

# LOCAL SEXUAL ORIENTATION NON-DISCRIMINATION LAWS: A MEANS OF COMMUNITY EMPOWERMENT

## INTRODUCTION

Certain segments of society actively discriminate against and advocate discrimination against gay, lesbian, bisexual, and transgender people. These groups have thus far prevailed in their efforts to halt federal legislation that would prohibit discrimination on the basis of sexual orientation. What hope do local governments with limited resources and overburdened agencies have in successfully combating such oppression?

This article makes three basic assumptions. First, it assumes that differences in sexual orientation occur naturally in the population. It also assumes that a diverse set of viewpoints and experiences (including sexual orientation) contributes to a healthy society. Third, it assumes that government should discourage discrimination on the basis of sexual orientation through legislation. To illustrate why sexual orientation non-discrimination laws are desperately needed, Part I of this note exposes some of the conditions of oppression. Keeping these conditions in mind, Part II then tells the story of a community that turned to local legislation to combat sexual orientation discrimination. Finally, Part III evaluates the effectiveness of and benefits associated with local non-discrimination legislation.

## I. EXPOSING THE OPPRESSION

Gay, lesbian, bisexual, and transgender people in our society are oppressed. This oppression is not limited to ancient, historical manifestations. Rather, as illustrated by the events of 1998 and 1999 described below, it is an ongoing concern.

In 1998 and 1999, advertisements promoting the “conversion” of gays and lesbians to heterosexuality ran on television and in newspapers nationwide. Funded by the Family Research Council, they advocated and celebrated the conversion of gays and lesbians to heterosexuality.<sup>1</sup> The Council explained that it ran the ads to promote the “hope and healing” of homosexuals.<sup>2</sup> However, spokespeople for the gay, lesbian, bisexual, and transgender community asserted that the ads denied gay,

<sup>1</sup> Bruce Sullivan, *Television Ads Invite Gays To Change*, CONSERVATIVE NEWS SERVICE IN-DEPTH (Oct. 8, 1998), <http://www.cnsnews.com>.

<sup>2</sup> *Id.*

lesbian, bisexual and transgender people “their identity and humanity,”<sup>3</sup> and were “meanspirited . . . deceptive [and] damaging.”<sup>4</sup>

In February 1999, the nation heard that Tinky Winky, the Teletubby entertaining the nation’s two-year-olds, was gay.<sup>5</sup> Reverend Jerry Falwell’s *National Liberty Journal* concluded that the evidence — a red handbag, a purple coat, and a triangle headpiece — was conclusive.<sup>6</sup> “Role-modeling a gay life style,” declared Falwell, “is damaging to the moral lives of children.”<sup>7</sup> Tinky Winky was “intended” to be a gay role model and parents were so warned.<sup>8</sup> Public proclamations that gays and lesbians are damaging and that they could and *should* be heterosexual foster intolerance that has economic, emotional, and social costs.

However, even Falwell has acknowledged that gay, lesbian, bisexual, and transgender people face intense hatred and animosity.<sup>9</sup> At a recent “anti-violence summit” hosted by Falwell for 200 of his followers and 200 homosexual-rights advocates, Falwell spoke of the need to find common ground to oppose violence targeted at gays, lesbians, and Christians.<sup>10</sup> The summit was held in response to the position taken by groups like Fred Phelps’s Westboro Baptist Church.<sup>11</sup> Phelps and his followers believe that “God hates fags”<sup>12</sup> and that this “is a profound theological statement, which the world needs to hear more than it needs oxygen, water and bread.”<sup>13</sup> His website features a “countdown” of the number of days that Matthew Shepard, a gay man murdered in 1998, has been in hell.<sup>14</sup> While it is disturbing merely to face evidence of such blatant hatred, it is even more disturbing to note that Phelps’s site had 1,132,520 hits as of this writing.<sup>15</sup>

In addition to facing the anti-gay events and organizations that receive national coverage in the media, gay, lesbian, bisexual, and trans-

<sup>3</sup> Media Statement, GLAAD, Community Leaders Respond to Announcement of ‘Ex-Gay’ Television Ad Campaign Launch (May 7, 1999) (quoting Equal Partners in Faith), <http://www.glaad.org/glaad/press/index.99.html>.

<sup>4</sup> *Id.* (quoting Joan M. Garry, Executive Director GLAAD).

