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THE GAY MARRIAGE BACKLASH AND ITS SPILLOVER EFFECTS: LESSONS FROM A (SLIGHTLY) “BLUE STATE”

John G. Culhane* and Stacey L. Sobel**

I. INTRODUCTION

Backlash, indeed! The stories streaming in from across the country can scarcely be believed. In Alabama, a legislator introduced a bill that would have banished any mention of homosexuality from all public libraries—even at the university level.¹ In Virginia, the legislature’s enthusiasm for joining the chorus of states that have amended their constitutions to ban gay marriage was eclipsed by a legislator’s suggestion that the state’s license plates be pressed into service as political slogans, and made to read: “Traditional Marriage.”² (Some years ago, the state’s license plates read “Virginia is for Lovers.”³) The new Secretary of Education ushered in her administration by decrying an episode of a children’s public television show that depicted a lesbian couple, and suggested that PBS return the federal funding used to create the show.⁴

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** Executive Director, Center for Lesbian and Gay Civil Rights; Lecturer in Law, University of Pennsylvania School of Law. I would like to thank Steve Glassman, Steve Black, and Mara Keisling who were tireless advocates and made a LGBT inclusive hate crimes law in Pennsylvania possible, and John Culhane for all of his support as a co-author and as Vice-President of the Center's Board of Directors.

1. Kim Chandler, *Gay Book Ban Goal of State Lawmaker*, Birmingham News A1 (Dec. 1, 2004). The legislator in question, one Gerald Allen, suggested nothing less than the destruction of the offending volumes: “I guess we dig a big hole and dump them in and bury them,” he said. *Id.*

2. 365Gay.com, *Virginia Considers Issuing Anti-Gay License Plates*, www.365gay.com/newscon05/01/010405vaLicense.htm (Jan. 4, 2005) (discussing bill introduced by Delegate Scott Limgamfelter (R-Prince William) that would change the state’s license plates to feature interlocking gold wedding bands over a red heart, and bearing the legend “Traditional Marriage”).

3. VATC.org, *VTC “Virginia is for Lovers” Slogan*, <http://www.vatc.org/pr/factslogan.htm> (accessed Apr. 13, 2005).

4. Secretary Margaret Spellings wrote in an unsupported letter to PBS that “many parents would not want their young children exposed to the life-styles portrayed in this episode.” Lisa de Moraes, *PBS’s “Buster” Gets an Education*, Washington Post C1 (Jan. 27, 2005). She asserted that Congress, in funding the program, did not want “to introduce this kind of subject matter to children.” *Id.* As a result, PBS executives refused to distribute the show to member stations. Among the few television stations to air the show despite the controversy was Channel 12 in Denver, which contracted with the show’s Boston producer to obtain the episode. Diane Carman, *Denver PBS Rises Above Childishness*,

Private citizens, too, have jumped in. In Texas, a silly homecoming tradition that had boys and girls dressing in traditional clothing of the opposite sex for one day was halted by the school board after a few parents complained that the cross-dressing was encouraging, and perhaps tantamount to, homosexuality.⁵ And in Cosa Mesa, California, anti-gay parents sought to bar a pair of kindergartners from attending the local Catholic school because their parents are gay.⁶ Even the beloved SpongeBob SquarePants has had to absorb his share of criticism; right-wing religious groups denounced this animated character for his star-fish turn⁷ in a video promoting diversity that was sent to public schools across the nation.

With the exception of the Texas cross-dressers and the pronouncement by Secretary Spellings, few of these initiatives seem likely to succeed. But the very fact that they have been introduced stands as a sharp reminder of the results of the last election: Eleven state constitutional amendments banning same-sex marriage were presented to voters, and eleven passed—all by comfortable margins.⁸ These initiatives were not confined to so-called red states.⁹ Most of them anticipatorily prohibited not only gay marriages, but also watered-down versions of it: civil unions, domestic partnerships, and reciprocal beneficiaries.¹⁰ A few laws even

Denver Post B1 (Feb. 8, 2005). “The Boston public TV station says it will air the episode and has offered it to any station willing to defy the Education Department.” de Moraes, *supra*, at C1.

5. 365Gay.com, *News and Issues, No Cross Dressing in Texas School*, <http://www.365gay.com/news/con04/11/111704txDress.htm> (accessed Apr. 13, 2005).

6. 365Gay.Com, *Parents Try to Oust Gay Couple's Kids from School*, <http://www.365gay.com/news/con05/01/010205calSchool.htm> (Jan. 2, 2005). The school has resisted this call from parents, one of whom complained that the children's parents were using their kids as “pawns” to further their “agenda.” *Id.*

7. This is not to be confused with the “starfish” turn that might have been turned in by Bob's best friend, Patrick. According to the website of Focus on the Family, its founder, Dr. James C. Dobson, opposes the airing of the cartoon for fear that the animated characters “are being exploited by an organization that's determined to promote the acceptance of homosexuality among our nation's youth,” an “agenda” he finds “morally offensive to millions of moms and dads.” For Focus on the Family's explanation of the controversy, see James C. Dobson, *Setting the Record Straight*, <http://www.family.org/docstudy/newsletters/a0035339.cfm> (Feb. 2005). For a very different take on the merits of the controversy, see Steven Hyden, *A Year after Janet, SpongeBob Has Nation's Ninnies Riled Up*, Post-Crescent (Appleton, Wis.) B1 (Feb. 4, 2005).

8. Gina Piccalo, *Union and Division: The Electorate's Response to Gay Marriage Sent a Community Reeling*, L.A. Times E1 (Nov. 6, 2004) (delineating the margins by which the amendments passed). For the exact language used in each amendment, see *Marriage Amendments: A State-By-State Look at the 11 States that Voted on Marriage Amendments Tuesday*, Augusta Chronicle (Ga.) A9 (Nov. 3, 2004).

9. So-called “red states” are those that vote Republican, and, specifically, that voted for President George W. Bush. “Blue states” tend to be Democratic. In terms of ballot initiatives, Oregon was the most notable of the blue states to enact a constitutional amendment banning gay marriage. See *The Bush Mandate*, Wall St. J. A14 (Nov. 4, 2004). This defeat was particularly difficult because national LGBT advocacy groups believed the issue could be won. See e.g. Human Rights Campaign, *HRC and the Elections*, http://www.hrc.org/Content/ContentGroups/Campaign1/Campaigns_and_Elections.htm (accessed Apr. 13, 2005).

10. The Human Rights Campaign discusses exactly which forms of same-sex relationships are recognized in each state at *What's Happening in Your State & in Your Community*, http://www.hrc.org/Template.cfm?Section=Your_community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=8471 (accessed Apr. 13, 2005).

threaten contractual agreements between same-sex couples.¹¹ In such a climate, why wouldn't the most radical anti-gay forces feel emboldened?

Lesbian, gay, bisexual, and transgender ("LGBT") activists are understandably experiencing the same sort of soul-searching—and hand-wringing—as the Democratic party. The successes in the movement toward same-sex marriage delivered by judicial decisions in *Baker v. State*,¹² *Lawrence v. Texas*,¹³ and especially *Goodridge v. Department of Public Health*,¹⁴ and then enacted by joyful couples in places from San Francisco to New Paltz, New York,¹⁵ have lost some of their luster in the wake of reactionary responses. Should activists continue to press for full marriage equality, or back down and seek more incremental victories? How much effort should be devoted to positive reform efforts, and how much to combating the powerful forces of retrenchment? Are the courts the best places to secure victories?

Working from the general to the specific, this article explores these issues, which involve complex and messy questions of philosophy, strategy, and the art of the possible. Part II examines the issues on a national level, and concludes that the backlash is real, but overstated. Part III takes advantage of the position of one of the authors, who serves as executive director of a surprisingly rare type of

11. The Virginia law bans all variations listed in the text and any "contract or other arrangement" that same-sex couples might enter into. Va. Code Ann. § 20-45.3 (2004). In theory, this law could prevent enforcement of a support agreement entered into by a same-sex couple. See William S. Friedlander, *Do Mom and Mom and Baby Make a Family?* Trial 36 (Dec. 2004) (offering litigation strategies for jurisdictions with similar laws). Virginia is currently considering a constitutional amendment to strengthen the ban. As of this writing the ban had passed the Virginia Senate, and was awaiting action in the Virginia House of Delegates. Va. H. 2490, 2005 Reg. Sess. (Jan. 12, 2005). Under the Virginia Constitution, amendments must be passed by two successive sessions of the state legislature before being placed on the ballot. Va. Const. art. XII, § 1. In its current form, the new constitutional amendment would provide that the prohibition against a "civil union, partnership contract or other arrangement between persons of the same sex . . . shall not abridge the right of any person to enter into a lawful contract that pertains to the ownership or devising of joint property, the maintenance of personal health, or the protection of private assets." Va. H. 2490, 2005 Reg. Sess. at 1 (emphasis in original).

12. 744 A.2d 864 (Vt. 1999). In *Baker*, the Vermont Supreme Court held that denying same-sex couples the benefits of marriage violated the state constitution's guarantee of equality, but left to the legislature the issue of whether to confer marriage itself or a "virtual equivalent." *Id.* at 881. The Vermont legislature subsequently passed, and Governor Howard Dean signed, a law establishing civil unions for same-sex couples. Such unions confer all of the benefits of marriage, but reserve the word "marriage" for opposite-sex couples. Vt. Stat. Ann. tit. 15, §§ 1201-1207 (2002). For a good insider's view of the legislative process leading to civil unions, see David Moats, *Civil Wars: A Battle for Gay Marriage* (Hardcourt 2004).

