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## In Times of Medical Crisis: Inadequacy of Legal Remedies Available to Sexual Minorities.

A. Nicole Kwapisz

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## NOTE

### IN TIMES OF MEDICAL CRISIS: INADEQUACY OF LEGAL REMEDIES AVAILABLE TO SEXUAL MINORITIES

#### A. NICOLE KWAPISZ\*

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**Thomas University School of Law, Miami, Florida; B.S., 2002, Barry University. I confess, English is not my first, second, or third language. Growing up in Communist Poland, I studied Russian, German, and Latin in school, before undertaking English, as my fifth language. I was fifteen. I would like to dedicate this Note to my husband, Andres. I am most grateful to Professor Amy D. Ronner, for her dedication and guidance; to Professor John Kang, for his advice and research recommendations; and to Professor Jay Silver for his encouragement.**

## I. INTRODUCTION

Everyone covers. To cover is to tone down a disfavored identity to fit into the mainstream. In our increasingly diverse society, all of us are outside the mainstream in some way. Nonetheless, being deemed mainstream is still often a necessity of social life. For this reason, every[one] . . . has covered, whether consciously or not, and sometimes at significant personal cost.<sup>1</sup>

On the surface all is well. In our modern society, covering<sup>2</sup> may seem like a thing of the past, a distant concept no longer applicable to our egalitarian social order. After all, we rose above the stereotypes of the past and became more tolerant. We evolved and emerged as more fair-minded, well-intentioned people. In sum, we emerged as more understanding of others who are not exactly like most of us. And judging by the media portrayal of lesbian, gay, bisexual, and transgender (collectively LGBT) issues, we are now more comfortable and accepting of sexual minorities.<sup>3</sup>

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1. KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS, at ix (2006).

2. See YOSHINO, *supra* note 1 (citing ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 102 (2d prt. 1964)). Goffman writes that “[i]t is a fact that persons who are ready to admit possession of a stigma (in many cases because it is known about or immediately apparent) may nonetheless make a great effort to keep the stigma from looming large. . . . This process will be referred to as covering.” *Id.* (emphasis omitted).

3. Over the past two decades, there have been several TV shows portraying LGBT themes, most notably, Ellen DeGeneres’ courageous “coming out” episode on her show, *Ellen*, which aired in April of 1997, and changed the TV landscape and made other shows with openly gay characters, such as *Will and Grace*, acceptable for the mass markets. See, e.g., *Ellen Degeneres Bio*, ELLEN: THE ELLEN DEGENERES SHOW, <http://ellen.warnerbros.com/about/bio.php> (last visited Oct. 9, 2011) (discussing her character’s coming out episode, viewed by 46 million viewers, for which Ellen received the Peabody Award as well as an Emmy Award for writing). Today, there are several shows both on cable and network TV portraying LGBT characters; there is even a TV channel specifically dedicated to LGBT issues, called LOGO. *About Logo*, LOGO, <http://www.logotv.com/about/> (last visited Oct. 9, 2011). There have been various recent TV shows portraying gays and lesbians on television, reflecting “some improvement in the representation of gays and lesbians” on network television. *Representations of Gay and Lesbians on Television*, MEDIA AWARENESS NETWORK, [http://www.media-awareness.ca/english/issues/stereotyping/gays\\_and\\_lesbians/gay\\_television.cfm](http://www.media-awareness.ca/english/issues/stereotyping/gays_and_lesbians/gay_television.cfm) (last visited Oct. 10, 2011). This trend “illustrates that networks are willing to feature gay characters, as long as the shows draw high ratings, and generate profits for advertisers.” *Id.*

Over the past two decades, the “[i]ncreasingly fair, accurate and inclusive news media coverage has played an important role in expanding public awareness and understanding of . . . LGBT lives.” GAY & LESBIAN ALLIANCE AGAINST DEFAMATION (GLAAD), MEDIA REFERENCE GUIDE 4 (8th ed. 2010), available at <http://www.glaad.org/files/MediaReferenceGuide2010.pdf>. In an increasingly diverse society, the media coverage of

In a social climate that is seemingly conducive to peaceful coexistence, increasing numbers of LGBT bravely abandon their closets, and choose to live their lives *cover-free*.<sup>4</sup> Regrettably, like other minorities, LGBT are routinely denied equal treatment for refusal to downplay “their stigmatized identities to get along in life.”<sup>5</sup> Taking a quick survey of the recent media coverage with regard to legal controversies involving LGBT proves that the rights of sexual minorities remain a hotly contested topic.<sup>6</sup>

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LGBT has moved beyond the simplistic dichotomy of the “pro-gay”/“anti-gay” perception, and “[i]n an era when . . . LGBT lives increasingly intersect with mainstream media coverage of . . . [a] myriad of issues,” GLAAD is committed to providing necessary resources and statistics to journalists in order to facilitate a fair and accurate portrayal of the LGBT community. *Id.*

4. *But see* YOSHINO, *supra* note 1. The author calls for a critical approach to the renaissance of assimilation in the United States. *Id.* He reasons that “we must be willing to see the dark side of assimilation, and specifically of covering, which is the most widespread form of assimilation required of us today.” *Id.*

5. For an interesting discussion of public figures that engaged in covering to advance their careers, including Martin Sheen and Ben Kingsley who changed their names to cover their ethnic backgrounds see YOSHINO, *supra* note 1, at ix–x.

6. *See, e.g.,* Tara Siegel Bernard, *What the Gay Marriage News Means for You*, N.Y. TIMES, Feb. 23, 2011, <http://bucks.blogs.nytimes.com/2011/02/23/what-the-gay-marriage-news-means-for-you/>. “On Wednesday [February 23, 2011] President Obama directed the Justice Department to stop defending the law that bans federal recognition of same-sex marriages.” *Id.* However:

[T]he move doesn’t actually repeal the so-called Defense of Marriage Act. So same-sex couples will still remain strangers, for the most part in the eyes of the federal government. Couples will still be unable to jointly file their federal tax returns, and they won’t be eligible to receive Social Security benefits based on their spouse’s earnings record.

*Id.* For a discussion of the history of the controversial Defense of Marriage Act (DOMA) in the context of Obama administration’s position, see David G. Savage & James Oliphant, *Obama Administration Shifts Legal Stance on Gay Marriage*, L.A. TIMES, Feb. 23, 2011, <http://articles.latimes.com/2011/feb/23/nation/la-na-obama-gay-marriage-20110224>. “During the Clinton administration, a Republican-led Congress passed the Defense of Marriage Act to prevent . . . states’ adoption of gay marriage from spreading nationwide.” *Id.* Despite the states’ obligation to recognize legal agreements from other states, including marriage (pursuant to the Full Faith and Credit Clause), Congress decided that “neither the states nor the federal government were obligated to recognize a marriage other than ‘a legal union between one man and one woman.’” *Id.* *See* Kevin Cathcart, *Asking and Telling Since 1975*, HUFFINGTON POST (Dec. 22, 2010, 2:25 PM), [http://www.huffingtonpost.com/kevin-cathcart/asking-and-telling-since\\_b\\_799668.html](http://www.huffingtonpost.com/kevin-cathcart/asking-and-telling-since_b_799668.html) (discussing the final decision by the Senate on December 18, 2010 following the House’s decision to repeal the Don’t Ask, Don’t Tell law, which, for decades, has perpetuated discrimination against lesbian, gay, and bisexual service members). The repeal of Don’t Ask, Don’t Tell allows LGBT service members the ability to now live openly, without cover. Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2, 124 Stat. 3515 (to be codified at 10 U.S.C. § 654 note). For more discussion about the effects of Don’t Ask, Don’t Tell see generally, Debra A. Luker, Comment, *The Homosexual Law and Policy in the Military “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harrass . . . Don’t be Absurd!*, 3 SCHOLAR 267 (2001).

In a world marked by so-called “progress,” LGBT, and most notably gay men and lesbians,<sup>7</sup> remain second-class citizens in vital ways.<sup>8</sup> Thus, as long as homosexuals are ordered to sit in the back of the bus, we as society (collectively in the driver seat) ought to recognize that sexual minorities require a legally protected status.<sup>9</sup> The United States Constitution

7. The claims in this Note will relate to all sexual minorities (LGBT), but I will often use references to gay men and lesbians, as the discrimination against these particular groups is the most cited in references used for this Note.