<sup>5</sup> *Parents Alert . . . Parents Alert*, NATIONAL LIBERTY JOURNAL ONLINE, Feb. 1999, at <http://www.liberty.edu/chancellor/nlj/feb99/polliotics2.htm>.

<sup>6</sup> *Id.*

<sup>7</sup> Press Release, Falwell.com, Children’s Television Programming, Feb. 10, 1999, at <http://www.falwell.com/press%20statements/prsarchives/prstubb.htm>.

<sup>8</sup> *Id.*

<sup>9</sup> Jerry Falwell, *Inside the Anti-violence Forum*, WORLD NET DAILY, Nov. 3, 1999, at [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=17743](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=17743).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> The Westboro Baptist Church Home Page, at <http://www.godhatesfags.com> (last visited Dec. 16, 1999).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

gender people also confront discrimination and harassment in their everyday lives that varies in degree from name-calling<sup>16</sup> to assault and murder.<sup>17</sup> Yet courts have often characterized gay rights as unnecessary special rights. In 1996, Justice Scalia noted that “those who engage in homosexual conduct . . . possess political power much greater than their numbers both locally and statewide, [that homosexuals] enjoyed enormous influence in American media and politics,”<sup>18</sup> and that citizens are “entitled to be hostile toward homosexual conduct.”<sup>19</sup>

This kind of legal discourse is oppressive to gay, lesbian, bisexual, and transgender people. It validates the actions of those who fire or refuse to hire them, those who refuse to rent or sell housing to them, and those who otherwise discriminate against them. Fearing such discrimination, many gay, lesbian, bisexual, and transgender people do not “come out” to their employers, their co-workers, and even their friends and family. The existing equal protection law perpetuates this tendency because it seeks to “eradicate difference through three strategies — converting, passing or covering.”<sup>20</sup> Like the demands to convert and to pass, the demand to “cover” one’s identity, to stay in the closet, oppresses gay, lesbian, bisexual, and transgender people. “The symbol of the closet . . . has become the primary symbol for a certain kind of identity harm — the harm of being forced to negate one’s identity.”<sup>21</sup> Most clearly evident in the cases of hate crimes and firings, the harm perpetrated by this oppression is also experienced every day by those gay, lesbian, bisexual, and transgender people who continue to live in the closet because they fear violence, job loss and general rejection from society. I will argue in Part III that local sexual orientation non-discrimination legislation is an appropriate means to combat this oppression.

<sup>16</sup> This is a reference to personal experience.

<sup>17</sup> Some of the most publicized recent murders of gay men include those of Matthew Shepard on October 12, 1998, Billy Jack Gaither on February 19, 1999, and Barry Winchell in July of 1999.

<sup>18</sup> *Romer v. Evans*, 517 U.S. 620, 645–46, 652 (1996) (Scalia, J., dissenting) (overturning Colorado’s constitutional amendment which would have banned all sexual orientation non-discrimination laws).

<sup>19</sup> *Id.* at 644. Although these remarks come from Justice Scalia’s dissenting opinion in *Romer v. Evans*, they echo his earlier majority opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986) (affirming the constitutionality of Georgia’s sodomy law and stating that the privacy right does not include the narrowly defined right to commit consensual homosexual sodomy).

<sup>20</sup> Kenji Yoshino, *Covering*, Paper presented at the SELA CONFERENCE 1 (June 17, 1999), available at <http://www.yale.edu/lawweb/lawfac/fiss/yoshie/pdf>.

<sup>21</sup> *Id.* at 12.

## II. LOCAL LAW 6, TOMPKINS COUNTY FAIR PRACTICES ORDINANCE<sup>22</sup>

During the early 1980s, the City of Ithaca, New York adopted ordinances that prohibited discrimination on the basis of "sexual preference or affection" in housing.<sup>23</sup> In 1984, the City expanded the prohibition to any act which does or would "result in unequal treatment or separation or segregation . . . or denies, prevents, limits or otherwise adversely affects," an individual because of sexual orientation.<sup>24</sup> Then, in 1991, a few local attorneys and organizers began a quiet effort to pass an amendment that would add sexual orientation to the protected classes in the existing County Fair Practices Law. Doing so would create a cause of action for persons discriminated against because of sexual orientation.<sup>25</sup> This effort did not stay quiet. On July 9, 1991, over 300 people attended the County Board meeting held to discuss the proposed amendment to the County Fair Practices Law.<sup>26</sup> Opponents of the amendment voiced concerns that the "homosexual act"<sup>27</sup> would contribute to "the possible destruction of the family unit and [that it would have a] negative influence on children."<sup>28</sup> Some County Board members said they opposed the amendment because the issue belonged at the state level.<sup>29</sup>