13. 539 U.S. 558 (2003). On its face, *Lawrence*, which dealt with the right of same-sex couples to sexual intimacy, has nothing to do with marriage. In fact, the Supreme Court repeatedly demurred on the issue. *Id.* at 567 (noting that liberty must be respected "absent . . . abuse of an institution the law protects"); *id.* (discussing same-sex relationship "whether or not entitled to formal recognition in the law"); *id.* at 585 (O'Connor, J., concurring) (referring to "preserving the traditional institution of marriage" as a legitimate state interest). But *Lawrence's* broad statements of respect for gay people have been read by some as lending support to arguments that same-sex marriage is constitutionally required. *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

14. 798 N.E.2d 941 (Mass. 2003); see *infra* at nn. 51-52 and accompanying text.

15. For one view on the impact of the gay marriages in San Francisco on the 2004 presidential election, see Evelyn Nieves, *For Gay Couples, Anniversary Party: Unions' Legality Still Hotly Debated*, Wash. Post A10 (Feb. 12, 2005). Even heterosexual couples felt the backlash of gay weddings performed in New Paltz, New York. Damien Cave, *Documents of Weddings in New Paltz are Rejected*, 154 N.Y. Times A45 (Dec. 19, 2004).

organization: a *state*-focused civil rights organization that focuses on both direct legal services to the community and political advocacy.¹⁶ This discussion examines the sausage factory, as it were, providing an insider's view of the workings of the Pennsylvania state legislature, and thereby supplying an illustration of the collision of optimism and practicality in the struggle for LGBT equality. Inasmuch as Pennsylvania is a "blue" state with a heavy "red" influence, the example may be especially apt. In Part IV, we offer practical suggestions for regaining the momentum on issues of concern to the LGBT community.

II. LGBT BACKLASH: REAL, BUT OVERSTATED

As one of us has written elsewhere, many of those identified with the radical right long for the days of gay invisibility that existed, with some dramatic exceptions, before the LGBT movement began to gather strength about two generations ago.¹⁷ Periodically, this desire to stuff gay people back into the closet has been expressed unapologetically. For instance, in the late 1970s Anita Bryant's successful crusade to undo political advances by the gay community in Florida culminated in some of the most regressive legislation yet enacted, including the still-extant ban on gay adoptions in that state.¹⁸ After this victory denying gays basic rights, one proponent of the legislation crowed that the devastating political loss would help urge gays back into the closet.¹⁹ In 1997, on the eve of the coming out of Ellen DeGeneres's sitcom alter ego, some opined that it would be better for the character to remain in the closet.²⁰

Outside of specific contexts such as the military, however, this societal "don't ask, don't tell" policy²¹ has been steadily beaten into submission by the increase of openly gay people during the past thirty years. The coming out process has the remorseless logic of the exponential: A few bold souls trickle out; others follow, perhaps slightly less hardy or constrained by more daunting personal obstacles;

16. The Center for Lesbian and Gay Civil Rights has the following mission statement: "[T]o advocate equality for lesbian, gay, bisexual and transgender individuals in Pennsylvania by providing legal assistance through counseling and representation, conducting educational programs and seminars, and seeking policy reform." See Ctr. for Lesbian & Gay Civil Rights, *About Us*, www.center4civilrights.org/aboutus.htm (accessed Apr. 13, 2005).

17. John G. Culhane, *The Heterosexual Agenda*, 13 *Widener L.J.* 759, 779-80 (2004).

18. Fla. Stat. Ann. § 63.042(3) (West 2003). Recently, the Eleventh Circuit Court of Appeals ruled that the state ban passes the low threshold required of "rational basis" analysis. *Lofton v. Sec. Dept. of Children & Fam. Servs.*, 377 F.3d 1275 (2004). For two accounts of the relationships between Anita Bryant, Florida's current adoption law, and *Lofton*, see Let Him Stay, *The Lawsuit*, <http://www.lethimstay.com/lawsuit.html> (accessed Apr. 13, 2005); Linda Greenhouse, *Justices Refuse to Consider Law Banning Gay Adoption*, 154 *N.Y. Times* A14 (Jan. 11, 2005).

19. "The bill's chief sponsor explained it as a valiant effort to open lines of communication with gays: 'We're trying to send them a message, telling them: 'We're really tired of you. We wish you'd go back into the closet.'" Steve Chapman, *Florida's Puzzling Case Against Gay Adoptions*, *Chicago Tribune* C9 (Jan. 16, 2005).

20. See Seeq.com, *When Ellen Came Out*, http://www.shootthemessenger.com.au/pre_dec97/a_tele_dec97/t_ellen.htm (last updated Feb. 1998) (discussing the reactions of, among others, Pat Robertson and Jerry Falwell to Ellen's coming out).

21. The full policy that goes by the shorthand name in the text is found at 32 C.F.R. ch. I, pt. 41, app. A, pt. 1(H) (revised as of July 1, 1998).

then gay visibility and a measure of acceptance embolden a still larger exodus from the deception and hard work of the closet; finally, "gayness" enters the mainstream to the point that thoughtful social critics begin writing mournful books about the end of gay culture through assimilation.²²

Of course, social assimilation precedes legal recognition and protection. But as certain states began to house large LGBT populations, a rush of legislative and judicial victories followed. The broad legal categories covered by these advances are well known. Most states have done away with laws prohibiting sexual intimacy between same-sex couples;²³ some state hate crimes laws now cover sexual orientation bias;²⁴ an increasing number of states and municipalities now protect LGBT persons against discrimination;²⁵ and openly gay people now populate federal and state courts and legislatures.²⁶ Each of these victories has been hard-fought, and regressive forces have sometimes succeeded in rolling back advances, at least temporarily.²⁷ But in general, progress has been steady, if uneven.

Relationship recognition has been harder to come by, and until recently was more limited. During the past decade or so, states have come up with both judicial and legislative—but always piecemeal—solutions to real problems confronting gay couples and their children. Among many others, these have included increased recognition of gay parents (in the areas of custody and adoption),²⁸ accession to rent-control benefits,²⁹ domestic partnership registrations that confer a small number of benefits,³⁰ and the right to sue in tort for the injury

22. One especially thoughtful book on the topic is Daniel Harris, *The Rise and Fall of Gay Culture* (Hyperion 1997).

23. By the time *Lawrence* rendered such statutes dead letters, only thirteen states banned "sodomy" and, of those, only four limited the prohibition to contact between same-sex partners. 539 U.S. at 572.

24. The Human Rights Campaign has a document on its website that lists the states with such protections. See Human Rights Campaign, *supra* n. 10. A discussion of the Pennsylvania response to this issue that includes a recent effort to remove "sexual orientation" and a few other categories as protected classes is found in Part III(A) of this article.

25. *Id.*

26. Although no U.S. Senator identifies as a member of the LGBT community, U.S. Representatives Barney Frank (D-Mass.) and Tammy Baldwin (D-Wis.) do so identify. On the state and local levels, the examples are by now too numerous to be noteworthy.

27. In Maine, for example, a law prohibiting discrimination on the basis of sexual orientation was rendered inoperative by a subsequent state-wide vote on the issue. Paul Carrier, *Promised Gay-Rights Bill Could Raise Timing Issues: Gov. Baldacci Has Said He Will Propose a Bill in 2005. Similar Legislation Was Defeated in 1998 and 2000*, Portland Press Herald A1 (Sept. 7, 2004) (comparing the close defeat margins in two similar referendums). In Colorado, the now-infamous Amendment 2 to the state's constitution would have made access to the political process for LGBT people more difficult by prohibiting laws that would further the interests of that group. The amendment was trumped by the Supreme Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996), which found it to violate the equal protection guarantee of the Fourteenth Amendment to the U.S. Constitution.

28. See generally D. Kelly Weisberg & Susan Frelich Appleton, *Modern Family Law: Cases and Materials* 819-26 (custody), 1164-65 (adoption) (2d ed., Aspen 2002).

29. See *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (N.Y. 1989). *Braschi* had importance beyond its limited context, because the New York Court of Appeals found that the definition of "family" could be broad enough to include a same-sex partner. *Id.* at 53-54. For a discussion of the case that is both laudatory and critical, see John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 Cardozo L. Rev. 1119, 1139-41 (1999).

30. One problem with such laws is that the rights they confer bear no consistency from state to state. Compare 2003 N.J. Laws Ch. 246 (granting limited rights), with Cal. Fam. Code Ann. § 297.5

or death of a same-sex partner.³¹ Progressive legislation even protected same-sex spouses left behind by the events of September 11, 2001.³² Again, these incremental but vital advances have often met with opposition, but the overall movement has been positive.

The preceding account grounds the backlash phenomenon in the specific context in which it most dramatically arises: gay marriage. Where courts have found that same-sex couples have a constitutional right to marry, the push-back response has been swift, strong, and often nasty. But why does marriage, specifically, cause such a nuclear reaction? In our view, the often-vicious response on the marriage issue has both a thin and a thick description. The simpler explanation is that marriage is, in short, the whole ball game. If gay marriage takes hold, all of the battles over equal recognition of same-sex relationships will be over.