8. CRAIG A. RIMMERMAN, *FROM IDENTITY TO POLITICS: THE LESBIAN AND GAY MOVEMENT IN THE UNITED STATES* 1 (2002).

[Coming out in] the 1970s (and 1980s and 1990s) . . . was the major challenge facing most lesbians and gay men in America in their personal and public lives. Although the media depicted a growing openness toward homosexuality in American society, this did not easily translate into the daily lives of individual lesbians and gay men. Overall their connection to any larger sense of a lesbian and gay community was tenuous at best.

FRED FEJES, *GAY RIGHTS AND MORAL PANIC: THE ORIGINS OF AMERICA'S DEBATE ON HOMOSEXUALITY* 7 (2008).

[T]here is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today. Indeed, until very recently states have “demean[ed] the[ ] . . . existence” of gay and lesbians “by making their private sexual conduct a crime.”

Letter from Eric H. Holder, Attorney Gen., to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011) [hereinafter Holder] (alteration in original) (citing *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

9. On February 23, 2011 President Obama declared the Defense of Marriage Act of 1996 (DOMA), which prohibited recognition of same-sex marriages, to be unconstitutional. Consequently, President Obama instructed the Department of Justice to stop defending its constitutionality. Siegel Bernard, *supra* note 6. Eric H. Holder, the U.S. Attorney General, announced President Obama's recommendations in a letter directed to the members of Congress:

After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination [immutability, lack of political power, and the trait's lack of bearing on legitimate policy objections], classifications based on sexual orientation should be subject to a more heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA [defining marriage for federal purposes as only between a man and a woman], as applied to legally married same-sex couples, fails to meet the standard and is therefore unconstitutional. . . .

... .

Much of the legal landscape has changed in the [fifteen] years since Congress passed DOMA. The Supreme Court has ruled that laws criminalizing homosexual conduct are unconstitutional. Congress has repealed the Military's Don't Ask, Don't Tell policy. Several lower courts have ruled DOMA itself to be unconstitutional. [However,] Section 3 of DOMA will continue to remain in effect unless Congress repeals it or there is a final judicial finding that strikes it down, and the President has informed me that the Executive Branch will continue to enforce the law.

seems like the most obvious and perfectly suited refuge to guarantee rights to personal privacy, equal protection, and due process. Although an in-depth constitutional analysis is beyond the scope of this Note, the existing line of jurisprudence on the subject of gay rights reflects a deep divide, abundant in bias and prejudice.<sup>10</sup> Therefore, we must look beyond the judiciary for a solution to curtail LGBT discrimination.

Recent developments, in particular President Obama's official statement declaring the Defense of Marriage Act (DOMA) unconstitutional, are promising but limited in scope.<sup>11</sup> Although the Obama administration is helping to build the political momentum against DOMA,<sup>12</sup> the Act remains enforceable law.<sup>13</sup> Thus, same-sex partners who are legally mar-

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Press Release, Dep't of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>.

10. *E.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996); *Bowers v. Hardwick*, 478 U.S. 186 (1986); EVAN GERSTMANN, *THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION* 3 (1999) (discussing how the class-based approach of equal protection jurisprudence denies justice to gays and lesbians because they are regarded as a "minimally protected class"). While *Romer* produced a narrow victory for gays and lesbians, it failed to produce a principle which could be relied on by future litigants. GERSTMANN, *supra* at 10. To remedy the disparate treatment of the courts, Gerstmann calls for reformation of the Equal Protection Doctrine from the class- to the rights-based system to ensure democratic process and limit judicial capacity. *Id.* at 14, 17.

The debate over gay and lesbian rights, although important in and of itself, reveals far-reaching contradictions and difficulties with how we conceive of constitutional and civil rights. The question now is whether we respond to these difficulties by accusing one another of bigotry or of seeking special rights, or whether we work together to create a nation in which we can all live under the equal protection of the laws. *Id.* at 181; *see also* Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1551–53 (1993) (discussing the legal history of lesbian, gay, bisexual, and transgendered litigation pre-*Hardwick*, and providing post-*Hardwick* implications). One author focuses on "the roles of a positive emotion, love—and a procedural method of proof—science—in the shaping of laws defining the rights of sexual minorities," based on the legal scholarship of Professor Martha Nussbaum, which promoted principles of equal dignity and respect to all members of the society. Nancy Levitt, *Theorizing & Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 21–22 (2010).

11. *See* Press Release, Dep't of Justice, *supra* note 9; Don't Ask, Don't Tell Repeal Act § 2.

12. *See* E.J. Graff, *Is DOMA Dead?*, THE NATION, Feb. 26, 2011, <http://www.thenation.com/article/158862/doma-dead> (discussing practical implications of the Obama administration's stand on DOMA and stating that eventually "[t]he clear moral and legal determination will reverberate throughout the law"); Holder, *supra* note 8 (explaining that "while both wisdom and the legality of Section 3 of DOMA will continue to be the subject of both extensive litigation and public debate, this Administration will no longer assert its constitutionality in court").

13. *See* Holder, *supra* note 8 (recognizing the still-valid authority of Section 3, despite concluding that it is "unconstitutional").

ried in their home states still remain single “for the purposes of taxes, Social Security benefits, immigration, and all other federal legal matters.”<sup>14</sup> Also, it is rather impractical for sexual minorities to march on Washington whenever they want to be employed, marry, adopt children, decide on estate planning and medical directives, preserve their dignity, or simply hold the hand of their dying partners.

This Note examines the inadequacy of legal remedies available to sexual minorities in medical emergencies based on a discussion of four selected cases. The analysis of these cases reveals that regardless of whether in conformity or defiance of the closeted existence, the families involved in these medical emergencies suffered harmful consequences imposed by the societal covering demands. In search of a solution, this Note analogizes LGBT with other stigmatized groups, namely minorities based on race or gender. This Note proposes a comprehensive legislative act to guarantee LGBT protective status, which would help to minimize and eventually abrogate the LGBT need to “cover” in order to live their lives.<sup>15</sup> As such, this Note is divided into five parts.

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[T]he President has informed me that Section 3 will continue to be enforced by the Executive Branch. To that end, the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive’s obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law’s constitutionality. This course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised.

*Id.*

14. See Graff, *supra* note 12.

15. See MORRIS B. KAPLAN, *SEXUAL JUSTICE: DEMOCRATIC CITIZENSHIP AND THE POLITICS OF DESIRE* 14, 16–17 (1997). The author explores the *relationship* between lesbian and gay rights, federal law, and the role of states in civil rights protections. *Id.* at 14. Because these competing interests often conflict, it is necessary to define “the divergent strands of a movement for lesbian and gay rights,” which includes three categories of claims: “1) decriminalization of homosexual activities between consenting adults; 2) the prohibition against lesbians and gays in employment, housing, education, and public accommodations; and 3) the legal and social recognition of the ethical status of lesbian and gay relationships and community institutions.” *Id.* Particularly, the third group of claims reveals the “the political and philosophical heart of the movement for lesbian and gay rights.” *Id.* at 17.

At issue is the demand for the recognition and respect of lesbian and gay relationships and institutions within the broader legal, social and ethical context. . . . The rights in question are not simply those of individuals, but of couples, families, and voluntary associations. Ultimately, what is at stake is the moral legitimacy and ethical validity of lesbian and gay ways of life.

*Id.* at 16. *But see* YOSHINO, *supra* note 1, at 194 (offering an alternative solution to seeking legal recourse to achieve equality for LGBT).

Part II discusses the case of *Langbehn v. Public Health Trust of Miami-Dade County*.<sup>16</sup> This tragic case involved Lisa Marie Pond, a lesbian mother, whose partner and three adopted children (Langbehn-Pond family) were denied access to her by the hospital staff, during the last hours of her life, in spite of properly executed medical directives. Janice Langbehn lost the court case against the hospital, which was based on a state negligence claim. However, due to the public nature of the case, President Obama directed the Secretary of Health and Human Services (HHS) to amend the federal HHS guidelines to include same-sex partners among those granted visitation rights in federally-funded medical facilities (through Medicare and Medicaid programs).<sup>17</sup> This Note argues that this partial remedy, as commendable as it may be, cannot curtail the type of discrimination experienced by the Langbehn-Pond family, because such bias is an example of a systemic problem in the way our society views and holds prejudice against sexual minorities.

