

ENDNOTES

- ¹ Both the 1990 and 2000 Census questionnaires asked people sharing a household to check a category that described their relationship. Five categories were offered for people who are “not related,” including “unmarried partner.” The questionnaires also asked respondents to break down their households by sex, which enabled a calculation to be done of same-sex households. The U.S. Census Bureau appended a Technical Note to the same-sex partner data gathered for the 2000 Census indicating that comparisons between the 1990 Census and the 2000 Census may be misleading due to same-sex couples identifying each other as “spouses” and as “married” instead of “unmarried partner.” In its Preliminary Analysis of 2000 United States Census Data report entitled *Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households (August 2001)*, the Human Rights Campaign reported that there were 601,209 total gay and lesbian families accounted for in the 2000 U.S. Census, a 314% increase over the 1990 census count. HRC estimates that the 2000 U.S. Census count of gay and lesbian families could be undercounted by as much as 62%.
- ² Robin Fields, “Unwed partners become a common household unit,” *Albany Times Union*, August 20, 2001.
- ³ Lisa Keen, “Census shows dramatic surge,” *The Washington Blade*, January 25, 2002.
- ⁴ *Inside-OUT: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public’s Views on Issues and Policies Related to Sexual Orientation*, The Henry J. Kaiser Family Foundation, November 2001.
- ⁵ Black Pride Survey, the Policy Institute of the National Gay and Lesbian Task Force, March 2002.
- ⁶ “Gay Poll: Let My People Marry,” *Gay City News*, June 7, 2002.
- ⁷ Public opinion polls:
 Human Rights Campaign: *Gay & Lesbian Families and the Boy Scouts’ Policy*, conducted by Peter D. Hart Research Associates, June 2001.
 The Henry J. Kaiser Family Foundation, *Inside-OUT: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public’s Views on Issues and Policies Related to Sexual Orientation*, November 2001.
 The Gay and Lesbian Victory Foundation: *Focus Groups and Survey Research in the African American and Latino Communities*, conducted by Gutierrez and Associates and The Feldman Group, Inc., Fall 2001.
 ABCNews.com, April 2002.
 Hamilton College, *Gay Issues Poll*, conducted in collaboration with Zogby International, August 2001.
 We are not aware of any polls that measure the public’s views specifically on transgender relationship and family issues, although the Human Rights Campaign conducted a survey, *Public Perceptions of Transgender People (August 2002)*, on transgender discrimination in general.
- ⁸ This piece was written by Ross Levi, Esq., Legislative Counsel, Empire State Pride Agenda; J.D., Brooklyn Law School, 1997; B.S. Boston University, 1989. The author would like to thank Ryan Mensing, Shannon Mintor, Sandra Rivera-DesBiens, Moonhawk River Stone, Richard Redlo and Joe Tarver for their research assistance, and Paula Ettlbrick, Sheila Healy and Sabrina Shulman for their conceptual and editorial guidance.
- ⁹ There is little to no polling data on how specifically New Yorkers feel about outlawing transgender discrimination. A recent poll of voters nationally found that 61% believe that the country needs laws to protect transgender people from discrimination, though that belief appeared to be based on a fairly thin level of education on transgender issues. *See Lake Snell Perry & Associates, Inc. poll, Aug. 2002 (on file with the Human Rights Campaign, Washington D.C. and the Empire State Pride Agenda).*
- ¹⁰ *See, e.g., Zogby poll, Mar. 1999 (finding that 65.3% of 703 New York voters polled would not have any problem supporting legislation that prohibits discrimination based on sexual orientation, including approval from 63.4% of upstate New Yorkers, 64.5% of Catholics, 60.3% of Protestants, and 80.2% of Jews) (on file with the Empire State Pride Agenda); EDK Associates poll, spring 1993 (finding that at least 60% of voters in each of eight New York State senatorial districts believed it should be illegal for an employer to discriminate against an employee or applicant on the basis of sexual orientation, and between 57% and 74% of voters in each district believed the state should pass a law to ban discrimination based upon sexual orientation) (on file with the Empire State Pride Agenda); Fredric Dicker, GOP Poll: Voters Want Gay Rights, N.Y. Post, Mar. 29, 1993, at 7 (describing a poll by the State Republican Party that asked 500 voters across the state, “Should New York pass laws to protect homosexuals like it protects other groups?” 65% answered “yes,” while not quite 25% answered “no.”).*
- ¹¹ *See Policy Institute of the National Gay and Lesbian Task Force, Legislating Equality 65-68 (2000).*
- ¹² Governor’s Exec. Order No. 28 (Nov. 18, 1983), *amended by* Governor’s Exec. Order No. 28.1 (Apr. 12, 1987). These executive orders were continued under Governor Cuomo’s successor, Governor George Pataki. *See Exec. Order No. 33 (Apr. 9, 1996).*
- ¹³ Sexual Orientation Non-Discrimination Act, ch. 2 (Dec. 17, 2002, effective Jan. 16, 2003) (to be codified at N.Y. Exec. Law secs. 291, 292, 295, 296; N.Y. Civ. Rights Law sec. 40 and N.Y. Educ. Law sec. 313). This is only the second law in New York State to include the words “sexual orientation,” the first being the Hate Crimes Act of 2000, ch. 107 (July 10, 2000, effective Sept. 20, 2000) (codified at N.Y. Penal Law secs. 200, 240, 485; and N.Y. Exec. Law sec. 837).

