have more expenses). The old couple or individual may now qualify as poor, but only because social security enabled them to maintain a poor *separate* household.

Id. at 163-64.

143. This counterproductivity of incrementalism is not restricted to economic programs. By some analyses, the correctives intended to address social inequalities are themselves the source of social inequalities. *See* Mortimer B. Zuckerman, *Piling on the Preferences*, 126(25) U.S. NEWS & WORLD RPT. 88 (June 28, 1999).

prejudice in our society as ever. The only change has been the target of that venom. Passing ENDA may very well safeguard our own positions, but it will probably do *nothing* to advance the overall goal of social and economic justice. This realization undercuts the public arguments to pass ENDA at all.

This fact is an embarrassment for the present case because HRC's standard arguments to advance the cause of ENDA are not framed in the special circumstances of gay men and lesbians. Instead it argues that to champion the cause of gay men and lesbians is merely to hope to have society extend to them ordinary "human rights" from which they have been excluded; in the words of its Executive Director, Elizabeth Birch, HRC works "to create an America where lesbian and gay people are ensured of their basic equal rights."[144] But the organizational name suggests that the ambit of the organization's goal is wider; that is, that it champions the general cause of human rights, gathering in all the disenfranchised, that it champions "human rights" and not "gay rights." In the organization's description of ENDA, HRC claims, "[I]t simply affords to *all Americans* basic employment protection from discrimination based on irrational prejudice."[145] As demonstrated, however, ENDA is by design less encompassing than HRC advertises. This is not to accuse HRC of advancing the cause of "special rights" for lesbians and gay men. But it still seems disingenuous to claim that the extension of employment protections to gay men and lesbians will advance the cause of human rights, when the expected net outcome will be an increase in security for gay men and lesbians but no overall improvement in the exercise of human rights.

Interestingly, an alternative bill actually does what HRC claims for ENDA: it protects the employment rights of all Americans. The Workplace Fairness Act [WFA], sponsored by Rep. Brian Bilbray (R-Calif.), "would protect everyone—a liberal impulse—without giving anyone the 'special rights' decried by conservatives."[146] Bilbray's bill

> establishes categories not of people (what conservatives derisively call 'the victim list'), but of job-related qualifications, with an additional twist: Where the Civil Rights Act of 1964 created lists of types of people and said, Thou shalt not discriminate for these reasons, Bilbray's proposal specifies nine factors pertaining to job performance and says, In these instances, thou *shalt* discriminate, but only for these reasons.

No person shall be subjected "to different standards or treatment on any basis other than factors pertaining to job performance in connection with

144. Elizabeth Birch, *Welcome from the Executive Director*, 1999 Louisiana Human Rights Campaign Dinner, Dinner Program, at 1.

145. HRC, *ENDA Summary*, Oct. 2, 1998 (emphasis added). *See also* Sen. Comm. on Labor & Human Resources, *Employment Non-Discrimination Act of 1997: Hearings on Sen. 869*, 105th Cong. 98 (Oct. 23, 1997) (testimony of Elizabeth Birch) ("ENDA confers only the most basic, equal rights *to everyone, regardless of their sexual orientation.*") (emphasis added).

146. Chandler Burr, *All or Nothing at All*, 24(3) MOTHER JONES 62 (May-June 1999).

employment."[147] The nine identified "factors" are employment history, ability and willingness to comply with performance requirements, educational background, drug or alcohol use, conviction of an offense with the potential penalty of one year imprisonment, any conflict of interest relating to the employment, recognized seniority, insubordination, and "ability to work well with others."[148]

The WFA more closely embodies the ideals HRC claims for ENDA. One would consequently expect HRC and other community representatives to align themselves behind the WFA as a viable alternative to ENDA. Not so. "The gay community's official objection is that since the bill does not specifically cover sexual orientation, employers could use it to fire gays under the theory that homosexuality is inherently disruptive in the workplace."[149]

This objection is directed toward the last criterion, which indeed could be problematic depending on how it is construed. If people refuse to work with a homosexual, does this count against the candidate's "ability to work well with others," so that group prejudice can veto his or her employment? While this problem seems real enough,[150] it is a minor and technically remediable difficulty compared with the major tumults HRC is willing to endure to pass ENDA, much less a transgender-exclusive ENDA.

The true reason the WFA lacks support from the gay community may be that it calls our bluff. It takes us at our word about what it is we claim to be striving for, and compels us to admit that those are merely catchphrases glossing over what we really want.

> [Boston University sociology professor Alan Wolfe] finds the [WFA] bill intriguing because, he says, "When you start talking seriously about words like 'merit' and 'freedom' you quickly discover how many people don't believe in those things. "Bills like this that call attention to our hypocrisy clear the air. And I have to say that if a bunch of businessmen were called to a congressional hearing on this bill and asked why they would want to hire on any basis other than merit, I for one would be very interested in what they would have to say.[151]

At the very least we learn from this case the same lesson we saw in earlier sections. Specifically, that incrementalism can be the preferred strategy even when more elegant wholesale options are available. People find secu-

147. Workplace Fairness Act, H.R. 1980, 106th Cong. § 2 (1999).

148. *Id.* § 14.

149. Burr, *supra* note 146, at 63.

150. "In 1987, a *Roper* poll found that 25% of the respondents to a national survey would strongly object to working around people who are homosexual, and another 27% would prefer not to do so; only 45% 'wouldn't mind.'" Gregory M. Herek, *Stigma, Prejudice, and Violence against Lesbians and Gay Men*, *in* JOHN C. GONSIOREK & JAMES D. WEINRICH, HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 60, 61 (1991).

151. *Id.*

rity and comforting predictability in lists, and will find a way to create one even if it is not in their best long-term interests.

To rehearse the argument thus far: Lists weaken the primary statutory prescriptions, even though they are designed to support them. They should never be encouraged or lightly indulged. Even were there not the formal arguments to show why incrementalism as a form of overspecification defeats the legal benefit it intends to bestow, the practical example of the effort to pass ENDA demonstrates that the outcome of piecemeal approaches are something altogether different from that achieved wholesale. In the name of fostering equality and unity, the effort generates division and invidious hierarchies.

The specific example of ENDA is not anomalous. Where list incrementalism has been pursued the general outcome has been something other than what would have been expected had the problem been tackled all at once. Incrementalism is not an alternative strategy toward the same goal as wholesale efforts, but a different method which necessarily ends differently.