The amendment was defeated by a single vote. Afterwards, opponents lined the hallway clapping their hands and chanting "family, family" as people left the building. The defeated proponents countered with the familiar mantra: "We're here. We're queer. Get used to it."<sup>30</sup>

Outraged by the defeat, the gay, lesbian, bisexual, and transgender community organized a town meeting attended by representatives from Act Up, Queer Nation, and the Ithaca Lesbian, Gay and Bisexual Task Force. The attendees formed committees that would lobby the County Board members, work on the amendment, write and circulate a petition,

<sup>22</sup> TOMPKINS COUNTY, N.Y., FAIR PRACTICES ORDINANCE, Local Law 6 (1991). This narrative is compiled from an interview with Roey Thorpe and articles from Ithaca's weekly newspaper. Amy Kweskin, *Rights Law Denied*, ITHACA TIMES, July 11, 1991, at 5; David Takacs and Jae Wise, *Fundamental Differences*, ITHACA TIMES, Dec. 5, 1991, at 1 [hereinafter Takacs & Wise, *Fundamental Differences*]; David Takacs & Jae Wise, *We're Here, We're Queer and We Deserve Equal Protection and Respect*, ITHACA TIMES, Nov. 21, 1991, at 1 [hereinafter Takacs & Wise, *We're Here, We're Queer*]; Interview with Roey Thorpe, Field Organizer, Empire State Pride Agenda, in Ithaca, N.Y. (Dec. 1, 1999).

<sup>23</sup> CITY OF ITHACA, N.Y., FAIR HOUSING art. I, § 215-4 (1980).

<sup>24</sup> CITY OF ITHACA, N.Y., ANTI-DISCRIMINATION, art. II, § 215-8. (1984).

<sup>25</sup> The amendment eventually was passed, producing the current law which includes sexual orientation as a protected class. TOMPKINS COUNTY, N.Y., FAIR PRACTICES ORDINANCE, Local Law 6 (1991).

<sup>26</sup> Kweskin, *supra* note 22, at 5.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Interview with Roey Thorpe, *supra* note 22.

rally support from local businesses, and organize boycotts. After a massive effort, organizers reintroduced the amendment in December 1991. This time they expected success. In order to secure the needed votes, the amendment's supporters made compromises as to the remedies available in the proposed legislation. Rather than imposing fines or penalties, as initially contemplated, the law would instead focus the efforts of the Tompkins County Human Rights Commission on the investigation of complaints and on conciliation.<sup>31</sup>

The gay community's efforts to reintroduce the legislation sparked a heated community debate. During the months of organizing preceding the reintroduction of the amendment local papers often published letters on both sides of the controversy. In November 1991, a gay couple authored a feature article in which they gave their very personal views on sexual orientation discrimination and the oppression of the closet.<sup>32</sup>

The County Board Meeting on December 2, 1991 was filled to capacity with 650 people attending and more turned away. With a row of tables separating the amendment's opponents from its proponents, the factions were segregated like the bride's and the groom's parties at a wedding.<sup>33</sup> Opponents argued that, if passed, the law would infringe on their duty and right as Christians to discriminate, that it was traditional and appropriate to condemn homosexuality, and that "dark forces" threatened the family and the very fabric of society.<sup>34</sup> Proponents spoke of Christianity's obligation to include rather than exclude, of violence and other harms that come from discrimination, and of the need to fight intolerance.<sup>35</sup> The final vote was 9-6 in favor of passage.<sup>36</sup> The amendment's supporters attributed their success to the compromises they had made as to remedies, and to the support of small businesses in the largely conservative communities outside of Ithaca who said they had no objections to hiring gay or lesbian employees.<sup>37</sup>

Since 1991, the Tompkins County Human Rights Commission has completed the investigation of seven complaints under Local Law 6 and has four cases currently under investigation.<sup>38</sup> Recently, a candidate for the County Board told members of the gay, lesbian, bisexual, and transgender community that while she would not have supported the law in

<sup>31</sup> See TOMPKINS COUNTY, N.Y., FAIR PRACTICES ORDINANCE, Local Law 6, § 5(h) (1991).