Part III focuses on three other cases, encompassing three decades of discrimination against same-sex couples who, like the Langbehn-Pond family, experienced grave prejudice and lacked adequate legal remedies. *In re Guardianship of Sharon Kowalski*<sup>18</sup> involved a deeply closeted couple living in a rural area, who did not execute legal documents that could have validated each partner's rights in the event of a medical emergency.<sup>19</sup> For over a decade Karen Thompson was repeatedly denied

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I am troubled that Americans seem increasingly to turn toward the law to do the work of civil rights precisely when they should be turning away from it. The real solution lies in all of us as citizens, not in the tiny subset of us who are lawyers. People who are not lawyers should have reason-forcing conversations outside the law. They should pull Goffman's term "covering" outside of academic obscurity and press it into the popular lexicon. . . . People confronted with demands to cover should feel emboldened to seek a reason for that demand, even if the law does not reach the actors making the demand, or recognize the group burdened by it.

*Id.*

16. 661 F. Supp. 2d 1326 (S.D. Fla. 2009).

17. 42 C.F.R. §§ 482, 485 (effective on Jan. 18, 2011). The regulation is formally titled, *Medicare and Medicaid Programs: Changes to the Hospital and Critical Care Access Hospital Conditions of Participation to Ensure Visitation Rights for All Patients*.

18. 478 N.W.2d 790 (Minn. Ct. App. 1991).

19. See CASEY CHARLES, *THE SHARON KOWALSKI CASE: LESBIAN AND GAY RIGHTS ON TRIAL* 8–9 (2003) (discussing the political and social landscape during the time the case was filed and points out that in 1983, "social theories of homosexuality were shifting from notions of sin and sickness to conceptions of neutral difference, social construction, and genetics"). *Id.* Although the case had little legal significance outside of Minnesota, "Thompson's petition in 1991 has become a touchstone for legal reformers in areas of custody law, same-sex marriage litigation, and domestic partnership litigation." *Id.* at 9. For a detailed discussion of the case, see KAREN THOMPSON & JULIE ANDRZEJEWSKI, *WHY CAN'T SHARON KOWALSKI COME HOME?* (1988). See, e.g., Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protec-*



guardianship of her girlfriend Sharon, a cognitively-impaired paraplegic, injured and paralyzed as a result of a car accident.<sup>20</sup> Also discussed in Part III are *Flanigan v. University of Maryland Medical System Corp.*<sup>21</sup> and *Reed v. AMN Healthcare*,<sup>22</sup> which involve same-sex couples living openly. In both cases, Bill Flanigan and Sharon Reed were barred by hospital staff from making medical decisions and visiting their life partners shortly before their deaths.<sup>23</sup> Because these cases involve the rights of both closeted and openly gay couples, with and without advance medical directives, this Note concludes that the discrimination against LGBT is so widespread and comprehensive that documents are not the magic panacea.

Part IV shifts to a general discussion of the inadequacy of legal remedies available to LGBT and offers a federal legislation as a remedy. This Note proposes a comprehensive federal act, analogous to the Civil Rights Act,<sup>24</sup> which would provide an umbrella of protection for sexual minorities. Legislative protection similar to that received by other identity-based groups, namely racial and gender minorities (females), will allow the LGBT community to continue to gain much needed legitimacy of their claims.<sup>25</sup> Furthermore, drawing analogies of experiences with other

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*tion for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1991) (explaining that the *Kowalski* case is the most notorious example of legal dispute demonstrating “gay men and lesbians. . . lack [of] legal standing to make decisions for an incapacitated partner” when conflicts with blood relatives arise). *Id.* at 581. “The *Kowalski* affair . . . reflect[s] our society’s unabating refusal to acknowledge or accept gay relationships. The state does not forbid two lesbians from living together or raising children together; it merely denies them the benefits that would require it to publicly recognize the relationship.” *Id.* at 583; Rhonda R. Rivera, *Lawyers, Clients, and AIDS: Some Notes from the Trenches*, 49 OHIO ST. L.J. 883, 895–97 (1988) (discussing the *Kowalski* case in the context of same-sex partners’ necessity for medical power of attorney).

20. *In re Guardianship of Kowalski*, 478 N.W.2d 790, 791 (Minn. Ct. App. 1991).

21. Complaint, *Flanigan v. Univ. of Md. Med. Sys. Corp.* (No. 24-c-02-001289) (Md. Cir. Ct. Balt., Feb. 27, 2007) available at [http://www.lambdalegal.org/in-court/legal-docs/flanigan\\_md\\_20020205\\_complaint-circuit-court-for-baltimore-city.html](http://www.lambdalegal.org/in-court/legal-docs/flanigan_md_20020205_complaint-circuit-court-for-baltimore-city.html) [hereafter *Flanigan Complaint*].

22. 225 P.3d 1012 (Wash. Ct. App. 2008).

23. *Reed v. AMN Healthcare*, 225 P.3d 1012, 1012 (Wash. Ct. App. 2008); *Flanigan Complaint*, *supra* note 21, at 2.

24. Civil Rights Act, ch. 31, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981 (2006)) (stating the intent of the act is “[t]o protect all persons in the United States in their civil rights, and furnish the means of their vindication”).

25. *But see* RIMMERMAN, *supra* note 8, at 155–56 (explaining how the rights-based perspective of the gay rights movement fails to remedy all social inequalities).

[The] narrow, rights-based perspective, rooted in identity politics, has largely been unquestioned by the mainstream contemporary lesbian and gay movements, especially those that dominate politics at the national level. But this perspective, in and of itself, is far too limiting, as it often ignores the economic and social inequities that provide

oppressed groups will emphasize the universal nature of discrimination, which centers around a specific trait shared by the members of the group.<sup>26</sup> This Note argues that, based on the experience of other minorities, a uniform act is more effective than piecemeal legislation, because it brings into focus the inequality of treatment shared by the minority, which can lead not only to social changes, but also to revamped attitudes.

The conclusion suggests that, like other protected minorities, members of the LGBT community share a longstanding and comprehensive history of discrimination and social stigmatization.<sup>27</sup> Because of the continuing

opportunities for coalition building across class, racial, gender, and workplace divides. It also fails to provide an effective challenge to the Christian Right's vast organizing efforts.

*Id.* See William N. Eskridge Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 421, 425 (2001).

[T]he new social movements of the late twentieth century sought to change the status of marginalized groups. Theirs was a politics of recognition. For these civil rights, women's movements, pro-choice, gay liberation, . . . the core goal was to force society to recognize the movements constituents as equal citizens and persons who were just as worthy as the social norm, namely the [W]hite heterosexual male.

*Id.*; See William N. Eskridge Jr., *A Social Constructionist Critique of Posner's Sex & Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333, 384 (1993) [hereinafter Eskridge, *A Social Constructionist Critique*] (highlighting that government is "potentially important" to support bisexuals, gay men, and lesbians against social oppression).

Just as feminists have called upon the government to fight violence against women in the home and harassment and discrimination in the workplace, so those of us who fight for gay liberation should be calling upon the government to fight social oppression against us [LGBT], through antidiscrimination statutes, hate crime laws, and sex education programs.

*Id.*

26. See RIMMERMAN, *supra* note 8, at 155 (explaining the effect of drawing analogies to other minority groups); ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 2 (2d prt. 1964), Goffman states that:

Society establishes the means of categorizing persons. . . . When a stranger comes into our presence, then, first appearances are likely to enable us to anticipate his category and attributes, his "social identity . . . ."

We lean on these anticipations that we have, transforming them into normative expectations, into righteously presented demands. . . .

While the stranger is present before us, evidence can arise of . . . his possessing an attribute that makes him different from others in the category of persons available for him to be, and of a less desirable kind. . . . He is thus reduced in our minds from a whole and usual person to a tainted, discounted one. Such an attribute is a stigma, especially when its discrediting effect is very extensive. . . . [However] . . . not all undesirable attributes are at issue, but only those which are incongruous with our stereotype of what a given type of individual should be.

GOFFMAN, *supra* at 2-3.