But something more complex is also at work. Marriage, after all, confers the full panoply of *relational* rights, but no others. Thus, if same-sex marriage became legal in Pennsylvania tomorrow, an employer could still fire a gay employee simply for being gay. In that way, the employer could avoid paying benefits to the employee's spouse while indulging his dislike of gay people. Nor would same-sex marriage alone even prevent states from banning intimate conduct between *unmarried* gay partners.³³ Further, this explanation does not deal with the fact that the virtually equivalent institution called the "civil union" produces far less opposition than gay marriage. Most polls show a solid majority of Americans in opposition to gay marriage, but in favor of civil unions that confer all or most of

(2005) (granting virtually all state-conferred rights on same-sex couples with certain exceptions pertaining to tax and community property status).

31. See *Langan v. St. Vincent's Hosp. of N.Y.*, 765 N.Y.S.2d 411 (Sup. Ct. 2003). As discussed in John G. Culhane, *A "Clanging Silence": Same-Sex Couples and Tort Law*, 89 Ky. L.J. 911 (2001), progress in this area of the law has been halting indeed.

32. The Special Master of the Victim Compensation Fund, Ken Feinberg, broadly interpreted the statute creating the Fund to allow many surviving "spouses" of those killed on September 11th to recover, even where applicable state law might have suggested the contrary result. See John G. Culhane, *Tort, Compensation, and Two Kinds of Justice*, 55 Rutgers L. Rev. 1027, 1039 n. 78 (2003). New York State, home to most of the victims, also enacted legislation protecting same-sex couples. *September 11th Victims and Families Relief Act*, 2002 N.Y. Laws 346 (amending the worker's compensation law, the estates, powers, and trusts law, and the surrogate's court procedure act in order to assist victims of the September 11th terrorist attacks and their families). The New York legislature was explicit about wanting to assist surviving members of same-sex couples with their efforts to gain compensation under the Fund. The provision setting forth legislative intent reads as follows:

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

2002 N.Y. Laws at 346; see also John O. Enright, Student Author, *New York's Post-September 11, 2001 Recognition of Same-Sex Relationships: A Victory Suggestive of Future Change*, 72 Fordham L. Rev. 2823, 2853-62 (2004) (containing an exhaustive discussion of compensation for same-sex partners after September 11th).

33. As discussed more fully at *infra* nn. 42-50 and accompanying text, the Supreme Court's decision in *Lawrence* does prevent the states from intruding on the private sexual conduct of "homosexual persons." 539 U.S. at 567. The point in the text is that the issue is logically separable from that of gay marriage.

the same benefits.³⁴ Indeed, even the President has "softened" his call for a constitutional amendment banning gay marriage with a permissive stand on state civil unions.³⁵ What is going on, and how does it explain the gay rights backlash currently in ascendance?

Quite simply, gay marriage is vertiginous in a way that civil unions are not.³⁶ This point was made clear as far back as 1996, when Congress passed the reactionary Defense of Marriage Act ("DOMA"),³⁷ which both defined marriage as a union of one man and one woman for federal law purposes and expressly empowered the states to disregard same-sex marriages performed in other states. DOMA and the many "mini-DOMAs" that followed it were passed in direct response to a decision by the Hawaii Supreme Court that made same-sex marriage likely in that state in the near future.³⁸ The prospect of gay marriage in a tiny state in the middle of the Pacific Ocean, and the possibility that this product could surpass pineapples as the state's chief export, occasioned a near-panic in Congress: Senator Bill Bradley, hardly a reactionary, felt he was "on ground full of quicksand."³⁹ This was an odd admission indeed coming from the United States Senate, an institution not known for the reticence of its members.

34. In response to the question, "Would you favor or oppose a law that would allow homosexual couples to legally form civil unions, giving them some of the legal rights of married couples?" forty-nine percent of respondents said that they would favor such a law, while forty-eight percent said they would oppose it. This poll was conducted in May 2004. The results are even more favorable when respondents are asked about gay marriage *or* civil union recognition; the totals routinely exceed fifty percent. For example, when asked, in November 2004, "Which of the following arrangements between gay or lesbian couples do you think should be recognized as legally valid—same-sex marriages, civil unions, but not same-sex marriages, or neither same-sex marriages nor civil unions?," twenty-one percent answered same-sex marriages, thirty-two percent said civil unions, forty-three percent said neither, and four percent gave no opinion. Thus, a total of fifty-three percent, according to this Gallup poll, favor at least civil union status for same-sex couples. The Gallup Org., *Homosexual Relations*, <http://www.gallup.com/poll/content/print.aspx?ci=1651> (accessed Apr. 13, 2005).

35. See e.g. Dan Stober, *Candidates Irk Some in GOP by Backing Civil Unions*, San Jose Mercury News B1 (Oct. 28, 2004).

36. The underlying reasons for the discomfort many people feel about gay marriage are complex, and have been explored in detail elsewhere. Some of the opposition stems from the challenge to traditional gender roles that gay marriage squarely presents. Religious views play a major part, as well. The following is a short list of academic writings that address these points in greater detail: Culhane, *supra* n. 29; William N. Eskridge, Jr., *The Case For Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* (Free Press 1996); Evan Gerstmann, *Same-Sex Marriage and the Constitution* (Cambridge U. Press 2004); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187; Cass R. Sunstein, *Homosexuality and the Constitution*, in *Sex, Preference, and Family* 208 (David M. Estlund & Martha C. Nussbaum eds., Oxford U. Press 1996); Paul J. Weithman, *Natural Law, Morality, and Sexual Complementarity*, in *Sex, Preference and Family*, *supra*, at 227.

37. Pub. L. No. 104-199, 110 Stat. 2419 (1996).

38. In *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), the Hawaii Supreme Court ruled that denying same-sex couples the right to marry amounted to sex discrimination, and remanded the case to the trial court to determine whether the state could show that it had a compelling reason for this denial of rights. The trial court said that no such showing had been made, *Baehr v. Muike*, 1996 WL 694235 (Haw. Super. Ct. Dec. 3, 1996), and the case went back up to the state supreme court. While the case was pending, the state constitution was amended to allow the legislature to restrict marriages to opposite-sex couples. See Haw. Const. art. 1, § 23. The compromise that grew out of these events resulted in the creation of what was, at the time, the most comprehensive bestowal of rights on same-sex couples. *Reciprocal Beneficiaries Act*, Haw. Rev. Stat. Ann. § 527C-1 to C-7 (LEXIS 1999).

39. 142 Cong. Rec. 22462 (daily ed. Sept. 10, 1996) (testimony of Sen. Bill Bradley on DOMA).

Civil unions, on the other hand, were met with relative silence when brought about in Vermont at the dawn of the present century. Congress did nothing to ban these novel entities that conferred all of the benefits of marriage on same-sex couples—saving for opposite-sex couples only the *label* marriage. States also stood by in silence, not bothering to fortify their own DOMAs with civil union bans.⁴⁰ While it is true that many of the recent state constitutional amendments ban the full panoply of marriage equivalents⁴¹—including civil unions and domestic partnerships—it is doubtful whether many of these initiatives would have been approved by the voters had the issue of same-sex marriage been separated from the other, less incendiary alternatives. Faced with an “up or down” decision on a slate of bans that included marriage, many voters were apparently willing to deprive same-sex couples of the rights that marriage equivalents would have conferred, even if item-by-item alternatives might have yielded a different outcome. That this tactic is of questionable legitimacy is beside the point.⁴² Same-sex marriage was a kind of “poison pill” for the LGBT civil rights movement.

Thus, while alternatives such as civil unions have drawn a relative “ho hum” from all but the most rabid anti-gay forces, they have lately been drawn into the marriage vortex, and expelled. This result could likely have been avoided but for two developments in 2003 that pushed gay marriage—and the ensuing backlash—to the forefront. The first comes from *Lawrence*, but *not* from the majority’s holding that the Fourteenth Amendment’s guarantee of liberty prevents the states from criminalizing intimate sexual behavior between consenting same-sex partners. Although this holding drew the predictable jeremiads about the fall of civilization from the extreme right wing,⁴³ a strong majority of Americans had long since stopped thinking that the state had any business prying into private sexual conduct it did not approve of.⁴⁴

40. One exception to this rule was Nebraska. The state was in the process of amending its state constitution to ban same-sex marriage when the decision in *Baker* was handed down. So that state’s amendment was worded to exclude not only same-sex marriage but civil unions, domestic partnerships, and other similar unions. Neb. Const. art. I, § 29.

41. See *supra* nn. 11-12 and accompanying text.

42. For an example of such a challenge to the legitimacy of combining these different issues in one amendment, see *Forum for Equality PAC v. McKeithen*, 893 So. 2d 715 (La. 2005). The Louisiana Supreme Court ruled that the state’s constitutional amendment did not run afoul of the “single object” rule by prohibiting not only same-sex marriage, but also other state-conferred status on same-sex couples. The court found that the “object” was not to ban same-sex marriage, but, more broadly, to “defend” traditional marriage against its rivals. *Id.* at 724. By this logic, the amendment could have contained a ban against no-fault divorce as well.