<sup>32</sup> Takacs & Wise, *We're Here, We're Queer*, *supra* note 22.

<sup>33</sup> Takacs & Wise, *Fundamental Differences*, *supra* note 22.

<sup>34</sup> *Id.* at 5.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Interview with Roey Thorpe, *supra* note 22.

<sup>38</sup> Interview with Gen Smith, paralegal, Tompkins County Human Rights Comm., Ithaca, N.Y. (Dec. 15, 1999). These cases are discussed further in part three.

1991, she would support it now after witnessing its low costs and its positive effects.<sup>39</sup>

Ithaca area residents generally pride themselves on belonging to a liberal and enlightened community. However, neither a majority of liberals nor a large gay, lesbian, bisexual, and transgender community is necessary to realize the benefits of an effort to pass a local sexual orientation non-discrimination law. The goals of consciousness raising and community organizing, discussed in Part III, are two important reasons why an effort in a conservative community, even if not ultimately successful, is worthwhile. Indeed, communities with a high incidence of sexual orientation discrimination would perhaps derive the most benefit from such a campaign.

### III. EVALUATION OF LOCAL LEGISLATION

#### A. LIMITS OF LAW IN GENERAL

Martha Fineman, a feminist legal theorist, has said: "While law can reflect, and even facilitate, social change, law can seldom, if ever, initiate it."<sup>40</sup> Because of these limits, Fineman asserts that reform efforts must be politically rather than legally focused.<sup>41</sup> I concede the limits of the law as a venue for social change. Law is mainly a conservative discipline, generally reflecting majority values. However, one must not ignore the power of the law.

The best feminist legal scholarship is about law in its broadest form, as a manifestation of power in society, and recognizes no division between law and power . . . . Law is found in the discourse used in everyday life. Law is evident in the beliefs and assumptions we hold about the world in which we live and in the norms and values we cherish.<sup>42</sup>

Civil rights movements have utilized the power of law to shape public opinion time and time again. Obviously, a legal approach has not totally eradicated discrimination on the basis of race and gender. Yet, intolerance of such discrimination has certainly become more widespread since the adoption of civil rights laws. The effort of a community to enact legislation that would prohibit discrimination on the basis of sexual orientation constitutes a political effort to seize some of this legal power.

#### B. LEGISLATING MORALITY

The question of whether the government should legislate morality is intimately related to the passage of sexual orientation non-discrimination

<sup>39</sup> Interview with Roey Thorpe, *supra* note 22.

<sup>40</sup> Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 33 (1990).

<sup>41</sup> *Id.* at 32.

<sup>42</sup> *Id.* at 34.

laws. Significantly, this question is easily manipulated when addressing laws about sexual orientation. Proponents of sodomy laws would have the government policing the bedrooms of homosexuals, actively enforcing morality for the good of society. Ironically, opponents of civil rights legislation prohibiting discrimination on the basis of sexual orientation — often the same folk — argue that government should not interfere with an individual's moral decisions.<sup>43</sup> Non-discrimination laws do not reflect the morality of those who feel they must discriminate against gay, lesbian, bisexual, and transgender people because of their religious beliefs.<sup>44</sup> They claim that a non-discrimination law would infringe upon their freedom.

Yet, prohibiting behavior deemed unacceptable or immoral is precisely what law does. Our incest and bigamy laws determine who may marry based on moral judgments that may not accommodate what consenting adults think is best or moral for them.<sup>45</sup> Law limits one's freedom to act in ways that would cause harm to others or to society. But which harms do we want to prevent, and whose morality do we want to reflect? Sexual orientation non-discrimination legislation would simply extend the protections already available to members of protected classes — such as race and gender — to sexual orientation. There are already eleven states and numerous municipalities that prohibit discrimination on the basis of sexual orientation.<sup>46</sup>

### C. CRITIQUE OF LEGISLATION AT THE LOCAL LEVEL

Concerns about the desirability of local legislation invariably include the question of whether local governments have the authority to enact human rights legislation.<sup>47</sup> Where state government has reserved human rights legislation to itself, efforts are obviously better aimed at the state legislature. However, lobbying local governments is clearly appro-

<sup>43</sup> Cf. Jean Bethke Elshtain, *Law and The Moral Life*, 11 YALE J.L. & HUMAN. 383 (1999).