27. See FEJES, *supra* note 8, at 5 (explaining that gays and lesbians, like other minorities, were subjected to discriminatory local, state, and federal laws and policies). However, "[l]esbians and gays never found strong advocates in the government, as did the other

societal demands to cover imposed on sexual minorities, evidenced by the cases of grave prejudice experienced by same-sex couples in medical emergencies discussed in this Note, the group cannot rise above the identity based on trait that defines it. Thus, a comprehensive legislation prohibiting discrimination against LGBT is needed to first ensure equal treatment, and then to facilitate societal changes in attitudes towards sexual minorities. For as long as the law does not prohibit the conduct that forces LGBT to assimilate or risk being accused of “flaunting” their sexuality by simply living their lives,<sup>28</sup> we perpetuate the debilitating covers that prevent us from seeing who we really are. The ultimate challenge is to rise above people’s sexual identities while maintaining respect for those identities.<sup>29</sup>

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groups, and the logic of client politics never extended to them.” *Id.* at 6. See Eskridge, *A Social Constructionist Critique*, *supra* note 25, at 383, 426 (discussing legalized discrimination after World War II as the time during which many minorities, including homosexuals, were categorized and privileged or deprived rights based on various identifying traits).

28. Cf. Fajer, *supra* note 19, at 570–75 (discussing how lesbians and gays must be able to live their lives publicly to the same extent as heterosexuals). In general, relationships are public in nature because a couple that is in love wants to live life together; this sometimes—even inadvertently—confirms to the world that they share a romantic involvement. See *id.* at 575. In addition, “[m]ost discrimination, particularly by private individuals or business entities, is not directed at private behavior, but at some type of public behavior or speech that acknowledges and calls attention to a person’s gay sexual orientation.” *Id.* at 570. Consequently, same-sex couples experience significant discrimination, which can only be countered by extending to lesbians and gay men “the right to carry on . . . [their] lives in public to the same extent as anyone else [who is heterosexual].” *Id.*; see also CHARLES, *supra* note 19, at 7.

Lesbians and gays must get out more in every geography, not passing as assimilated and normal humans, not just feeling to the havens of urban ghettos, but also celebrating their own cultural and social heritage of same-sex love while demanding freedom from state-sanctioned intolerance. The struggle for a queer-accessible world involves not only filing lawsuits, . . . but also building social and cultural bridges through acts as simple as introducing partners or holding hands on Main Street.

CHARLES, *supra* note 19, at 7.

29. See RIMMERMAN, *supra* note 8, at 17; Eskridge, *A Social Constructionist Critique*, *supra* note 25 (offering a comprehensive approach to end discrimination against LGBT and to implement societal changes).

If we want to break down anti[-]homosexual attitudes in American society . . . [w]e must draw upon gay and lesbian history, anthropology, sociology, philosophy, sexology, and literature, as well as the more standard legal sources, to reveal that . . . [LGBT] communities are worthy contributors to America’s pluralism and should be accorded the same equal and dignified treatment accorded other communities. This positive case rests more on narrative than on argumentation: we must bring our personal stories and histories to the attention of law and society. Narratives can rectify stereotypical misconceptions about us and can educate society about our legitimate concerns, needs, and the unjustified ways social mores and policies hurt us.

Eskridge, *A Social Constructionist Critique*, *supra* note at 25.

## II. LANGBEHN-POND FAMILY

### A. *The Tragic Story of Janice and Lisa*

It began as a rather ordinary story. On February 17, 2007, a family of two parents and three of their four adopted children departed Seattle, Washington to travel to Miami, Florida for a family cruise.<sup>30</sup> The next day they boarded the ship, the children happily anticipating a tropical family vacation; however, right before the ship left the port, their mother, Lisa Marie Pond, fell ill and collapsed on the deck.<sup>31</sup> Still conscious, Lisa was rushed by ambulance to Ryder Trauma Center at Miami's Jackson Memorial Hospital and was admitted at approximately 3:30 in the afternoon.<sup>32</sup> Her family arrived at the hospital soon after, and that is when the family's harrowing ordeal began.

Up to this point, the Langbehn-Pond family seemed just like any other family; however there was one difference, and the hospital staff would make it very clear that the difference mattered. Lisa Marie's spouse and co-parent of their four adopted children was Janice Langbehn, another woman.<sup>33</sup> At the hospital, Janice immediately informed the admitting clerk "that she was Lisa Marie's life partner," and that she would like to receive any relevant medical information and updates regarding Lisa Marie's condition.<sup>34</sup> Janice also explained that the children were legally adopted by the couple and requested that she be at her partner's side.<sup>35</sup> She also spoke to the social worker, who stated that Janice's requests for information and for access to Lisa Marie would likely be ignored because she was "in an 'anti-gay city and state.'"<sup>36</sup> Furthermore, because of the

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30. Amended Complaint and Jury Demand at 10, *Langbehn v. Pub. Health Trust of Miami-Dade Cnty.*, No. 08-21813-CIV (S.D. Fla. Sept. 29 2008) (dismissed); Janice Langbehn, *Family Trauma*, THE ADVOCATE, Oct. 9, 2007, available at <http://www.thefree-library.com/Family+trauma%3a+when+her+partner+was+rushed+to+the+hospital+with...-a0169412887>.

31. Amended Complaint, *supra* note 30, at 10–11; Langbehn, *supra* note 30 (relaying the narrative of Janice Langbehn, life-partner of Lisa Marie Pond). "For months, each of us had been dreaming of white sandy beaches and blue waters and spending some much needed vacation time together as a family." *Id.*

32. Amended Complaint, *supra* note 30, at 10–11.

33. *Id.* at 9 (stating that Lisa Marie and Janice Langbehn had been life partners since 1987). Lisa Marie and Janice were "involved in a monogamous, romantic, and emotionally and financially dependent relationship since shortly after their meeting . . ." *Id.* In 1991 they celebrated their relationship in a commitment ceremony and holy union at Tacoma Community Church. *Id.* Since 1992, Lisa Marie and Janice served as foster parents to a total of twenty-two children with "'special needs' who were considered hard to place." *Id.*

34. *Id.* at 11.

35. *Id.*

36. *Id.*; see also *Langbehn v. Pub. Health Trust of Miami-Dade Cnty.*, 661 F. Supp. 2d 1326, 1332 (S.D. Fla. 2009).

holiday weekend, it would not be several days before Janice could appear before the court in order to qualify her legal rights.<sup>37</sup> Janice informed the social worker that Lisa Marie had executed a power of attorney and advance medical directives authorizing Janice to act on her behalf in an event of incapacity.<sup>38</sup> The records indicate that the hospital received these documents via fax at approximately 4:15 p.m.<sup>39</sup> At the same time, the treating physicians determined that Lisa Marie suffered a burst aneurysm.<sup>40</sup> Despite receipt of the documentation, the hospital staff never provided Janice with proper consent forms for her signature to validate Janice's status as Lisa Marie's healthcare surrogate.<sup>41</sup> However, the hospital did manage to have Lisa Marie's father sign the forms authorizing some of her treatment.<sup>42</sup>

Over the next seven hours, despite repeated requests and pleas made to the hospital staff, Janice was given very limited information and access to her partner.<sup>43</sup> In fact, during that time, she was only allowed to see Lisa Marie once, for five minutes.<sup>44</sup> At 6:10 p.m., both of Lisa Marie's treating physicians told Janet that her condition had deteriorated and that surgery was no longer advisable. Janice informed the doctors that Lisa Marie was an organ donor and pled with the hospital staff to allow her and the children to see Lisa Marie. Unfortunately, Janice and the children were denied access to Lisa Marie while they watched other families escorted into the trauma-restricted area.<sup>45</sup> Janice repeated her pleas to the hospital staff every twenty minutes, and due to the emotional trauma

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"You are in an antigay city and state." Those were the words of a social worker at Miami's Jackson Memorial Hospital as my partner, Lisa, lay dying just steps away in the trauma center, behind locked doors. He punched his code on the keyboard and walked away, leaving me standing in the waiting room with our children—Katie, David, and Danielle, ages [nine] through [thirteen]. None of us could see her.

Langbehn, *supra* note 30 (recalling her encounter with the social worker and the treatment received by her and her children).

37. Amended Complaint, *supra* note 30, at 11.

38. *Id.* at 12.

39. *Id.* at 11.

40. *Langbehn*, 661 F. Supp. 2d at 1332.

41. *See id.* at 1332 (stating that hospital personnel "also did not allow Ms. Langbehn to receive Ms. Pond's medical records").

42. *Id.*

43. Amended Complaint, *supra* note 30, at 13 (stating that at 5:20 p.m. one of the attending physicians informed Janet that Lisa Marie needed a brain monitor, and Janet authorized the procedure).

44. *Id.* (stating that at 6:50 p.m. a Catholic priest, who was called to perform last rites for Lisa Marie "escorted Janice into the trauma area, where Lisa Marie lay alone in a trauma bay, and the priest performed last rites." Immediately after, at 6:55 p.m., Janice was escorted back to the waiting area).