43. See e.g. Julie E. Payne, Student Author, Abundant Dulcibus Vitiis, *Justice Kennedy: In Lawrence v. Texas, an Eloquent and Overdue Vindication of Civil Rights Inadvertently Reveals What is Wrong With the Way the Rehnquist Court Discusses Stare Decisis*, 78 Tul. L. Rev. 969, 971 n. 14 (2004) (discussing reactions of Sean Hannity and Jerry Falwell to the *Lawrence* majority opinion; the former reduced the civil rights issue to a “culture war” and the latter likened the right protected in the case to a legalization of bestiality).

44. When asked on May 30th and June 1st of 2003, shortly before the *Lawrence* decision was issued on June 26, 2003, “Do you think it should be legal or should not be legal for two men who are consenting adults to have sex with each other in their own home?,” sixty-two percent said that it should be legal, thirty-one percent said that it should not, and seven percent had no opinion. When the same question was asked about lesbians, sixty-three percent of respondents said that consensual adult sex

Justice Scalia's dissent, on the other hand, was a call to arms. Although the majority stressed that the case did not involve any "institution"⁴⁵ and Justice O'Connor's concurrence even more pointedly stated that the marriage issue would involve a different analysis,⁴⁶ the dissent urged the reader: "Do not believe it."⁴⁷ The logic of the majority's decision, Scalia wrote, left little room to argue against same-sex marriage. What sufficiently strong interest might the state be able to show in order to stop same-sex marriages? Not procreation, he stated, because the state allows non-procreative opposite-sex partners, such as post-menopausal women, to marry.⁴⁸

Cases decided after *Lawrence* have shown that the "marriage is for procreation" rationale has had mixed success.⁴⁹ Beyond that, however, surely Justice Scalia's prediction that permitting same-sex intimacy is tantamount to permitting same-sex marriage is overly facile. But it served its purpose, which was to galvanize the anti-gay forces in their effort to write a same-sex marriage ban into the U.S. Constitution. Only in that way could those opposed to such marriages be assured that the Court would not interpret the liberty guarantee of the Fourteenth Amendment in the way that Justice Scalia feared. The murmurings of the marriage backlash began in the wake of *Lawrence*; President Bush cleared his throat by warning that judicial activism might cause him to support "the constitutional process" for protecting traditional marriage.⁵⁰

The second development—less than six months later—was *Goodridge v. Department of Public Health*. *Goodridge* ignited the combustible material provided by Justice Scalia in *Lawrence*. As virtually the entire civilized world

should be legal in their own home, thirty percent said that it should be illegal, and seven percent had no opinion. The Gallup Org., *supra* n. 34. Gallup also asked the question, "Do you think homosexual relations between consenting adults should or should not be legal?" several times between June, 1977 and May, 2004. With the exception of the mid-1980s—perhaps due to the then-new popular association of gays with HIV/AIDS—those agreeing that such relations should be legal have increased. Interestingly, the highest point of acceptance occurred in May, 2003, again, just before *Lawrence* came down. *Id.*

45. *Lawrence*, 539 U.S. at 567.

46. *Id.* at 585 (O'Connor, J., concurring).

47. *Id.* at 604 (Scalia, J., dissenting).

48. *Id.* at 605.

49. Compare *Goodridge*, 798 N.E.2d 941, and *Hernandez v. Robles*, No. 103434/2004 (N.Y. Sup. Ct. Feb. 4, 2005) (available at www.lambdalegal.org/cgi-bin/iowa/cases/decisions.html?record=1635) (accessed Apr. 13, 2005) (holding that state's interest in procreation not rationally related to ban on same-sex marriage), with *Standhardt v. Super. Ct. for the County of Maricopa*, 77 P.3d 451 (Ariz. App. Div. 1 2003) (finding that state had established connection between its interest in procreation and restriction of marriage licenses to opposite-sex couples).

50. Robert D. Kalinoski, *Commentary—Sense and Sensibility on Gay Marriage*, The Daily Rec. A10 (June 18, 2004). "The current push for the right of gays to marry was triggered by the Supreme Court's recent decision in *Lawrence v. Texas*." *Id.* After discussing *Goodridge*, in which the Massachusetts Supreme Court announced "that it is a violation of the Massachusetts constitution to permit anything less than full gay marriage," Kalinoski noted that:

On the federal level, President Bush until recently had insisted that an amendment to the U.S. Constitution prohibiting gay marriage was an unnecessary and bad idea. After the Massachusetts decision, however, he changed his mind and has now said he will support a constitutional amendment defining marriage as being solely between a man and a woman.

Id.

knows by now, the Supreme Judicial Court of Massachusetts held in *Goodridge* that denying same-sex couples the right to marry contravened the state's constitution, offending principles of both equality and liberty.⁵¹ *Goodridge* spun off a number of developments, most of which can be seen as part of the backlash now in plain evidence. First, the dramatic and emotional victory spawned a number of arguably *ultra vires* actions by executives in far-flung parts of the country. The mayor of tiny New Paltz, New York began issuing marriage licenses to same-sex couples, and so did Mayor Gavin Newsom of San Francisco.⁵² San Francisco, in particular, became a rallying point for the same-sex and LGBT equality movements; viewers throughout the country were treated to the sight of long, enthusiastic lines of gays and lesbians waiting for their marriage licenses. To many activists and fair-minded people, the sight of Phyllis Lyon and Del Martin finally gaining legal sanction for their marriage after fifty-three years together admitted of no response.⁵³ Same-sex marriage seemed, for a moment, to have captured the zeitgeist.

The euphoria proved short-lived. It quickly became apparent that public discomfort with gay marriage made useful political capital. The President soon stated his support for a constitutional amendment defining marriage as the union of a man and a woman,⁵⁴ and state after state moved to fortify their own DOMAs with state constitutional amendments (just in case the state DOMA might be found to violate the state constitution).⁵⁵ Even in Massachusetts, a constitutional convention was convened for the purpose of responding to *Goodridge*, and resulted in the narrow approval of a proposed constitutional amendment that would create civil unions for same-sex couples while making explicit that "marriage" (with the same rights as civil unions) was reserved for the union of a man and a woman.⁵⁶

But the backlash engendered by the spate of successes (and apparent successes) on the gay marriage issue went far beyond marriage itself. It has been the peculiar genius of reactionary forces to use the most controversial victories to attempt to dismantle much of the LGBT rights edifice that has been painstakingly constructed over the past generation. Marriage provided the spark, but the flames

51. 798 N.E.2d at 968.

52. See *supra* n. 15 and accompanying text.

53. For an account of the events surrounding gay marriage in San Francisco that discusses the important and symbolic roles that Lyon, age 79, and Martin, age 83, played, see David J. Garrow, *Toward a More Perfect Union*, N.Y. Times Mag. 52, 56 (May 9, 2004).

54. See *supra* n. 50 and accompanying text.

55. See *supra* nn. 41-42 and accompanying text.

56. On March 29, 2004, the legislature passed an amendment that, if ultimately approved, would permit civil unions to same-sex couples, but exclude such couples from marriage. See W. James Antle III, *Bay-State Barometer*, http://www.nationalreview.com/comment/antle_200404130908.asp (Apr. 13, 2004) (discussing the view that the amendment is designed to fail by substituting civil unions, with all of the legal incidents of marriage, for marriage; the compromise will not please either proponents or opponents of same-sex marriage). This amendment cannot become law unless passed by two consecutive sessions of the legislature, and then approved by a simple majority of the voters. Mass. Const. art. XLVIII. This means that such an amendment could not take effect until 2006 at the earliest.

threaten to lap up much more. The dramatic examples set forth at the beginning of this article are less important for their substance than for what they signify about the political climate. Caught in this backlash have been "marriage lite" alternatives, but not only those. The effort has been to dismantle the LGBT community, reconciling gay people to the margins they once inhabited. The extent to which these efforts succeed or fail will influence—but not fully determine—the future of the movement and the lives of gay people. The following description of developments in Pennsylvania during the past fifteen years serves as an object lesson of the challenges and opportunities that the backlash phenomenon presents.

III. ADVANCES, DELAYS, SETBACKS, OPPORTUNITIES: THE PENNSYLVANIA EXPERIENCE

The backlash phenomenon must be understood in the specific state context in which it arises. In Pennsylvania, legislation favorable to the LGBT community already faced an uphill struggle before the marriage issue arose. The battle over the state's hate crimes bill, which long antedated same-sex marriage on the political agenda, provides a useful case study in the frustrations—and ultimate satisfaction—that LGBT advocacy groups face. While gay marriage makes the task more difficult, recent developments in Pennsylvania also show that anti-gay legislators fail when they overreach.

A. *How to Pass a Hate Crimes Bill in Pennsylvania*

In 1989, Pennsylvania had no legislation protecting the rights of gay people. That year,⁵⁷ activists began meeting with Pennsylvania legislators to discuss what type of civil rights legislation the lesbian and gay community should pursue. Those discussions led LGBT advocates to work on bringing an amendment to Pennsylvania's Ethnic Intimidation Act ("the Act")⁵⁸ to the House floor for a vote in 1990. The bill attempted to add sexual orientation to the list of groups covered by the Act; it was defeated 80 to 118.⁵⁹

Over the next few years, activists continued working to amend the Act. The legislation's greatest hurdle was in finding a way to move it out of committee.⁶⁰ In

57. Over the thirteen years it took for LGBT inclusive hate crimes legislation to become law, various groups worked on its passage. In the early years, organizational leaders included the League of Gay and Lesbian Voters and the Pennsylvania Justice Campaign. The organizations that successfully led the efforts to amend the Act included the Pennsylvania Gay and Lesbian Alliance, the Statewide Pennsylvania Rights Coalition, the Center for Lesbian and Gay Civil Rights, and the Pennsylvania Gender Rights Coalition.