V. LIST INCREMENTALISM ASSUMES A DIFFERENT KIND OF HUMAN RIGHT: THE PHILOSOPHICAL ANALYSIS

We have seen that serious formal and practical difficulties complicate the plan to secure gays' rights by incremental steps. Even aware of these difficulties we might still be persuaded to adopt an incrementalist strategy because it seems so darned reasonable. But this prima facie reasonableness is supported by a claim that in the long run incrementalism and wholesale-ism bring about the same result, so that the choice between them is, in the grand scheme, irrelevant. The claim that rights are of a kind that can be indiscriminately advanced by either strategy is probably false. Each strategy nurtures its own kind of idea about what a "right" is generally, and what a "human right" is specifically. The difference can be discerned by consideration of the assumption embedded in the initial claim that incrementalism will advance human rights. The justifications proposed for choosing an incrementalist strategy are wrong. The argument here is not that the alternative is necessarily bad, only that it is contrary to the public characterization of the strategy and is therefore, on that account, false.

The question we must ask is whether "human rights"[152] is a cluster right[153] one can decompose into bits like "employment non-discrimination

152. Could we avoid this problem, and the discussion to follow, by merely relabeling the issue so that instead of "human rights" we are instead concerned with, say, "civil rights"? Probably not, for two reasons. First, the salient terms of this discussion have been chosen for us by such facts as the name of the "Human Rights Campaign," and that most of the proponents frame the issue in these terms.

There is also another argument that little would be gained by recasting the terminology. Jack Donnelly distinguishes human from civil rights in the following way: Human rights "are usually taken to have a special reference to the ways in which states treat their own citizens." JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 1 (1993). He further argues that "claims of

rights" and between groups like gays and lesbians, or whether it is an indivisible, unsegmentable whole that one must presuppose at the outset if one is to have the category at all. Either alternative is defensible; the argument here is that they cannot be simultaneously asserted because they are not axioms of the same philosophical reality. It is not possible is to divide "human rights" into separate elements and then later reassemble them to arrive in the end with the original unity of "human rights" because the very act of dividing denies the unity attributed to it. In short, the ordinary argument in support of incrementalism advances two mutually exclusive understandings of "human rights," although in actuality incrementalism fosters one at the expense of the other. Once the inconsistency has been isolated, the reasonableness of the strategy vanishes. That demonstration requires the examination of each of the two terms, "human" and "rights."

A. The Source of Human Rights

Few people contest that "rights," as generally understood, are something that groups recognize among themselves. For example, Americans turn to the United States Constitution (as amended) to delineate their basic rights. Nonliterate societies may depend upon custom and tradition to identify what duties, responsibilities and privileges are possessed by which categories of persons.[154] But some also presume there to be rights that require no formal grant, written or traditional, to be active. In our own society these are indicated by the Declaration of Independence as those "endowed by our Creator," rights which we have whether the state recognizes them or not because their source is not one controlled by the state. These are rights the State can only choose to recognize and honor or not; it cannot create or bestow them.

That, at least, is the chartering supposition behind the modern category of the "human right." On what basis is this claim for a class of fundamental human rights defended? We examine two common authorities for this class of rights: the natural and the legal.

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human rights" are "self-liquidating." By this he means that claims for human rights are invoked when they "are not effectively guaranteed by national law and practice." Gays' rights in the United States are thus a matter of human rights; similar battles for racial minorities are, however, debates about *civil* (not human) rights because the necessary legal guarantees are in place for the latter but not the former. *Id.* at 20-21. Eventually all human rights claims will be "liquefied" by becoming civil rights claims. Civil rights and human rights are therefore distinguishable not by the content of the rights claims, or by the source of the claimed rights—these are the same for both. Instead, the difference lies with the their recognition or lack thereof by the State.

153. A cluster right is a right which contains other rights. One example of a cluster right is the right of ownership, which contains within it the subsidiary rights of *usus*, *fructus*, and *abusus*. For a discussion of this concept, see JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 55 (1990). For Thomson, the prototypical cluster right is what we call "liberty."

154. ALISON DUNDES RENTELN & ALAN DUNDES, 1 FOLK LAW 1 (1994).

1. Human Rights Grounded in the Natural Condition of Being Human

The first argument in defense of a category of "human rights" holds that "human" is a natural category, and that "human rights" are rights innate to members of that category. These rights are beyond the reach of the state because it is not within the state's power to deprive us of our humanity other than, perhaps, to kill us. The contrast is presumably between inalienable human rights and merely civil rights that the state can control, bestow and withdraw.[155]

An example of this kind of argument is the following:

> The very term *human rights* indicates both their nature and their source: they are the rights that one has simply because one is human. They are held by all human beings, irrespective of any rights or duties one may (or may not) have as citizens, members of families, workers, or parts of any public or private organization or association. . . . [Because] being human cannot be renounced, lost or forfeited, human rights are inalienable.[156]

For this argument to serve as more than a policy statement, the term "human" must be clarified. What are the criteria by which membership in the class of "human" is governed? If that word lacks specific meaning, it is hard to imagine how it could attach to anything so substantive as a legal right. Rights are the claims and privileges of concrete entities, and some means are needed to determine who belongs to the class of rights-bearers in order to determine whether the invoked claim should be honored. As we shall see, "human" can be assigned some consistent meaning, but not one which favors the category of "human rights" as normally understood. The ordinary understandings of "human" and "human rights" cannot co-exist. To preserve "human rights," "human" will have to be drawn quite narrowly. On the other hand, to preserve "human," the category of human rights must contain very few members, and certainly nothing like employment nondiscrimination rights. This section scrutinizes the first term, "human," while the next gives its attention to "rights."

What is it to be human? The primary work of this term is usually to separate humans from the nonhumans commonly called "animals." The problem of demarcation between animal and human is philosophically vague, and hence scientifically inspecific.[157] Still, most educated persons begin with the assumption that humans are part of the evolutionary process and assign them membership in the Animal Kingdom. Whatever humans may be

155. As statements herein have intimated, the exact relationship between "civil rights" and "human rights" is problematic. Depending on one's theory of choice, they can be either qualitatively different, distinguished by their source of authority (natural versus legal), or they can be different stages of development of the same general thing, with civil rights tending to mature into human rights.

156. DONNELLY, *supra* note 152, at 19.

157. This problem is framed nicely in the title to Douglas Keith Candland's FERAL CHILDREN & CLEVER ANIMALS (1993).

in addition to this, they have their origin here, and are thereby animals. To contrast animals with humans is therefore perhaps disingenuous at the outset. But the distinction is marked; our task is to find out how. How does "human" relate to the animal "*Homo sapiens*"?[158]

The first attempted clarification offered might be that "animal" means "non-*Homo sapiens*." Those organisms belonging to the species *Homo sapiens* are therefore humans; to be *Homo* is to be human.