45. *Id.* at 14.

of this experience, she became ill herself.<sup>46</sup> The staff also failed to inform Janice that Lisa Marie was transferred to another area of the hospital.<sup>47</sup>

Lisa Marie's sister and brother-in-law made it to the hospital nearly half an hour before midnight; upon their arrival, hospital staff notified them of Lisa Marie's relocation within the Intensive Care Unit and they were given her new room number.<sup>48</sup> Around midnight, Janice and the children were finally allowed to see Lisa Marie, who was unconscious.<sup>49</sup> The next morning at 10:45 a.m., Lisa Marie was confirmed brain-dead, and "her heart, kidneys and liver were donated to four patients."<sup>50</sup>

### B. *The Lawsuit*

On September 2, 2008, Janice Langbehn with the help of the Lambda Legal Defense and Educational Fund, Inc. (Lambda Legal) filed a lawsuit against Jackson Memorial Hospital, the treating physicians, and the hospital's social worker.<sup>51</sup> Because Langbehn sued for negligence, the Amended Complaint did not seek damages for the discriminatory treatment experienced by the Langbehn-Pond family at the hospital.<sup>52</sup> Thus, the real issue was kept in the periphery while the lawyers attempted to

46. *Id.* at 14–15 (stating that Janice suffered stomach ache, nausea, and vomiting while waiting to see Lisa Marie).

47. *Id.*

48. Amended Complaint, *supra* note 30, at 15.

49. Tara Parker-Pope, *Kept From a Dying Partner's Bedside*, N.Y. TIMES, May 19, 2009, [http://www.nytimes.com/2009/05/19/health/19well.html?\\_r=1&adxnnl=1&adxnnlx=12957.html](http://www.nytimes.com/2009/05/19/health/19well.html?_r=1&adxnnl=1&adxnnlx=12957.html).

50. *Id.*

51. Amended Complaint, *supra* note 30, at 39 (showing Lambda Legal was included on the electronic service when the complaint was filed with the Clerk of Court); Tika Milan, *Lambda Legal Sues Florida Hospital for Mistreatment of Deceased Lesbian's Family*, LAMBDA LEGAL (June 25, 2008), [http://www.lambdalegal.org/news/pr/fl\\_20080625\\_lambda-sues-fl-hospital.html](http://www.lambdalegal.org/news/pr/fl_20080625_lambda-sues-fl-hospital.html).

52. Amended Complaint, *supra* note 30, at 1–2, 32–33. In the *Summary of the Action*, the Amended Complaint addresses the "anti-gay animus," but only in context of proving elements of the negligence claims. *Id.* at 1–2. Specifically, paragraph 5 states that "Defendants' cruel and/or substandard treatment was motivated by anti-gay animus, was contrary to professional standards of care, and was a breach of Defendants' duty of reasonable care, as a consequence of which the Plaintiffs have suffered serious and irreparable injury." *Id.* at 3. The other allegations of discrimination, based on sexual orientation, are included in Counts VI and VII, both referring to breaches of fiduciary relationship by the hospital and the physicians against the Estate of Lisa Marie and Janice, respectively. *Id.* at 32–33. Paragraph 130(e) alleges that the physicians breached their fiduciary duties to Lisa Marie and Janice by "discriminating against Lisa Marie [or Janice] and [her] family based on her sexual orientation and/or same-sex relationship and familial status in violation of state law, hospital policies, national standards, medical ethics and/or generally accepted medical practice." *Id.* In addition, the *Factual Background* section notes Janice's encounter with the social worker at the hospital, who stated that she should not expect to receive any

frame it only as a negligence claim, as that was the only legal claim available.

Defendants responded by filing a motion to dismiss, on which movants ultimately prevailed.<sup>53</sup> In their motion and the subsequent reply, defendants did not even dispute the “anti-gay animus” as the reason for denial of visitation rights.<sup>54</sup> Instead, defendants argued that plaintiffs failed to state any facts supporting defendants’ wrongdoing, repeatedly calling the “animus” allegation “conclusory.”<sup>55</sup> Defendants also admitted that even if the social worker made a statement to Janice that she was in an “anti-gay city and state,” he was bound by § 765.401 of Florida Statutes.<sup>56</sup> This statute, for purposes of informed consent, does not recognize “same sex life partner[s], regardless of their legal status within another state, as anything other than a ‘close friend,’ the seventh class in order of priority.”<sup>57</sup> Furthermore, § 741.212 disallows recognition of same sex marriage in

information regarding Lisa Marie’s condition, since they were in an “anti-gay city and state.” *Id.* at 11.

53. *Langbehn v. Pub. Health Trust of Miami-Dade Cnty.*, 661 F. Supp. 2d 1326, 1347 (S.D. Fla. 2009). (stating that “Counts I-IV are dismissed with prejudice as to the individual defendants, and are dismissed without prejudice as to the Public Health Trust. Counts V-VIII are dismissed without prejudice as to all defendants”).

54. Defendants’ Reply in Support of Their Motion to Dismiss Amended Complaint and Incorporated Memorandum of Law at 18, *Langbehn*, 661 F. Supp. 2d 1326 (No. 08-21813-CIV) [hereinafter Defendant’s Reply]. Plaintiffs’ “assumptions” regarding “gay animus” rest solely on a statement made by the social worker, which was factually accurate and had no effect on Janice’s involvement in medical decisions regarding Lisa, because the physicians consulted with Janice even after the social worker made the comment regarding “anti-gay city and state.” *Id.*

55. *Id.* at 29.

Plaintiffs’ conclusory assertion of “anti-gay animus,” which is not attributed to any individual Defendant, and which is unaccompanied by any other fact demonstrating wrongdoing, simply cannot be enough to haul well-meaning, well-respected, and dedicated health professionals into court and accuse them of intentionally trying to harm patients and their loved ones on account of sexual orientation. . . . It is irresponsible and scandalous insinuation and there will never be facts to support it.

*Id.*

56. FLA. STAT. ANN. § 765.401 (West 2007). The statute designates order of priority in cases where the patient is incapacitated or developmentally disabled, without an executed advance directive or designated surrogate, as follows: (1) judicially appointed guardian; (2) the patient’s spouse; (3) an adult child of the patient; (4) a parent of the patient; (5) the adult sibling of the patient; (6) “an adult relative of the patient who has exhibited special care and concern for the patient”; (7) a close friend of the patient; or (8) a social worker.

*Id.*

57. FLA. STAT. ANN. § 741.212 (West 2007)

Marriage between persons of the same-sex entered into in any other jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, or relationships between persons of the same-sex which are treated as marriages in any jurisdiction,

Florida “for any purposes.”<sup>58</sup> Thus, even if the social worker made the statement, the statement was accurate under the applicable Florida law.<sup>59</sup> The hospital could not interpret “the [second] category of ‘spouse’ in § 765.401 as including same-sex partners, even if it wanted to, because Florida law forbids it.”<sup>60</sup> The defendants concluded that the social worker did not state that either he, or any other hospital staff member, were gay, thus the court should not hold “that providing accurate information about the laws of the state, however unfair those laws may be, amounts to extreme and outrageous conduct.”<sup>61</sup>

The trial court granted defendants’ motion to dismiss.<sup>62</sup> The court carefully avoided the “gay-animus” issue for the better part of the opinion, referring to it only twice, and completely avoided § 765.401 of the Florida Statutes. The court first referenced the anti-gay comments made by the social worker in a footnote discussing Count V of the Amended Complaint, alleging intentional infliction of emotional distress by the treating physicians.<sup>63</sup> The court concluded that in negligence, the doctors could not be held responsible for the derogatory comments made by another person, but rather they could only be accountable for their own tortious acts.<sup>64</sup> In conclusion, the physicians’ conduct was neither so extreme nor outrageous to rise to the level of intentional infliction of emotional distress.<sup>65</sup>

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either domestic or foreign, or any other place or location, are not recognized for any purpose in this state.

*Id.*; Defendants’ Motion to Dismiss Amended Complaint with Prejudice and Incorporated Memorandum of Law at 27, *Langbehn*, 661 F. Supp. 2d 1326 (No. 08-21813-CIV).

58. § 741.212; Defendants’ Reply, *supra* note 54, at 27–28 (citations omitted).