58. In 1990, the Act stated in pertinent part: "A person commits the offense of ethnic intimidation if, with malicious intention toward the race, color, religion or national origin of another individual or group of individuals, he commits an offense under any other provision of this article . . ." 18 Pa. Consol. Stat. Ann. § 2710 (West 1998).

59. Pa. H. 1655, 1989-1990 Reg. Sess. (June 26, 1990); see Pa. H. J., 1989-1990 Reg. Sess. 1202-12 (1990).

60. Judiciary Committee hearings were held in the House in 1995 and 1996 with no further actions taken on the legislation. Pa. H. 903, 1995-1996 Reg. Sess. (Feb. 28, 1995). The Senate Judiciary

1996, a Senate bill⁶¹ was voted out of committee, but the legislation was never brought to the floor for a vote because legislators claimed there was a lack of interest from their constituents.⁶² With little support for the bill by Senate Republicans, the majority Republican leadership chose not to run the hate crimes bill.

Prospects for a hate crimes bill further dimmed that same year, when, as part of the first gay marriage backlash,⁶³ Pennsylvania became one of the first states with a mini-DOMA law.⁶⁴ Legislators enacted the state DOMA by amending a custody bill, SB 434, which moved quickly through both houses. The legislation passed the House by a vote of 189 to 13 and the Senate 43 to 5.⁶⁵

The suddenness of the vote and the wide margin of victory discouraged some Pennsylvania activists about the likelihood of passing proactive legislation protecting the rights of lesbian, gay, and bisexual people. While some people pressed for hate crimes legislation over the next few years, these efforts stalled. In general, the overwhelming numbers by which the state DOMA passed quashed the enthusiasm and even the hope of many in the larger LGBT community.

Over the next few years, activists began considering what steps should be taken. Some activists advocated for an amendment to the state's Human Relations Act ("HRA")⁶⁶ to prohibit discrimination on the basis of sexual orientation by arguing that such legislation would have a bigger impact on lesbian and gay individuals than hate crimes legislation. After much discussion, activists and legislators decided they should continue focusing on the Pennsylvania Ethnic Intimidation Act. One legislator, Senator Allen Kukovich (D-Westmoreland), said he would help to amend the HRA after a hate-crimes bill passed.⁶⁷ He explained that if legislators did not think it was unacceptable to beat up or murder gay people, then it would be impossible to get them to agree it was unacceptable to fire them from their jobs or kick them out of their homes. This sentiment seemed prevalent at the time.⁶⁸

Committee considered hate crimes bills in 1994 and 1996. Pa. Sen. 1218, 1993-1994, Reg. Sess. (June 15, 1993); Pa. Sen. 701, 1995-1996 Reg. Sess. (Mar. 7, 1995).

61. Pa. Sen. 701, 1995-1996 Reg. Sess.

62. When activists first started educating legislators about the need for hate crimes legislation, many legislators insisted they did not have any gay constituents or that no one in their district cared about LGBT people. During the course of the hate crimes efforts, activists generated more than ten thousand post-cards and letters asking legislators to pass a LGBT inclusive hate crimes law.

63. See *supra* nn. 37-41 and accompanying text.

64. 23 Pa. Consol. Stat. Ann. § 1704 (West 2001).

65. Pa. Sen. 434, 1995-1996 Reg. Sess. (June 28, 1996); Pa. Sen. J., 1995-1996 Reg. Sess. 2452 (1996); Pa. H. J., 1995-1996 Reg. Sess. 2193 (1996).

66. 43 Pa. Consol. Stat. Ann. §§ 951-963 (West 2001).

67. Conversation between Stacey Sobel, other activists, and Senator Allen Kukovich. No cite available.

68. *Id.* While the statement in the text may seem sensible, reasonable people can disagree about the relationship between hate crimes laws and anti-discrimination laws. Opposition to hate crimes laws is based, for some at least, on a commitment to free speech and a concomitant concern about the potential for such laws to be too broadly construed. Thus, it is possible to be in favor of anti-discrimination laws but opposed to hate crimes legislation, not just as these categories of laws are applied to gay people, but more generally.

In the "lull" between uprisings over gay marriage, activists began a hard push to pass a hate crimes bill in the 2001 legislative session. The time seemed right for such an initiative, as, by then, a majority of the states had some form of hate crimes legislation offering protection to LGBT people.⁶⁹ While a number of hate crimes amendments were pending in the House, activists and legislative allies had little hope that the bills would actually move out of committee. A strategic decision was made to work on the legislation in the Senate first. It would be easier to educate and gain the needed votes from the Senate's fifty members than from the House's two hundred and three members.

As the end of June 2001 drew near, there was increased pressure to find a way to move hate crimes legislation to the floor for a vote before the legislature adjourned for the summer. Borrowing a tactic from their opponents in passing the state DOMA, activists and legislative allies focused their efforts on amending another piece of Title 18 (criminal legislation) on the floor of the Pennsylvania Senate to include the expanded hate crimes text.⁷⁰

During this time, there was a significant amount of discussion regarding whether the bill would be more likely to pass if gender identity were not included in the bill. Interestingly, this issue was raised by Democrats, from whom activists had expected less opposition. Republicans, who understood why the Act needed to be expanded, felt that this decision should be left to the activists. The activists, through much discussion, decided that the bill would go forward with both sexual orientation and gender identity included. This decision was the result of choosing reality over political expediency; transgender individuals are in many ways more susceptible to hate crimes attacks than other people.⁷¹ Activists and legislators continued to work on the legislation with the gender identity inclusive language.

On the last day of session in June, HB 1492, a Title 18 bill which had passed the House, was amended in the Senate with the language of another Title 18 bill, HB 1493. The latter bill, an agricultural vandalism bill, was gutted of its original language. Around midnight on June 21, 2001, HB 1493, now an empty bill, came up on the calendar for a vote. An amendment was offered to the gutted bill that included the inclusive proposed hate crimes text. The Republican Senate Majority Leader David J. Brightbill then made a motion to hold the bill for a vote until the Senate came back in September. A procedural motion was then made by the hate

69. Currently, twenty-nine states and the District of Columbia have hate crimes laws protecting individuals on the basis of sexual orientation. Seven of these laws also include gender identity. See Natl. Gay & Lesbian Task Force, *Hate Crime Laws in the U.S.*, www.thetaskforce.org/downloads/hatemap0400.pdf (accessed Apr. 13, 2005).

70. The amendment language added "actual" or "perceived" before all protected categories and the categories sexual orientation, gender identity, gender, nationality, and mental and physical disability to the Act. Pa. Sen. J., 2001-2002 Reg. Sess. 848-49 (2001).

71. One expert estimates that transgender individuals have a one in twelve chance of being murdered. Human Rights Campaign, *Transgender Basics, How do Transgender People Suffer from Discrimination, Hate Violence*, http://www.hrc.org/Content/NavigationMenu/HRC/Get_Informed/Issues/Transgender_Issues1/Transgender_Basics/Transgender_Basics.htm#f1 (accessed April 13, 2005). In contrast, the average person has about a one in eighteen-thousand chance of being murdered. FBI, *Murder and Nonnegligent Manslaughter*, http://www.fbi.gov/ucr/Cius_98/98crime/98cius07.pdf (accessed Apr. 13, 2005).

crimes bill supporters to vote on the bill that night. In a highly unusual vote, six republicans joined all twenty democrats to force a vote on the bill.⁷² Another amendment was offered that would have stripped all of the protected categories from the law and rendered it basically useless by making all crimes hate crimes.⁷³ That amendment was defeated. Finally, a vote on the hate crimes language proposed by LGBT allies was held and passed by a 32 to 15 vote.⁷⁴

The amended HB 1493 was sent back to the House on a concurrence vote on the Senate amendments.⁷⁵ Some House legislators were displeased by the way the bill was amended. In general, these were the same house members who did not support the legislation in the first place. Activists and allies spent the fall of 2001 and the spring of 2002 trying to get HB 1493 moved out of the Rules and Judiciary Committees.⁷⁶ Difficulties passing the state budget and other legislation were holding up HB 1493 as well as other bills. On the next to last day of the June session, the bill came up for discussion in the Republican Caucus. The Caucus debate was heated, and House Republican leadership decided to not run the bill.⁷⁷

When the legislature came back into session in September, it appeared that many House members did not want to move the bill before their November elections. While activists worked on educating legislators and gaining co-sponsors and support, they also began to fear that the legislation would not pass before the session came to an end. If the House did not vote on the legislation prior to the election, it would need to be passed in the lame duck session. If the bill didn't pass before the 2001-2002 legislative session ended, activists would have to start from the very beginning and reintroduce legislation in 2003.⁷⁸

After the elections and with constant activist and legislative effort, the bill was brought to the floor for a vote on November 26, 2002, and passed by a 118 to 79 vote—an almost exact reversal of the 1990 vote.⁷⁹ Thirteen years after activists began working on the issue, it had been passed by a Republican House and Senate and signed into law by Republican Governor Mark Schweiker.⁸⁰

In a postscript to the above account, a bill was introduced in February 2005 to repeal the hate crimes protections that were gained in 2002.⁸¹ This effort was a direct result of anti-LGBT protestors affiliated with “Repent America” being arrested at a Philadelphia LGBT community event, Outfest, in October 2004.⁸²

72. See Pa. Sen. J., 2001-2002 Reg. Sess. at 848-50.

73. *Id.* at 849-50.

