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TUMBLING TOWERS AS TURNING POINTS: WILL 9/11 USHER IN A NEW CIVIL RIGHTS ERA FOR GAY MEN AND LESBIANS IN THE UNITED STATES?

SUSAN J. BECKER*

I. INTRODUCTION

"Life will never be the same."

These six words have reverberated throughout the world since September 11, 2001 (9/11), when suicidal terrorists commandeered fuel-laden jets and slammed them into targets symbolic of the United States' power and wealth. For many people, especially those who have fought long and hard to preserve the freedoms that are the bedrock of federal and state constitutions in the United States, the threat to civil liberties embedded in this universal mantra is only slightly less frightening than the probability that terrorists are planning additional strikes on U.S. soil.¹

The omnipresent fear of additional, perhaps even more savage, terrorist attacks and the fear that cherished liberties will continue to implode like the twin towers of the World Trade Center are equally justified.

Reports issued from President George W. Bush and his newly created Office of Homeland Security stress that the war against terrorism has just begun and that additional attacks against the U.S. are virtually inevitable. At the same time, state and federal lawmakers, rendered impotent in the front line battles against terrorism, enact ill-conceived and poorly drafted legislation.

The USA PATRIOT Act,² signed into law just six weeks after 9/11, is a prime example. The Act is 161 pages long, amends more than a dozen federal statutes, and creates new legal standards of its own. Although complicated, convoluted, and not fully tested as yet, the Act significantly curtails the civil rights of every person who falls under the newly vigilant eye of U.S. intelligence agencies.³ As

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1. See Symposium, *Law and the War on Terrorism*, 25 HARV. J.L. & PUB. POL'Y 399 (2002).

2. Pub. L. No. 107-56, 115 Stat. 272 (2001). Signed into law on October 26, 2001, the "USA PATRIOT Act" is an acronym for "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism" Act. *Id.* at § 1(a).

3. Federal departments and agencies now charged with fighting terrorism include the

is the case with most solutions hastily devised in crisis conditions, the new standards are both over-inclusive and under-inclusive. The new rules arguably restrict certain liberties of every person in this country regardless of his or her individual terrorist quotient,⁴ while failing to focus intelligence resources on the relatively miniscule number of persons actively engaged in terrorist activities.⁵ As Supreme Court Justice Sandra Day O'Connor explained to a law school class shortly after the terrorist attacks, "we're likely to experience more restrictions on our personal freedom than has ever been the case in our country."⁶

This article examines the events of 9/11, and the potential resultant shifts in attitude, policies, and laws in the United States, through the lens of civil rights extended to gay and lesbian citizens.⁷ It seeks, but does not purport to definitively discover, the true meaning of the phrase "life will never be the same." It asks, but does not purport to fully answer, whether historians a century or two hence will look back on 9/11 as the turning point when the United States began to fulfill its promise of liberty to all people, or whether this date will be earmarked as the time when the United

Central Intelligence Agency (CIA), Department of Defense (DOD), Army, Navy, Air Force, Department of the Treasury, Department of Energy (DOE), Federal Bureau of Investigation (FBI), and the Coast Guard. See Intelligence Authorization Act for Fiscal Year 2002, 107 Pub. L. No. 108, § 101, 115 Stat. 1394 (2002).

4. See Adam Liptak et al., *After Sept. 11, a Legal Battle Over the Limits of Civil Liberty*, N.Y. TIMES, Aug. 4, 2002, at 1 (explaining the many legal battles being fought over civil liberties in the United States as the result of the government's "war on terrorism").

5. See Jennifer C. Evans, Comment, *Hijacking Civil Liberties: The USA PATRIOT Act of 2001*, 33 LOY. U. CHI. L.J. 933 (2002). See also *Senate Committee Grills Ashcroft on DOJ's Fight Against Terrorism*, 71 U.S.L.W. 2070 (2002) (explaining the many concerns expressed by members of the Senate Judiciary Committee while questioning Attorney General John Ashcroft about various anti-terrorism initiatives undertaken by the Justice Department that impinge on citizens' privacy and other civil liberties).

6. Linda Greenhouse, *In New York Visit, O'Connor Foresees Limits on Freedom*, N.Y. TIMES, Sept. 29, 2001, at B5.

7. This article focuses on gay and lesbian individuals, although much of what is discussed herein could be applied, with various degrees of narrowed focus, to bisexual and transsexual persons. The author fully realizes that the terms "gay men" and "lesbians" are defined differently depending on the author and the context. As one author aptly noted, "[t]he terms gay, lesbian, bisexual, sexual orientation, homosexuality, sexual identity and sexual conduct all have meanings that matter, yet all these meanings are contested." Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 48 (1996). "Gay men" and "lesbians" are used herein to designate individuals of all ages, national origins, ethnic backgrounds, religions, social status, economic means, educational levels, and myriad other variables, provided they identify themselves as having a primary affectional attraction to persons of the same biological sex. This article focuses on gay men and lesbians who are U.S. citizens, as opposed to persons temporarily residing and/or seeking to immigrate to this country, as the topic of sexual orientation and immigration is a very broad one outside the scope of this article.

States, wounded and weary, rejected individual civil liberties in favor of a restrictive but arguably "safer" society.⁸

The next section of this article, Section II, provides a brief status report on the civil rights of gay men and lesbians in the United States prior to 9/11. Additionally, Section II provides information in terms of the legal status of gays and lesbians and public attitudes about this segment of the U.S. population. Section III looks at how the nation has reacted to 9/11, and highlights the polar opposite reactions of those who seek to preserve civil liberties in this time of crisis and those who cite 9/11 as justification for significantly restricting these liberties. Section IV examines the situation through the narrower focus of civil rights extended to, and those denied to, gay and lesbian citizens of the United States. In addition to examining the important role gay and lesbian people played in 9/11 events, Section IV recounts the struggle of gay and lesbian people seeking eligibility for remedies routinely afforded their heterosexual counterparts. Section IV also identifies two other civil rights areas that may be affected by the events of 9/11: anti-discrimination in employment law and hate crime legislation. Section V provides a brief conclusion.

II. LEGAL-POLITICAL STATUS OF GAY MEN AND LESBIANS IN THE UNITED STATES PRIOR TO 9/11

Where We Were Legally

The western world's new millennium dawned with sanguine light on the rights and remedies available to gay men and lesbians in the United States.⁹ The last quarter of the twentieth century witnessed momentous gains in the extension to gay men and lesbians of the basic civil rights routinely granted heterosexual citizens of this country.¹⁰ These included rights essential to the

8. In this article, "civil rights" and "civil liberties" are inclusive terms that encompass all guarantees of freedom, privacy, benefits, entitlements, and the like that are set forth in federal and state constitutions, in federal, state and local laws, and in the corresponding case law interpreting those statutes and constitutional provisions.

9. This is true whether the reader considers January 1, 2000 or 2001 as the start of the new millennium.

10. For significant victories achieved toward the latter part of the twentieth century, see Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993); William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817 (1997) (recounting extension of privacy, First Amendment, due process, and other constitutional rights to gay men and lesbians during this period). For an accounting of the prosecuted status of homosexuals during the twentieth century, see William N. Eskridge, Jr.,

creation and recognition of families,¹¹ freedom from discrimination in employment,¹² sexual privacy,¹³ and the right to advocate change through the political process.¹⁴ In short, gay men and lesbians had become a vocal and visible political, economic, and social force, but had yet to achieve parite with heterosexuals.¹⁵

Indeed, one could hardly label the United States prior to 9/11 as a Utopia of civil rights for every citizen, much less for gay and

Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961, 24 FLORIDA ST. U. L. REV. 703 (1997) (explaining efforts made post World War II to eliminate homosexuality in the U.S.). See also JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970* (1983) (tracing the historical evolution of the gay emancipation movement); JONATHAN KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.* (1976) (compiling documentation of same-sex relationships in American history).

11. Gay men and lesbians, for example, were allowed to adopt children (*see generally* Mark Strasser, *Courts, Legislatures, and Second-Parent Adoptions*, 66 TENN. L. REV. 1019 (1999)), to retain custody and visitation rights of children conceived in heterosexual relationships (*see* Kif Skidmore, Note, *A Family Affair: Constitutional and Prudential Interests Implicated When Homosexuals Seek to Preserve or Create Parent-Child Relationships*, 89 KY. L.J. 1227 (2000)), and to secure health insurance and other benefits for their partners and children (*see* Ryiah Lilith, *Caring for the Ten Percent's 2.4: Lesbian and Gay Parents' Access to Parental Benefits*, 16 WISC. WOMEN'S L.J. 125 (2001); American Civil Liberties Union, *Domestic Partnerships: List of Cities, States and Counties*, at <http://www.aclu.org/issues/gay/dpstate.html> (last visited Oct. 18, 2002)).

12. Eighteen states, the District of Columbia, and more than 100 cities had enacted laws prohibiting sexual orientation workplace discrimination by private employers as of 2000. WAYNE VAN DER MEIDE, *LEGISLATING EQUALITY, A REVIEW OF LAWS AFFECTING GAY, LESBIAN, BISEXUAL, AND TRANSGENDERED PEOPLE IN THE UNITED STATES* 4 (2000). Impetus for the expansion of employment opportunities and benefits for gays and lesbians came largely from the private sector, as business entities discovered, and made public, their findings that retaining competent gay and lesbian employees was not only the morally right thing to do but also made good business sense. *See* Lilith, *supra* note 11, at 135-39.

13. In the area of sexual privacy, for example, many state courts struck down their respective sodomy laws as contrary to state constitutional protections, despite the Supreme Court's refusal to make such an assessment under the federal constitution in *Bowers v. Hardwick*, 478 U.S. 186 (1986). In fact, the Georgia Supreme Court struck down the exact sodomy statute that the Supreme Court upheld in *Bowers* on the grounds that the law violated state constitutional rights to privacy. *Powell v. State*, 510 S.E.2d 18 (Ga. 1998). *See generally* Melanie D. Price, *The Privacy Paradox: The Divergent Paths of the United States Supreme Court and the State Courts on Issues of Sexuality*, 33 IND. L. REV. 863 (2000) (focusing on the movement of privacy rights jurisprudence from the national arena, the Supreme Court, to the local arena, state courts).

14. *See Romer v. Evans*, 517 U.S. 620 (1995) (striking down as unconstitutional Colorado law prohibiting the state and any of its political subdivisions from creating a remedy for sexual orientation discrimination). Not everyone, however, views this decision as a step forward for homosexuals. *See, e.g.,* Robert D. Dodson, *Homosexual Discrimination and Gender: Was Romer v. Evans Really a Victory for Gay Rights?*, 35 CAL. W. L. REV. 271 (1999); Mark E. Papadopoulos, Note, *Inkblot Jurisprudence: Romer v. Evans as a Great Defeat for the Gay Rights Movement*, 7 CORNELL J.L. & PUB. POL'Y 165 (1997).

15. *See, e.g.,* John Leland et al., *Shades of Gay*, NEWSWEEK, Mar. 20, 2000, at 46 (devoting fourteen pages to explaining recent advancements, and set backs, of gay and lesbian Americans).

lesbian citizens.¹⁶ The federal government legislated in the mid 1990's that same-sex marriages would not be recognized for the purpose of any federal benefit, and also declared that no state had to recognize same-sex marriages of any other state.¹⁷ The latter declaration was legally irrelevant, serving only as a blatant proclamation of anti-gay sentiment, because no state has ever recognized marriages except those between two people of opposite biological sex.

At the state level, the extent to which gay and lesbian individuals enjoy basic civil rights was a matter determined by geography. Living in Vermont guaranteed gay and lesbian couples and their children rights (and corresponding responsibilities) roughly equivalent to a heterosexual couple with children.¹⁸ Living in

16. *Id.* See also R.L. Evans, *U.S. Military Policies Concerning Homosexuals: Development, Implementations, and Outcomes*, 11 TUL. J.L. & SEXUALITY 113 (2002) (discussing the historic and continued aversion of the military to allow openly gay and lesbian people to serve in the armed forces); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000); Amy D. Ronner, *Scouting for Intolerance: The Dale Court's Resurrection of the Medieval Leper*, 11 TUL. J.L. & SEXUALITY 53 (2002) (analyzing the Supreme Court's reasoning in upholding the Boy Scouts anti-gay discriminatory policies); Heather C. Brunelli, Note, *The Double Bind: Unequal Treatment for Homosexuals Within the American Legal Framework*, 20 B.C. THIRD WORLD L.J. 201 (2000). See generally Symposium, *From Outlaws to In-Laws: Issues Surrounding the Evolving Status of Lesbian and Gay Individuals*, 89 KY. L.J. 885 (2001) (discussing the implications of rights for gays and lesbians in various states, as a result of caselaw and constitutions).

17. Defense of Marriage Act, 1 U.S.C. § 7, 28 U.S.C. § 1738C (2002). See generally Diane M. Gullerman, Comment, *The Defense of Marriage Act: The Latest Maneuver in the Continuing Battle to Legalize Same-Sex Marriages*, 34 HOUS. L. REV. 425 (1997) (discussing the response to the implications of the Defense of Marriage Act in the context of constitutional and states' rights).

18. In *Baker v. State*, 744 A.2d 864 (Vt. 1999), the Vermont Supreme Court held that the Common Benefits Clause of Vermont's constitution required extension to same-sex couples of the benefits and protections that flow from heterosexual marriages. *Id.* at 867. The Clause states in pertinent part that "[t]he government is, or ought to be, instituted for the common benefit, protection, and security of the people, . . . and not for the particular emolument or advantage of any particular person, family, or set of persons." *Id.* (citing VT. CONST. OF 1777, ch. 1, art. 7). The Vermont legislature enacted extensive legislation, the Vermont Civil Unions and Reciprocal Beneficiaries Act, 15 VT. STAT. ANN. § 1201 et seq. (2000), to achieve that result rather than simply amending state law to allow same sex marriages. For more analysis on the *Baker* decision and Vermont's civil union statute, see Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15 (2000), and other articles published in the Vermont Law Review's twenty-fifth anniversary issue dedicated to Vermont's *Baker* decision and the Civil Union Statute.

Hawaii enacted legislation in 1997 allowing two persons who are unable to legally marry to enter into a partnership for the purpose of certain state benefits, but the resultant rights are not as extensive as those allowed in Vermont. Reciprocal Beneficiaries Act, 1997 Haw. Sess. Laws. (1997). See generally W. Brian Burnette, *Hawaii's Reciprocal Beneficiaries Act: An Effective Step in Resolving the Controversy Surrounding Same-Sex Marriage*, 37 BRANDEIS L.J. 81 (1998) (examining the positive and negative consequences of the Reciprocal Beneficiaries Act).