There is not yet any explicit statewide statutory protections from discrimination based on gender identity and expression, though three localities in New York – Buffalo, Ithaca and New York City – have enacted such provisions. *See, e.g.*, N.Y.C. Administrative Code sec. 8-102, subdivision 23 (added 2002). Some New York Courts have found that such discrimination might already be prohibited under the state prohibition on sex discrimination. *See, e.g.*, *Richards v. United States Tennis Ass'n*, 93 Misc.2d 713 (Sup. Ct. N.Y. County 1977); *Maffei v. Kolaepon Indus., Inc.*, 626 N.Y.S.2d 391 (Sup. Ct. N.Y. County 1995); *Rentos v. Oce-Office Sys.*, No. 95 Civ. 7908, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. Dec. 24, 1996). Likewise, a number of governmental sources have interpreted the “gender” part of the New York State hate crimes law to include transgender people. *See, e.g.*, State of N.Y. Office of the Attorney Gen., *Hate Crimes: A Manual for Prosecutors* 63-65 (Dec. 2001); State of N.Y. Div. Of Criminal Justice Servs., N.Y. State Hate Crime Incident Report form, Types of Hate Crimes Incidents (Jan. 11, 2002) (defining crimes motivated by gender as including “crimes directed at transgendered persons or others whose gender expression may be unconventional in some way”). Still, because of the lack of any statutory direction on transgender issues, the law in this areas remains largely unsettled.

¹⁴ *See, e.g.*, *B. v. B.*, 585 N.Y.S.2d 65 (2d Dep’t 1992) (denying a father overnight visitation with his biological son because of the father’s history of cross-dressing).

¹⁵ The first branch of government to address these issues on a statewide basis however was surprisingly the executive. The NYS Department of Social Service as early as 1981 adopted a regulation that explicitly allowed lesbian and gay parents to adopt in New York State. *See infra* text accompanying notes 27-28.

¹⁶ *In re Adoption of Robert Paul P.*, 471 N.E.2d 424 (1984).

¹⁷ *Id.*

¹⁸ *Id.* at 427.

¹⁹ *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (1989).

²⁰ *Id.* at 53-55 (citations omitted).

²¹ *In re Alison D. v. Virginia M.*, 572 N.E.2d 27 (1991).

²² *Id.*

²³ The Court of Appeals recently gave up an opportunity to revisit this decision by dismissing the appeal of *In re Janis C. v. Christine T.*, 742 N.Y.S.2d 381 (2d Dept. 2002), *rev’g* Matter of J.C. v. C.T., 711 N.Y.S.2d 295 (Fam. Ct. 2000). A Westchester family court awarded visitation to the separated domestic partner in this action, but the Appellate Division reversed that decision. The Court of Appeals granted the motion to appeal but dismissed the appeal itself saying that the case did not directly involve a substantial constitutional question. *In re Janis C. v. Christine T.*, N.Y. Mo. No. 975 (2003). *See also* Shawn Cohen, *Lesbian Gets Visitation Rights, For Now*, J. News (Westchester), July 18, 2002.