74. *Id.* at 850.

75. Pa. Gen. Assembly, *HB 1493 History*, <http://www.legis.state.pa.us/WU01/LI/B1/BH/2001/0/HB1493.HTM> (accessed Apr. 13, 2005).

76. *Id.*

77. No record is created of caucus meetings. The description in the text is from comments reported to Stacey Sobel from an anonymous state representative and staff.

78. See generally Pa. Const. art. II. Once the Senate passed Pa. H. 1493, it did not address any hate crimes issues for the remainder of the session.

79. Pa. H. J., 2001-2002 Reg. Sess. 2261-76 (2002). For the 1990 vote, see *supra* n. 59 and accompanying text.

80. Pa. H. 1493 was signed into law on December 3, 2002. Pa. Gen. Assembly, *supra* n. 75.

81. Pa. H. 204, 2005-2006 Reg. Sess. (Feb. 2, 2005).

82. Jim Remsen, *A Move to Change Pa. Hate-Crimes Law*, Philadelphia Inquirer B1 (Feb. 13, 2005).

Four protestors were charged with ethnic intimidation, among other violations, for their conduct at Outfest.⁸³ The leader of Repent America then engaged in a national media blitz, stating that the group was being prosecuted for their speech and preaching at Outfest.⁸⁴

Consequently, several Pennsylvania state legislators introduced legislation that would not only remove sexual orientation and gender identity from the state's hate crimes law, but would also remove the other protected classes added in 2002.⁸⁵ Because of the strong two-thirds support for the 2002 legislation, it is unlikely that there will be significant backing for this legislation. It does, however, show the lengths to which some legislators will go to limit the rights of LGBT people.

B. Gay Marriage Gives Rise to Backlash, but Reactionary Forces Overreach

After the hate crimes bill's passage, the Center for Lesbian and Gay Civil Rights, the ACLU of Pennsylvania, and the Pennsylvania Gay and Lesbian Alliance, among others, began talking about their next legislative effort. They decided to introduce legislation that would amend the commonwealth's HRA, which prohibits discrimination in employment, housing, public accommodations, and credit. Legislation was also prepared to amend the state's Fair Educational Opportunities Act⁸⁶ to prohibit discrimination in post-secondary education. Working with the Pennsylvania Human Relations Commission, activists also decided to seek to amend both laws' penalty and procedural provisions in order to make them more in line with federal law. Similar to the hate crimes legislation, the decision was made to focus on legislation first in the Senate and then in the House. Senate Bills 706 and 707 were introduced with nineteen co-sponsors.⁸⁷ This is particularly noteworthy because there were significantly more co-sponsors on these bills than on any hate crimes bill. Additionally, a simple majority (usually twenty-six legislators) is needed to pass a piece of legislation in the fifty member Senate.⁸⁸ Activists decided to introduce the legislation in the House when they had gathered fifty House co-sponsors. Once that happened,⁸⁹ the same language was introduced in the House as HB 1807 and 1808.⁹⁰

83. *Id.*

84. See WorldNetDaily.com, *Homosexuals Planned Christian Harassment: "Outfest" Organizers Announced Efforts to Block Protestors Now Facing Prison*, http://www.wnd.com/news/article.asp?ARTICLE_ID=42287 (accessed Apr. 13, 2005). The charges against the defendants were subsequently dropped. *Around the Nation, Anti-Gay Picketing Charges Dropped*, Bergen Rec. (N.J.) A10 (Feb. 18, 2005).

85. Pa. H. 204, 2005-2006 Reg. Sess.

86. 24 Pa. Consol. Stat. Ann. §§ 5001-5010 (West 2001).

87. 2003-2004 Reg. Sess. (June 17, 2003).

88. Pa. Const. art. III, § 4.

89. The legislation was introduced on June 17, 2003. Pa. Gen. Assembly, *Session Information*, <http://www.legis.state.pa.us/WU01/LI/BI/BT/2003/0/SB0706P0973.HTM> (accessed Apr. 13, 2005).

90. 2003-2004 Reg. Sess. (July 2, 2003).

Shortly after the legislation was introduced, the Supreme Judicial Court of Massachusetts issued its decision in *Goodridge*.⁹¹ *Goodridge*, as well as marriages conducted in San Francisco and other places in the country,⁹² caused concern among state legislators who feared what would happen in Pennsylvania. Even though Pennsylvania already had a DOMA, legislators feared it would not be enough to stop the push for relationship recognition for LGBT couples.⁹³ Some began to look at legislative fixes to ensure that not only same-sex marriages, but also other types of relationship recognition did not occur in the Commonwealth.

Consequently, Pennsylvania House Representative Jerry Birmelin (R-Monroe, Pike & Wayne Counties), prepared fifty-one separate anti-LGBT amendments to an adoption bill.⁹⁴ These pieces of legislation attempted to accomplish a number of things including: prohibiting recognition of unmarried heterosexual or same-sex relationships for any legal purpose; banning adoption by all unmarried individuals; ending common law marriage; and prohibiting domestic partner benefits to state employees or anyone doing business with the state.⁹⁵ This package of legislation that reached far beyond same-sex marriage caused activists to form a new alliance: the Value All Families Coalition (“VAFC”).⁹⁶

By sweeping so broadly, the “Birmelin amendments” engendered their own defeat. For the first time in the state’s history, the LGBT community worked with its non-gay allies to halt legislation that primarily targeted LGBT rights. The VAFC was created and coordinated by the Center for Lesbian and Gay Civil Rights and the ACLU of Pennsylvania.⁹⁷ This newly formed coalition comprised LGBT organizations, children’s advocates, labor unions, and religious organizations, among others.⁹⁸

91. 798 N.E.2d 941.

92. See *supra* pt. I.

93. The Pennsylvania DOMA not only prohibits same-sex marriages, but also states that Pennsylvania will not recognize marriages from another state or country even if legally obtained. 23 Pa. Consol. Stat. Ann. § 1704.

94. Pa. H. 345, 2003-2004 Reg. Sess. (Mar. 15, 2004).

95. Bill Toland, *Republican Lawmaker Targets Gay Couples: Amendments Would Ban Same-Sex Benefits, Adoptions, Marriages*, Pittsburgh Post-Gazette A13 (Feb. 18, 2004).

96. Value All Families Coalition, <http://www.sparc-pa.org/vaf> (accessed Apr. 13, 2005). The coalition name was specifically chosen by the member organizations to send a number of messages, including that the term “all families” encompasses LGBT families and anti-LGBT opponents could not co-opt the word “family” to fight against LGBT families.

97. The executive director of the Center for Lesbian and Gay Civil Rights, Stacey Sobel, and the legislative director of the ACLU, Larry Frankel, started calling other organizations they thought would be interested in working against the amendments because of the amendment’s effect on their constituencies.

98. Other coalition members include AFSCME Locals 2186, 2187, 1723, and DC 47, Citizens for Consumer Justice, Clergy Leadership Network, Common Roads, Gay and Lesbian Community Center of Pittsburgh, Gay and Lesbian Lawyers of Philadelphia, Gertrude Stein Political Club of Greater Pittsburgh, GLSEN Pittsburgh, Human Rights Campaign, Imago Dei Metropolitan Community Church, Lansdowne Equality Action Project, Liberty City Democratic Club, Log Cabin Republicans of Philadelphia, Metropolitan Community Churches, Metropolitan Community Church of the Spirit, National Association of Social Workers, Pennsylvania Chapter, Northeastern Pennsylvania Rainbow Alliance, OutFront, Pennsylvania Diversity Network, Pennsylvania Freedom to Marry Coalition, Pennsylvania Gay and Lesbian Alliance, Pennsylvania NOW, Pennsylvania SEIU State Council, PERSAD Center, Inc., Parents and Friends of Lesbians and Gays (PFLAG) of Eastern Pennsylvania, PFLAG Philadelphia, PFLAG Pottsville, Philadelphia Citizens for Children and Youth, Philadelphia

The coalition worked to successfully prevent Rep. Birmelin from introducing the legislation. Coalition members and allies created a grassroots campaign against the Birmelin amendments. Children's advocates were particularly effective at educating legislators and the public of the harm that would be created by limiting who could adopt a child.⁹⁹ The coalition also succeeded in getting press coverage throughout the state against the legislation. In a short amount of time, the VAFC generated a significant number of constituent phone calls, letters, and emails asking legislators not to support the Birmelin amendments. Facing pressure from Republican legislators, who did not want to be forced to vote on controversial legislation that was opposed by some of their constituents, Rep. Birmelin withdrew the amendments and the adoption bill ran unamended. On the House floor, however, he said he would introduce similar legislation in the future.¹⁰⁰

When Rep. Birmelin, along with Representative Mark McNaughton (R-Dauphin County), offered new amendments in May 2004, they did not contain any of the anti-adoption language, but addressed all of the other issues raised in his first round of amendments.¹⁰¹ One amendment attempted to prohibit the recognition of any "spousal equivalent relationship" in the commonwealth including:

A relationship between two individuals of the same sex or different sexes which the individuals may believe is similar to marriage, regardless of what the relationship is called. The term includes a domestic partnership, life partnership, civil union, domestic union, reciprocal beneficiary relationship and cohabitation relationship.¹⁰²

The second amendment was introduced as a direct response to Governor Edward G. Rendell's granting domestic partner benefits to some state employees in a recent contract negotiation.¹⁰³ This amendment would have prevented the state or companies doing business with the state from giving benefits to any unmarried couples.¹⁰⁴

The VAFC went to work again to educate legislators about the consequences of the legislation, including the negative economic impact.¹⁰⁵ This

Coalition of Labor Union Women (CLUW), Philadelphia Family Pride, Rainbow Journal, SEIU/District 1199P, SeniorLAW Center, Soulforce, Statewide Pennsylvania Rights Coalition, Steel City Stonewall Democrats, Support Center for Child Advocates, Thomas Merton Center, United Pennsylvanians, Valley Free Press, Voices for a New Tomorrow, William Way LGBT Community Center, and Women's Law Project.