Florida meant no recognition of the couples' relationships and a state law that prohibited homosexuals from adopting children.¹⁹

Even the location within a state made a difference in the rights accorded gay and lesbian citizens prior to 9/11. Gay and lesbian residents of San Francisco, for example, enjoyed extensive protections in terms of housing, employment, and domestic partnership benefits,²⁰ even though much of California, the political birthplace of former President Ronald Reagan, regularly approved statewide voter initiatives sponsored by ultra-conservative forces.²¹

The unequal rights provided gay and lesbian citizens throughout the U.S. prior to 9/11 presents a classic glass half-full or half-empty conundrum when evaluating the legal status of gay and lesbian citizens. An impressive graphic would result by highlighting all areas of a U.S. map where some civil rights provided to gay and lesbian persons as of September 2001, and comparing it to a similar graphic prepared a few decades earlier.²² This display would accurately reflect significant advancements in extending civil rights to gay and lesbian citizens as a glass half full.

Unfortunately, the "glass half empty" interpretation would also be viable as of September 2001.²³ This interpretation rings truest

19. FLA. STAT. ANN. § 63.042(3) (West 1997). See also Timothy P.F. Crowley, Case Note, *Lofton v. Kearney: The United States District Court for the Southern District of Florida Holds Florida's Statutory Ban on Gay Adoption is Not Offensive to the Constitution*, 11 TUL. J.L. & SEXUALITY 253 (2002).

20. See, e.g., SAN FRANCISCO, CA., ORDINANCE § 12B.1(b) (1997) (requiring that all entities that contract with the city must extend full benefits to registered domestic partners of their employees). See also Joseph M. Manicki, Case Note, *S.D. Myers v. San Francisco: Satisfactory C's on the Domestic Partnership Benefits Report Card: The Constitutionality of Contingent City Commerce Under the Commerce Clause*, 11 TUL. J.L. & SEXUALITY 243 (2002).

21. For example, California voters approved Proposition 22 in March, 2000, amending CAL. FAM. CODE. § 308.5 (West 2002) to state that "only marriage between a man and a woman is valid or recognized in California." Passage of this voter initiative was not necessary, since Congress passed the Defense of Marriage Act in 1996 stating, inter alia, that no state is required to give full faith and credit to a same-sex marriage allowed in any other state. See Jeffery Hubins, Note, *Proposition 22: Veiled Discrimination or Sound Constitutional Law*, 23 WHITTIER L. REV. 239 (2001).

22. See, e.g., Lewis I. Maddocks, *Homosexuals and the Law*, 34 SOC. ACTION 5 (1967) (containing interesting observations from a self-described "straight" author who spent several months reading about and talking to homosexuals regarding the laws governing homosexual conduct, federal employment, military service and other laws affecting homosexuals differently than heterosexuals, and concluding with a call to action to cease discrimination against homosexuals).

23. As one observer stated in his article about denial of tort law remedies to gay men and lesbians, "the deletion of same-sex relationships from . . . tort law is all too consistent with the overall judicial, legislative, and societal treatment of gay men and lesbians." John G. Culhane, A "Clanging Silence": *Same Sex Couples and Tort Law*, 89 KY. L.J. 911, 915 (2001) (focusing primarily on negligent infliction of emotional distress, loss of consortium, and wrongful death claims).

when one considers that gay and lesbian citizens were not, in any city or state or territory of the U.S., allowed the full range of civil rights that are considered the birthright of their heterosexual counterparts.

Examining the political climate preceding 9/11 further supports the "glass half empty" perspective. George W. Bush, described by supporters as a compassionate conservative and by critics as a hawkish right wing zealot, appeared comfortably ensconced in the presidency. State and federal executives and legislators advocated, with various degrees of success, new restrictions on abortion, relaxed relationships between church and state to provide government monies to faith-based initiatives, and lessening of government regulations over privately owned weaponry.²⁴ The Supreme Court appeared enamored with conservative points of view when interpreting the Constitution.²⁵ This perspective was especially true in cases involving gay and lesbian citizens.²⁶

Where Were We Heading?

Predicting whether the United States was moving toward or away from expansion of civil rights to gay and lesbians prior to 9/11 requires consideration not only of the predilections of the nation's then-political leaders, but perhaps more importantly, of the opinions of the people who voted them into office and who might choose to vote them out.

Taking the pulse of a nation on any particular subject is a daunting task, and trying to assess the country's attitude toward extending civil rights to its gay and lesbian citizens proves no exception. The United States is comprised of over a quarter billion

24. See generally Daniel O. Conkle, *Religion, Politics, and the 2000 Presidential Election: A Selective Survey and Tentative Appraisal*, 77 IND. L.J. 247, 265-66 (2002) (observing that conservative religious views predominated political debate in the 2000 election).

25. This is nowhere more evident than in *Bush v. Gore*, 531 U.S. 98, 111 (2000), a case in which the Court's involvement was questionable and that arguably gave the presidency to the Republican candidate. See also Symposium, *Litigation, War, and Politics by Other Means*, 13 STAN. L. & POL'Y REV. 5 (2002) (providing a variety of interesting viewpoints on the Court's role in the 2000 presidential election).

26. See, e.g., *Boy Scouts of America v. Dale*, 530 U.S. 640, 644 (2000) (holding Boy Scouts' exclusion of gay troop leaders constitutional); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 559 (1995) (holding exclusion of gay and lesbian group from public parade constitutional). See generally, JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* (2001) (discussing the generally anti-homosexual outcomes of cases the Supreme Court has heard and the pattern of denying certiorari in cases involving sexual orientation); Christopher S. Hargis, Note, *Romer, Hurley, and Dale: How the Supreme Court Languishes with "Special Rights"*, 89 KY. L.J. 1189, 1193 (2000).

people of diverse national origins, religious and personal convictions, life experiences, educational achievements, employment histories, economic backgrounds, geographical locations, and myriad other demographic variables.²⁷ This makes statements such as "people in the U.S. believe gay men and lesbians are good/bad" or "people in the U.S. think gay men and lesbians should be given/not be given equal rights" highly suspect. Despite the previously noted truism that certain areas of this country have proven more receptive to extending civil rights to gay and lesbian citizens, it is inaccurate to characterize all Vermont residents as pro-gay and all Florida residents as heterosexist.

Relying upon political election results is also problematic when trying to analyze the country's collective psyche prior to 9/11. On one level, federal and state elections at that time demonstrated a conservative shift.²⁸ As a general rule, conservative swings do not bode well for extension of civil liberties to any group, and certainly not for gay men and lesbians.

On another level, this measurement for determining a pre-9/11 national consensus is inconclusive because the voters' choice between moderately liberal Democrat Al Gore and the seriously conservative Republican George W. Bush was so close that the Supreme Court intervened to resolve the matter.²⁹ Based on popular vote, Gore won nationwide by more than 500,000 votes, but he lost at the Electoral College level when the Court awarded Florida's votes to Bush.³⁰ When votes received by ultra-liberal Independent Ralph Nader³¹ are added to those received by Gore, one

27. THE WORLD ALMANAC AND BOOK OF FACTS 2002 347-88 (William A. McGeeveren, Jr. et al. eds., 2002).

28. See, e.g., Cliff Schecter, *Extremely Motivated: The Republican Party's March to the Right*, 29 FORDHAM URB. L.J. 1663, 1671 (2002). See generally David Crary, *Though Their Ranks are Growing, Openly Gay Elected Officials Remain a Rarity*, SAN DIEGO TRIB., June 24, 2002, available at <http://www.signonsandiego.com/news/politics/20020624-0425-gaypoliticians.html> (reporting that only 218 of the more than 500,000 Americans in elected office are uncloseted gay men and lesbians, with three such persons serving in Congress, forty-seven in state legislatures, and the remainder holding local offices).

29. *Bush v. Gore*, 531 U.S. 98, 111 (2000). See generally Michael Herz, *The Supreme Court in Real Time: Haste, Waste, and* *Bush v. Gore*, 35 AKRON L. REV. 185, 204 (2002) (arguing the Court, relying on media time instead of judicial time, acted too quickly in deciding *Bush v. Gore* primarily to provide an opinion for the press); Mark Tushnet, *The History and Future of Bush v. Gore*, 13 U. FLA. J.L. & PUB. POL'Y 23 (2001) (contextualizing the decision in terms of the historical development of voting rights and speculating on the decision's doctrinal impact on voting practices).

30. Alan Agresti and Brett Presnell, *Statistical Issues in the 2000 U.S. Presidential Election in Florida*, 13 U. FLA. J.L. & PUB. POL'Y 117 (2001) (reporting on various analysis done on the Florida ballots and concluding that it is impossible to tell if more Florida voters cast their ballots for Bush or for Gore).

31. Nader received more than 2.5 million votes, representing three percent of those cast

could conclude that "the people"—at least those who voted—expressed a desire to stay a moderately liberal path or even move a bit to the left. One could also conclude that the conservative candidate awarded the office did not reflect the nation's political pulse prior to 9/11.

Data harvested from public opinion polls prior to 9/11, similarly provides mixed messages as to the nation's attitude regarding the rights that should be extended to gay men and lesbians in this country.³² In 1998, for example, eighty-two percent of those responding to a nationwide poll agreed "that as a matter of principle, the federal government should treat homosexuals and heterosexuals equally."³³ That is indeed a promising result for those advocating civil rights for gay men and lesbians. In mid-1999, forty-nine percent of respondents to another nationwide survey voiced support for current laws that prohibit discrimination against homosexuals, while forty-two percent agreed that "there are too many unnecessary laws that give special rights to homosexuals."³⁴ Those results provide grounds for at least cautious optimism for continued extension of civil liberties to gay men and lesbians. A few months later, however, just thirty-nine percent of respondents to yet another nationwide poll believed that the changes in gay rights over the past decade reflected a change for the better, while twenty-nine percent said it was a change for the worse.³⁵ None of these results support establishing a "Barney Frank for President" exploratory committee.³⁶

Polling data gleaned from questions about specific rights afforded gay men and lesbians are perhaps more insightful in divining the pro and anti-gay pulse of the nation prior to 9/11.

nationwide for presidential candidates in the 2000 election. See generally, Theresa Amato, *Participating in Power: A View from the Nader Campaign*, 13 STAN. L. & POL'Y REV. 143, 145 (2002) (discussing and challenging the theory that Nader's campaign resulted in the presidency going to Bush).

32. Another problematic aspect is that the results of public opinion polls are directly affected (and some times intentionally manipulated) by numerous variables including the wording of the questions, tone of voice used by the questioner, method of identifying the respondent pool, and means of recording and tabulating the results.

33. CNN/Time Poll conducted by Yankelovich Partners, Oct. 14-15, 1998, at <http://www.pollingreport.com/civil.htm> (last visited Oct. 18, 2002).

34. NBC News/Wall Street Journal Poll conducted of 2,011 adults by the polling organizations of Peter Hart (D) and Robert Teeter (R) on June 16-19, 1999, at <http://www.pollingreport.com/civil.htm> (last visited Oct. 18, 2002).

35. Pew Research Center for the People & the Press Survey conducted by Princeton Survey Research Associates of 1,546 adults between April 6-May 6, 1999, at <http://www.pollingreport.com/civil.htm> (last visited Oct. 18, 2002). The remaining thirty-two percent apparently believed the changes had not made much difference. *Id.*

36. Barney Frank (D-Mass.) is an openly gay Congressman.

While fifty-one percent of respondents to a nationwide poll conducted in May 2000 believed that gay men and lesbians should not be allowed to legally marry, thirty-four percent thought they should be extended this right.³⁷ However, forty-one percent of the respondents to the same survey approved of domestic partnerships that give same-sex couples "the same rights and benefits" of opposite-sex marriage.³⁸ As to other specific rights, fifty-six percent of respondents favored providing inheritance rights to gay partners while thirty-two percent opposed this; fifty-three percent approved of providing health insurance coverage to gay partners, while thirty-seven percent opposed this; and fifty percent thought Social Security benefits should be provided to gay partners, while forty-one percent opposed this extension.³⁹ In sum, these polls indicate that the majority of Americans oppose gay marriages, but support selective extension of spousal benefits to same-sex partners.⁴⁰ This suggests that prior to September 2001, a tide that was shifting toward extension of rights to gay men and lesbians, but doing so one right at a time.

Another key to measuring America's heartbeat is popular culture, especially television. Gay and lesbian characters had achieved a status somewhere past novelty and edging toward mainstream prior to 9/11.⁴¹ *Will and Grace*, a half-hour situation comedy focusing on the life of a gay New York lawyer and his heterosexual female roommate, was garnering high ratings and critical praise.⁴² A major network – the National Broadcasting Company (NBC) – produces the show and broadcasted it during prime viewing hours.⁴³ In other programs, multi-dimensional gay and lesbian characters in both leading and supporting roles appeared to be edging out the flaming male hairdresser or hyper-butth female motorcycle cop who had been injected when programs needed a sure-fire laugh.⁴⁴

37. Associated Press poll conducted by ICR May 17-21, 2002, of 1,012 adults nationwide, at <http://www.pollingreport.com/civil.htm> (last visited Oct. 18, 2002).

38. *Id.*

39. *Id.* The remaining percentage of respondents either answered "don't know" or refused to answer those particular questions. *Id.*

40. Jane Gross, *U.S. Fund for Tower Victims Will Aid Some Gay Partners*, N.Y. TIMES, May 30, 2002, at A1, A25.

41. Verne Gay, *They're Out and About: Gay Characters are More Prominent than ever on TV*, NEWSDAY, Nov. 26, 2000, at D6.

42. *Id.*

43. *Id.*

44. Multi-dimensional gay and lesbian characters were regularly featured on television programs including *ER*, *NYPD Blue*, *Six Feet Under*, and *All My Children*.

Finally, no prediction of where a capitalist society was heading would be complete without considering where corporate America was putting its money. By the turn of the millennium, many Fortune 500 and other for-profit companies had abandoned employment practices discriminating against gay and lesbian employees, and instead courted persons from this population by extending health care and other benefits to their employees' same-sex partners.⁴⁵ Large companies spent advertising dollars to broadcast commercial messages during gay-themed television shows and to place print advertisements in *The Advocate*⁴⁶ and other periodicals aimed at gay and lesbian audiences.

In sum, prior to 9/11, conservatism seemed to be riding a new wave of popularity. Just the same, many forces actively opposed the conservative shift, and gay men and lesbians were garnering victories on many fronts. Despite these victories, gay and lesbian citizens remained especially vulnerable to any shift to the right of the political spectrum. History teaches that the group that most recently secured civil rights is the group most likely to lose them when political winds shift. The winds were clearly shifting prior to September 11, 2001. What is not clear was which way they were blowing.

III. THE NATION'S BI-POLAR REACTION TO 9/11: EXTINGUISH OR EXTEND CIVIL LIBERTIES?

One would not expect a nation of diverse peoples to react in a unified manner to the events of 9/11. Photos published on the covers of magazines, on the front pages of newspapers and websites, and video clips broadcast on the national and local television news documented the plethora of human emotions exhibited throughout the country – anger, rage, disorientation, disbelief, horror, sorrow, guilt.⁴⁷ Perhaps the most common reaction was the one instinctively

45. See *List of Companies With Domestic Partners Benefits*, at <http://www.buddybuddy.com/ddd-p-pri.html> (last visited Oct. 18, 2002).