There is a strong sense in which we take this equation to be accurate. But we have two reasons to reject the contention that "human = *Homo sapiens*." First, if "human" and "*Homo sapiens*" are synonymous we should be able to employ them identically. That is, we should expect the two to be linguistically interchangeable. However, this is not the case. Consistently we find that the criteria for "human" are behavioral, while those for "*Homo*" are biological.

This point can be illustrated by considering what we mean when we discuss "human nature." "*Human nature*, in general terms, denotes the nature of man, with more especial reference to his personality and/or character *as acquired in the course of socialization* and often with further reference to aspects of human potential and powers of development."[159]

This definition of "human nature" is typical in that that which is "human" emerges from the organism's socialization into a culture. "Philosophies of human nature reflect beliefs about what people are like *after* they have moved through a lengthy socialization process. The concept does *not* attempt to reflect beliefs about inherent or innate qualities."[160] Work in this area does recognize forces that are *biological* rather than *social*, but these are not collected under the label "human nature" but instead "psychic unity."

This perspective holds that the organism left to develop in isolation might survive but would never be quite human, regardless of its genotype.[161] That is, *Homo* is not human where it lacks enculturation. Consequently, be-

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158. The question has been phrased in other terms. Where here the contrast is between "human" and "*Homo*", others mark the same broad distinction as arising between persons and mere human beings. *See* DEREK PARFIT, REASONS AND PERSONS 322 (1984). The first is to be preferred. Some legal systems explicitly restrict the status of personhood in ways which are discomforting. The Roman Catholic canon law, for example, accords the status of "person" only to those who are baptized. CODE OF CANON LAW can. 96.

159. E.H. Volkart, *Human Nature*, *in* A DICTIONARY OF THE SOCIAL SCIENCES 306 (1964) (emphasis added).

160. L.S. WRIGHTSMAN, ASSUMPTIONS ABOUT HUMAN NATURE 46 (2d ed. 1992).

161. An early articulation of this position is found in Aristotle's POLITICS:

> an individual *incapable* of membership of a *polis* is not, strictly speaking, a human being, but rather a (non-human) animal, while one who is self-sufficient apart from the *polis* is superhuman, or, as Aristotle puts it, a god. . . . [One] cannot be a human being except in the context of a *polis*.

C.C.W. Taylor, *Politics*, *in* THE CAMBRIDGE COMPANION TO ARISTOTLE 239 (1995). This possibility raises the issue of feral children, some of whom are described by Candland, *supra* note 157.

ing *Homo* does not entail being human, falsifying the assumption that "human = *Homo sapiens*."

The same point can be argued from the opposite direction. Instead of showing that not all *Homo* are human, we might argue that some non-*Homo are* human. Regardless of its genotype, an enculturated organism may be definitionally human. If culture and humanness are strictly correlated, "then some chimpanzees may be human or human-like."[162] The force of this fact has become so strong that "a growing number of scientists argue that [chimpanzees] belong in our own genus *Homo*."[163] If "human rights" is tied to our humanness, which in turn is definitionally equated with our status as *Homo*, and further, if the higher primates are embraced by that genera either literally or proximately, then, by conclusion, we will have to accept that these animals are entitled to the full panoply of human rights. This outcome will please some more than others.

These facts jointly force the conclusion that while *Homo* and human are highly correlated, they are not equivalent. Even if in practice they are largely co-occurring, they are nevertheless distinctively different categories and cannot be defined in terms of one another.

The logical conclusion that human and *Homo* are nonequivalent categories can be further illustrated through the widely ranging historical judgments about whether a particular token of *Homo* qualifies as human.

Prior to the Middle Ages humans and animals were viewed as biologically permeable categories, meaning that individuals could just as easily move in one direction as the other: Humans become animals (werewolves, vampires), and animals become humans (the characters of Aesop's fables). Later behavioral category markers opened the possibility that even certain members of *Homo* routinely failed to qualify as human. If being "rational," for example, is the definitional human trait (Feinberg identifies this as "the capability most commonly favored for this role"[164]), then persons who act in ways judged "irrational" (e.g., women in general, peasants in French folk tales) may come off as less than human.[165] This trend can so overexercise itself that by tighter and tighter constriction no actual humans exist. If true rationality is the possession of only the theoretical philosopher, only he might be human. But, in the last analysis, true knowledge is an impossible goal that

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162. WILLIAM NOBLE & IAIN DAVIDSON, HUMAN EVOLUTION, LANGUAGE AND MIND 83 (1996). *See also* FRANS DE WAAL, THE APE AND THE SUSHI MASTER: CULTURAL REFLECTIONS OF A PRIMATOLOGIST (2001).

163. Joseph Hart, *Chimps are People Too: But Should Their Rights Ape Our Own?*, 99 UTNE READER 20 (May-June 2000).

164. JOEL FEINBERG, SOCIAL PHILOSOPHY 91 (1973).

165. Joyce E. Salisbury, *Human Beasts and Bestial Humans in the Middle Ages*, *in* ANIMAL ACTS: CONFIGURING THE HUMAN IN WESTERN HISTORY 15 (1997). Thus, for example, women for Aristotle were "'necessary deformities', not quite human." Stephen R. Clark, *Is Humanity a Natural Kind*, *in* WHAT IS AN ANIMAL? 17, 26 (Tim Ingold ed., 1994).

no one achieves, so no one at all is human.[166] Similar absurd outcomes result whatever the definitional human attribute is taken to be.

"Human" is obviously a vague term, and not merely at its boundaries. But suppose that, despite the problems outlined above, we stipulated for practical reasons the referent of "human" to be the species *Homo*: any organism belonging to this animal species is entitled to the full claims of "human rights," be they fetuses, stem cells, or whatever. Would advocates of human rights approve? Perhaps not, if they are aware of some of the ramifications.

Most would probably have no difficulty accepting some of the obvious practical benefits of this position. It does have the attractive virtue of seeming to definitively resolve the abortion controversy. *Homo* is a status conferred by genetic code; a fetus is consequently *Homo,* and, by this standard, also human, with all that that entails. But such parsimony in some areas is not without costs in others. Some advocates for animals imply that human rights are such that they encompass animals. Feinberg believes that "a human right held by animals is not excluded by definition."[167] Those convinced animals *should* be included within human rights would not embrace the "human = *Homo*" equation.