59. Defendants’ Reply, *supra* note 54, at 28.

[E]ven accepting Dr. Frederick’s alleged statement as true, which he must for purposes of this Motion to Dismiss, the alleged statement that Florida and the City of Miami are “anti-gay,” is an accurate characterization of Florida law in the context of health care advance directives. Indeed, Florida is one of only four states that categorically refuse to recognize same-sex marriages from other states.

*Id.*

60. *Id.* at 27 (citing § 741.212(3)) (“‘spouse’ applies only to a ‘union between one man and one woman’”).

61. *Id.* at 29.

62. *Langbehn*, 661 F. Supp. 2d 1326.

63. *Id.* at 1344.

64. *Id.* at 1344 n.9.

65. *Id.* at 1344.

There are a number of cases which, though not directly on point, indicate that the alleged conduct here is not “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.”

*Id.*



The court's second reference to the alleged discrimination based on sexual orientation came towards the end of the opinion. The court stated that in their Amended Complaint, plaintiffs contradicted their earlier claim regarding denial of right to make medical decisions on behalf of Lisa Marie.<sup>66</sup> Specifically, the Amended Complaint provided a detailed timeline acknowledging that the doctors informed Janice of Lisa Marie's grave condition, and that Janice provided them with information that Lisa Marie was an organ donor.<sup>67</sup> The court stated that the inclusion (in the Amended Complaint) of this brief encounter between Janice and Lisa's doctors was sufficient to support its conclusion that the physicians did not violate their fiduciary duties owed to Janice as a healthcare surrogate of Lisa Marie.<sup>68</sup> Janice could not win; first the defendants found her claims too conclusory and then, when she made a good faith effort to provide more detailed, truthful information, the court found her statements contradictory. Keeping with the theme of the negligence-based claims alleged in the Amended Complaint, the court held that under Florida law, the hospital and the physicians had a limited duty to provide medical information to Janice, but not to the children who lacked capacity to make any medical decisions on their mother's behalf.<sup>69</sup> Furthermore, even if the duty to inform extended to children, it was discharged by providing any update on Lisa Marie's medical condition to Janice.<sup>70</sup>

The court avoided deciding the issue of the hospital's duty to allow Janice and the children to visit Lisa Marie at her bedside. Instead, the court left the decision regarding patient visitations to the discretion of medical personnel: stating that in certain units, such as the trauma unit, visitation may create an "unreasonable risks[ ] of harm to the patient or to the putative visitors . . . establish[ing] a legal duty in tort."<sup>71</sup> In doing so the court just paid lip service to the principle of deferring to hospital and medical expertise.

The court concluded there was no physical impact to support Janice's claims with regard to Lisa Marie, because medical records did not support such a conclusion and Janice did not allege malpractice against the

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66. *Id.* at 1346–47.

67. *Langbehn*, 661 F. Supp. 2d at 1346–47.

68. *Id.* at 1347 (“ . . . [T]he more specific factual allegations in the amended complaint, which govern over more general ones, demonstrate beyond any doubt that Ms. Langbehn was not denied the right to make any medical decisions on behalf of Ms. Pond.”).

69. *Id.* at 1326.

70. *Id.* at 1336.

71. *Id.* at 1338 (stating that “absent contrary directive by the Florida courts or the legislature, decisions as to visitation should be left to the medical personnel in charge of the patient, without, second guessing by juries and courts”).

hospital.<sup>72</sup> The complaint also failed to allege any physical injuries suffered by the children as a consequence of the alleged psychological trauma.<sup>73</sup> The court, however, upheld Janice's claim as "somewhat thin," but nonetheless sufficient to comply with the impact rule.<sup>74</sup>

Finally, the court acknowledged the hospital's lack of sensitivity and attention towards the Langbehn-Pond family, which resulted in "needless distress during a time of anguish and vulnerability."<sup>75</sup> However, the hospital's failure to provide Janice with "frequent updates" and to allow her and the children to visit Lisa Marie, although regrettable, as plead in the allegations in the Amended Complaint did not state a claim for which relief could be granted.<sup>76</sup> Although the court allowed a second amendment to the complaint, it was not filed by the required deadline.<sup>77</sup>

### C. *Obama to the Rescue*

Although Lambda Legal lost the case it had filed against the hospital on behalf of Janice Langbehn, the case created enough publicity to attract the attention of the White House.<sup>78</sup> In fact, one may speculate that Lambda Legal filed the suit—and many others similar suits around the country—hoping to generate the publicity necessary to eventually prompt policy changes.<sup>79</sup> One may say that sexual minorities in desperate times

72. *Langbehn v. Pub. Health Trust of Miami-Dade Cnty.*, 661 F. Supp. 2d 1326, 1336, 1341 (S.D. Fla. 2009). "The psychological trauma 'must cause a demonstrable physical injury such as death, paralysis, muscular impairment, or similarly objectively discernible physical impairment before a cause of action may exist . . . there is no cause of action for psychological trauma alone when resulting from simple negligence.'" *Id.* at 1336.

73. *Id.* at 1341. "The [Amended] [C]omplaint does allege in Count II that the children have suffered 'physical injury,' but allegation is conclusory, lacks any factual nexus, and is devoid of any supporting facts so as to survive a motion to dismiss." *Id.*

74. *Id.*

75. *Id.* at 1347.

76. *Id.* "Unfortunately, no relief is available under Florida law for these failures based on the allegations pled in the amended complaint." *Id.* Thus, "the law does not provide a remedy for every wrong." *Id.*

77. Order Granting Motion to Dismiss at 24, *Langbehn*, 661 F. Supp. 2d 1326 (No. 08-21813) (stipulating the filing deadline as October 16, 2009).

78. See *Presidential Memo on Healthcare: Cathcart says, "This Is How Change Happens."*, LAMBDA LEGAL (Apr. 16, 2010), [http://www.lambdalegal.org/news/pr/ny\\_20100416\\_presidential-memo.html](http://www.lambdalegal.org/news/pr/ny_20100416_presidential-memo.html) [hereinafter LAMBDA LEGAL, *Cathcart*] (discussing the policy changes that will be implemented to address health care issues and hospital visitation in regard to LGBT families). Kevin Cathcart, Executive Director of Lambda Legal, stated that Lambda "[t]ogether with Janice, . . . raised the issue and opened it up for public discussion." *Id.* As a result, "the President heard it and acted. When you stand up for what is right, you build toward the day when change is made. Lambda Legal and Janice never gave up fighting." *Id.*

79. See *In Court*, LAMBDA LEGAL, <http://www.lambdalegal.org/in-court/> (last visited Sept. 6, 2011) (providing basic information about Lambda Legal). For almost forty years,

undertake desperate measures. Furthermore, the success of activism in the *Kowalski* case,<sup>80</sup> a notorious battle involving same-sex couples' rights, proved how minorities can utilize the power of media to further their agenda.<sup>81</sup>

After a succession of New York Times articles and other media coverage of the *Langbehn* case against the hospital, on April 15, 2010, President Obama issued a memorandum to Kathleen Sebelius, the Secretary of Health and Human Services specifically titled: *Respecting the Rights of Hospital Patients to Receive Visitors and to Designate Surrogate Decision Makers for Medical Emergencies*.<sup>82</sup> This memorandum stated:

There are few moments in our lives that call for greater compassions and companionship than when a loved one is admitted to the hospital. In these hours of need and moments of pain and anxiety, all of us would hope to have a hand to hold, a shoulder on which to lean – a loved one to be there for us, as we would be there for them.<sup>83</sup>

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Lambda Legal has worked on behalf of LGBT right, litigating around sixty-five cases per year. *Id.* The organization chooses its cases “by analyzing them to see which will have the greatest impact in protecting and advancing the rights of LGBT people . . .” *Id.*

80. *See infra* Part III.A (discussing the *Kowalski* case).

81. *See In re Guardianship of Sharon Kowalski*, LAMBDA LEGAL, <http://www.lambdalegal.org/in-court/cases/in-re-guardianship-of-sharon.html> (last visited Sept. 6, 2011) (summarizing the amicus brief that Lambda Legal and several other LGBT groups filed in *In re Kowalski* on August 21, 1991). *See also* CHARLES, *supra* note 19, at 15 explaining that “[t]he *Kowalski* case put a face on lesbian and gay discrimination”; Fajer, *supra* note 19 at 582 (emphasizing that “[d]uring the court battles over guardianship and visitation, the Kowalskis consistently denied that their daughter was in a lesbian relationship”). They claimed, implausibly, that Thompson had made up the story and risked the discrimination that attended her coming out to profit herself and advance the cause of gay rights. *Id.* *See also* Rivera, *supra* note 19, at 896 n.80 (stating that “Karen Thompson has taken her battle to care for her lover Sharon to the national media,” and as a result, “[g]rassroot support and fundraising groups have sprung up across the [United States]”).