²⁴ The Appellate Division also made this distinction in *In re Estate of Cooper*, 592 N.Y.S.2d 797 (2d Dep’t 1993), when it decided that a same-sex partner could not be considered a “surviving spouse” who could exercise a right of election. In deciding the case, the Court distinguished *Alison D.* from *Braschi*, saying that *Braschi* involved the definition of “family” and *Alison D.* the definition of “parent,” so *Braschi* did not require the court to expand the term “surviving spouse” as used and explicitly defined by the Legislature in the right of election context. *Id.* Likewise, the Appellate Division in *Raum v. Restaurant Associates, Inc.*, 675 N.Y.S.2d 343 (1st Dep’t 1998), found that the term “family” interpreted in *Braschi* was an inherently more expansive classification under New York law than “spouse,” and thus denied wrongful death benefits afforded to spouses to a surviving domestic partner. The Supreme Court of Queens County also continued relying on this distinction in *Stewart v. Schwartz Bros.-Jeffer Memorial Chapel*, 606 N.Y.S.2d 965, 968 (Queens County 1993) (finding that a domestic partner had legal authority to challenge what would happen to the body of his partner because a “close, spousal-like relationship” existed between the two). Because New York law regarding the disposition of a body was not specific about who could best effectuate the desires of the decedent, the domestic partner could be considered as the family member most likely to know the decedent’s wishes for the disposition of his remains. *Id.* at 968-69.

²⁵ *In re Jacob*, 660 N.E.2d 397 (1995).

²⁶ *Id.* at 668-69.

²⁷ The NYS Department of Social Services was divided into the Office of Children and Family Services and the Office of Temporary and Disability Assistance in 1998.

²⁸ N.Y. Comp. Codes R. & Regs. tit. 18, sec. 421.16 (h)(2) (2001). *See also* Joseph B. Treaster, *New York Issues New Guidelines on Adoptions for State’s Agency*, N.Y. Times, Aug. 28, 1982, at sec. 1 p. 27.

²⁹ *See* National Gay and Lesbian Task Force, *Adoption/Foster Care Laws in the U.S.* (July 2002) (available at www.nglftf.org/downloads/adoptionmap.pdf).

³⁰ N.Y. Comp. Codes R. & Regs. tit. S, sec. 2520.6 (2001).

³¹ Letter from Salvatore R. Curiale, Superintendent of Insurance to Governor Mario M. Cuomo (Sept. 26, 1993) (on file with the Empire State Pride Agenda). This letter was based on a formal opinion of the Insurance Department’s General Counsel. *See* No. 93-43 Op. General Counsel, Insurance Department (May 19, 1993).

³² Letter from Salvatore R. Curiale, Superintendent of Insurance to Governor Mario M. Cuomo (Sept. 26, 1993) (on file with the Empire State Pride Agenda).

³³ *See, e.g.*, State of N.Y. Dep’t of Civil Serv. Employee Benefits Div., Instructions for Enrolling Domestic Partners in the N.Y. State Health Ins., Dental and Vision Programs; State of N.Y. Dep’t of Civil Serv. Employee Benefits Div., Affidavit of Financial Interdependence (requiring state employees to submit a number of original documents as proof of financial interdependence in order to be eligible for domestic partner health benefits).

³⁴ *See State Senate Offers Health Benefits to Domestic Partners*, Press & Sun-Bulletin (Binghamton, N.Y.), Jan. 20, 2001. A number of local municipalities, including the City of Ithaca (1990), the City of New York (1994), the City of Rochester (1994), Tompkins County (1996) and Albany County (2001), have followed the lead of the state and added benefits for domestic partners of their municipal employees. *See* Empire State Pride Agenda, Domestic Partnership Benefits: Enrollment Numbers and Costs at State, County and City Levels (2001) (on file with the Empire State Pride Agenda).

³⁵ *See* Jessica DuLong, *Pair Recognition: Sept. 11 Survivors of Same-Sex Partners Face Extra Challenges*, *Newsday* (N.Y.), Jan. 22, 2002; Hank Stuever, *The Bomb With a Loaded Message*, *Washington Post*, Oct. 27, 2001 at c01. After September 11th, the American Red Cross changed its disaster relief guidelines so that domestic partners will be treated almost identically to surviving spouses. *See* Andy Humm, *Red Cross to Recognize Gay Partners in All Disasters*, *Gay City News* (N.Y. City), Aug. 23-29, 2002 at 4.

³⁶ Exec. Order No. 113.30 (Oct. 10, 2001).

³⁷ *Id.*

³⁸ *See* Advisory Bulletin from Joan A. Cusack, Chairwoman, N.Y. State Crime Victims Board, Jan. 23, 2003.

³⁹ The application materials developed by the NYS Department of Taxation and Finance used the term “surviving spouse/domestic partner” and said, “A surviving spouse includes a domestic partner.” *See* N.Y. State Dep’t of Taxation and Finance, N.Y. State World Trade Center Relief Fund Surviving Spouse Application (Jan. 2002) (available at http://www.nysegov.com/news/wtcrfl_802.pdf). Unlike married spouses, however, domestic partners were required to fill out an additional domestic partner affidavit swearing to the relationship and provide at least three forms of proof of cohabitation and financial interdependence. Married couples needed to provide no proof whatsoever of their interdependence, not even a marriage certificate.