46. *The Advocate* is a monthly magazine geared to gay and lesbian readers.

47. Stephanie Strom, *Finding Cure for Hearts Broken, Sept. 11 is as Difficult as Explaining the Cost*, N.Y. TIMES, July 22, 2002, at B1 (estimating that about \$200 million will be spent addressing the mental health needs of those most directly affected by the terrorist attacks on September 11, 2001). See also Erica Goode, *Program to Cover Psychiatric Help for 9/11 Families*, N.Y. TIMES, Aug. 21, 2002, at A1 (explaining that the American Red Cross expects to spend \$40 million and the September 11th Fund will spend \$45 to \$55 million for treatment of the approximately 150,000 families most directly affected by the September 11 attacks).

triggered whenever the survival of an individual or a species is threatened. That emotion is fear.

Fear is "a painful emotion excited by an expectation of evil or the apprehension of impending danger."⁴⁸ For some people, fear is an overwhelming experience. While in a terrified state, they are willing to sacrifice almost anything to help them retrieve even the smallest scrap of security they experienced before the fear-producing event. For others, fear is a fortifying agent. It fuels an adrenaline rush, empowering them to accomplish Herculean tasks despite seemingly impossible odds.

Neither reaction is morally superior. Fight or flight reactions are human instincts, ingrained at a cellular level. They work in tandem to ensure survival of the species.

Those overwhelmed by the waves of fear emanating from 9/11 focused on one objective: immediate guarantees of safety, or, at least, restoration of the illusion of safety. From that perspective, the sacrifice of any civil liberty was justified, provided it offers a chance, however slight, of increased "homeland" security. Increased domestic surveillance by the Central Intelligence Agency (CIA), significant erosion of Fourth Amendment restrictions on electronic eavesdropping and searches of personal and real property by state and federal agents, restructuring of the Federal Bureau of Investigation (FBI) to more fervently pursue stealth investigations of private lives, the use of military tribunals when no war had been officially declared, the federal government's long-term detention of hundreds of aliens residing in this country and refusal to make public the names of those detained or their alleged infractions, significant reductions of privacy rights regarding health, education and financial records requested by law enforcement agencies, and the commitment of several billion taxpayer dollars to effectuate these procedures dealt potentially life-threatening blows to numerous civil liberties.⁴⁹ These multiple contusions to civil

48. EDUCATIONAL BOOK OF ESSENTIAL KNOWLEDGE: AN EDITION OF THE WEBSTER ENCYCLOPEDIA OF THE ENGLISH LANGUAGE 321 (1968).

49. See generally David Abramowitz, *The President, the Congress, and the Use of Force: Legal and Political Considerations in Authorizing the Use of Force Against International Terrorism*, 43 HARV. INT'L L.J. 71, 72-73 (2002) (outlining the issues raised by the White House's proposals to combat terrorism and how Congress considered these proposals); Steven J. Bucklin, *To Preserve These Rights: The Constitution and National Emergencies*, 47 S.D. L. REV. 85, 96-97 (2002); Tom Brazaitis, *Some Fear Stronger FBI will Return to Old Abuses*, PLAIN DEALER, July 7, 2002, at A1; Mark Cutler, *USA PATRIOT Act Increases Burden on Demands for Consumer Information*, 70 U.S.L.W. 2619 (2002); *Defense Department Announces Rules for Trials by Military Commissions*, 70 U.S.L.W. 2591 (2002); Walter Pincus and Dana Priest, *Congress Moves to Lift Intelligence Spending; Hill Also Told of Afghan War Costs: \$17 Billion*, WASH. POST, May 15, 2002, at A1; *Post-Sept. 11 Changes for Health Providers Add Up*

liberties were accepted by many as the logical extension of their belief that “life will never be the same.” No massive protests accompanied these changes, despite the complete dearth of any evidence that any of these measures, either alone or in combination, would in fact curtail acts of terrorism on U.S. soil.⁵⁰

As one observer commented six months after the attack:

We should not be surprised by any of this. September 11 was horrifying: it proved that our enemies are vicious, powerful, and imaginative, and that they have well-trained and suicidal fanatics at their disposal. People’s respect for human and civil rights is often very fragile when they are frightened, and Americans are very frightened.⁵¹

People fortified by their fears, however, expressed a polar opposite reaction. They believed that civil liberties, and not just persons and buildings, were primary targets of the terrorists attacks on 9/11.⁵² To them, any assessment of the terrorists’ damage could not be measured only in lost lives, crumbled buildings, and a plummeting economy, but had to include the civil liberties their fellow citizens were willing to relinquish, and that the government was willing to eviscerate, in response to the attacks.⁵³ Accordingly, people like Rep. Barbara Lee (D-Calif.)—the only member of Congress to vote against the USA PATRIOT Act—were willing to fight for civil liberties despite being labeled traitors.⁵⁴ In response to these criticisms, one activist wrote:

Dr. Martin Luther King once said “We’re at a terrible stage when we confuse dissent with disloyalty, and we view every protestor as a traitor.” Community activists are an important part of our democracy. Without them, we wouldn’t have

to Greater Disclosure to Authorities, 70 U.S.L.W. 2594 (2002); *Yahoo Changes Privacy Policy to Facilitate Information Sharing with Law Enforcement*, 70 U.S.L.W. 2623 (2002). Historical and constitutional analysis of the governmental activities in response to 9/11 is also provided in documents posted on the American Civil Liberties (ACLU) website located at <http://www.aclu.org>.

50. See generally, Philip Shenon, *U.S. Agencies Seen as Slow to Move on Terrorism Risks*, N.Y. TIMES, May 12, 2002, § 1, at 1.

51. Ronald Dworkin, *The Threat to Patriotism*, N.Y. REV. OF BOOKS, Feb. 28, 2002, available at <http://www.nybooks.com/articles/15145>.

52. Martin A. Scordato & Paula Monopoli, *Free Speech Rationales After September 11th: The First Amendment in Post-World Trade Center America*, 13 STAN. L. & POL’Y REV. 185, 185-86 (2002).

53. *Id.* at 186.

54. Michael Shaw, *Long Winter Ahead for Dissent*, PROVIDENCE J.-BULL., Dec. 27, 2001, at B6.

abolished slavery, and women wouldn't be able to vote. But if intimidation, fear, and war end up muzzling this vital form of dissent, then our society will be the big loser. Community activism and dissent must be supported.⁵⁵

President Bush's unprecedented high public approval ratings throughout the year following 9/11 suggest that the vast majority of U.S. citizens responded to their fears by bartering civil liberties for the illusion of security that comes from the myriad laws, executive orders, intelligence agency policies, and other invasive/restrictive procedures enacted by all levels of government.⁵⁶ But dissenting voices were not completely silenced.

After the initial shock wore off, the American Civil Liberties Union (ACLU), the Society of American Law Teachers (SALT), Amnesty International, the Human Rights Campaign, Lambda Legal Defense and Education Fund, a significant number of journalists and news reporters, and others commenced campaigns of respectful dissent, pointing out the shortcomings of virtually every tactic the government had employed. In addition to these progressive forces, more moderate groups, including the American Bar Association (ABA), took public positions opposing specific governmental actions.⁵⁷

Although the chorus of dissent appeared to grow stronger as time passed, that voice was often drowned out by those who preferred to sing "God Bless America" at every opportunity, trusting that their government was making appropriate choices in response to continued terrorist threats.

IV. RAMIFICATIONS FOR GAY AND LESBIAN CITIZENS

Loud Voices: Gay Men and Lesbians Are Responsible for the Attacks

During a television show broadcast two days after 9/11, Christian evangelist Jerry Falwell blamed the terrorist attacks on "the pagans, and the abortionists, and the feminists, and the gays and the lesbians who are actively trying to make that an alternative lifestyle, the ACLU, the People for the American Way, all of them

55. *Id.*

56. Scordato & Monopoli, *supra* note 52, at 185.

57. See, e.g., ABA Opposes Secret Custody in 9/11 Probe, WASH. POST, Aug. 14, 2002, at A10.

who have tried to secularize America.”⁵⁸ Falwell’s reasoning was that the activities of gay men, lesbians, and others had angered God. “I point the finger in their face and say ‘you helped this happen,’” Falwell said.⁵⁹ Pat Robertson, founder of the right-wing Christian Coalition who was hosting the television program, agreed with Falwell.⁶⁰

It is tempting to characterize Falwell’s finger wagging at gay men and lesbians as the act of a fundamental zealot responding impetuously to catastrophic horror. The staying power and the irony of his words, however, cannot be lightly dismissed.

Irony, of course, is found in the fact that the zeal of another religious fundamentalist, Osama bin Laden, inspired the attacks. Using Falwell’s own logic, the gay men, lesbians, and other civil libertarians indicted by Falwell and Robertson as casual agents of the 9/11 scourge would have been equally justified in pointing the finger at Falwell and Robertson, by arguing that religious fundamentalism, not liberal activism, is the root of modern evil. This table turning finds further support in the often-cited fact that more people have been killed and tortured in the name of religion than any other cause.⁶¹

Finger pointing aside, Falwell’s words have a haunting presence that endures despite his attempt to retract them.⁶² Falwell’s words linger in this country’s collective psyche because he articulated what many people believe regarding the inevitability of God’s retribution on a society that tolerates homosexuals, allows abortion, and encourages personal freedoms.⁶³ Falwell was merely tapping into a belief that took root when the first Europeans set foot on Plymouth Rock and dedicated themselves to creating a Puritanical society.⁶⁴ These Puritans believed they formed a special covenant with God,⁶⁵ just as the ancient Israelites had done in their new land after 40 years wandering the desert.⁶⁶ In exchange for

58. *The 700 Club* (CBN television broadcast, Sept. 13, 2001) (comment of Jerry Falwell).

59. *Id.*

60. *Id.*

61. See, e.g., Andrew Sullivan, *This is a Religious War*, N.Y. TIMES, Oct. 7, 2001, § 6, at 44.

62. Jim Drinkard, *Pat Robertson Quits Christian Coalition Post*, USA TODAY, Dec. 6, 2001, at 8A (noting that both Falwell and Robertson had backed down from the opinions expressed during the show broadcast on Sept. 13, 2001).

63. See generally Jeff Brumley, *Are We God’s “Chosen People?”*, STUART NEWS/PORT ST. LUCIE NEWS, Sept. 22, 2001, at D1.

64. PETER W. WILLIAMS, *AMERICA’S RELIGIONS: FROM THEIR ORIGIN TO THE 21ST CENTURY* 107-118 (2002).

65. *Id.* at 111.

66. *Id.* at 39-40.

strict adherence to God's laws as set forth in the Christian Bible, the Puritans believed they would prosper in their New World. If they violated their God's law, they would suffer and perhaps perish.⁶⁷

Conviction in the Puritanical philosophy that "the wages of sin is death"⁶⁸ extended to other religions and even non-religious people in this county. It is a deeply internalized part of our culture.⁶⁹ Thus, when destruction and death rained down on us on 9/11, many persons besides Falwell and Robertson may have seen the wrath of God intermingled with the rubble.

On the other hand, the extremist statements made by Falwell and Robertson have caused persons who had previously provided political and financial support to the religious right to abandon that ship.⁷⁰ Even notoriously conservative radio talk show guru Rush Limbaugh condemned Falwell's reaction.⁷¹ Robertson resigned as president of the Christian Coalition, and many questioned whether this once powerful but precipitously declining force will survive his departure.⁷²

In addition, Falwell's words may have inspired previously closeted and/or nonpolitical gay men and lesbians to come out and become activists. For example, Tom Ryan, a NYPD firefighter at ground zero on 9/11, had this reaction to Falwell's comments: "I was just livid When people say things like that, I want to stand up and show them what a gay man is."⁷³

In sum, Falwell's words may have struck a common chord, but even those who see God's vengeance in the devastation of 9/11 have not proposed burning homosexuals (or anyone else) at the stake to try to appease God's anger.⁷⁴ In light of the other carnage heaped on our civil liberties, the non-revival of burning at the stake should be counted as a blessing.

67. *Id.* at 109-110.

68. *Romans* 6:23.

69. Brumley, *supra* note 63.

70. Drinkard, *supra* note 62.

71. Hank Stuever, *The Bomb with a Loaded Message: For Gays in America, Even Heroism Isn't a Ticket to Inclusion*, WASH. POST, Oct. 27, 2001, at C1.

72. Drinkard, *supra* note 62.

73. Jessica DuLong, *We Were There: Gay and Lesbian New York City Police and a Firefighter Unite for These Photos - and to Share Their September 11 Stories: Gay Heroes*, ADVOC., Jan. 22, 2002, at 52.

74. Burning people alive was a technique commonly employed by Puritans to eliminate the perceived evil among them. MARION STARKEY, *THE DEVIL IN MASSACHUSETTS* (1949).

Quiet Murmurs: The Private Lives of Public Heroes

U.S. news media were quick to portray every person who lost his or her life in the 9/11 attacks as heroes who made the ultimate sacrifice for their country. News magazines, newspapers, radio programs, Internet news services, and television broadcasts related story after story of people who had lost fathers, mothers, sons, daughters, wives, and husbands on that day. As hard news stories and commentaries on the political and international intrigue of 9/11 were front-page news, the human-interest aspect of American families ripped apart by the attacks acquired equal coverage. Photos of grieving widows and widowers, clutching snapshots of their deceased spouses while tears rolled silently down the survivors' cheeks, were ubiquitous and heartrending.

No one could, or ever should, doubt the pain and devastation inflicted on those who lost loved ones on that day. But what the newsmen overlooked, either in their haste to market their products or pursuant to their usual deference to heterosexist America, was that many gay and lesbian families were also torn asunder by the attacks. And some of those gay men and lesbians who lost their lives were, in fact, heroes. Mark Bingham is one of those heroes.

Bingham was a passenger on United Flight 93 that crashed into a field in Pennsylvania instead of a possible Washington D.C. target.⁷⁵ Bingham defied any stereotype of gay men as effeminate. He was 6 foot 5 inches tall, 220 pounds; a player/coach of his amateur rugby team, a runner with the bulls in Spain, and owner of a public relations firm with offices in San Francisco and New York.⁷⁶

Bingham called his mother while en route from Newark to California on 9/11. He told her that several men who claimed to have a bomb had hijacked the flight.⁷⁷ Bingham was seated near the cockpit. Based on his location, his athleticism, and his previous encounters with muggers in which he fought back, many believe he helped overpower the terrorists to prevent Flight 93 from reaching its targets. As one reporter surmised, "liberals and conservatives alike invoke Bingham's name as an example of America's strength

75. Margie Mason, *Gay Hero Emerges from Sept. 11 Attacks: Credited with Helping to Thwart Hijackers of Jet that Crashed in Pa.*, REC., Oct. 23, 2001, at A12. See also JERE LONGMAN, *AMONG THE HEROES: UNITED FLIGHT 93 AND THE PASSENGERS AND CREW WHO FOUGHT BACK* 129-41(2002).