The most attractive aspect of this position is that it does seem to clearly answer to whom human rights should be assigned. But this clarity may be illusory. Even if we restrict ourselves to the biological criteria implied by the term *Homo*, what *exactly* earns someone this honorific? Is it the number of chromosomes? Some people have extras: are they therefore not sufficiently *Homo* to deserve human rights? If not chromosomes, what? Particular genes? This route seems unhelpful given that species are not defined by having a specific gene, but by having been drawn from a specific gene pool. It is therefore possible that no specific gene appears in every uncontested member of a species. An analogy can be made to the attempt to draw conclusions about population averages from a single specimen: by definition the attempt is nonsensical. Likewise, no genetic attribute of any individual can be taken as definitive for a species.

If it is not genes, what then makes someone *human*? Odds are that *whatever* trait is identified, here too some presumptive bearers of human rights will be disqualified as they are proven to lack the required attribute.

Recall, however, that our primary problem is not to identify to whom human rights apply, but what the grounds are for recognizing the category at all. There are other difficulties in using the "human = *Homo*" equation to perform this work. How can biological species membership confer the moral status implied by possessing a right? The assertion with which we began was not merely that human rights are perfectly correlated with *Homo* status, but the stronger claim that *Homo* status grounds the human rights. The rights are

166. Gregory B. Stone, *The Philosophical Beast: On Boccaccio's Tale of Cimone, in* ANIMAL ACTS: CONFIGURING THE HUMAN IN WESTERN HISTORY (1997).

167. FEINBERG, *supra* note 164, at 86.

a consequence, not a mere correlative, of our membership within this species.

The naturalistic fallacy says that we cannot derive an *ought* from an *is*. Human rights are, by definition, statements of what *ought* to pertain; biological species is a description of what *is* the case. Unless a way is found to bridge this gap, mere membership in *Homo* can never serve as grounds for human rights.[168]

Our illustration above highlights that whatever trait is identified as essential to being human—be it achieved via enculturation or endowed by biology—some members of *Homo* will lack that trait. The fetus, for example, has achieved nothing, and hence cannot be covered by any definition of human as encultured. On the other hand, the brute fact of biological variability means that, if we select a genetic criterion for "human," some non-*Homo* specimens might possess it. Adopting this standard also raises the issue of how much deviation from cultural values is tolerable before one is judged "inhuman." Undesirable outcomes seem imminent regardless of which path is chosen. This conundrum has been noticed before:

> If, conversely, 'mankind' stands for all of those, of whatever descent and lineage, who display a devotion to the values that we serve—civility and rational debate, for example—we have to face the fact that not all biologically human beings can be expected to do so, and some biologically non-human ones might, at least in some degree. The problem, notoriously, is that the harder we make it to meet the qualifications of 'real humanity' (so as to exclude dolphins, chimpanzees, squids and honeybees), the more creatures of clearly human descent we also push beyond the pale. . . . Either most human beings may rightly be treated 'like animals', when we deal with them at a practical level, and when we try to explain their behaviour; or a good many animals should not be treated like that either.[169]

So "human" can be assigned positive content. The term is not inherently meaningless. But when the category is restricted adequately to clarify the term, it generates outcomes that are not easily reconciled with our ordinary understandings as to whom human rights should apply. In either case, entitlement to "human rights" is a rebuttable presumption rather than an inviolate possession.

We are apparently left with two choices. Either the term "human" is undefined, in which case it is meaningless and so too is anything it modifies, such as "human rights." Alternatively, if "human" is defined, it will not demarcate the political class of rights-holders we expected. In sum, there either are no human rights at all, or the holders of such rights as might follow from

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168. Judith Thomson claims that she has solved this problem. THOMSON, *supra* 153, at 1-33. I, for one, am unconvinced by her argument that she has successfully found a way to argue from facts to values.

169. Clark, *supra* note 165, at 28.

a reasonably specific understanding of the term "human" are very different from the popular idea of them as endowments of a natural kind.[170]

We may pause momentarily to ascertain the impact thus far of this argument for incrementalism. Very often incrementalism is defended because it advances society toward the achievement of some other goal (e.g., the full recognition of human rights) rather than it being designed to cure the specific ills of a particular group. In those situations, the reasonableness of the immediate proposal, such as ENDA, depends upon the reasonableness of the ultimate goal.

The examination of the "human" component of *human rights* results in the conclusion that either there are no such rights, or they are of a qualitatively different number and kind than commonly supposed. If there are no "human" rights per se, then incrementalist proposals parasitic on that objective must similarly fail. In the alternative, if there are human rights, the burden remains upon the incrementalist strategist to demonstrate that the specific proposal at issue belongs in that very limited category. Freedom from employment discrimination based upon sexual orientation likely does not qualify. In any event, given the contestability of the concept of human rights, ENDA advocates would be better advised to argue its passage on its intrinsic merit alone, rather than depend upon the reflected deference afforded some other, higher end which ENDA purportedly advances.

2. Are Human Rights Legal Rights?

The attempt to identify our biological status or our natural condition as the source for human rights fails to support the ordinary understanding of the term. If there are to be "human rights," the authority for the category must lie elsewhere than in the elusive status of being "human." We turn our attention, then, toward the second term, that of "rights."

"Human rights" is necessarily a subset of the larger class of general rights. For instruction on this broader category of rights in general we turn to Judith Thomson's important volume of political philosophy, *The Realm of Rights*.[171] One of her many projects is to sever moral (human, natural) rights from the class of legal rights. The issue arises in part because of the influence of early theorizing by Wesley Hohfeld. While he made a significant contribution to the theory of rights in his discussion of duties and claims, he

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170. Falling between this consideration of any natural source of human rights and that in the following section, the social attribution of rights, is the curious assertion that human rights are not the rights we need for health, economic security, etc., but are rather the rights we need to live lives of human "dignity." *See* JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 21 (1993). It is unclear what such a claim means, and in any event advances our argument not at all but only changes the terms of the debate. We are still left to ascertain the source of "dignity."

171. JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 55 (1990).

specifically limited his discussion to *legal* rights.[172] The question then raised is the relationship of legal to moral rights.