99. Barbara White Stack, *Anti-gay Adds to Adoption Bill Decried*, Pittsburgh Post-Gazette B20 (Mar. 12, 2004).

100. Pa. H. J., 2003-2004 Reg. Sess. 216-17 (2004).

101. Pa. H. J., 2003-2004 Reg. Sess. 948-57 (2004).

102. Pa. H. J., Amend. 1695, 2003-2004 Reg. Sess. 948 (2004) (amend. to Sen. 296 offered by Rep. McNaughton).

103. Amy Worden, *Stiffer Ban on Gay Vows Sought in Pa.*, Philadelphia Inquirer A1 (Mar. 12, 2004).

104. Pa. H. J., Amend. 1828, 2003-2004 Reg. Sess. 949 (2004) (amend. to Sen. 296 offered by Rep. Birmelin).

105. Pennsylvania is one of the slowest growing states in the country in jobs and population in the last census. See Pa. Econ. League, *Change in Population, 1992-2002*, <http://www.issuespa.net/scorecards/377/457/> (accessed Apr. 13, 2005). As a result, the legislature is somewhat more responsive to economic growth arguments.

legislation, they pointed out, would make Pennsylvania less attractive to employers who offered domestic partner benefits and would make it harder to attract and retain good employees for Pennsylvania's businesses. Additionally, the commonwealth's neighbors and regional competitors such as New Jersey, New York, and Maryland had more progressive non-discrimination laws that were likely to make Pennsylvania look regressive in the business world.¹⁰⁶ This is especially true when considering that more than eighty-two percent of Fortune 500 companies prohibit discrimination on the basis of sexual orientation and almost half of Fortune 500 companies offer domestic partner benefits.¹⁰⁷ Working closely with labor organizations, led by the Pennsylvania Service Employees International Union, the coalition attempted to convince legislators that this was bad legislation for Pennsylvania.

The coalition also worked to persuade legislators that a controversial vote on gay issues, when the state already had a DOMA law, was not something they wanted to hold before the November election. When SB 296 came up for a vote on the House floor, a procedural motion to table the legislation until November 8, after the election, was offered.¹⁰⁸ The motion passed 96 to 94 with twelve legislators excused.¹⁰⁹ Although the subject was not precisely the same, this vote was a dramatic turnaround from 1996, when only thirteen House members voted against the Pennsylvania DOMA.

The week of November 8 finally arrived with the coalition pressing legislators not to bring the bill up for a vote. Given the short amount of time left in the lame duck session, the bill was not likely to be considered by the Senate or signed by the Governor in any case. After much effort to halt the legislation, the amendments were withdrawn.

C. Legislators: "Don't Even Think about Getting Married in Pennsylvania"

One of the more unusual backlash actions in the country occurred in Pennsylvania in 2004. Robert Seneca and Stephen Stahl, a New Hope Pennsylvania couple of twenty-five years, were inspired by seeing same-sex marriages happening in other parts of the country. They applied to the Bucks County Register of Wills for a marriage license, and were promptly turned away. Stahl and Seneca were barraged with media questions afterwards, including whether they would file a lawsuit. The couple expressed their anger and

106. Out of the sixteen states that prohibit discrimination on the basis of sexual orientation or gender identity in the workplace, eight states are in the northeast or mid-Atlantic regions of the country. Human Rights Campaign, *Statewide Anti-Discrimination Laws & Policies*, www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=14821 (accessed April 13, 2005) (providing an updated map of state anti-LGBT discrimination). See e.g. Md. Ann. Code Art. 49B, § 5 (Supp. 2004); N.J. Stat. Ann. §§ 10:5-1 to 10:5-49 (2002); N.Y. Exec. Law §§ 296, 296-a (McKinney Supp. 2005); *Rentos v. OCE-Office Systems*, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. Dec. 23, 1996); *Maffei v. Kolaeton Industry, Inc.*, 626 N.Y.S.2d 391 (Sup. Ct. 1995).

107. Human Rights Campaign, *HRC Corporate Equality Index*, www.hrc.org/PrinterTemplate.cfm?Section=Corporate_Equality_Index&CONTENT (accessed Apr. 13, 2005).

108. See Pa. H. J., 2003-2004 Reg. Sess. 956 (2004).

109. *Id.* at 957.

frustration with the Pennsylvania DOMA and said they might look into a lawsuit.¹¹⁰

Two months after these events, the couple had taken no legal action. But opponents of same-sex marriage did: Twelve Pennsylvania House members and a Pennsylvania corporation, Creative Pultrusions, Inc. sued Seneca and Stahl in the Court of Common Pleas of Bucks County.¹¹¹ The plaintiffs sought a declaratory judgment action to declare the state's DOMA and marriage laws constitutional under the Pennsylvania and United States Constitutions.¹¹²

This suit shocked attorneys and advocates; citizens were sued by elected officials for merely expressing their displeasure with a law. If this suit were successful, it would set a horrific precedent that would reach well beyond LGBT issues. These legislators, once again, appeared to not care who got caught in the backlash.

Defendants' counsel¹¹³ filed preliminary objections asserting that the complaint should be dismissed because the plaintiffs lacked standing and failed to state a claim that was ripe for adjudication. The motion was granted. The court's decision stated that, "[w]hatever the Defendants' intentions are, their statements to the press, without more, do not, for purposes of deciding whether a controversy is 'ripe,' qualify as 'imminent.' To hold otherwise would set untenable precedent that posturing before the media equated to 'inevitable litigation.'"¹¹⁴ In dismissing the suit, the court also held that the plaintiffs lacked standing.¹¹⁵

The brazenness of these legislators and anti-LGBT legal advocates is not likely to stop after suits like this are lost; rather, they will continue to bring other "creative" attacks to LGBT relationship recognition issues as long as the backlash continues. And while this absurd episode highlights the danger anti-LGBT forces encounter when they reach too far, the backlash in Pennsylvania continues to play out as this article goes to press. Emboldened by the passage of the state constitutional amendments in the last few months, some legislators have begun talking about introducing an amendment to the Pennsylvania Constitution limiting marriage to the union of a man and a woman. Whether this effort will gain traction is yet unknown. But the specter of such an effort can immobilize the LGBT movement, causing advocates to focus on defensive strategies rather than on positively advancing the cause of equality.

110. Walter F. Naedele & Larry King, *Gay Couple Will Try to Wed in Bucks*, *Philadelphia Inquirer* B1 (Mar. 12, 2004).

111. *Egolf v. Seneca & Stahl*, No. 2004-03160-28-5. This litigation was supported and argued in court by the Alliance Defense Fund ("ADF"), an Arizona based anti-LGBT organization. ADF, *Pennsylvania DOMA Unaffected by Decision to Dismiss Legislator's Lawsuit*, <http://www.alliancedefensefund.org/news/default.aspx?mid=800&cid=2821> (accessed Apr. 13, 2005).

112. 23 Pa. Consol. Stat. Ann. § 1102 (2001).

113. The couple was represented by the Center for Lesbian and Gay Civil Rights, Schnader, Harrison, Segal & Lewis, LLP; the Women's Law Project, and the ACLU of Pennsylvania.

114. *Egolf*, slip op. at 6.

115. *Id.*

IV. BEYOND BACKLASH:
OBSERVATIONS AND POSSIBLE RESPONSES

Many in the LGBT community have understandably felt dispirited, even defeated, by recent setbacks. Some have suggested abandoning the push for marriage equality, at least for now.¹¹⁶ On the other side are those who feel that the movement must push past this backlash, which they regard as the last gasp of a defeated orthodoxy.¹¹⁷ A middle position, sketched out recently by the Human Rights Campaign (“HRC”), calls for a double-barreled approach: In the short term, advocate for specific pieces of legislation that confer the most important marriage benefits, such as social security death benefits for “spouses.” In the long term, gain full marriage equality.¹¹⁸

Of these three general philosophical responses, the HRC’s approach seems to stand the best practical chance of achieving success. Polls consistently show that most people favor granting specific rights to gay people and to same-sex couples. Added up, those rights could approach those conferred by marriage.¹¹⁹ Marriage itself, however, remains a much harder sell.¹²⁰ The two-step approach provides time to devise arguments and strategies that will result in full marriage equality while not neglecting the most serious injustices faced by gay people every day. It also gives LGBT people time to educate the general public so that they can catch up with the evolving law, and should thereby gradually lessen support for anti-LGBT legislation and ballot initiatives.