⁴⁰ World Trade Center Memorial Scholarship, ch. 176 (July 23, 2002).

⁴¹ Ch. 467 (Aug. 20, 2002) (to be codified at N.Y. Work. Comp. Law sec. 4). *See also* *In re Clark*, Case No. 0015 4679 Work. Comp. Board (Nov. 22, 2002) (finding surviving domestic partner of a Sept. 11 victim eligible for benefits under N.Y. State Workers’ Compensation Law).

⁴² *See In re Lopez*, Case No. 0016 3762 Work. Comp. Board (Dec. 4, 2002) (finding that the surviving domestic partner of a flight attendant who died when his flight crashed in Queens on November 12, 2001, failed to establish any rights to benefits under the Workers’ Compensation Law, even though the other potential claimant, the father of the deceased, waived any rights under the law and submitted an affidavit expressing his request that benefits be awarded to the domestic partner).

⁴³ Letter from Governor George Pataki, Attorney General Eliot Spitzer and Mayor Rudolph Giuliani to President George W. Bush (Nov. 27, 1991) (“The families of the victims of the September 11th attacks reflect the full spectrum of the people of New York and of America in terms of gender, race, religion, color and national origin, as well as marital status and sexual orientation. ... The lack of formal legal recognition, however, does not mitigate the shattering impact of the death of a beloved companion, parent or guardian. ... [T]he thousands of victims of the September 11th tragedy include many individuals who were in long-term domestic partnerships, some of whom engaged in acts of great heroism as they tried to save the lives of others that day. Surely Congress did not intend that those dependent upon these heroes should be denied compensation under the fund.”) (on file with the Empire State Pride Agenda).

⁴⁴ Sept. 11th Victims and Families Relief Act, ch. 73 (May 21, 2002) (to be codified at N.Y. Work Comp. Law sec. 29; N.Y. Est. Powers & Trusts Law secs. 11-4.7 and 29; N.Y. Surr. Ct. Proc. Act Law secs. 205 and 2307). There is reason to be optimistic that despite the federal government’s reluctance to explicitly treat domestic partners as surviving spouses as New York State did, domestic partners will be eligible for relief on at least a case-by-case basis. A surviving lesbian partner recently became the first domestic partner to be granted an award under the federal fund. *See* Associated Press, *9/11 Fund Awards Lesbian Partner*, *Newsday* (N.Y.), Jan. 24, 2003 (reporting on the \$557,390 that was awarded from the federal Victim Compensation Fund to Peggy Neff whose partner of 18 years died at the Pentagon on September 11th).

⁴⁵ Ch. 542 (Sept. 17, 2002) (to be codified at N.Y. Ins. Law sec. 4216).

⁴⁶ S. 1205, 224th N.Y. Leg., 2001-02 Regular Sess.

⁴⁷ A. 2998, 225th N.Y. Leg., 2003-04 Regular Sess.

⁴⁸ Admin. Code of City of N.Y. sec. 3-240 et seq. *See also* Policy Institute of the National Gay and Lesbian Task Force, *supra* note 11 at 66. The Appellate Division upheld the validity of New York City’s domestic partnership registry in *Slattery v. City of N.Y.*, 697 N.Y.S.2d 603 (1999) (finding that the creation of the registry did not conflict with state marriage laws, state policy, or the prohibition on common law marriages).

⁴⁹ *See* Policy Institute of the National Gay and Lesbian Task Force, *supra* note 11 at 65-67.

⁵⁰ *See* Editorial, *Finally, a Domestic Partner Bill*, J. News (Westchester), Sept. 25, 2002.