Positivists claim that moral rights are *only* legal rights. Just as there are no crimes other than those acts statutorily criminalized, so too are there no rights except those legislatively or constitutionally granted. Thomson disagrees. She wants to show that legal and moral rights are neither synonymous (that the set of legal rights is not identical to the set of moral rights), nor subsets one of the other (all moral rights are not legal rights, nor are all legal rights moral rights). She dramatizes her point with the following scenario:

> For suppose a law is passed in our community which declares that there is henceforth no penalty attached to murdering Jews, and moreover that there is henceforth a penalty attached to attempting to prevent the murder of Jews. Here is Bloggs, who hates a certain Jew, namely Smith. Does Bloggs now have a legal privilege as regards Smith of murdering Smith? Does Bloggs now have a legal claim against me that I not attempt to prevent his murdering Smith? If Positivism is correct, the answer to both questions is yes. But then at least legal rights are not members of the genus rights. No doubt Bloggs has a *legal* privilege of murdering Smith, on this understanding of legal privileges; but he has no privilege of murdering Smith. No doubt I infringe a *legal* claim of Bloggs' if I attempt to prevent him from murdering Smith, on this understanding of legal claims; but he has no claim against me that I not do this—I infringe no claim he really has if I proceed to do it.[173]

She believes that this hypothetical highlights the difference between moral rights and legal rights. We can possess the legal right to do something (kill Smith) without thereby acquiring the moral right to do that same thing.[174] Because some legal rights are obviously not moral rights, the relationship between the two is neither that of synonyms nor subsets, but instead constitutes a third relationship: Legal rights and moral rights are independent but intersecting categories.

Whatever Thomson's hypothetical accomplishes, it is not as much as she hopes. Thomson has shown that not all moral rights are legal rights, and

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172. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16 (1913).

173. *Id.* at 75.

174. *See* SHELLY KAGEN, NORMATIVE ETHICS 9 (1998):

> [T]he substantive moral claims of normative ethics should not be confused with descriptive claims about what people actually do, or about what various groups (or individuals) think people should do. But there is something else normative ethics should not be confused with: the law. Determining what people morally should do is not the same thing as determining what the *law* says they should do. For the law may permit some particular act, even though that act is immoral; and the law may forbid an act, even though that act is morally permissible, or even morally required.

Id.

that not all legal rights are moral rights. We can grant her this. Her goal is to deflect the Positivistic interpretation of law, and we can stipulate that she has succeeded.

But she frames her conclusions in overly broad terms. It is one thing to conclude that there are extra-*legal* sources for rights. That result does not force upon us the conclusion that therefore a *natural* source for rights exists. Thomson has adequately demonstrated that "our rights have different sources."[175] But her "proof" is framed in purely dichotomous terms, the legal versus the natural, so that, if some rights are nonlegal, by default there must be natural (or human) rights. We have natural rights "just in case [the claim] is not a pure social claim."[176] But her conclusion is valid only if legal claims exhaust the kinds of nonnatural claims that can exist.

Unfortunately for her argument, there exist other social authorities for rights besides the law, such as custom and tradition, or "folk law."[177] That fact opens the possibility that, despite the story of Bloggs presented above, natural rights still do not exist. Rights, by whatever name they are called, civil or human or something else, exist only to the extent they are grounded in social premises, legal or extra-legal. The introduction of a category of "natural" rights accomplishes no explanatory work (at least in Thomson's story) and therefore by Ockham's razor it should be disallowed.[178]

Thomson view is specifically vulnerable to this criticism because, for her, natural rights are merely a residual category; they are those claims which are nonsocial. They possess no positive definitional attributes of their own. This is her solution to the problems of trying to assign positive content to the term "human" outlined in the previous section. If the category is empty, even by her estimate there must be no natural rights. She only arrives at the conclusion that natural rights exist because she equates "legal" with "social," and having demonstrated that nonlegal rights exist, she feels justified in presuming that nonsocial rights exist, and therefore in asserting that natural rights must necessarily exist.

In seeming support of Thomson's dichotomous categories of natural and legal rights, Feinberg makes the following distinction:

> A man has a legal right when the official recognition of his claim (as valid) is called for by the governing rules. This definition, of course, hardly applies to moral rights, but that is not because the genus of which moral rights are a species is something other than claims. A man has a moral right when he has a claim, the recognition of which is called for—

175. THOMSON, *supra* note 171, at 76.

176. *Id.* at 274.

177. RENTELN & DUNDES, *supra* note 154, at 1.

178. "Ockham's razor" refers to the philosophical principle attributed to William of Ockham, a fourteenth century theologian. As commonly phrased, the principle states that explanatory entities should not be multiplied beyond those necessary to the problem. If variable X and Y will explain phenomenon A just as well as X, Y, and Z, then Ockham's razor "cuts out" Z from the preferred explanation. The usual application of the razor is to eliminate supernatural explanatory entities (God, spirit, soul) from explanations for natural phenomena.

> not (necessarily) by legal rules—but by moral principles, or the principles of an enlightened conscience.[179]

But Feinberg makes explicit what is hidden in Thomson's text. Moral rights are legitimated by "moral principles, or the principles of an enlightened conscience." Whence the source of moral principles or those principles of an enlightened conscience, if not one's social environment? Can anyone, even a detached philosopher, claim to be other than a product of his time and place? If moral rights are chartered by socially derived principles, then they are themselves social products, and the distinction between legal and moral rights does not hinge, as Thomson hopes, on the assertion that one is social and the other not.[180]

This problem becomes obvious in Thomson's text through her repeated invocation of moral "data," which are only her private intuitions that she thinks are so obvious and inarguable that they constitute evidence for the existence of a nonsocially grounded moral right. As she says, "I take much of the stuff of morality as given."[181] One may ask, "Given by whom or what?" And again the answer must be, "Society."

One example of these bald assertions is her claim that "One ought not torture babies to death for fun . . . is surely a necessary truth."[182] We can concede that it is indeed a true statement about our own public morality without agreeing that it is a necessary truth. Aristotle, for example, claims that babies are like animals;[183] and Descartes believes that animals are like machines.[184]

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179. JOEL FEINBERG, SOCIAL PHILOSOPHY 67 (1973).

180. A recent invocation of this principle was made by the Vatican. In its buildup toward an apology "for the Roman Catholic Church's historical failings," the document entitled *Memory and Reconciliation* pointed out that "many act of earlier centuries cannot be judged solely by contemporary moral standards." *Pope Releases Preface to Coming Apology*, THE TIMES-PICAYUNE (New Orleans), Mar. 2, 2000, at A13. Moral principles are temporally relative in this way if they are based upon something which is itself temporally relative, like society. However this claim comports with the Vatican's broader stance on human rights, here they are depending upon the belief that they are *not* grounded in immutable features. Otherwise, what is immoral to our eyes today would have been necessarily immoral at the time they were committed, a charge the clergy would prefer to avoid.

181. THOMSON, *supra* note 171, at 4. Thomson has here fallen victim to the weakness noticed by Simpson:

> The mass of people usually find that their own introspective judgment of right and wrong, the edicts of the authorities accepted by them, and the conventions of their society coincide rather closely. They coincide because their sources are related and because the individuals in society tend to modify them or to ignore their discrepancies so as to produce the illusion, at least, of coincidence.

GEORGE GAYLORD SIMPSON, THE MEANING OF EVOLUTION 295 (1950).