<sup>44</sup> See Jerry Falwell, *Speaking the Truth In Love*, NLJ ONLINE, Oct. 1999, at <http://www.nljonline.com/October 1999/publisherspage4/htm> ("God's servant must not compromise his or her biblical convictions."); see also Takacs & Wise, *Fundamental Differences*, *supra* note 22, at 5 (quoting Barbara Phelps, an opponent of Tompkins County Local Law 6, as saying: "To adequately live my Christian life, I need to be discriminating.").

<sup>45</sup> See N.Y. PENAL LAW § 255.25 (McKinney 1999) (incest); N.Y. PENAL LAW § 255.15 (McKinney 1999) (bigamy).

<sup>46</sup> These states include California, Connecticut, Hawaii, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin. Empire State Pride Agenda, *Frequently Asked Questions*, at <http://www.prideagenda.org/briefingpackets/sonda/sonda.html> (last visited Feb. 21, 2001).

<sup>47</sup> See generally Chad A. Readler, *Local Government Anti-Discrimination Laws: Do They Make a Difference*, 31 U. MICH. J.L. REFORM 777, 783–87 (1998) (contending that local regulations do not help employees and, in fact, have only minimal effect on discrimination).

priate in states that have either upheld or not spoken on the issue of local legislation.

Another critique of local legislation is that it is ineffective.<sup>48</sup> While it is true that few sexual orientation cases are brought to local agencies, it does not follow that local non-discrimination laws are therefore ineffective. This critique presumes that the objective of these laws is to bring cases and to get damage awards. To begin with, in a community that has mustered the initiative to pass such legislation one might assume that fewer cases exist because of pre-existing progressive community norms. Yet, even conceding the low number of suits brought and even fewer wins, assessment of a particular law's success or failure must also take into account the objectives of the law. What do we wish to accomplish with this legislation?

#### D. CONVENTIONAL OBJECTIVES

Non-discrimination laws have two conventional objectives. The first, reparation, focuses on the harm done to the individual victims of discrimination. Because the objective is to compensate the harmed party, many non-discrimination laws offer a restitution remedy. For example, a person discharged from employment for an illegal discriminatory reason is usually entitled to reinstatement or monetary damages for lost wages.<sup>49</sup> He or she may also receive the cost of seeking new employment.<sup>50</sup>

Deterrence, the second objective, focuses on the individuals or the organization that discriminates. The objective is to penalize the discriminatory behavior to the extent that it no longer becomes a reasonable option.<sup>51</sup>

In Tompkins County, only one case has been taken through the entire process of investigation, attempted and failed conciliation, determination of probable cause, and issuance of a right to sue letter.

<sup>48</sup> *Id.* at 778.

<sup>49</sup> 42 U.S.C. § 2000e-5(g)(1) (2000) provides in relevant part:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

*Id.*

<sup>50</sup> *Id.*

<sup>51</sup> 42 U.S.C. § 1981(a)(1) (2000) (providing that "the complaining party may recover compensatory and punitive damages" in cases of intentional discrimination in employment).



Ultimately, the case was dismissed for an untimely complaint.<sup>52</sup> Tompkins County Local Law 6 would fail miserably if the measure of success was the number of cases won in court. Yet, Local Law 6 has had a variety of effects that bear additional consideration.

#### E. BARGAINING TOOLS

First, the threat of prosecution under local non-discrimination laws not only provides incentive to engage in conciliation, but it also potentially deters discrimination in the first place. For example, in Tompkins County, at least three of the cases that have been brought under Local Law 6 have resulted in conciliation. In one case, the mere filing of a claim against a local health spa resulted in the extension of membership benefits to same sex couples.<sup>53</sup> Another case, brought in 1994, involved an Ithaca College policy regarding resident directors. The twelve complainants alleged that the College policy restricting the use of on-campus housing for residential directors to legally married couples violated Local Law 6 because it discriminated against lesbian and gay couples.<sup>54</sup> Seven months after the complainants filed the claim, the Human Rights Commission concluded its investigation by finding probable cause that the policy was illegally discriminatory.<sup>55</sup> Although throughout the investigation Ithaca College had consistently refused to make any concessions, it ultimately agreed to change the policy after the Commission's findings. Neither party saw the inside of a courtroom.<sup>56</sup>