82. *See* Tara Parker-Pope, *For Same-Sex Couples, Equality in the Hospital*, N.Y. TIMES, Apr. 19, 2010, <http://well.blogs.nytimes.com/2010/04/19/for-same-sex-couples-equality-in-the-hospital/?scp=1&sq=for%20same-sex%20couples%20equality%20in%20hospital&st=cse> (discussing President Obama’s memorandum to Kathleen Sebelius that was partially prompted by the *Langbehn-Pond* case); Tara Parker-Pope, *No Visiting Rights for Hospital Trauma Patients*, N.Y. TIMES, Sept. 30, 2009, <http://well.blogs.nytimes.com/2009/09/30/no-visiting-rights-for-hospital-patients/?html> (discussing the dismissal of the lawsuit in the *Langbehn-Pond* case). Beth Littrell, the Lambda Legal lawyer who represented Janice Langbehn, stated that “there was no medical or legitimate reason to deny the family access to her [Lisa Marie’s] bedside. The court’s decision paints a tragically stark picture of how vulnerable same-sex couples and their families are during times of crisis.” *Id.*

83. Memorandum on Respecting the Rights of Hospital Patients to Receive Visitors and to Designate Surrogate Decision Makers for Medical Emergencies, 75 FR 20511 (Apr. 15, 2010), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-hospital-visitation>; [hereinafter Presidential Memorandum]; *President Obama Issues*

The memorandum addressed issues of visitation rights of various groups, who do not fit within traditionally defined categories. It specifically discussed visitation rights of gay and lesbian Americans “barred from the bedsides of the partners with whom they may have spent decades of their lives.”<sup>84</sup> Although the memorandum addressed only federally funded facilities that participate in Medicare and Medicaid programs, it was an important first step to address inequalities in treatment of LGBT in medical emergencies. Furthering the publicity, President Obama personally called Janice Langbehn from Air Force One to express his sympathy for the tragic loss of her partner and for the outrageous treatment she suffered.<sup>85</sup> Janice was also invited to the White House “in recognition of her tireless advocacy beginning in a Florida hospital over three years ago.”<sup>86</sup> While the Obama memorandum was advisory in nature, designed to provide guidelines for the legislature (not enforceable

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*Memo on LGBT Health Issues; Calls Janice Langbehn from Air Force One*, LAMBDA LEGAL (Apr. 16, 2010), [http://www.lambdalegal.org/news/pr/us\\_20100415\\_president-obama-issues-memo-on-lgbt-health-issues.html](http://www.lambdalegal.org/news/pr/us_20100415_president-obama-issues-memo-on-lgbt-health-issues.html) [hereinafter LAMBDA LEGAL, *Langbehn*].

The steps that President Obama outlined tonight are a great leap forward in addressing discrimination affecting LGBT patients and their families . . . . These measures are intended to ensure that no family will have to experience what the Langbehn-Pond family did that night at Jackson Memorial Hospital. We are so proud of Janice and her family – she stood up and told her story and it made a difference.

*Id.* See also LAMBDA LEGAL, *Cathcart*, *supra* note 78 (discussing the presidential memo on hospital visitation for same-sex couples).

84. Presidential Memorandum, *supra* note 83 (requesting that healthcare providers to take various measures to provide patients with compassionate and equal treatment).

By this memorandum, I request that you take the following steps: 1. Initiate appropriate rulemaking, pursuant to your authority under 42 U.S.C. 1395x and other relevant provisions of law, to ensure that hospitals that participate in Medicare or Medicaid respect the rights of patients to designate visitors. *It should be made very clear that designated visitors, including individuals designated by legally valid advance directives (such as durable powers of attorney and health care proxies), should enjoy visitation privileges that are no more restrictive than those that immediate family members enjoy.* You should also provide that participating hospitals may not deny visitation privileges on the basis of race, color, national origin, religion, sex, *sexual orientation*, gender identity, or disability. The rulemaking should take into account the need for hospitals to restrict visitation in medically appropriate circumstances as well as the clinical decisions that medical professionals make about a patient’s care or treatment.

*Id.* (emphasis added).

85. LAMBDA LEGAL, *Cathcart*, *supra* note 78. The “[p]resident direct[ed] Health and Human Services to report in 180 days with additional recommendations about actions it can take to address hospital visitation, medical decision-making and other health care issues that affect LGBT patients and their families.” *Id.*

86. *Lambda Legal Client Janice Langbehn to Attend White House Pride Event*, LAMBDA LEGAL (June 21, 2010), [http://www.lambdalegal.org/news/pr/us\\_20100621\\_langbehn-to-attend.html](http://www.lambdalegal.org/news/pr/us_20100621_langbehn-to-attend.html) (quoting Kevin Cathcart, Executive Director for Lambda Legal).

procedurally nor substantively), it indeed sent a message and provided a framework for the law.

On August 27, 2010, Lambda Legal, along with the Gay and Lesbian Medical Association, and the National Health Law Program, filed a twenty-six page memorandum with comments in response to the proposed guidelines, published in June by the Centers for Medicare & Medicaid Services, within the U.S. Department of Health and Human Services (HHS).<sup>87</sup> After a careful review, Tara Borelli, the staff attorney for Lambda Legal, found the guidelines were a good starting point. However, one major problem, which was not addressed, was the uncertainty of patient rights when he or she is incapacitated and unable to designate the visitors or decision makers.<sup>88</sup> Other recommendations made to HHS included: (1) requirement for documentation reflecting patient-visitor relationship should be minimal and not discriminatory towards LGBT; (2) the visitations provisions for hospice and nursing home facilities should include explicit non-discrimination language to protect LGBT; (3) the fa-

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87. Letter from Lambda Legal, GLMA, & NHeLP, to Ctrs. for Medicare & Medicaid Svcs., (Aug. 27, 2010) [hereinafter Letter] (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (the letter was jointly written by Lambda Legal, the Gay & Lesbian Medical Association, and the National Health Law Program).

In many states there is limited legal recourse when LGBT patients and their families are mistreated by health professionals, and litigating such cases always is emotionally wrenching. As a result, few such cases have been brought and even fewer succeeded—underscoring further the need for these Proposed Rules to provide meaningful protections. While advance directives sometimes help, private documents alone are not adequate protection, as demonstrated by the *Langbehn* and *Flanigan* cases. . . . Given the obvious need for greater national uniformity and certainty for patients, and for health care providers and organizations, these Proposed Rules do promise improvement by clearly prohibiting discrimination, and by underscoring the seriousness of the need for change by wielding a powerful enforcement policy.

*Id.* at 4. For a further discussion of the suggestions made to Health & Human Services see *Lambda Legal, GLMA, NHeLP on Hospital Visitation Guidelines for LGBT Patients: "A Good Start, But Important Clarifications Are Needed"*, LAMBDA LEGAL (Aug. 27, 2010), [http://www.lambdalegal.org/news/pr/dc\\_20100827\\_lambda-glma-nhelp.html](http://www.lambdalegal.org/news/pr/dc_20100827_lambda-glma-nhelp.html). To see the full text of the final guidelines that became effective on January 18, 2011 see 42 C.F.R. § 482 (2010).

88. Letter, *supra* note 87, at 13–14.

The Proposed Rules are silent regarding the circumstance in which LGBT patients and their families are perhaps most vulnerable—when a patient is incapacitated and has not previously designated in writing a health care agent or representative. LGBT patients far too often experience discriminatory visitation denials even when they *have* designated an agent in writing, and patients who have not done so—a common circumstance—are even more vulnerable.