182. THOMSON, *supra* note 171, at 18.

183. For example, Aristotle favorably compares animals and children throughout the NICOMACHEAN ETHICS. *See, e.g.*, Aristotle, THE NICOMACHEAN ETHICS 30, 73, 243 (J.E.C. Welldon trans., Prometheus, 1987).

184. A complete discussion of Descartes's belief that animals are mere automata is available in DAISIE & MICHAEL RADNER, ANIMAL CONSCIOUSNESS (1996).

Surely we have no necessary repugnance against breaking our machines for amusement. That we do not have this attitude toward babies is therefore a contingent truth, not a necessary one.[185]

The outcome is this: Thomson has adequately shown that moral rights are not reducible to legal rights. However, she invalidly uses this result to claim that there are rights that are not social, and that, by implication, natural rights exist. Her conclusions do not follow from her argument. In fact, given her position that natural rights, if they exist, are only a residual category, the conservative result of this discussion parallels that of the previous section in that we again find no coherent argument that natural rights exist. Society is answerable in this regard to no higher authority, be it god or nature.[186] At best, because all rights are grants by society, "human rights" covers only those social grants of rights that are universal because some brute facts of social living, in any culture or time, are likewise universal. But even if universal social grants, human rights are still merely social grants. They are not a claim superseding society's order. To the extent they might appear otherwise, this is only because of a disagreement about which society is the proper reference standard. Do we, for example, look to the specific local society, or toward some kind of hegemonic world culture?

3. Summary

If rights generally are better recognized as social rights (whether legal or not) then so too must this be said of human rights because what is true of the genus must be true of the species. This result has implications. For one, there is no such thing as an "inalienable" right. What society gives, it can take away (Thomson seems largely sympathetic to this claim in her later chapters). This would be harder to argue were the question whether the state can deprive the individual of a biological endowment or a supernatural gift. But that is not the case of rights; the sole source of rights is society. Some rights might be so fundamental to the healthy functioning of any human society that society would be unwise to eliminate such rights. But any persuasive claim that the society lacks that power cannot be built upon the premise that

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185. Similarly, Thomson claims that "Isn't it obvious that X's throwing a child into the water is something bad, and that Y's jumping into the water to save it is something good? How could anyone think otherwise?" THOMSON, *supra* note 171, at 131. Here's how:

> There is no Merit in saving an innocent Babe ready to drop into the Fire: The Action is neither good nor bad, and what Benefit soever the Infant received, we only obliged our selves; for to have seen it fall, and not strove to hinder it, would have caused a Pain [to ourselves], which Self-preservation compell'd us to prevent.

BERNARD MANDEVILLE, THE FABLE OF THE BEES I:56 (1732). This counterexample does not mean that Thomson is wrong, but only that what she assumes needs no supportive argument actually does.

186. It should not be assumed that I take this to be a good thing, only that it is a true thing.

these rights are natural, or that they inhere directly to the condition of being "human." However attractive this argument appears, it does not survive scrutiny.

B. Human Rights: All of Us or Each of Us?

We have now answered the preliminary question about the prima facie sensibility of the concept of "human rights." If the term has a utility beyond political posturing, it most defensibly refers to socially granted rights. This general conclusion might be further restricted to those socially granted rights that stipulate prudent rules of group boundary behaviors on matters which are universal to members of our species cross-culturally and transtemporally.[187] Now that we know what "human rights" is, we can move to the second phase of our argument by examining that category's internal structure in preparation to consider how these results impact the choice between incrementalism and wholesale-ism.

First, this characterization of human rights supports category divisibility. Human rights are social grants and not biological endowments. Because societies change and develop, their understanding and grants of rights to their members must also change and develop. In other words, rights will necessarily be recognized and enforced piecemeal. The category of "human rights" is therefore a cluster right that has accreted over time as new rights have been identified and new categories of persons encompassed. We set aside the task of itemizing a list of those parts that constitute this cluster right.[188]

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187. The foreseeable objection to this conclusion is that it seems to imply that if one society declines to recognize a right, that right is not a human right. Attempts would be made to illustrate this objection through some detail of the Nazi atrocities. This Article is not the place to demonstrate how the conclusion that human rights are social grants of universal occurrence does not require accepting those same Nazi atrocities, or to refrain from characterizing those atrocities as violations of human rights. But easily imagined future clarifications can make that point.

For example, although the argument here is being phrased in terms of societies, a subsequent, more nuanced discussion may find the appropriate level of comparison to be instead cultural. In that case, so long as the preponderance of societies within a cultural tradition recognizes the rights, and if all cultures recognize the rights, then the rights are human rights despite sporadic deviance at the level of a specific society. Or a more careful examination could find that there is no right at issue that Nazi Germany failed to recognize; they merely did not extend that right to all persons. In that case, the refined result could be that the social recognition required is not what the right-bestowers grant to others, but what they grant to themselves. If, for example, we wish to include a right to marriage among the "human rights," and the Nazis granted themselves this right but withheld it from Jews, in our cross-cultural comparison in search of universal social grants of rights, it would be upon the former and not the latter that we would focus, and which would fail to judge the Nazi society an exception.

Any true rebuttal to this characterization of "human rights" will have to be deeper than mere invocation of apparent extremes that at first blush seem to be counterexamples.

188. A review of the list of formally recognized "human rights" by the United Nations does little to persuade one of argument that such rights are based upon anything "natural." *See* JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 9 (1993). Some are merely too vague to be

We next consider the relation of the parts to the whole. Again, the previous discussion leans toward the view that the category of "human rights" is (like "ownership rights") a cluster comprised of other, more elemental rights. "Human rights" are synthesized from independent, lower-level rights. Binding the individual elements into the single category of "human rights" are the universal facts of social living.[189] Critically, there will be nothing inherent in a constituent right that marks it as belonging to the cluster right of "human rights." Reversing the direction of analysis can be very difficult, if not impossible. That is to say, "human rights" cannot be easily dissected to discover its components. What qualifies as a human right is historically contingent, and not logically necessary.

Since human rights is a bottom-up and not a top-down category, the higher level cannot be invoked to justify the lower. Each alleged fundamental right must be justified on its own terms and not by appeal to an anticipated, emergent category of human rights. Arguments, for example, that ENDA should be supported *because* employment non-discrimination is a fundamental human right therefore make no sense. If employment non-discrimination were truly a human right, ENDA is superfluous; if it is not a human right, ENDA cannot be defended on this basis.