76. Mason, *supra* note 75.

77. *Id.*

and spirit."⁷⁸ What virtually everyone who invoked this hero's name failed to mention was that he was a gay man.

Bingham was not the only hero whose actions made a difference, but whose non-heterosexual orientation was rarely (if ever) acknowledged by the mainstream news media. Others include American Airlines co-pilot David Charlebois, first officer of American Flight 77, who lost his life when the plane slammed into the Pentagon,⁷⁹ and a number of police officers and firefighters who participated in the initial emergency response and subsequent rescue efforts at the sites of the attacks.⁸⁰ At least six gay firefighters lost their lives in New York.⁸¹ Franciscan Priest Mychal Judge, an extremely popular and openly gay chaplain to New York firefighters, died in Tower One when he was struck by falling debris shortly after he administered last rites to a firefighter.⁸² Wesley Mercer, vice president of security for Morgan Stanley, supervised the company's evacuation process, making sure all 3,700 employees were out of the second tower before the second plane hit.⁸³ He returned upstairs to make sure everyone got out of the building safely, and died when the second tower collapsed.⁸⁴ Mercer, who received medals for his military service in Korea and Vietnam, is survived by Bill Randolph, his partner of twenty-six years.⁸⁵

Some people argue that the sexual orientation of these individuals is irrelevant, especially in a time of national tragedy. That argument would be more persuasive if the standard for reporting the sexual orientation of newsmakers was universally applied. But it is not.

The U.S. is a heterocentrist society. Definitions of who a person is, what s/he has achieved, and whether his/her contribution to society is of value is still measured largely in terms of heterosexual norms: i.e., whether s/he is married and whether s/he has produced offspring. Thus, when a newsworthy event occurs—a person achieves a boost up the corporate ladder, is appointed to the board

78. *Id.*

79. Lou Chibbaro Jr., *Gay Co-Pilot Killed in Pentagon Attack; Gay Man Possible Hero in Pa. Crash*, WASH. BLADE, Sept. 12, 2001, at <http://www.washblade.com/national/010912a.htm>.

80. See, e.g., DuLong, *supra* note 73.

81. George Watson, *Ceremony Honors Gay Victims*, PRESS-ENTERPRISE, Jan. 11, 2002, at B1.

82. *Id.* See also Jennifer Senior, *The Firemen's Friar*, N.Y. MAG., Nov. 12, 2001, available at <http://www.newyorkmetro.com/nymetro/news/sept11/features/5372>.

83. Victoria Scanlan Stefanakos, *Life Goes on: Surviving Partners of Victims of the Terrorist Attacks Take Different Approaches to the Same Goal—Getting on With Their Lives*, ADVOC., Jan. 22, 2002, at 48.

84. *Id.*

85. *Id.*

of a non-profit organization, or is inducted into a sports hall of fame—the existence of a spouse and family is almost universally noted. But when gay or lesbian persons achieve those same successes, there is an ominous absence of any mention of a personal life. In this heterosexual climate, news recipients are left to assume that the subjects of the news reports, while successful in business or public service or sports, must be failures in their personal lives. The possibility that the person might have a long-term partner and children fails to occur to most people. And if sexual orientation of a gay or lesbian person is mentioned, it is often perceived as a negative rather than a positive characteristic.

The irony, of course, is that the media's routine failure to acknowledge successful family relationships of gay and lesbian newsmakers is exactly what fuels this society's heterosexism. This point was stressed in an open letter to news organizations from the National Lesbian and Gay Journalists Association (NLGJA) when it became clear that the sexual orientation of people like Mark Bingham and Father Judge were being omitted from news accounts of their 9/11 heroics.⁸⁶ The letter explained:

Some journalists may embrace outdated ideas that identifying openly gay and lesbian heroes will cast a negative image on their memory. This decision is based on the presumption that being gay or lesbian is wrong, a bias that works completely against news objectivity. Withholding relevant details about these lives, their partners and families is unfair and hurtful to the people they loved. In our mission as journalists, it also denies our readers and viewers' information about the true identities of those who are in the news. It is the same as withholding information about the spouse, children and other features about the heterosexual heroes.⁸⁷

NLGJA further recognized the need for a healthy balance between respecting the privacy of newsmakers' personal lives and providing more comprehensive and accurate reporting. NLGJA suggested that journalists achieve this balance by asking newsmakers if they have a partner, rather than asking if they are married. "This basic question may open the door to find out more about the subject of your story—including the chance that they were

86. *Open Letter to News Organizations from the National Lesbian and Gay Journalists Association*, PR NEWswire, Oct. 22, 2001 (on file with author).

87. *Id.*

heterosexual and had a significant, romantic relationship outside of traditional marriage,"⁸⁸ NLGJA advised.

Mark Bingham would have agreed with NLGJA's approach. Shortly before he took the fateful flight on United Flight 93, Bingham's gay rugby team was accepted into a straight league in California. He sent this e-mail to his teammates:

We have the chance to be role models for other gay folks
We have the opportunity to let these other athletes know that gay men were around all along – on their Little League teams, in their classes, being their friends. This is a great opportunity to change a lot of people's minds.⁸⁹

Bingham's advice on how he lived may have dramatically foreshadowed the impact his death may have regarding Americans' perception of their gay and lesbian compatriots.

Advancing or Retreat of Civil Liberties for Gay Men and Lesbians

What long-term impact will 9/11 have on the rights afforded gay men and lesbians in the U.S.? That question can only be answered by future legal historians. At this juncture, one can only suggest a few lenses through which historians might answer the question years hence. The following discussions of tort remedies, employment law, and hate crime legislation offer three lenses that may prove helpful in answering the inquiry. While hardly exhaustive of the many areas of law in which gay men and lesbians have yet to achieve full legal recognition and protection, the events of 9/11 bring the shortcomings of these three areas of law into clear focus.

As explained more fully below, gay men and lesbians who lost partners in the 9/11 attacks initially found themselves outside the classes of persons entitled to various state and federal remedies. Their efforts to be included in various 9/11 compensation programs may establish standing for gay and lesbian persons to pursue tort remedies in other contexts. Similarly, the deaths of gay and lesbian persons employed in the World Trade Center on 9/11 has been cited by some members of Congress as additional rationale for passing federal legislation prohibiting employment discrimination based on sexual orientation. Finally, the hate-inspired attacks of 9/11 may inspire federal and state legislators to reexamine their positions on

88. *Id.*

89. Mark Bingham, quoted in Mason, *supra* note 75.

hate crime legislation, possibly resulting in increased criminalization of and punishments for crimes motivated by hatred of the victim based on his or her sexual orientation.

Eligibility for Victims' Remedies

*This has nothing to do with money, but it has everything to do with the recognition.*⁹⁰

*Because of the creative power inherent in tort's elastic capacity, recognizing a right of recovery for relational injury by same-sex couples could begin to change the wider terrain, legal and societal, for gay people.*⁹¹

The U.S. legal system is based on a number of fictions. Principals who act through agents are deemed to have acted themselves. Persons who wrongly take property from another with no intent to return it are adjudged to be constructive trustees for the true owner. Octogenarians are considered fertile to protect the rights of yet unborn heirs who, in all likelihood, will never be born. These and myriad other fictions give serious pause regarding the collective sanity of legal professionals. But the figment that binds our entire justice system is perhaps the most fantastical of all. That is the belief that any property loss, physical injury, or emotional trauma can be measured in monetary terms, and that surviving victims and decedents' survivors can be "made whole" by filling the massive voids in their lives with money.⁹²

The hundreds of millions of dollars⁹³ people in this country donated for 9/11 victims' relief funds and the billions of dollars Congress has set aside for the federal compensation scheme suggest that, as a society, we have collectively bought into the fiction of money as a balm for even the most catastrophic of losses.⁹⁴ By itself,

90. Keith Bradkowski, same-sex partner of Jeff Coleman, a flight attendant who died when Americans Airline Flight 11 slammed into the World Trade Center, quoted in Carol Ness, *Survivors Can Begin Applying to Sept. 11 Fund: Gay, Lesbian Partners Unsure of Eligibility*, SAN FRAN. CHRON., Dec. 21, 2001, at A1.

91. Culhane, *supra* note 23, at 980.

92. See generally, William Glaberson, *Lawyer Math in Sept. 11 Death Shows Varying Value for a Life*, N.Y. TIMES, Nov. 11, 2001, at B1.

93. Exact totals remain elusive, but it appears that at least \$1 billion has been raised. See, e.g., Stephanie Strom, *Families Fret as Charities Hold a Billion Dollars in 9/11 Aid*, N.Y. TIMES, June 23, 2002, § 1, at 29.

94. Of course, many other explanations are equally plausible. The millions in contributions could be the result of the capitalistic society willing to give up one of the things it values the most in times of tragedy, or the rage and impotence that caused many to feel that

financial compensation is not a bad thing. No other compensatory scheme exists to actually restore victims to their pre-injury status, and requiring tortfeasors to provide financial compensation to their victims injects a certain fairness element into the civil justice system. But the bigger fairness issue raised by our civil justice system is this: how do we define "victims" for purposes of awarding financial compensation?

As a rule, the civil justice system is not fair to gay and lesbian victims. Same-sex partners and their children have historically and are currently denied standing to pursue state and federal remedies including loss of consortium claims, wrongful death suits, intestate inheritances, Social Security disability and death benefits, Workers' Compensation death benefits, military pensions, and other remedies and entitlements that are routinely awarded to their heterosexual counterparts.⁹⁵ The manner in which compensation is administered to the victims of 9/11 may set important precedents for changing the historic treatment of gay and lesbian families.⁹⁶

Married heterosexuals whose spouses were victims of the 9/11 attacks are entitled to a wide variety of benefits from public and private sources.⁹⁷ There is no indication that these traditional benefits will be extended to the twenty-two known partners⁹⁸ and other yet-unidentified partners of gay and lesbian victims.⁹⁹ To the

they just had to take some action—and reaching for the wallet seemed the most obvious choice.

95. See Culhane, *supra* note 23, at 911 (providing a detailed analysis of how gay men and lesbians are excluded from pursuing remedies under legal theories including loss of consortium and wrongful death). See also Jon W. Davidson, *Blazing the Trail to Love with Equality*, LAMBDA/UPDATE 8 (Spring 2002) (reporting on Lambda's attempt to obtain N.Y. workers' compensation benefits for two men who lost their same-sex partners in the Sept. 11 attacks); Tara Burghart, *Fund to Assist Gay Partners of Sept. 11 Victims*, REC., Dec. 14, 2001, at A25 (reporting that gay and lesbian victims will not be included in a variety of traditional funds and that a special fund with \$141,000 in donations would be distributed to them by the N.Y.C. Gay and Lesbian Anti-Violence Project); Stuever, *supra* note 71 (explaining the variety of traditional compensation programs from which gays and lesbians will be excluded absent changes in governmental and private policies and advocacy by gay and lesbian activists). But see Ness, *supra* note 90, at A1 (stating that gay and lesbian residents of Vermont, Hawaii, and to a lesser extent California, may be entitled to state benefits according to domestic partner statutes enacted in those states).

96. See generally Nancy J. Knauer, *The September 11 Attacks and Surviving Same-Sex Partners: Defining Family Through Tragedy*, 75 TEMP. L. REV. 31 (2002) (providing excellent discussions of probate law, survivor benefits, wrongful death and survival actions, and other compensation schemes as traditionally applied to same-sex couples).

97. These benefits are not automatically limited to persons who have satisfied their respective state's statutory marriage requirements. Some states dispense benefits upon a showing by a heterosexual couple that a common law marriage existed, but do not allow benefits for a homosexual couple who meet the same standards. *Id.*

98. Gross, *supra* note 40, at A1.

99. Gay and lesbian victims of 9/11 will have to fiercely advocate for participation in

contrary, the "bereaved lesbian and gay men whose partners died in the tragedy have had to face not only painful loss but also unequal treatment from the government and other institutions that are supposed to be sources of support through such heartbreak."¹⁰⁰

Fundamental evangelists and right wing politicians have publicly denounced compensation to the partners of gay and lesbian victims, claiming that homosexuals "are taking advantage of this national tragedy to promote their agenda" and urging that first priority should be given "to those widows who were at home with their babies and those widowers who lost their wives."¹⁰¹ One observer classified the opposition to inclusive compensation programs as "vociferous."¹⁰²

Despite this resistance, there has been significant progress toward extending remedies to gay men and lesbians. This result is in large part due to the intense lobbying efforts by the Human Rights Campaign, Lambda Legal Defense and Education Fund, National Center for Lesbian Rights, Gay and Lesbian Advocates and Defenders, Log Cabin Republicans, National Gay and Lesbian Task Force, American Civil Liberties Union, the state and city of New York, and other national and regional entities.

On June 24, 2002, for example, President Bush signed legislation amending a 1968 omnibus crime statute. As amended, the statute authorizes a federal payment of \$250,000 to persons named as beneficiaries in the life insurance policies of public safety officers killed in the line of duty.¹⁰³ The legislation is retroactive to 9/11 and

various compensation systems. See, e.g., Mubarak Dahir, *September 11: Are All Survivors Equal?*, ADVOC., Sept. 17, 2002, at 26 (detailing efforts by gay men and lesbians to obtain compensation); Denny Lee, *Partners of Gay Victims Find the Law Calls Them Strangers*, N.Y. TIMES, Oct. 14, 2001, § 14, at 4 (reporting on circumstances of Bill Randolph, who lost his partner of twenty-six years in the World Trade Center, and others similarly situated who will be denied myriad state and federal benefits available to spouses of other victims, but who may be eligible for funds from private sources like the Red Cross and the decedent's former employer); *On the Road to Recovery: Ensuring that Gay Survivors of Sept. 11 Attacks Find Equal Justice*, HRC Q., Spring 2002, at 8 (discussing initial, unsuccessful efforts of a lesbian who lost her partner of 18 years when American Airlines Flight 77 crashed into the Pentagon, to obtain compensation from Virginia's victim's assistance fund and the federal government's initial reluctance to include gay and lesbian survivors in the federal compensation scheme). See also, Stefanakos, *supra* note 83, at 48 (explaining gay and lesbian survivors losses in personal as well as financial terms).

100. LAMBDA LEGAL, 2001 ANNUAL REPORT: JUSTICE 4 (2002).

101. Rev. Louis P. Sheldon, Chairman and Founder of the Traditional Values Coalition, quoted in Thomas B. Edsall, *Minister Says Gays Should Not Get Aid*, WASH. POST, Oct. 5, 2001, at A22. See also Gross, *supra* note 40, at A25 (containing a similar quote attributed to Sheldon).

102. Kathleen Burge, *Sept. 11 Leaves Same-Sex Partners Adrift: Laws Bar Benefits, Even Recognition*, BOSTON GLOBE, Mar. 18, 2002, at B1.