Assuming that a federal constitutional amendment banning same-sex marriage lacks sufficient support to become law, the HRC’s strategy may be wise on the national level. But the individual states face more complex choices. While LGBT advocates in Massachusetts deal with comparatively minor issues, such as whether corporations in the state will continue to grant health benefits to unmarried partners now that everyone has the right to marry,¹²¹ advocates in more

116. See e.g. Paula L. Ettelbrick & Julie Shapiro, *Are We on the Path to Liberation Now?: Same-Sex Marriage at Home and Abroad*, 2 Seattle J. Soc. Just. 475, 490 (2004); Zachary A. Kramer, *Exclusionary Equality and the Case for Same-Sex Families: A Reworking of Martha Fineman’s Revisited Family Law*, 2 Seattle J. Soc. Just. 505, 522-23 (2004).

117. See e.g. Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 Wm. & Mary L. Rev. 513, 601 (2004). This polar account leaves out those who emphasize the limited ability of marriage rights to deliver social justice to those most in need of it. To them, the fight for marriage equality is at best a distraction, and at worst an elitist exercise. See e.g. Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 L. & Inequality 1, 46-53 (2005); Craig Willse & Dean Spade, *Freedom in a Regulatory State?: Lawrence, Marriage and Biopolitics*, 11 Widener L. Rev. ___ (forthcoming 2005). In our view, these broader criticisms have value if seen as an exhortation to undertake parallel efforts to work for justice for the entire LGBT community. Most of the day-to-day work of the Center for Lesbian and Gay Civil Rights is about this struggle.

118. John M. Broder, *Groups Debate Slower Strategy on Gay Rights*, 154 N.Y. Times A1 (Dec. 9, 2004).

119. See Culhane, *supra* n. 17, at 775.

120. See *supra* nn. 33-36 and accompanying text.

121. For a good discussion of the many issues that Massachusetts same-sex marriage creates for employer benefit plans, see Judy Greenwald, *Advent of Gay Marriage Alters Massachusetts Partner Benefits*, 39 Bus. Ins. 4 (Jan. 17, 2005).

conservative states are dealing with initiatives that make the state constitutional bans on gay marriage seem tame. Adoption and contract rights, among others, are threatened by the tide of intolerance.¹²² As demonstrated in Part III, reactionary proposals have even had some traction in "blue states" such as Pennsylvania, although reactionary forces do the LGBT community a favor by overreaching.

Moreover, LGBT organizations may not have the luxury of choosing when, or even how, to conduct their battles. Individual litigants may place the marriage issue before a state's courts, even where the likelihood of success seems dim.¹²³ More often, one of the rights that marriage confers will be litigated separately by a couple on whom denial of that right imposes a hardship.¹²⁴ Further compounding the challenge faced, the legislature's sympathy with the LGBT community changes with each election cycle and, as demonstrated by the discussion of the recent hate crimes dust-up in Pennsylvania,¹²⁵ with significant news stories.

Given these complex and interlocking obstacles, it is evident that no one approach to same-sex marriage or to the broader movement for social justice can succeed. The brief observations and suggestions that follow underscore the complexity of the task ahead, while providing some optimism about the long-term results.

As the Pennsylvania experience demonstrates, the first task is to identify and cultivate allies beyond the LGBT community. While certain organizations, notably the ACLU, have been steadfast in their support, efforts must be made to forge broader partnerships. In the case of marriage, progressive religious groups can be tapped. Their message can provide a welcoming, even loving, counter to the intolerant screeds coming from the reactionary wing of the religiously motivated. As long as same-sex marriage alone (or some "virtual equivalent") is under attack, however, such coalitions will continue to be difficult to forge until more people are sympathetic to such unions.

Greater potential for alliance-building is found where opponents of same-sex marriage attempt to use this "wedge issue" to ram other extreme measures through legislatures. Coalitions formed by those potentially affected create a powerful lattice of engaged resistance. The VAFC in Pennsylvania was a nice example of how this cooperative effort can work. When the Birmelin amendments reached beyond the issue of same-sex marriage and threatened the ability of children to be raised in supportive and functional homes, they planted the seeds of their own defeat. Further, the dialogue that takes place during such battles can spill back over into the gay marriage debate and create progress: If children are the concern, and stable and loving homes are best for children, then

122. See *supra* n. 18 and accompanying text.

123. This has already happened in Florida. See *Gay Couples Drop Marriage Act Challenges*, S. Fla. Sun-Sentinel (Ft. Lauderdale) B7 (Jan. 26, 2005) (noting that attorney for the couples, having lost several legal challenges to same-sex marriage ban in the state, decided to "back off and let the gay rights organizations take over and try to mold public opinion").

124. See *e.g. infra* n. 128 and accompanying text (discussing wrongful death suit by surviving member of same-sex couple).

125. See *infra* pt. III(A).

allowing same-sex couples to marry seems *ipso facto* to be a child-friendly idea. Thus, even organizations not initially favorable to gay marriage might begin to rethink their positions.

The state (or local) level organizations needed to combat anti-gay initiatives can also be used in the related task of more broadly educating the public about the lives that gay people are actually leading. In fact, opponents of the same-sex marriage ban in Oregon were successful in just such an education project. Even though the state amendment passed, the vote was closer on election day than early polls had projected.¹²⁶ This “success within failure” also contains an important admonition not to overstate the breadth of defeat suffered during the last election. The problem, in part, has been insufficient time to do the kind of grassroots, door-to-door teaching that is so vital to the cause—not only of gay marriage, but of LGBT equality more generally.

Indeed, some of the most important work toward marriage equality will continue to take place in contexts other than marriage itself. Gay people and couples who have compelling practical needs will push the law forward in ways that, by accretion, will come to approximate at least the tangible economic benefits of marriage.¹²⁷ Many of those advances were discussed earlier; one example will suffice here. When the same-sex spouse of a man who died because of the alleged malpractice of a hospital looked to New York’s wrongful death law for recovery, he ran into an archaic impediment: standing to sue is conferred only on specific classes of people (a small subset of those covered by the law of intestacy).¹²⁸ The challenge for the plaintiff was to convince the trial court that he should qualify as a “spouse” within the meaning of the statute. The court allowed the claim to proceed, looking to a number of factors, including: (1) the couple’s Vermont civil union;¹²⁹ (2) the willingness of New York courts to read laws expansively to give legal standing to surviving members of same-sex couples in other contexts,¹³⁰ and (3) the New York legislature’s generally progressive view of gay people.¹³¹ Thus, one important right previously restricted to married couples opened up to same-sex couples. The decision also recognized, albeit in a limited way, the intimate life that the couple had been leading before death.

Such decisions should be publicized and built upon. Not only do they advance the cause of equality, but they also place real lives before the public in a

126. See Ltr. from Natl. Gay & Lesbian Task Force to Supporters (Feb. 2005) (copy on file with *Tulsa Law Review*).

127. This accomplishment, even if it becomes complete, will not be the same as “marriage,” a term that is jealously guarded. True equality demands nothing short of marriage itself. See *Op. of the JJ. to the Sen.*, 802 N.E.2d 565, 569 (Mass. 2004) (rejecting proposed civil union legislation, and requiring full marriage equality for same-sex couples, the Massachusetts Supreme Judicial Court stated: “The history of our nation has demonstrated that separate is seldom, if ever, equal.”).

128. *Langan*, 765 N.Y.S.2d 411. The statute in question is N.Y. EPTL § 5-4.4(a) (McKinney 2004). This statute limits standing to spouses.

129. *Langan*, 765 N.Y.S.2d at 418.

130. *Id.* at 415 (citing *Braschi*, 543 N.E.2d 49 (covering rent control laws)).

131. *Id.* at 416 (examples included adoption, anti-discrimination, and eligibility for certain state-conferred death benefits).

way that arouses natural sympathy, and that (for many) appeals to basic notions of justice. Of course, lawsuits and other widely public affirmations of gay lives are just a small part of the story. Gay people help themselves immeasurably, in the long run, by living open lives. Over time, the constant exposure to gay neighbors, friends, and family will normalize "gayness" to the point that the reactionary forces will lose all forward momentum. Thus, LGBT organizations must not neglect the important support work needed to enable these lives to be fully lived. This work includes advocacy, lawsuits, and education. A lesbian who does not have to fear losing her job because of her sexual orientation is more likely to be out at work; a transgendered person who has confidence that the police will protect him against violence—because of training initiated at the behest of a LGBT organization—may be more apt to attend a public rally.

V. CONCLUSION

This timely symposium on backlash has identified a real and troubling development for the LGBT community. We can now say in hindsight that it should have been expected. It is also fair to say that the community has much work to do. Attitudes about marriage are deeply inhumed and will change only with hard work over time. The numbingly difficult process of advancing even the most basic equality in Pennsylvania is a sobering reminder of the hard slog that lies ahead.

The good news is that we will prevail. No movement grounded in such basic precepts of justice and fairness as marriage equality can long be held back, especially if gay people resist the temptation to shrink from the battle when opposition stiffens. Our response must be precisely the opposite: To be more insistent, more visible, and more confident.