- ⁵¹ A. 2634 / S. 1628, 224th N.Y. Leg., 2001-02 Regular Sess.; see also A.1118/S.1925, 225th N.Y. Leg., 2003-04 Regular Sess.
- ⁵² S. 7690, 224th N.Y. Leg., 2001-02 Regular Sess.
- ⁵³ The Assembly's Dignity bill also defines gender as including gender identity and expression, thus explicitly protecting students from transgender-based harassment. See A. 2634, 224th N.Y. Leg., 2001-02 Regular Sess.; see also A. 1118, 225th N.Y. Leg., 2003-04 Regular Sess..
- ⁵⁴ Even in the absence of a specific school bias bill, the New York State Education Department has taken some action to address the problem of bias-based harassment in schools. As required by the omnibus Project SAVE safe schools legislation, SED promulgated regulations to collect data on violent incidents in schools, and in doing so required that schools indicate whether a violent incident was motivated by bias, including bias based on sexual orientation. See N.Y. Comp. Codes R. & Regs.tit. 8, sec. 100.2 (gg)(2)(d)(3)(2001).The school is not required to specify what type of bias was involved in the incident, only that bias was involved. Also, SED has required schools to develop a Code of Conduct, and in that regulation required districts to outline how they will deal with harassment, though harassment went undefined in the regulation. See N.Y. Comp. Codes R. & Regs. Tit. 8, sec. 100.2 (l)(2)(11)(e)(2001).
- ⁵⁵ A. 8919 / S. 3292, 224th N.Y. Leg., 2001-02 Regular Sess.; see also A. 282 / S.281, 225th N.Y. Leg., 2003-04 Regular Sess.
- ⁵⁶ A. 7911 / S. 2695, 224th N.Y. Leg., 2001-02 Regular Sess.; see also S. 5159, 224th N.Y. Leg., 2001-02 Regular Sess. (the Governor's omnibus domestic violence program bill, which includes the expanded definition of family, among other provisions).
- ⁵⁷ See S. 5159, 224th N.Y. Leg., 2001-02 Regular Sess. (the Governor's omnibus domestic violence program bill, which includes both the expanded definition of family and the "lifetime" order of protection).
- ⁵⁸ A. 4221 / S.2320, 224th N.Y. Leg., 2001-02 Regular Sess.; see also S.372, 225th N.Y. Leg., 2003-04 Regular Sess.
- ⁵⁹ A. 4302 / S.6910, 224th N.Y. Leg., 2001-02 Regular Sess.; see also S.350, 225th N.Y. Leg., 2003-04 Regular Sess.
- ⁶⁰ A. 2678 / S.719, 224th N.Y. Leg., 2001-02 Regular Sess.
- ⁶¹ A.9555, 224th N.Y. Leg., 2001-02 Regular Sess.
- ⁶² A number of municipalities across the nation, including Los Angeles, San Francisco, Oakland and Seattle, have enacted similar legislation. See San Francisco Human Rights Commission, Five Year Report on the San Francisco Equal Benefits Ordinance n.20 (2002). New York City is actively considering such a measure right now. See Intro. 271, N.Y. City Council (2002).
- ⁶³ Levin v. Yeshiva Univ. 754 N.E.2d 1099 (2001).
- ⁶⁴ *Id.*
- ⁶⁵ The question is likely to turn on whether New York's civil rights laws have been interpreted to prohibit policies that, though neutral on their face, disparately impact one class of people over another. The *Yeshiva* case was decided on these grounds and relied heavily on New York City's ordinance, which explicitly prohibits policies with such a disparate impact. See *id.* at 491 (quoting sec. 8-107 (17) of the N.Y. City Human Rights Law that creates a cause of action for a policy or practice that has a disparate impact to the detriment of a protected group).
- ⁶⁶ Though the terms "husband" and "wife" are used in New York marriage laws, the gender of those terms is never specified, nor is gender of parties to be married mentioned anywhere else in New York law. See, e.g., N.Y. Dom. Rel. Law Art. 3 (1999); N.Y. Gen. Oblig. Law Tit. 3 (2001).
- ⁶⁷ The courts will have to decide whether to treat same-sex marriages from another state like underage or common law marriages which, though not permitted in N.Y., are recognized here when created in another state, or like a marriage between persons related by blood, which are void in New York even if valid in another jurisdiction.
- ⁶⁸ See note 13 *supra*.
- ⁶⁹ See Paula L. Ettelbrick, Wedlock Alert: A Comment on Lesbian and Gay Family Recognition, 5 J.L. & Pol'y 107, 160 (1996) ("The lesbian and gay community will need more than marriage to address the many issues of their family structures that will never fit the heterosexual model.").
- ⁷⁰ See Stephanie Coontz, The Way Things Never Were 29 (2000) (pointing out that the idealized version of the nuclear family popularized throughout the 1950s existed for a very brief period of time in American history, if indeed it ever existed as depicted at all. "Contrary to popular opinion, 'Leave It to Beaver' was not a documentary.").
- ⁷¹ See *id.* at xxiii ("We can no longer count on marriage to be the primary way that interpersonal obligations, intergenerational caregiving, and childrearing are organized.")