103. Mychal Judge Police and Fire Chaplains Public Safety Officers' Benefit Act of 2002,

will cover future deaths of police and fire persons.¹⁰⁴ Prior to the amendment, only the legally recognized spouse, children or the parents of a police officer or firefighter who died in the line of duty were eligible for this benefit.¹⁰⁵ Expanding coverage to all named beneficiaries authorizes payment of federal benefits to same-sex partners of deceased safety personnel, provided that the same-sex partners were designated as beneficiaries by their partners.

The legislation is named in honor of Father Mychal Judge, the openly gay New York City chaplain killed in the attack. While the Human Rights Campaign (HRC) and other gay rights groups cite this as an important advancement, neither the members of Congress who voted for it nor President Bush characterize it as gay rights legislation.¹⁰⁶ As explained more fully below, there is some question whether the legislation truly represents a significant advance for gay men and lesbians.

The Act's co-sponsors include conservative Representative Donald Muzullo (R-Ill.) who proudly boasts of his anti-gay voting record.¹⁰⁷ Muzullo explained that he has "zero contact with the gay community,"¹⁰⁸ and views the legislation as one of general application, similar to the tax code which allows two people who jointly own a house to both enjoy the mortgage tax deduction, regardless of their sexual orientation.¹⁰⁹

The Rev. Louis Sheldon of the Traditional Values Coalition and Paul Weyrich of the ultra-conservative Free Congress Foundation were among those highly offended by passage of the Mychal Judge Act, claiming that it is a first step towards recognizing homosexual marriage and equating it to "a stamp of approval" by the Bush administration on a "deviant lifestyle."¹¹⁰ The opposite view appeared in an editorial in a Norfolk, Virginia newspaper: "A conservative administration—particularly a compassionate one—ought to recognize that firefighters or police officers willing to die in

Pub. Law No. 107-196, 116 Stat. 719 (2002). See *National Briefing Washington: Death*

Benefits for Domestic Partners, N.Y. TIMES, June 26, 2002, at A20 (stating that if there are multiple beneficiaries, the \$250,000 is evenly divided among them).

104. Pub. L. No. 107-196, 116 Stat. 719, at § 2(c).

105. Elisabeth Bumiller, *Washington Memo: The Most Unusual Story Behind a Gay Rights Victory*, N.Y. TIMES, June 26, 2002, at A25.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. Editorial, *Bush Shows Backbone in OK-ing Benefits Law*, VA.-PILOT, June 29, 2002, at B8.

the line of duty to save others should, at a bare minimum, be able to leave their life insurance to whomever they wish.”¹¹¹

Despite the parade of horrors that conservatives such as Sheldon and Weyrich associate with the Mychal Judge Act, the impact of the legislation is extremely limited. The legislation does not automatically extend benefits to all same sex partners. Rather, it applies to a same-sex partner of (1) a fire or police person (2) killed in the line of duty (3) if the same-sex partner is the designated beneficiary of the decedent's life insurance. In the case of the Act's namesake, for instance, the federal benefit arising from Father Judge's death is payable to his two sisters who he had named as beneficiaries in his life insurance policy.¹¹²

Moreover, the Act could be characterized as a conservative coup. The express purpose of the Act is to amend federal law “to ensure that chaplains killed in the line of duty receive public safety officer death benefits.”¹¹³ Thus, one would think that Rev. Sheldon and like-minded individuals should celebrate the federal government's recognition of services performed and sacrifices made by religious personnel.

A more certain, yet more geographically limited, victory was recorded when New York Governor George E. Patiki issued Executive Order 113.30,¹¹⁴ empowering New York's State Crime Victims Board to award domestic partners of persons killed on 9/11 awards of up to \$600 a week, with a cap of \$30,000 each.¹¹⁵ The governor's order thus extended the benefit, ordinarily only applicable to legally recognized husbands and wives, to persons in same sex partnerships.¹¹⁶ Governor Patiki also allowed gay partners to receive compensation under New York state's 9/11 charitable fund.¹¹⁷

Similarly, Pennsylvania's Sept. 11 Victim Assistance Program, established to provide compensation for Pennsylvania residents victimized by the attacks including the crash of United Flight 93 in the western part of the state, was amended to cover “significant

111. *Id.*

112. *Id.*

113. Mychal Judge Police and Fire Chaplains Public Safety Officers' Benefit Act of 2002, Pub. L. No. 107-196, 116 Stat. 719 prologue (2002).

114. Exec. Order No. 113.30, *Suspension of Provisions Relating to Crime Victim Awards for Persons Dependent Upon Victims of the World Trade Center Attacks*, Oct. 10, 2001, available at http://www.state.ny.us/sept11/exorders/113_30.pdf (last visited Oct. 18, 2002).

115. Gross, *supra* note 40, at A25. See also Knauer, *supra* note 96, at 82-84.

116. Gross, *supra* note 40, at A25.

117. *Id.*

others.”¹¹⁸ In contrast, Virginia has rejected extending coverage of its Criminal Injuries Compensation Fund to persons whose same-sex partners were murdered in the 9/11 attacks.¹¹⁹

The 9/11 attacks have caused other U.S. institutions to re-examine their approaches to gay and lesbian clients. The American Red Cross, for example, was embarrassed by numerous missteps that included turning away gay and lesbian partners at the Family Assistance Center at Pier 94 in New York City following the 9/11 attacks.¹²⁰ It has expanded its definition of family and trained its volunteers to aid same-sex partners.¹²¹ Conversely, the Salvation Army rescinded its policy allowing regional offices to establish their own policies regarding domestic partner and other employee benefits.¹²²

The eligibility of gay and lesbian partners of persons who died in the 9/11 attacks to participate in the federal September 11 Victims' Compensation Fund (“the Fund”) may, in the long run, be one of the most accurate barometers of whether the terrorist attacks have resulted in a country more tolerant of homosexual citizens.

The Fund was established by Congress in part to avoid personal injury and wrongful death lawsuits that might bankrupt the airlines whose lax security arguably facilitated the 9/11 terrorist attacks.¹²³ Participation in the \$6 billion Fund offers tax-exempt payouts averaging over \$1 million per decedent if the victim's survivors agree never to sue the airlines involved in the attack.¹²⁴ Awards will be determined under regulations promulgated by the Department of Justice (DOJ) at the request of Congress.¹²⁵ The rules for determining the amount of each award take into account each survivors' economic and emotional losses, offset by certain collateral

118. Knauer, *supra* note 96 at 84-87.

119. *Id.* at 79-82.

120. Gross, *supra* note 40, at A25.

121. *Id.* See also Knauer, *supra* note 96, at 88-93.

122. Christopher Heredia, *Salvation Army Says No Benefits For Partners; Regional Panel Overturns Regional OK*, SAN FRAN. CHRON., Nov. 14, 2001, at A22.

123. Air Transportation Safety and Stabilization Act, Pub. L. No. 107-42, §§ 1-601, 115 Stat. 230 (2001). See generally Knauer, *supra* note 96, at 54-79.

124. Ness, *supra* note 90, at A1. The first awards announced by the federal government to 25 families who'd lost loved ones ranged from \$300,000 to \$3 million, with an average of \$1.36 million. David W. Chen, *Victims' Fund Announces First Awards*, N.Y. TIMES, Aug. 23, 2002, at B1.

125. Ness, *supra* note 90, at A1. See also, September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66282 (Dec. 21, 2001) (interim rule); September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11233 (Mar. 13, 2002) (final rule to be codified at 28 C.F.R. 104 (2002)). Frequently updated information about the Fund is provided by the DOJ at <http://www.usdoj.gov/victimcompensation/index.html>.

benefits each survivor received due to the attacks.¹²⁶ The Fund is administered by DOJ Special Master Kenneth R. Feinberg, a lawyer with expertise in mass tort claims, who will make final determinations as to eligibility and the amount of compensation for each applicant.¹²⁷ According to Feinberg, the average payment prior to offset for other compensation will be \$1.6 million.¹²⁸

The DOJ regulations do not expressly include or exclude same-sex partners from the compensatory scheme.¹²⁹ Pertinent definitions in the Justice Department Regulation governing eligibility are vague enough to cover gay and lesbian partners, as well as opposite-sex domestic partners, illegitimate children, and dependents as defined by federal tax law who might not be recognized under traditional state laws defining survivors' rights.¹³⁰

Specifically, the regulations define "eligible claimant"¹³¹ as an individual present at a site of the terrorist attacks on 9/11¹³² or the "personal representative" of (1) someone present at a site¹³³ or (2) an individual (other than a terrorist) who died on one of the four jets.¹³⁴ For victims who died testate, the personal representative will be the executor named in the will or appointed by a court.¹³⁵ If no will exists, Special Master Feinberg may use his discretion to determine that the "first person in line of succession established by the laws of the decedent's domicile governing intestacy"¹³⁶ is the appropriate personal representative of the victim. Since same-sex partners are not recognized as legal beneficiaries in state statutes of descent and distribution, partners of gay men and lesbian victims will be designated as personal representatives only if their deceased partners died testate and named the surviving partners as executors, or where courts appoint the partners as executors.

Designation as a "personal representative," however, does not automatically determine eligibility to receive compensation from the Fund. Rather, it empowers the person so designated to file the claim form on behalf of the decedent, and upon notice to the immediate family of the decedent and to any other persons who may

126. Ness, *supra* note 90, at A1.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* Knauer, *supra* note 96, at 55.

131. 28 C.F.R. § 104.2(a) (2002).

132. *Id.* at (a)(1).

133. *Id.* at (a)(3).

134. *Id.* at (a)(2).

135. *Id.* at (a)(1)-(2).

136. *Id.* at (a)(2).

assert an interest in the claim,¹³⁷ to advocate for an appropriate award to be distributed to eligible "beneficiaries."¹³⁸ In addition to documenting the amount of an appropriate financial award, the personal representative also submits a plan of distribution that lists all beneficiaries and the amount each will receive.¹³⁹ The Special Master then reviews the plan and can approve it or revise it. The regulations mandate that the Special Master ascertains that the distribution proposed by the personal representative appropriately compensate "the victim's spouse, children, or other relatives."¹⁴⁰

In sum, the lengthy regulatory scheme for awarding federal benefits neither expressly includes nor excludes same-sex couples from participation in the Fund. The significant discretion vested in the Special Master suggests that in the end, Kenneth Feinberg will make decisions affecting gay men and lesbians on a case by case basis.¹⁴¹

Undoubtedly, gay and lesbian survivors will encounter more obstacles to recovery than their heterosexual counterparts who apply to the Fund,¹⁴² and may ultimately receive less than a victim's legally recognized spouse due to the complicated scheme for calculating awards.¹⁴³ Nonetheless, the DOJ regulations provide the first opportunity gay and lesbian advocates have had to argue for domestic partner benefits under federal law. Special Master Feinberg has stated that he is "very sympathetic" to persons who

137. *Id.*

138. In somewhat circuitous fashion, "beneficiary" is defined as "a person to whom the Personal Representative shall distribute all or part of the award" 28 C.F.R. 104.3(a) (2002). This definition arguably expands the definition published in the interim rule, which limited a beneficiary to a "person entitled to receive payments or benefits from the estate pursuant to the laws of the decedent's domicile." September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66282, § 104.3(a) (Dec. 21, 2001) (interim rule).

139. 28 C.F.R. § 104.52 (2002).

140. *Id.*

141. Some members of Congress have weighed in favor of including gay men and lesbians in the program: twenty-nine Democrats and sixteen Republicans signed a letter urging adoption of a broad definition for beneficiaries for the distribution of federal funds for the 9/11 attack. Christopher Heredia, *45 Lawmakers Urge Broad Definition of Attack "Survivors,"* WASH. TIMES, Nov. 21, 2001, at A6. The letter was drafted by Congressman Barney Frank.

142. See, e.g., Jeremy Quittner, *New Hurdles for Survivors: How Will Gay Survivors of the September 11 Attacks Cash in on the Federal Compensation Fund?*, ADVOC., Feb. 5, 2002, at 13 (noting complications for gay and lesbian applicants arising from DOJ decisions to rely on state laws when determining federal eligibility for the Fund and only allowing one person to serve as representative of an estate). See also Knauer, *supra* note 96, at 55, 72-76 (explaining that only same-sex partners who were both the beneficiary and executor of wills executed by a victim of the attacks have clear standing to pursue awards, and explaining other complications that entangle same-sex partners seeking benefits under the federal regulatory scheme); Kathleen Burge, *Sept. 11 Leaves Same-Sex Partners Adrift: Laws Bar Benefits, Even Recognition*, BOSTON GLOBE, Mar. 18, 2002, at B1.

143. Knauer, *supra* note 96, at 60 n.167, 65-72.

lost same-sex partners in the attacks and intends to allow such claimants to apply and “demonstrate why justice and equity would be served by considering that same-sex partner”¹⁴⁴ eligible for Fund participation. Feinberg has also stated that if a parent or other representative of an estate instructs him to “cut a check for the same-sex partner” of someone killed in the 9/11 attacks, Feinberg will follow the representative’s directive.¹⁴⁵ Conversely, a legal representative who opposes a distribution of benefits to the same-sex partner of a decedent may be effective in blocking the partner’s award.¹⁴⁶

Feinberg started processing claims in March 2002, and by mid-April Lambda Legal Defense and Education Fund filed the first claim on behalf of a lesbian, Peggy Neff, whose partner of seventeen years was killed in the Pentagon attack.¹⁴⁷ Lambda is also providing legal support for Keith Bradkowski, whose partner of eleven years died in the attacks, in applying for the federal monies.¹⁴⁸ There was no word as of this writing as to how Feinberg was handling the claims of Neff, Bradkowski, or other claims filed by gay and lesbian survivors.¹⁴⁹

It may seem a small step, but the DOJ’s decision not to explicitly exclude same-sex partners from eligibility for federal remedial funds is an important victory in a country that boasts a Defense of Marriage Act (DOMA) that purports to deny any legal recognition same sex couples. Eligibility to participate in the victims’ compensation funds of New York and Pennsylvania are also important steps, as is the shift in attitudes by the Red Cross and other organizations to extend aid to members of non-traditional families. As one pollster commented, the potential eligibility of same-sex partners for such relief changes the political climate, “and

144. *Market Call: Tough Call: Same-Sex Partners, Survivors of 9/11, Break New Ground in Compensation* (CNN television broadcast, Mar. 12, 2002) (CNN Transcript # 031215cb.105 on file with author).

145. Gross, *supra* note 40, at A1. Feinberg explained that following a directive from an estate’s representative would present “no problem” because it would constitute a purely “ministerial function” that does not require his exercise of discretion. *Id.*

146. Legally recognized relatives of victims of the 9/11 attack have successfully blocked same-sex partners from other types of benefits normally due a surviving spouse. *See id.* at A25.

147. Rachel Katzenellenbogen, *Lambda Legal Fights for Relationship Recognition and Equal Access to “Safety Nets”*, LAMBDA LEGAL ENEWS (#8), Apr. 26, 2002 (received by author from listserve of lambdalegalnewslist@benjaminco.com).