What could happen, though, is this: If a survey of world cultures reveals a central tendency to recognize employment non-discrimination rights, then we may inferentially conclude that this right belongs within the superordinate class of "human rights," with all that that might entail. The major lesson to draw here is that whereas the first argument initially *asserts* human rights to garner support to recognize a subordinate right, the second reverses the logical order. It begins with the fact of predominant recognition that a right has been recognized, and then *concludes* with the categorization of that right as a human right.

We can see that two contradictory views about human rights are in play. On the one hand, the ordinary view of human rights is that they belong to "all of us" by virtue of our natural condition, which is somehow intended to be captured by the term "human." Efforts to identify with precision what is being "captured" have been disappointing, but the category is typically taken as self-evidently valid and as roughly synonymous with the status of *Homo sapiens*. This understanding of human rights not only does not require a gatekeeper separating the right-possessors from all others (the species

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helpful: Is the right to "life" a right to live, or a right not to have one's life taken by the state? In other words, does this human right make a claim that the State has a duty to preserve life, or merely not to terminate it? Other items on the list are too culturally specific to be credible: The alleged human right to free trade unions and leisure time and paid holidays. Given the difficulty in isolating any natural endowment which entails any rights at all, it would asking too much indeed to find one which required trips to Disney World.

189. The recognition of human rights, given this discussion, hinges on the determination of the right at issue being found to be a sociocultural human universal. That means that identification of these rights is a clear task for anthropology, and not for the juridical or political sciences.

boundary is presumed to serve that function), but the very suggestion to the contrary becomes itself a violation of human rights since by definition there can be no class of human nonpossessors of the right at issue. This kind of human rights supports the wholesale approach to rights activism. Within this strategy human rights is a *premise* in an argument that non-discrimination rights should be granted *because* they are human rights.

Concurrent with this understanding of "human" as "biological descent" runs another understanding of "human" as describing the essential virtues of an entity. Here human rights belong potentially to "each of us," recognized in any entity that has achieved certain levels of socialization and moral development. This understanding *does* require a gatekeeper of some kind to ascertain whether any given entity (*Homo* or non-*Homo*) has achieved the required level of socialization or moral development and would thereby be entitled to claim the status of "human" and the possession of human rights. This understanding of human rights easily lends itself to incrementalism, as new groups of persons aspire toward inclusion within the certified class. Here the label "human rights" is a *conclusion* supported by the accord of the predominant individual experiences of particular societies.

In thumbnail form, incrementalism favors the *achievement* of human rights rather than their *ascription* as natural entitlements. The existence of a list of groups to whom certain rights are *extended* becomes reasonable because these rights are differentially granted by society accordingly as those achievements are attained. The list is a record of those social grants. Within the context of list incrementalism, "human rights" emerges as an *inductive* conclusion after surveying the broad, cross-cultural patterns of the social grants of rights.

Wholesale efforts, marked by the more radical and revolutionary attempt to complete change at one fell swoop, eschew the list. Wholesale-ism effort is reasonable only if it assumes that no discrimination need be made between current rights-possessors and all others because it denies that this difference can exist. The theory of human rights that buttresses this argument must be that these rights are natural endowments entailed by membership within the category "human" into which one is born. Within the framework of wholesale political strategies, "human rights" is the premise of a *deductive* argument justifying the *recognition* of the already-possessed right in a particular group.

Incrementalism and wholesale-ism rights strategies each depends upon and reinforce contradictory understandings of "human rights." Incrementalism favors a view of human rights as achieved, granted, and as inductive conclusions; the wholesale approach presumes that human rights are natural, recognized, and as deductive premises.

Accept for present purposes that this analysis of human rights has merit. Incrementalism supports the perspective on human rights that this discussion has identified as the most rational, albeit not the one with which people are most comfortable or familiar. In this the reader may find, finally, one argu-

ment that supports incrementalist strategies for rights extensions. That might well be true. But the standard argument for incrementalism is not that it fosters a correct understanding of human rights, but that it supports the same understanding implied by wholesale-ism. The end result does not differ between the two strategies, but only the means.

This assertion is false. Simply put, incrementalism and wholesale-ism are emphatically *not* different routes to the same outcome. Each strategy fosters its own kind of human rights, and the social and political possibilities under the two kinds of human rights are dramatically different. Anyone claiming that incrementalism will in the long run lead to the same final outcome as would wholesale-ism is woefully mistaken. Incrementalism may be the better choice, but it is not a different route to the same goal.

As applied to our specific case study of the push for a federal ENDA, the choice of incrementalism by HRC is fatally flawed. It invokes human rights as a premise in an argument that concludes that ENDA should be enacted. But in an environment of consistently applied incrementalism, human rights can only serve in an argument as an inductive conclusion. HRC, in other words, is "mixing its metaphors." One or the other must go. If HRC wishes to use human rights as an argumentative premise, it must adopt a wholesale strategy to employment non-discrimination and refuse to settle for any bill which excludes transgenders. Or, if it wishes to continue to bar transgendered persons from ENDA protections, it must eschew arguing in defense of ENDA on the grounds that it will promote the cause of human rights.

VI. DOES REFUSING TO ADOPT INCREMENTALIST STRATEGIES PROMOTE UNHEALTHY EXTREMISM?

If incrementalism is bad either intrinsically or as implemented, what is the committed advocate of rights to conclude? If the compromise associated with incrementalism is precluded as a deliberate strategy, does this mean that the serious philosophical thinker must adopt a stance of shrill and strident extremism lest she risk intellectual inconsistency?

No. We have only discussed the most defensible position for each individual voice in a particular debate. We have not attempted to characterize the nature of the full discussion. In that discussion, each advocate does not assume a responsibility to anticipate the final outcome, or to reflect that prospective result and adopt it as her own. Quite the contrary, in fact, is true. If the debate is to be full and complete, each participant must adhere to her own position and endeavor to represent it persuasively and thoroughly.

American legal practice already models its courtroom procedure on this advocacy principle. Each side is expected to argue the merits of the case in the light most favorable to its client. The adversaries do not discuss between themselves the relative merits of the case and reach a consensus about the just outcome. "The lawyer . . . is an advocate whose role is not to reach the

closest approximation to the truth, but to put forward the strongest case for the client."[190] In fact, the process can be gummed up when persons abandon their adversarial roles to act as objective fact-finders.[191] Finding the truth among the conflicting claims and differently accentuated accounts is left to a third-party finder of fact, either a jury or a judge. The system works best when each party hews firmly to the version of the story that it believes to be true. "Truth is best discovered by powerful statements on both sides of the question."[192]

The same is true in most debates. Each side of a debate about rights extension should press the full weight of its argument. To do less is unreasonable and disingenuous, and fails to provide the necessary grist for the mill of third-party evaluation. If there is a reasonable middle ground to be sought, that task remains to the policy-equivalent of the judicial finder of fact, either a legislative body or the electorate directly.