These cases illustrate that employers and others who would discriminate, whether consciously or not, will often change course after their actions are revealed as potentially unlawful. The law's mere existence encourages them to at least attempt conciliation when they would have otherwise acted unilaterally. Indeed, the very existence of the law forces the potential discriminator to consider the point of view of the gay, lesbian, bisexual or transgender person against whom he or she intends to discriminate. Will they file a claim? Will there be publicity? Will they win? Is it worth it? While such a law clearly has deterrence value, more importantly, it encourages consideration of the individual.

#### F. ACTIVATING THE COMMUNITY

A local campaign for the passage of non-discrimination legislation may also benefit the community by promoting the political coordination

<sup>52</sup> Interview with Gen Smith, *supra* note 38.

<sup>53</sup> *Id.*

<sup>54</sup> Simeon Moss & Jay Tokasz, *IC Cited For Rights Violation*, ITHACA JOURNAL, Jan. 27, 1994, at 1A.

<sup>55</sup> *Id.*

<sup>56</sup> Jay Tokasz, *IC Relents on Staff Housing Policy*, ITHACA JOURNAL, Apr. 21, 1994, at 1A.

and consolidation of disparate community groups. It is when communities come together that things happen.<sup>57</sup>

As a result of coordination and consolidation in 1991, the gay, lesbian, bisexual, and transgender community in Tompkins County has a greater chance of political success in the future. A coalition was developed that brought together radical groups such as Act Up and Queer Nation, with religious organizations seeking to show an alternative Christian approach of inclusion. The Ithaca Lesbian, Gay and Bisexual Task Force supported the complainants in the Ithaca College resident director case with "legal counsel, research, background information, political resources and people power,"<sup>58</sup> and continues to support the community by publishing a newsletter, by organizing events, and by simply being visible.

Despite Ithaca's relatively small size, it is well marked on the gay, lesbian, bisexual, and transgender political landscape. Ithaca has two members on the board of representatives for the Empire State Pride Agenda (ESPA),<sup>59</sup> a statewide lesbian and gay political organization. Ithaca also has one of only three field organizers for ESPA outside of the New York City metro area. People choose to live in Ithaca and Tompkins County today because of the existence of this law and because of what it says about this community.<sup>60</sup>

Furthermore, the message sent by the 1991 campaign to pass Local Law 6 will likely stay with the community at large. The sensitization of Tompkins County Board members and voters to the harms of discrimination and the fear that keeps gay, lesbian, bisexual, and transgender people in the closet has diluted stereotypes and has encouraged the development of tolerance and acceptance.

#### G. GRASS ROOTS ORGANIZING BUILDING TOWARD STATE LAWS

An additional benefit of organization at the local level is that it provides a platform for agenda lobbying at the state level. When the Empire State Pride Agenda wants to lobby the state legislators about passing

<sup>57</sup> Feminist Mary Joe Frug believes that this is one of the strengths of Catharine MacKinnon's and Andrea Dworkin's anti-pornography campaigns in the 1980s. MARY JOE FRUG, *POSTMODERN LEGAL FEMINISM* 145-47 (1992). According to Frug, "concentrating so much effort, energy, and expertise, and even money on the . . . issue simplified and thereby facilitated . . . political organizing . . . . Political success is predictably correlated with coordinating and consolidating efforts." *Id.* at 149-50.

<sup>58</sup> Press Release, Robin McColley, Ithaca College Settles Employee Discrimination Case, (Apr. 20, 1994) (on file with Cornell Journal of Law and Public Policy).

<sup>59</sup> Empire State Pride Agenda Board of Directors, at <http://www.prideagenda.org/pride/board.html> (last visited Dec. 20, 1999); Pride Agenda Staff, at <http://www.prideagenda.org/pride/staff.html> (last visited Dec. 20, 1999).