148. LAMBDA LEGAL, 2001 ANNUAL REPORT: JUSTICE 4 (2002).

149. Matthew A. Hennie, *Gay Partners Yet to Receive Federal 9/11 Funds: Lengthy Application Process, Murky Regulations Slow Process, Attorney Says*, N.Y. BLADE NEWS, Oct. 4, 2002, at <http://www.nyblade.com/local/020823benefits.php3> (last visited Oct. 18, 2002).

it's hard to imagine totally turning back the clock"¹⁵⁰ after such a shift has occurred.

Freedom from Employment Discrimination

Extension of employment discrimination protections to *all* gay and lesbian individuals working in both the public and private sectors is an established goal of gay rights activists. The Human Rights Campaign (HRC) and other individuals and groups have repeatedly lobbied federal and state legislators to enact "Employment Non-Discrimination Act" (ENDA) legislation and similar laws to add sexual orientation to the list of existing protected classes such as race, sex and religion. As a result, twenty states and the District of Columbia offer varying degrees of protection against sexual orientation discrimination in employment.¹⁵¹

Like other civil rights, the right of gay and lesbian people not to be discriminated against in employment varies greatly from region to region and from job to job. In addition to the previously noted state laws, protection for gay and lesbian employees are found in federal and state executive orders, case law interpreting state constitutional provisions, local laws and ordinances, and policies adopted by governmental agencies and private employers.¹⁵² Anti-gay sentiment continues in the workplace despite the consensus

150. Lee M. Miringoff, Director of the Marist College Poll, quoted in Gross, *supra* note 40, at A25.

151. California, Connecticut, The District of Columbia, Hawaii, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin have laws protecting both public and private employees from sexual orientation discrimination, while only public employees receive such protection in Colorado, Delaware, Illinois, Montana, New Mexico, New York, Pennsylvania, and Washington. *Maryland Governor Signs Legislation Barring Sexual Orientation Bias in Jobs*, 69 U.S.L.W. 2727 (2001). Law in this area is in a constant state of flux. For example, an executive order that had protected gay and lesbian Ohio state employees from discrimination for fifteen years was sunset by an outgoing Republican governor George Voinovich (now a U.S. Senator) and purposely not reinstated by the successor Republican governor in 2000. Bill Sloat, *Gays Cut from Job Protection Policy: Taft Drops "Sexual Orientation" Reference*, PLAIN DEALER, Jan. 12, 2000, at 1A. Current information on proposed state and federal legislation that would amend existing orientation statutes or enact new legislation is provided at http://www.hrc.org/issues/federal_leg/enda/index.asp (last visited Oct. 18, 2002).

152. See generally Thomas H. Barnard & Timothy J. Downing, *Emerging Law on Sexual Orientation and Employment*, 29 U. MEM. L. REV. 555 (1999). See also Alex Turner, *The Denial of Benefits to the Same-Sex Partners of State Employees: How do Claims of Discrimination Fare Outside the Shadow of ERISA Preemption*, 4 U. PA. J. LAB. & EMPLOY. L. 669, 675-90 (2002) (discussing various sources of non-discrimination law based on sexual orientation).

among most Americans that a person's sexual orientation should not be a factor in his or her employment opportunities.¹⁵³

Uniformity in employment rights for gay and lesbian persons is best achieved through federal legislation. Current federal law prohibits private employers with fifteen or more workers from taking discriminatory action "against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individuals race, color, religion, sex, or national origin" ¹⁵⁴ Discrimination based on disability is also prohibited.¹⁵⁵ Protection against discrimination based on sexual orientation, however, is found neither in the text of federal anti-discrimination statutes nor in courts' interpretations of federal law.¹⁵⁶

Gay and lesbian employees of the federal government arguably are protected¹⁵⁷ from sexual orientation discrimination pursuant to a presidential executive order issued by former President Clinton¹⁵⁸ and enforced by the Department of Labor (DOL).¹⁵⁹ Even assuming that Clinton's executive order is respected by the thousands of government bureaucrats making employment decisions for the federal government, and enforced by the DOL, such protection rests on precariously thin ice. A successive president can rescind any executive order at any time and for any reason.

Even when state and local anti-discrimination laws and policies cover gay and lesbian employees, a significant gap often remains between the "rights" they are accorded compared to their heterosexual co-workers. Such laws often prohibit discriminatory employment decisions (hiring, firing, failing to promote, etc.) based on sexual orientation, but fail to require employers to extend standard employee benefits to the families of gay and lesbian employees, such

153. Even a decade ago, seventy-eight percent of the respondents to a nationwide poll agreed that homosexuals should "have equal rights in job opportunities." Bill Turque et al., *Gays Under Fire*, NEWSWEEK, Sept. 14, 1992, at 34, 36.

154. 42 U.S.C. § 2000e-2(a)(1) (2002) (commonly referred to as Title VII).

155. Americans with Disabilities Act, 42 U.S.C. § 12112 (2002).

156. Courts have uniformly rejected the argument that sexual orientation discrimination is "because of sex," and thus prohibited by federal law. See, e.g., *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) and cases discussed therein. See also, Theodore A. Schroeder, *Fables of the Deconstruction: The Practical Failures of Gay and Lesbian Theory in the Realm of Employment Discrimination*, 6 AM. U. J. GENDER & LAW 333, 335-42 (1998) (explaining reasons for courts' rejections of employment discrimination claims by gay and lesbian employees filed under existing law).

157. The illusion of federal job equality is shattered by the government's failure to provide domestic partnership and related family benefits to its gay and lesbian employees. Kitti Durham, "Employer of Choice?" - *Not by a Long Shot*, HRC Q., Spring 2002, at 10.

158. Exec. Order No. 13087, 63 Fed. Reg. 30097 (May 28, 1998).

159. Barnard & Downing, *supra* note 152, at 564.

as their partners and children, that are routinely provided to heterosexual employees.¹⁶⁰ And when an employer extends comparable health insurance and other benefits (generically referred to as "domestic partnership benefits") to gay and lesbian employees, the dollar value of the benefits are included as taxable income for gay and lesbian employees, while heterosexuals' benefits are tax-free.¹⁶¹

A partial remedy to this inequitable distribution of employment benefits to federal employees was presented in legislation introduced in the House of Representatives in February, 2001. Sponsored by Representative Barney Frank and four others, the Domestic Partnership Benefits and Obligations Act of 2001 (H.R. 638) articulated standards under which federal employees could establish the existence of domestic partnerships that would entitle employees "to benefits available to and obligations imposed upon a spouse of an employee."¹⁶² Enumerated benefits would include those available under Civil Service Retirement, Federal Employees' Retirement, life insurance, health insurance, and compensation for work related injuries.¹⁶³ The Act also exempted the value of the benefits from the gross income of the employee and the partner for federal tax purposes.¹⁶⁴ The bill was referred to the Committee on House Reform and the Committee on Ways and Means.¹⁶⁵

160. See generally James P. Baker, *Equal Benefits for Equal Work?: The Law of Domestic Partner Benefits*, 14 LAB. LAW. 23 (1998); Heidi Eischen, *Survey: For Better or Worse: An Analysis of Recent Challenges to Domestic Partner Benefits Legislation*, 31 TOL. L. REV. 527, 530-533 (2000); Mary N. Cameli, Note, *Extending Family Benefits to Gay Men and Lesbian Women*, 68 CHI.-KENT L. REV. 447 (1992).

161. Under Section 106 of the Internal Revenue Code, the value of an employer's health care coverage is excluded from the employee's gross income if the coverage is for the employee, employee's spouse, or dependents as defined by the Code. "If this exclusion does not apply, the excess of the fair market value of the medical coverage over the amount paid by the employee for the coverage is includable in the employee's gross income under Section 61 of the Code." Mark E. Brossman & Rebecca K. Kramnick, *Domestic Partnership Benefits*, EMPLOYEE BENEFITS J., Mar. 1994, at 4. A domestic partner is a "dependent" only if that partner receives more than one-half of his or her financial support from the taxpayer/employee. *Id.* See also, Patricia A. Cain, *Taxing Lesbians*, 6 S. CAL. REV. L. & WOMEN'S STUD. 471, 475-81 (1997); Glenn W. Carlson & Susan E. Goodwin, *COBRA and Tax Implications of Domestic Partner Coverage*, EMPLOYEE BENEFITS J., June 1993, at 6.

162. Domestic Partnership Benefits and Obligations Act of 2001, H.R. 638, 107th Cong. § 2(a) (2001).

163. *Id.* at § 2(e)(2)(A-E).

164. *Id.* at § 3.

165. The Committee on House Reform subsequently has referred it to the Subcommittee on the Civil Service and Agency Organization. No other action had been taken on H.R. 638 as of January 15, 2002.

Despite significant public support,¹⁶⁶ efforts to establish universal federal protection for gay and lesbian employees of all private employers in the U.S. have not been successful. ENDA-type legislation has been introduced in Congress five times since 1994, but it has not been brought to the floor of either house for a vote.¹⁶⁷

The current Senate version, Senate Resolution 1284, makes it unlawful for an employer:

- (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's sexual orientation; or
- (2) to limit, segregate, or classify employees or applicants for employment of the employer in any way that would deprive or tend to deprive any individual of employment or otherwise adversely affect the status of the individual as an employee, because of the individual's sexual orientation.¹⁶⁸

"Sexual orientation" is defined in that statute as "homosexuality, bisexuality, or heterosexuality, whether the orientation is real or perceived."¹⁶⁹ In addition to the prohibitions quoted above, ENDA further prohibits retaliation and coercive acts against gay or lesbian employees¹⁷⁰ and discriminatory action by employers against employees due to their association with gay and lesbian persons.¹⁷¹ ENDA applies to private employers with 15 or more employees, employment agencies,¹⁷² labor unions,¹⁷³ various training programs,¹⁷⁴ and, with some limitations, state and federal government employers.¹⁷⁵

166. A nationwide poll conducted for Newsweek magazine by Princeton Research Survey Associates in March 2000 found that eighty-three percent of Americans believe that gay men and lesbians deserve workplace protection; only fifty-six percent supported extension of this civil right to homosexuals in 1977. Leland, *supra* note 15, at 48-49.

167. *Senate Panel Okays Sexual Orientation Bill: Would Ban Employment Discrimination*, ABA WASH. LETTER, May 1, 2002, at 8; Christopher Labonte & Daryl Herrschaft, *An ENDA in Sight? Workplace Parity Bill Heads to a Full Senate for Vote*, HRC Q., Summer 2002, at 8, 9.

168. S. Res. 1284, 107th Cong. § 4(a)(1)-(2) (2001).

169. *Id.* at § 9.

170. *Id.* at § 5.

171. *Id.* at § 4(e).

172. *Id.* at § 4(b).

173. *Id.* at § 4(c).

174. *Id.* at § 4(d).

175. *Id.* at § 13. States that receive federal monies for "any program or activity" are deemed to have waived their Eleventh Amendment immunity from suits under ENDA. *Id.*

The list of entities exempt from ENDA's requirements and other limitations on remedies are significant. ENDA does not apply to private employers with less than 15 employees,¹⁷⁶ tax-exempt private membership clubs,¹⁷⁷ religiously affiliated organizations,¹⁷⁸ the military,¹⁷⁹ and certain voluntary membership organizations.¹⁸⁰ ENDA does not require covered employers to provide domestic partnership benefits to their gay and lesbian employees,¹⁸¹ it bans the use of quotas or preferential treatment to remedy sexual orientation discrimination,¹⁸² and it prohibits plaintiffs from pursuing disparate impact theories of recovery based on employment practices that discriminate based on sexual orientation.¹⁸³ ENDA does not ban discrimination against transgendered persons or persons whose gender identity does not conform to cultural norms.¹⁸⁴

With significant support from corporate America for the legislation,¹⁸⁵ the Senate is expected eventually to pass S. 1284. Success in the House of Representatives is less certain. Rep. Christopher Shays (R-Conn.) has introduced an identical ENDA bill (H.R. 2692). It has been referred to four committees and several subcommittees for consideration.¹⁸⁶ The House legislation has 191

at § 13(b)(1)(A). Punitive damages are not, however, available against either a state or federal defendant in an ENDA case. *Id.* at § 13(c)(1).

176. *Id.* at § 3(4)(A).

177. *Id.*

178. *Id.* at § 9.

179. *Id.* at § 10.

180. *Id.* at 11(b). This could appropriately be called the "Boy Scouts" provision, as it is clearly endorses the Supreme Court's decision in *Dale v. Boy Scouts*, 530 U.S. 640 (2000), allowing that organization to exclude homosexuals as members and troop leaders.

181. S. Res. 1284, 107th Cong. § 6 (2001).

182. *Id.* at § 8.

183. *Id.* at § 4(f).

184. "Sexual orientation" as defined in § 3(9) of ENDA makes no reference to transsexualism or gender identity. The issue of whether ENDA should include these categories has resulted in significant debate among gay and lesbian activists that, while of great validity, is outside the scope of this article. *See, e.g., James M. Donovan, Baby Steps or One Fell Swoop?: The Incremental Extension of Rights is Not a Defensible Strategy*, 38 CAL. W. L. REV. 1, 32-45 (2001) (explaining the ramifications of excluding gender identity from ENDA type legislation).

185. *See, e.g., HRC News Release, ENDA Senate Hearing Features Unprecedented Support From Large Corporations and Small Businesses*, Feb. 27, 2002, at <http://www.hrc.org/newsreleases/2002/020227enda.asp> (last visited Oct. 18, 2002) (reporting that representatives from Shell Oil, Microsoft, Hewlett-Packard, Coors Brewing, FleetBoston, Eastman Kodak and other large and small companies testified in support of ENDA during hearings before the Senate Health, Education, Labor and Pensions Committee in late February, 2002, as did the AFL-CIO's civil rights department director).

186. Introduced on July 31, 2001, H.R. 2692, 107th Cong. (2001) was referred on that same date to the House Administration Committee; the Committee on Education and the

co-sponsors,¹⁸⁷ including twenty-one Republicans,¹⁸⁸ but needs 218 votes for House approval.¹⁸⁹ President Bush has not publicly stated whether he would sign ENDA if passed by Congress.