Unwavering adherence to one's position becomes a fault only when the same person functions as both advocate and adjudicator/decision-maker. In all other circumstances our political system presumes strong position advocacy. For this reason, to conclude that incrementalism should not be adopted as a deliberate strategy does not entail the collapse of our political discussions. Just the opposite: When those discussions will be resolved by third-parties, incrementalism undermines the process. Chaos is more likely to follow compromise, not the principled stance.

Even if this were not the case, however, we should hesitate to attach a negative connotation to the term "extremism." While extremists may be viewed as indecorous, they are sometimes necessary. Martin Luther King, Jr., regarded as a moderate voice in the racial tensions of the sixties, earned that high regard only after initial success and in contrast to later, more violent agitators. When he began, he was himself viewed as the extremist. In his famous "Letter from Birmingham Jail" he responded to critics among his fellow African-American religious who called his activities "unwise and untimely."

> I must confess that over the past few years I have been gravely disappointed with the white moderate. I have almost reached the regrettable conclusion that the Negro's great stumbling block in his stride toward freedom is not the White Citizen's Counciler or the Ku Klux Klan, but the white moderate, who is more devoted to "order" than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says: "I agree with you in the goal you seek, but I cannot agree with your methods of direct action"; who paternalistically believes he can set the timetable for another man's freedom; who lives by a mythical concept of time and who constantly advises the Negro to wait for a "more convenient season." Shallow under-

190. STEPHEN E. FIENBERG, ED., THE EVOLVING ROLE OF STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS 155 (1989).

191. *Id.* at 303.

192. United States v. Cronic, 466 U.S. 648, 655 (1984) (quoting Lord Eldon).

> standing from people of good will is more frustrating than absolute misunderstanding from people of ill will. Lukewarm acceptance is much more bewildering than outright rejection.[193]

Our adoration of tranquility over agitation holds regardless whether the tranquility is stagnant or the agitation creative. Sometimes forceful measures are demanded.

> But though I was initially disappointed at being categorized as an extremist, as I continued to think about the matter I gradually gained a measure of satisfaction from the label. Was not Jesus an extremist for love: "Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you.". . . So the question is not whether we will be extremists, but what kind of extremists we will be. Will we be extremists for hate or for love? Will we be extremists for the preservation of injustice or for the extension of justice?[194]

In answer to our question, then, refusing to reflexively endorse incrementalist strategies need not result in excessive divisiveness on the political stage. Moreover we should remember that extremism, while perhaps uncomfortable to watch because it challenges us to commit ourselves to principles we ordinarily merely mouth, is not necessarily unhealthy to the body politic.

CONCLUSION

> *"If the goal of visionaries is to make a quantum leap forward, the goal of pragmatists is to make a percentage improvement—incremental, measurable, predictable progress."*[195]

Despite the commonsensical acceptability of this characterization of the "leaper" versus the "incrementalist lister," embedded within it are at least three questionable assumptions. First, that there is actually a choice to be made, that one can either leap or list, with either being potentially acceptable. But the formal argument has shown that there may be no such choice between possible alternatives, especially if the desire is, as claimed, "improvement" or "progress." List incrementalism is a form of adding detail in the quest of increasing precision, which, as Lieber argues, actually leads to less "improvement" and no "progress" by reducing clarity and increasing *im*precision.[196] If the statement of the goal is accurate, one must choose wholesale "leaps."

The second assumption behind the epigraph is that even were incrementalism available as a strategy at least in theory, it can be a good one in prac-

193. Martin Luther King, Jr., *Letter from Birmingham Jail*, April 16, 1963, *available at* http://www.almaz.com.nobel/peace/MLK-jail.html.

194. *Id.*

195. MALCOLM GLADWELL, THE TIPPING POINT 198 (2000) (quoting Geoffrey Moore).

196. *See supra* Section III.

tice. The practical argument is illustrated in at least one instance, that being the push for a federal Employment Non-Discrimination Act that includes protections for gay men and lesbians, where the costs outweighed the potential benefits. If, as we are told, the goal of this legislation is to assure equal treatment for us all, incrementalism fails because we advance at the price of leaving behind others such as the transgendered. If the goal is simply to advance our own cause, in this case at least incrementalism is still a failure because by so narrowly describing the basis of the new protections, even most of our own group is no longer protected; a gay man can just as easily be fired for gender role infractions as for sexual orientation. Analysis of other attempts at incrementalist improvement of the disadvantaged lead us to believe that the ENDA example is not unique.

Finally, the above quote depends upon a linear image of progress, in which a leap is just as good, in the end, for getting from point A to point B as incremental strategies would be. But the philosophical argument has shown that this is not the case. Once your feet have left the ground, which path they land upon depends upon the strategy taken and the entailments therein. Incremental steps require an understanding of human rights as socially achieved, while wholesale jumps imply an endowment of moral rights somehow emerging from our biological natures. Regardless of which view of human rights you favor, you cannot say they are the same.

The critic might say that this has all been much ado about nothing. Rights clearly advance incrementally, so incrementalism is the truer description of what actually happens. Nothing here challenges that assessment. However, the task before us was not to find the better post facto description, but to identify the superior a priori strategy for rights advancement. The analogy here would be with David Hume's devastating argument against inductive reasoning. He argues not that it doesn't happen, or even that it doesn't work, but only that it is inherently irrational and cannot thereby be the basis of any further arguments.[197] We remain free to think inductively, but we can no longer claim that in so doing we are being strictly reasonable.

The brute fact that incrementalism "happens" does not mean that incrementalism is rational or that it should be deliberately pursued, much less that we are free to ignore the long-range implications of adopting an incrementalist position. This article does not claim to have definitively demonstrated the foolishness of incrementalism. Rather, it intends simply to show that blithe claims that incrementalist strategies are self-evidently the more reasonable and preferable approach to rights activism must be dismissed as simplistic.

197. Hume's argument is that all reasoning concerning cause and effect are founded on experience, and that all reasonings from experience are founded on the supposition that the course of nature will continue uniformly the same." DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING 34 (Antony Flew ed., 1988). That uniformity, however, can never be rationally demonstrated without presupposing that very uniformity. Any inductive reasoning, therefore, is fundamentally irrational to the extent that it depends upon this indemonstrable proposition. *See also* Robert J. Fogelin, *Hume's Skepticism, in* THE CAMBRIDGE COMPANION TO HUME 90, 94-100 (David Fate Norton ed., 1993).