<sup>60</sup> Interview with Roey Thorpe, *supra* note 22. Personally, I considered and weighed heavily the local law in my decision to come to Cornell.

sexual orientation non-discrimination law for New York it knows whom to call in Tompkins County. While political organizing is rarely simple, it is much easier when you do not have to start from scratch. In addition, state legislators representing areas that already have local ordinances may be more likely to support statewide legislation prohibiting discrimination on the basis of sexual orientation.<sup>61</sup>

#### H. AGENCY

Finally, one of the harms produced by discrimination and oppression is the need to hide one's orientation and "negate one's identity"<sup>62</sup> for fear of rejection, discrimination, and violence. Laws like Local Law 6 foster agency in gay, lesbian, bisexual, and transgender people by reducing fear and enabling "coming out."

According to Catherine MacKinnon's dominance theory, the oppression and subjugation of women results in the complete domination of females by males, the objectification of women, and the erasure of women as people.<sup>63</sup> Similarly, the closet effectively erases the personhood of gays, lesbians, bisexuals, and transgenders. One's existence as an individual, at least as a sexual individual, is obliterated by the closet. Gay or lesbian people who deny their orientation and their sexual relationships because of fear are denied their ability to express themselves fully.

Yet, as MacKinnon's critics have observed, it is not possible to reconcile a theory of complete erasure and total victimization with the activism and resistance exhibited by oppressed people.<sup>64</sup> Gay, lesbian, bisexual and transgender people fight erasure all the time. Our rainbows, triangles and parades combat the erasure attempted by the hegemonic construction of heterosexuality. If invisibility equals death, then visibility equals life, and in this case, empowerment.

While gay, lesbian, bisexual, and transgender people may be oppressed, we still have agency. Thus, although gay, lesbian, bisexual, and transgender people cannot act as "paradigmatic legal subject[s]" with total autonomy because of the constrained choices available,<sup>65</sup> we can act within these constraints to affect what Kathryn Abrams calls "self-definition" and "self-direction."<sup>66</sup>

The coming out process is but one example of self-definition. The first step in coming out is coming out to oneself, becoming aware of and

<sup>61</sup> *Id.*

<sup>62</sup> Yoshino, *supra* note 20, at 12.

<sup>63</sup> CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 115 (1989).

<sup>64</sup> See generally Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

<sup>65</sup> Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 807 (1999).

<sup>66</sup> *Id.* at 824.

acknowledging one's sexuality.<sup>67</sup> This has proven difficult for gay, lesbian, and bisexual people because heterosexuality is the norm and homosexuality is considered deviant. Laws that prohibit discrimination on the basis of sexual orientation, and the resulting public awareness and compliance with such laws, challenge that construct and promote the agency necessary for self-definition.

Gay, lesbian, bisexual, and transgender people exhibit "resistant self-direction" when they come out in the workplace, and seek equal treatment, whether by placing a picture of a partner on their desks or by directly discussing their orientation and concerns with their employers.<sup>68</sup> Again, agency is fostered by the protection of non-discrimination laws. The gay, lesbian, bisexual, and transgender community exhibits "transformative self-direction" when it acts collectively to resist discrimination and oppression by campaigning for sexual orientation non-discrimination laws.<sup>69</sup> This form of agency alters the institutions and understandings that have operated to erase gay, lesbian, bisexual, and transgender people.<sup>70</sup>

### CONCLUSION

In order to assess the desirability and effectiveness of local sexual orientation non-discrimination legislation one must consider all of the possible objectives for and benefits of such a law. If the number of claims and monetary awards measure success, then local legislation rates poorly. However, the view is much brighter if one considers the political, organizational, and other long-term positive effects that accrue from a successful (or even a failed) effort to enact local legislation. Not only is there is an appreciable increase in bargaining power and community consideration of gay, lesbian, bisexual, and transgender viewpoints, but there can also be a potential grass roots effect on higher levels of government. Finally, the effort to enact local non-discrimination laws promotes empowerment and agency. Seen in this light, local sexual orientation non-discrimination laws are a viable means by which the gay, lesbian, bisexual, and transgender community may accomplish its goals.

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<sup>67</sup> CHARLES ZASTROW & KAREN K. KIRST-ASHMAN, UNDERSTANDING HUMAN BEHAVIOR AND THE SOCIAL ENVIRONMENT 554 (1994).

<sup>68</sup> Harris, *supra* note 64.

<sup>69</sup> *Id.* at 836-37.

<sup>70</sup> *Id.*

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