Will the events of 9/11 inspire Congress to finally pass ENDA? If so, will President Bush sign the legislation into law? There is no doubt that pro-ENDA legislators, including Senators Tom Daschle and Edward M. Kennedy, have attempted to draw Congress's attention to the deaths of gay and lesbian people on 9/11, and particularly the death of Flight 93 hero Mark Bingham, as reasons to enact ENDA.¹⁹⁰

In a speech advocating ENDA on the Senate floor in January, 2002, Senator Daschle invoked Bingham's name and said: "His courage may have helped save this very building. This year, we should have the courage to pass ENDA . . . and prohibit employers from discriminating on the basis of sexual orientation."¹⁹¹ Senator Kennedy advocated a similar position in a speech in Washington:

We know of victims in the World Trade Center – contributing, hardworking citizens, who were gay. So was one of the heroes of flight 93. They died because they were Americans. And their memory should tell us that all Americans should be able to live their lives as full citizens of a free society.¹⁹²

Invoking 9/11 as a rationale for Congress to pass ENDA has not been well received by groups at opposite ends of the gay rights debate. The pro-gay HRC's position is that ENDA should pass on its own merits, and that reference to 9/11 is unnecessary and inappropriate.¹⁹³ The Rev. Louis Sheldon, head of the anti-gay Traditional Values Coalition, also criticized the strategy, calling it "a gimmick in a time of national tragedy."¹⁹⁴

It appears that Congress's focus on the events of 9/11 has caused some federal lawmakers to abandon, at least for a limited time period, partisan battles over internal divisive matters includ-

Workforce, which referred the matter on November 2, 2001 to its Subcommittee on Employer-Employee Relations; the House Government Reform Committee, which referred the legislation on August 13, 2001 to its Subcommittee on the Civil Service and Agency Organization; and the House Judiciary Committee, which referred the bill on September 10, 2001, to its Subcommittee on the Constitution.

187. H.R. 2692, 107th Cong. (2001).

188. Labonte & Herrschaft, *supra* note 167, at 9.

189. *Id.*

190. Dave Boyer, *Rights for Gays Issue in Senate: September 11 Part of Debate*, WASH. TIMES, Jan. 29, 2002, at A8.

191. *Id.*

192. Sen. Edward M. Kennedy (Jan. 16, 2002), as quoted in Boyer, *supra* note 190, at A8.

193. Boyer, *supra* note 190.

194. *Id.*

ing domestic partnership benefits. For example, Congress recently ended its decade-long injunction of a domestic partnership law enacted by the District of Columbia in 1992.¹⁹⁵ Does this signal a momentary reprieve from hostility toward gay rights, or a turning point for all citizens to share equal rights? That question will largely be answered by Congress's ultimate decision on ENDA.

Protection Under Hate Crimes Legislation

*Perhaps the most perplexing problem in the entire field of human relations is this: Why do so relatively few of our contacts with other people fit in with, and satisfy, our predominately affiliative needs, and why do so many find their way into sentiments of hatred and hostility?*¹⁹⁶

Criminal hate crime statutes criminalize, or enhance penalties for, injurious activities that are motivated by bias toward individuals or groups.¹⁹⁷ Some people believe that "hate crimes"¹⁹⁸ skate on thin constitutional ice¹⁹⁹ and questionable policy goals.²⁰⁰ Hate crimes, critics argue, allow imposition of criminal sanctions for an individual's private thoughts and beliefs that are entitled to sanctuary from government regulation under the First Amendment's free speech clause. The U.S. Supreme Court, however, has

195. Alia Ibrahim, *District Registers Domestic Partners: Congress Blocked Law for 10 Years*, WASH. POST, July 9, 2002, at B1.

196. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 343 (1958).

197. Ryken Grattet & Valerie Jenness, *Examining the Boundaries of Hate Crime Law: Disabilities and the "Dilemma of Difference"*, 91 J. CRIM. L. & CRIMINOLOGY 666 (2001).

198. *Id.* As more fully explained in subsequent text and footnotes, "hate crimes" include a variety of offenses and punishments. As two experts on the topic explain: "Hate crime statutes have taken many forms throughout the United States, including statutes proscribing criminal penalties for civil rights violations; specific 'ethnic intimidation' and 'malicious harassment' statutes; and provisions in previously enacted statutes for enhanced penalties if an extant crime is committed for bias or prejudicial reasons." *Id.* at 659-60.

199. See generally HATE CRIMES (Paul A. Winters ed., 1996) (containing thirty essays from persons all along the political spectrum who advocate or who denounce hate crimes on policy and legal grounds); SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY* (1994); Craig L. Ulrich, Note, *Hate Crimes Legislation: A Policy Analysis*, 36 HOUS. L. REV. 1467 (1999) (discussing constitutional concerns and policy debates).

200. See generally VALERIE JENNESS & RYKEN GRATTET, *MAKING HATE A CRIME: FROM SOCIAL MOVEMENT TO LAW ENFORCEMENT* (2001) (tracing the development of hate crimes legislation and the many resources devoted to research on and prevention of hate crimes). One classic policy question hate crimes pose is whether "the stigma of difference" associated with being a member of a minority group is increased rather than decreased by including that group in hate crime legislation. See generally MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 20-23 (1990).

rejected this argument, at least in the area of hate crime legislation that allows enhanced penalties for bias-motivated crimes.²⁰¹

For civil libertarians who decry hate crimes but who advocate equal rights for gay men and lesbians, the current dilemma surrounding hate crimes is this: the only thing worse than having hate crimes legislation in the first instance is having hate crimes legislation that purposefully excludes sexual orientation as a basis for enhanced punishment of criminal behavior. Stated differently, the omission of sexual orientation from hate crimes legislation reflects this society's belief that it is still permissible to harass, beat, and even murder gay men or lesbians because members of this minority are not valued as highly as members of minorities defined by race, religion, color, disability, gender, national origin or other traditional categories.²⁰²

Much of the current legal and public debate focuses on the types of activities hate crimes legislation should prohibit.²⁰³ Whether sexual orientation bias should serve as a basis for enhanced criminal penalties has proven especially controversial.

As hate crimes legislation reflects the value that society places on protecting minorities from abuse, inclusion of sexual orientation as a protected category is an important goal for those who seek equal rights for gay men and lesbians. The battle to protect gay men and lesbians from certain hate crimes is currently being fought on two fronts. The first is inclusion of sexual orientation as a protected category in hate crime legislation, whether via city ordinance or federal statute. The second is getting law enforcement officers to recognize crimes motivated by prejudice against gay men and lesbians, and encouraging prosecutors to seek enhanced penalties based on this motivation. Ironically, the "homophobia"²⁰⁴ that motivates criminals to seek out gay men and lesbians in the

201. Compare *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down hate crime ordinance because it punished criminal conduct – i.e. burning a cross on a black family's lawn – based on content of expression), with *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (upholding sentencing enhancement law, applicable where criminal's act is motivated by bias against victim, as appropriate exercise of state's police powers).

202. See, e.g., Grattet & Jenness, *supra* note 197, at 653 (observing that "[s]ome criminals use a victim's minority group membership as a means of gauging the victim's level of guardianship and the degree to which society cares about what happens to the victim," and that this attitude is based on the expectation "that the criminal justice system will share the view that such victims are unworthy of vigorous enforcement of the law." *Id.*

203. See generally, JAMES JACOBS & KIMBERLY POTTER, *HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS* (1998).

204. "Homophobia" has many definitions. This article refers to it as loathing, hatred, and anger based on the actual or perceived status of another as a lesbian or gay man.

first instance is reflected in the attitudes of police officers and prosecutors who dismiss such crimes.

Violence against gay men and lesbians is by no means a new phenomenon.²⁰⁵ Indeed, gay bashing as official government policy is traceable to the country's earliest years when colonial law mandated either death or disfigurement for acts of lesbianism or sodomy.²⁰⁶

Identifying recent trends is difficult, however, due to the dearth of comprehensive statistics on anti-gay hate crimes. It is widely accepted that "[d]ata compiled by local anti-violence programs and police account for only a fraction of anti-gay episodes that actually occur."²⁰⁷

The National Gay and Lesbian Task Force (NGLTF) was among the first organizations to attempt to gather reliable statistics regarding the incidence of hate crimes based on the sexual orientation of the victims. In 1991, for example, the NGLTF issued a report²⁰⁸ summarizing the occurrence of anti-gay violence during 1990 in six U.S. cities.²⁰⁹ The 1,588 incidents recorded in 1990 included the stabbing death of a gay man in New York, attempts by a white supremacist group to bomb a busy gay and lesbian dance club in Seattle, and college students at Central Connecticut State College attacking two gay men and shouting anti-gay slurs as they kicked the teeth out of one of the victims.²¹⁰

The NGLTF's report for 1991 showed a 31 percent increase in murders, assaults, vandalism and other acts of hate directed against

205. See generally CLAUDIA BRENNER & HANNAH ASHLEY, EIGHT BULLETS (1995); Kevin T. Berrill, *Anti-Gay Violence and Victimization in the United States: An Overview*, 5 J. INTERPERSONAL VIOLENCE 274 (1990); Suzanne B. Goldberg & Bea Hanson, *Violence Against Lesbians and Gay Men*, 28 CLEARINGHOUSE REV. 417 (1994); Bill Turque et al., *Gays Under Fire*, NEWSWEEK, Sept. 14, 1992, at 34.

206. JONATHAN NED KATZ, GAY/LESBIAN ALMANAC 21-133 (1983). For example, Virginia enacted a sodomy statute in 1610 that mandated death for offenders; New Netherland (now New York), Maryland, Massachusetts, and Connecticut had similar laws in place by 1642. *Id.* at 68-85; RUTHANN ROBSON, LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW 40-41 (1992).

207. NGLTF POLICY INSTITUTE, ANTI-GAY/LESBIAN VIOLENCE, VICTIMIZATION, & DEFAMATION IN 1990, 10 (1991) [hereinafter 1990 NGLTF REPORT]. See also KEVIN J. STROM, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: HATE CRIMES REPORTED TO NIBRS, 1997-1999 3 (2001) (stating that hate crimes are among the "majority of crimes experienced by the public" that "are not reported to police"); Gregory M. Herek et al., *Victim Experiences with Hate Crimes Based on Sexual Orientation*, 58 J. SOC. ISSUES 319, 332 (2002) (stating that nonreporting of hate crimes by gay men and lesbians may be as high as ninety percent due to fear of "secondary victimization" by authorities).

208. 1990 NGLTF REPORT, *supra* note 207.

209. The cities were Los Angeles, San Francisco, New York, Chicago, Boston, and Minneapolis/St. Paul. *Id.* at 1.

210. *Id.* at 2.

gay men and lesbians.²¹¹ More recent nationwide statistics gathered by the U.S. Department of Justice (DOJ) demonstrate steady increases in the number of reported hate crimes based on sexual orientation.²¹²

While the continued prevalence of homophobic violence is hardly news to gay men and lesbians, the brutality of recent cases such as the bludgeoning death of Matthew Shepard in Laramie, Wyoming has raised the profile of this social malady.²¹³ The volume and viciousness of the violence directed at gay men and lesbians has also fortified arguments for including "sexual orientation" in hate crimes legislation.

Since 1980, "almost every state in the United States has adopted at least one hate crime statute that simultaneously recognizes, defines, and responds to discriminatory violence."²¹⁴ As previously mentioned, the specific types of discrimination proscribed by the hate crime statutes vary significantly.²¹⁵ Common categories include race, ancestry, religion, age, and ethnicity, while a few include categories such as political affiliation and even involvement in human rights causes.²¹⁶ Four states and the district of Columbia have hate crime laws that include sexual orientation and gender bias,²¹⁷ twenty-two states have hate crimes legislation including sexual orientation,²¹⁸ and nineteen states have hate crime laws that do not include sexual orientation.²¹⁹

211. NGLTF POLICY INSTITUTE, ANTI-GAY/LESBIAN VIOLENCE, VICTIMIZATION, & DEFAMATION IN 1991 1 (1992) [hereinafter 1991 NGLTF REPORT]. This report did not contain data from Los Angeles for 1991.

212. Data collected by the Justice Department on hate crimes reported to law enforcement agencies for the years 1991 through 1998 are significantly lower than those recorded by NGLTF. The governments figures are summarized in Grattet & Jenness, *supra* note 197, at Table 1, 663-64. The number of crimes counted by the federal government based on the sexual orientation of the victim are as follows: 1991—425; 1992—944; 1993—938; 1994—790; 1995—1,288; 1996—1,256; 1997—1,375; and 1998—1,439. *Id.*

213. *See, e.g.*, HUMAN RIGHTS CAMPAIGN, A DECADE OF VIOLENCE: HATE CRIMES BASED ON SEXUAL ORIENTATION 1 (2000) (citing reports indicating "that antigay hate crimes are becoming increasingly more violent" throughout the U.S.).

214. *Id.* at 659. In fact, only five states—Arkansas, Indiana, New Mexico, South Carolina and Wyoming—have no state hate crimes laws. Human Rights Campaign, *Does Your State's Hate Crimes Law Include Sexual Orientation and Gender Identity*, at http://www.hrc.org/issues/hate_crimes/background/statelaws.asp (last visited Oct. 18, 2002).

215. Grattet & Jenness, *supra* note 197, at 660.

216. *Id.*

217. HUMAN RIGHTS CAMPAIGN, *supra* note 213 (states with sexual orientation and gender bias in hate crime legislation are California, Minnesota, Missouri, and Vermont).

218. *Id.* (states with sexual orientation based hate crimes are Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Tennessee, Texas, Washington, and Wisconsin).

219. *Id.* (these include Alabama, Alaska, Arizona, Colorado, Georgia, Idaho, Maryland,

Efforts to amend and to enact new hate crime legislation that includes sexual orientation bias continue at every level of the government, from municipalities to the U.S. Congress, with varying degrees of success.²²⁰

At the federal level, the Hate Crimes Statistics Act,²²¹ enacted in 1990, requires the Attorney General to maintain and make public statistics on hate crimes motivated, *inter alia*, by sexual orientation bias. It does not, however, create any crimes, provide for sentence enhancement of existing crimes, nor create a private civil cause of action for victims of hate crimes. In addition, the Hate Crimes Sentencing Enhancement Act,²²² enacted in 1994, calls for enhanced sentencing where the defendant has committed a federal crime against a person or a person's property motivated by the victim's "actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation."²²³

Application of both federal hate crimes statutes is severely limited. The 1994 Act, for example, does not create any federal hate crimes. Rather, it provides for the potential imposition of an increased sentence if hate is found to be a motivating factor for the defendant's violation of existing federal laws, such as criminal acts committed on federal land or acts that violate the victim's federally protected civil rights, such as voting or attending school.²²⁴ The 1990 statistics legislation simply requires the federal government to count the number of hate crimes committed, but does not empower or instruct any federal agency to take remedial measures to discourage hate crimes.²²⁵

Proposed legislation that would create a new federal offense based on hate crimes stalled in Congress in mid-2002, but its sponsors—who equated anti-gay hate crimes with domestic

Michigan, Mississippi, Montana, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Utah, Virginia, and West Virginia).

220. Frequently updated information about pending hate crimes legislation is available at the Human Rights Campaign homepage: <http://www.hrc.org>.

221. Pub. L. No. 101-275, 104 Stat. 140 (1990).

222. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003, 28 U.S.C. § 994 note (1994). *See also* FEDERAL SENTENCING GUIDELINES MANUAL, § 3A1.1 (2001) (implementing the 1994 Act by increasing by three levels federal crimes motivated by hate).

223. Pub. L. No. 103-322, § 280003, 28 U.S.C. § 994 note.

224. 18 U.S.C. § 3551(a) (2002) (providing that the sentencing guidelines apply to "a defendant who has been found guilty of an offense described in any Federal statute . . .").

225. The Hate Crimes Statistics Act is discussed in more detail *infra* at note 251 and accompanying text.

terrorism that should be a target of America's post-9/11 war on terrorism—claim that the legislation is not dead.²²⁶

This legislation, the Local Law Enforcement Enhancement Act of 2001 (LLEEA),²²⁷ which proponents have vowed to return to the Senate floor,²²⁸ has several purposes. One is to amend federal law to create federal hate crime offenses. Specifically, LLEEA would make it a federal crime to cause or attempt to cause bodily injury to any person “because of the actual or perceived religion, national origin, gender, sexual orientation, or disability”²²⁹ of the victim.²³⁰ Another objective is to provide states, local governments, and Indian tribes with federal financial,²³¹ “technical, forensic, prosecutorial, or any other form of assistance”²³² for investigation or prosecution of any crime “motivated by prejudice based on the race, color, religion, national origin, gender, sexual orientation, or disability of the victim.”²³³

The fifty-one Senators who co-sponsored LLEEA assert in the “Findings”²³⁴ section of the Act that the legislation is needed because hate-motivated violence “poses a serious national problem”²³⁵ that “devastates not just the actual victim and the family and friends of the victim, but frequently savages the community sharing the traits that caused the victim to be selected.”²³⁶ Recognizing that “state and local authorities are now and will continue to be responsible for prosecuting the overwhelming majority”²³⁷ of hate crimes in this

226. Amy Fagan, *Measure on Hate Crimes Halted: Democrats Vow Bill Will be Back*, WASH. TIMES, June 12, 2002, at A1; David Stout, *Senate Six Votes Shy of Passing Hate-Crimes Bill*, PLAIN DEALER, June 12, 2002, at A9. The bill stalled out because its sponsors were unable to get the 60 votes needed to pass the cloture motion necessary to cut off debate and call for a vote on the legislation. *Id.* When their cloture motion failed, sponsors pulled the bill rather than subjecting it to numerous amendments expected from opponents of the legislation. *Id.*

227. S. 625, 107th Cong. (2001); H.R. 1343, 107th Cong. (2001).

228. Fagan, *supra* note 226, at A1.

229. S. 625, 107th Cong. § 7(a) (2001), codified at 18 U.S.C. 249(a)(2) (2002).

230. The codification of S. 625, 107th Cong. § 7(a) (2001) at 18 U.S.C. 249(a)(2) (2002) makes the hate crimes specified in the legislation federal offenses. To constitute a federal crime, the hate-motivated act must also be related to interstate commerce - such as occurring when the defendant or victim is engaged in interstate, foreign travel, or when the defendant uses a weapon that has traveled in interstate or foreign commerce.

231. The legislation provides financial assistance via annual grants of up to \$100,000 to assist state or local officials “with the extraordinary expenses associated with the investigation and prosecution of hate crimes.” S. 625, 107th Cong. § 4(b).

232. *Id.* at § 4(a)(1) (federal assistance would be rendered if requested by state or local law enforcement agencies).

233. *Id.* at § 4(a)(1)(C).

234. *Id.* at § 2.

235. *Id.* at § 2(1).

236. *Id.* at § 2(5).

237. *Id.* at § 2(3).

county, the Senate further states that federal, state, and local authorities should work "as partners in the investigation and prosecution of such crimes."²³⁸

Opponents of LLEEA objected to the inclusion of sexual orientation as a basis for a federal hate-crime offense.²³⁹ The executive director of the Traditional Values Coalition, for example, claimed that the legislation would create special legal protections for some crime victims and not others, adding that a "person who is victimized because of his sex practices should not receive greater protection under the law than an elderly woman who is mugged for her purse."²⁴⁰

Arguments that the events of 9/11 should have eliminated sexual orientation discrimination apparently proved unpersuasive, much to the disappointment of some of the bill's sponsors. "Each year, thousands of Americans are attacked out of hatred for their religion, the color of their skin or their sexual orientation," said Senator Kennedy after the Senate failed to move forward with the legislation. "These senseless acts of violence are also terrorist acts, and we must do all we can do to end them."²⁴¹

Senators Daschle, Kennedy, and other LLEEA backers promised the legislation's return to the Senate floor, but that promise was made before Republicans gained control of the Senate in the November 2002 elections.²⁴² Regardless of the legislation's fate in the Senate, the Republican controlled House is unlikely to agree to hate crime legislation that includes sexual orientation anytime soon.²⁴³ Indeed, that is the only point on which Senator Kennedy and House opponents agree.²⁴⁴ The ongoing resistance to establishing a federal hate crime based on sexual orientation is, ironically, well-grounded in the existing federal hate crime laws that include sexual orientation.

238. *Id.* at § 2(12).

239. Tom Detzel, *Opponents Marshal Forces to Battle Hate Crimes Bill*, OREGONIAN, June 11, 2002, at A7.

240. Andrea Lafferty, Executive Director of the Traditional Values Coalition, quoted in Fagan, *supra* note 226.

241. Senator Edward M. Kennedy, quoted in Fagan, *supra* note 226, at A01.

242. Fagan, *supra* note 226.

243. *Id.* While the Senate's latest attempt to expand hate crime protection to gay men and lesbians at least sparked debate, its House counterpart endured a perhaps more terrible fate. The House bill was referred to the House Committee on the Judiciary on the day it was introduced, April 3, 2001, then to the Subcommittee on Crime a month later. As of this writing no further House, committee, or subcommittee action has been taken.

244. *Id.*

Since its enactment eight years ago, the Hate Crimes Sentencing Enhancement Act²⁴⁵ has been invoked only once by the federal government in a case where sexual orientation bias appeared a motivating factor.²⁴⁶ In April 2002, a grand jury in Virginia indicted Darrell David Rice for the 1996 slaying of Julianne Marie Williams and Laura "Lollie" Winans in Shenandoah National Park.²⁴⁷ Both women, who were lesbian partners, were found bound and gagged with their throats slit.²⁴⁸ As presented by the federal government, the indictment asked for enhanced sentencing because the defendant admitted he selected the women because he "hates gays" and that they "deserved to die because they were lesbian whores."²⁴⁹

During a press conference announcing the indictment, Attorney General Ashcroft stated:

Criminal acts of hate run counter to what is best in America The volatile, poisonous mixture of hatred and violence will not go unchallenged in the American system of justice. By invoking the hate crimes enhancement part of sentencing enhancement today, today's murder indictment makes clear our commitment to seek every prosecutorial advantage and to use every available statute to secure justice for victims like Julianne Marie Williams and Lollie Winans.²⁵⁰

Ashcroft's words would be inspiring if not for the contradictions between his words and the federal government's actions. First, one prosecution in eight years hardly reflects a solid record of federal commitment to eliminating hate crimes against gay men and lesbians who are victims of brutal crimes. Second, the dearth of prosecutions is not due to the shortage of brutal hate crimes against gay men and lesbians, but rather the incredibly narrow applicability of the Hate Crimes Sentencing Enhancement Act. Application was possible in the case of Williams and Winans only because the

245. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003, 28 U.S.C. 994 note (1994).

246. Human Rights Campaign, Press Release, *HRC Applauds Justice Department for Bringing Indictment in Double Murder of Lesbian Hiker*, at <http://www.hrc.org/newsreleases/2002/020410hikers.asp> (last visited Oct. 18, 2002) [hereinafter Press Release]. See also Chris Bull, *Support from Ashcroft: Hate Crimes Get Overdue Attention as the Attorney General Applies a Little-Known Law to a Six-year Old Murder*, ADVOC., May 14, 2002, at 15; Deb Price, *Ashcroft Enforces Important Hate Law*, DET. NEWS, Apr. 29, 2002, at 9A.

247. Press Release, *supra* note 246.

248. *Id.*

249. *Id.*

250. Price, *supra* note 246, at 9A.

women were murdered on federal land. With such limited potential for additional opportunities to apply the law, Ashcroft's promise to use "every available statute" to "secure justice" remains a vacuous pledge.

The Hate Crimes Statistics Act (HCSA) is not only ineffective, it is also expressly anti-gay. Signed into law by the first President George Bush in April 1990, HCSA merely requires the U.S. Attorney General to gather statistics on the number and types of hate crimes committed in the U.S. each year based on the victim's sexual orientation, race, religion, or ethnicity.²⁵¹

The HCSA's purpose was to establish a national data collection system on crimes motivated by hate so that federal and local law enforcement authorities could determine whether hate crimes were isolated events or a more pervasive problem, and whether any particular groups were more likely to be targeted than others.²⁵² The statistics would allow law enforcement agencies to "combat hate crimes more effectively by identifying their frequency, location, and other patterns over time."²⁵³

Although HCSA was the first federal legislation to include "sexual orientation" as a recognized class, and thus was cited as a coup by pro-gay rights groups, the language of the statute reflects significant anti-gay bias. For example, the Act expressly disclaimed the creation of a cause of action based on sexual orientation discrimination.²⁵⁴ HCSA also repeatedly emphasizes the importance of traditional American families, stating, for example, that "Federal policy should encourage the well-being, financial security, and health of the American family,"²⁵⁵ and that "nothing in this Act shall be construed . . . to promote or encourage homosexuality."²⁵⁶

In light of the stalemate over amendments to federal hate crimes law, supporters of gay rights may be well advised to focus their efforts on the inclusion of sexual orientation in state and local hate crime legislation. This is not a defeatist position, as criminal law is traditionally a matter of state power.²⁵⁷

251. Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990).

252. S. REP. NO. 101-21 at 2 (1990).

253. *Id.*

254. Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 § 1(b)(3) (1990).

255. *Id.* at § 2(a)(2).

256. *Id.* at § 2(b).

257. Although the inclusion of sexual orientation in the recently proposed federal hate crimes legislation is the most controversial feature, some Senators objected to the law as an improper usurping of traditional state power by the federal government. Fagan, *supra* note 226.

Increased enforcement of existing hate crimes laws as they apply to gay and lesbian victims of bias-motivated crimes is an equally worthy objective.

In sum, there is no doubt "that the law has become the primary institution charged with defining and curbing hate or bias-motivated violence," and that "[l]egal reform has been one of—if not the most—dominant response to bias-motivated violence in the United States."²⁵⁸

One lesson that cannot be ignored from the events of 9/11 is the power of hate. Indeed, it is tempting to conclude that the jets that slammed into American landmarks on 9/11 were powered more by hate than by jet fuel. Might 9/11, therefore, become a catalyst for changing the language and the application of hate crimes law to counter violence against gay men and lesbians? One would hope that making every effort to counter and diffuse hate, and to create a national atmosphere where hate is not a legitimate reason to strike out against another human being, would rise to the top of legislators' and prosecutors' agendas.

V. FACTS, FANTASIES, AND CONCLUSIONS

Human beings are notoriously inept in heeding the lessons that history repeatedly drops on our doorsteps. And yet, the terrorist attacks of 9/11, and more importantly the nation's long-term reaction to that event, demand reflection on where this country has been and where it should be going. As a country, we are now ashamed of the many civil liberties violations we tolerated and even embraced during our first two centuries of existence: the institution of slavery, "separate but equal" rationalization to support racial segregation well into the 1950's, the raids led by Attorney General Palmer in 1919-1920 on organizations based upon their political ideology and immigrant membership, punishment of protestors of the military draft in World War I, President Roosevelt's Executive Order 9066 that resulted in the internment of 120,000 Japanese—of whom approximately 80,000 were U.S. citizens—during World War II, and the many lives ruined due to the Red Scare and the zealotry of Senator McCarthy and his cronies on the House of Representative's Un-American Activities Committee.²⁵⁹ Will we as a nation, 25 or 50 or 100 years from now, be equally embarrassed at how this nation, as the most powerful country on earth, reacted to 9/11?

258. Grattet & Jenness, *supra* note 197, at 658-59 (footnote omitted).

259. These and other events are succinctly related in Bucklin, *supra* note 49.

Perhaps. As one commentator aptly noted regarding contemporary evaluations of past civil liberties atrocities:

That shame comes easier now, of course, because we no longer fear the Kaiser, or kamikazes, or Stalin. It may take a long time before we stop fearing international or domestic terrorism, however, and we must therefore be particularly careful now. What we lose now, in our commitment to civil rights and fair play, may be much harder later to regain.²⁶⁰

Even post 9/11 legislation intended to curtail freedoms for safety's sake reminds this country not to forsake those freedoms. The PATRIOT Act reflects the "sense of Congress that (1) the civil rights and civil liberties of all Americans . . . must be protected"²⁶¹ and that "any acts of violence or discrimination against any Americans be condemned."²⁶²

One of the lessons learned from 9/11 is that we are all vulnerable, and we need to understand and accept each other now more than ever. Death made no distinction based on sexual orientation on 9/11. Gay men and lesbians were victims, were rescue workers, and some were even heroes. But mostly they were all just people, trying to live lives that, truth be told, closely mirror those of their heterosexual counterparts.

After 9/11, the things that used to divide us—including different sexual orientations—now seem trifling compared to our commonalities. The incessant anti-gay rhetoric and bickering that has gone on, exploited by certain religious groups and conservative politicians to raise money, appear small and petty when viewed against the larger picture. If we learn this lesson, 9/11 will be a positive turning point for civil liberties of all, including gay men and lesbians. If not, 9/11 will represent a major step in the de-evolution of personal liberties as the rights most cherished in this country are sacrificed in an ill-conceived effort to protect them.

There may never be an obvious causal connection between the events of 9/11 and subsequent changes to laws that extend or restrict the rights of gay men and lesbians. But the more aware the public becomes about the realities of lives lived by their gay and lesbian neighbors, the more likely the general populace is to

260. Dworkin, *supra* note 51.

261. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, § 102(b)(1), 115 Stat. 272 (2002). Congress included this statement as a section that specifically condemns discrimination against U.S. citizens who are Muslim and/or of Arab ancestry.

262. *Id.* at § 102(b)(2).

perceive this segment of the population not as a threat, but simply as a minor variation of mainstream humanity. And, as enlightened familiarity replaces fear born of ignorance, the evolutionary process will continue towards a truly tolerant, and thus truly free, society.

Though perhaps fantastical, one hopes that an event as significant as 9/11 will even move people past mere tolerance for individuals and groups with whom they differ and towards true compassion for one another. Though tolerance is an important first step, it has serious limitations as it allows people to still despise each other so long as they adopt a live and let live attitude. True compassion, on the other hand, involves a deeper understanding and respect for differences. Compassion is the state of valuing other human beings because of their differences, rather than in spite of them. And a country comprised of compassionate citizens could do amazing things to improve the quality of life for everyone in the U.S. and throughout the world.

Returning to reality, it is clear that, at a minimum, 9/11 has raised the visibility of gay men and lesbians. Increased visibility, in turn, provides additional arguments for inclusion of gay men and lesbians as full participants in the rights and privileges promised to all by the U.S. Constitution. But today, in the midst of this all this uncertainty, only one prophecy is indisputable.

Life will never be the same.