*Id.* Thus, visitation rights “*should be allowed for any person who plays a significant role in the patient’s life.*” *Id.* at 14. And “*the Proposed Rules should make expressly clear that a person with whom the patient is in an adult domestic relationship formally recognized under the laws of any state or municipal government should be permitted to visit.*” *Id.* at 15.

cilities should provide patients with clear notice of their practices and procedures regarding visitation rights and standards; and (4) and there must be a process for denial of visitation rights.<sup>89</sup> The comment letter also provided a brief history of discrimination experienced by LGBT people in medical emergencies, referring specifically to the *Langbehn* and *Flanigan* cases as prime examples of anti-gay bias amongst hospital staff.<sup>90</sup> It was noted that such biases arose even in situations where couples had durable health care powers of attorney.<sup>91</sup>

The proposed guidelines were codified and became effective on January 18, 2011.<sup>92</sup> The regulations require the hospitals participating in Medicare and Medicaid programs to have written policies and procedures regarding patients' visitations rights, and to inform patients and visitors of their rights.<sup>93</sup> They also explicitly prohibit discrimination based on sexual orientation.<sup>94</sup> However, these rules, now in the Code of Federal Regulations, does not include the recommendations made by Lambda Legal. Specifically, it omits procedures for situations in which the patient is incapacitated and unable to designate visitors and proxies, and it does not set forth appeal procedures for denial of visitation rights.<sup>95</sup>

Once again, the victory in the fight for equality was only partial. And once again, it required a very public campaign. This was not a complete solution, but it moved the cause forward. In addition, Janice's courage

89. *Id.* at 13–15 (outlining these recommendations).

90. *See id.* at 4 & 4 n.8 (“The lack of adequate national standard for hospital visitation promotes inconsistencies with often devastating effect for LGBT patients and their families.”).

91. *Id.*

92. 42 C.F.R. § 482 (2010).

93. § 482.13.

94. *Id.*

Standard: Patient visitation rights. A hospital must have written policies and procedures regarding the visitations rights of patients, including those setting forth any clinically necessary or reasonable restriction or limitation that the hospital may need to place on such rights and the reasons for the clinical restriction or limitation. A hospital must meet the following requirements: . . . (3) Not restrict, limit, or otherwise deny visitation privileges on the basis of race, color, national origin, sex, gender identity, sexual orientation, or disability.

*Id.*

95. *See With Hospital Visitation Regulations in Effect, Lambda Legal Thanks Client Janice Langbehn and Obama Administration*, LAMBDA LEGAL (Jan. 19, 2011), [http://www.lambdalegal.org/news/pr/ny\\_20110119\\_with-hospital-visitation.html](http://www.lambdalegal.org/news/pr/ny_20110119_with-hospital-visitation.html) [hereinafter LAMBDA LEGAL, *Hospital Visitation*] (telling story about one woman's success in influencing new visitation regulations).

and efforts to make policy changes was rewarded on May 2, 2011, when Lambda Legal awarded her with its National Liberty Award.<sup>96</sup>

One question remains unanswered: should regular people, everyday citizens, be required to practically march on Washington and seek vindication whenever they experience discrimination because of irrational bias? Although Janice Langbehn's case influenced public policy and in the process she became a spokesperson for civil rights, it was at the cost of much suffering. Her family experienced grave and inexcusable discrimination, she lost her loving partner, and she lost her lawsuit—her chance at restitution. Perhaps Janice, like many people who experience great injustice and loss, found a deeper meaning and redemption in her civil rights work.<sup>97</sup> But, as discussed more in Part IV, a better solution to avoid such drastic measures would be to enact a comprehensive law, which would address the deeply rooted societal prejudice by prohibiting discriminatory treatment of sexual minorities. After all, there has to be a remedy that will allow LGBT, like other minorities with a history of discrimination and social stigma, to achieve equality without a need for a picket sign or a newspaper headline.

### III. THE LANGBEHN-POND FAMILY IS NOT ALONE

One might consider the suffering of the Langbehn-Pond family to be just an isolated incident, so outrageous and extreme in nature, that it would be nearly anomalous in an increasingly egalitarian society. However, a brief survey of the past three decades reveals plenty of cases involving discrimination against same-sex couples in emergency medical

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96. LAMBDA LEGAL, *Langbehn*, *supra* note 83 (discussing policy changes implemented by the hospital following the Langbehn case, including visitations rights, and updated definition of family to include same-sex partners and other people who may not be legally related to a patient); LAMBDA LEGAL, *Hospital Visitation*, *supra* note 95.

97. *See* GOFFMAN, *supra* note 26, at 26–27 (pointing out that stigmatized groups designate representatives, who are vocal about the group's complaints, aspirations, politics, and atrocities, and who often find that the "movement" absorbs all their time, taking on qualities of a profession); *see also*, CHARLES, *supra* note 19, at 263 (discussing how the perseverance of Karen Thompson served as a model for "making justice ad became legal and political precedent for the equality and respect for LGBT).

The guardianship of Sharon Kowalski acts as a metaphor for the stewardship of a political and social struggle for legal rights, whether those be health benefits for same-sex partners, employment discrimination laws, or hate crimes statutes. Unless the lesbian and gay community states its preference out loud in every venue, it will continue as a ward of a state that depends on that community's incapacity and confines that queer ward in a closet.

*Id.*

situations.<sup>98</sup> The three selected cases discussed below are just examples. They demonstrate that regardless of whether openly gay or closeted, with or without advance medical directives, sexual minorities experience grave prejudice, for which they lack adequate legal remedies.

#### A. *In re Guardianship of Sharon Kowalski*

Perhaps the worst example of discrimination, bigotry, and injustice is the case *In re Guardianship of Sharon Kowalski*, involving Karen Thompson and Sharon Kowalski, a lesbian couple who lived in rural Minnesota.<sup>99</sup> In November of 1983, “after four years of a committed and extremely closeted relationship, Sharon was hit by a drunk driver while driving in Northern Minnesota.”<sup>100</sup> As a result of the accident, Sharon suffered severe brain injuries and was paralyzed (wheelchair-bound). Initially, Karen acted as a caretaker for Sharon, but she became concerned the Kowalski family would prevent her from seeing Sharon; so, in an attempt to remain involved in Sharon’s medical treatment and rehabilita-

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98. See Letter, *supra* note 87, at 2 & 2 n.5 (discussing changes needed to ensure visitation rights for all patients). Lambda Legal conducted a national healthcare survey in February of 2010, which confirmed and underscored “the pervasive discrimination against LGBT people in healthcare settings, and . . . visitation discrimination is part of a larger dynamic that leads to systematically poorer health outcomes for LGBT people.” *Id.*

Countless LGBT people in this country continue to endure hardships because health care provider prejudice, ignorance and apathy needlessly keep patients isolated from their families and other supportive loved ones in times of medical crisis. The LGBT community members that . . . [Lambda Legal] serve[s] have reported being barred from a dying partner’s bedside, . . . choosing to skip necessary procedures because their partner was not allowed to stay with them overnight, . . . being turned away when offering important medical information about their partner or child, and otherwise being treated as a stranger, or at best, a “friend,” although their relationship to the patient was, by all fair measures, unmistakably familiar and supportive in nature.

*Id.* at 2. See generally Cain, *supra* note 10 (discussing the legal history of the gay rights movement); HUMAN RIGHTS CAMPAIGN FOUND., HEALTHCARE EQUALITY INDEX (2010), available at [http://www.hrc.org/files/assets/resources/HealthcareEqualityIndex\\_2010.pdf](http://www.hrc.org/files/assets/resources/HealthcareEqualityIndex_2010.pdf) (explaining that the survey monitors facility policies in order to prevent or remedy discriminatory treatment, and to ensure LGBT healthcare needs are adequately met). Healthcare Equality Index is an annual survey of healthcare policies related to LGBT patients and their families, compiling data from 178 healthcare facilities in 21 states and the District of Columbia. HUMAN RIGHTS CAMPAIGN FOUND., *supra*.

99. *In re Guardianship of Kowalski*, 478 N.W.2d 790, 791 (Minn. Ct. App. 1991); CHARLES, *supra* note 19, at 8 (“The late Tom Stoddard, director of the Lambda Legal Fund Defense Fund, called the Kowalski struggle the most important and compelling legal case concerning lesbian and gay rights in his lifetime.”); THOMPSON & ANDRZEJEWSKI, *supra* note 19, at 2 (discussing in great detail the circumstances of the case and relationship between Sharon and Karen).

100. THOMPSON & ANDRZEJEWSKI, *supra* note 20, at 1.



tion, she revealed to Sharon's parents they were lovers.<sup>101</sup> Sharon's family became enraged and prevented Karen from visiting Sharon.<sup>102</sup> In the spring of 1984, Sharon's father, Donald Kowalski, cross-petitioned for Sharon's guardianship,<sup>103</sup> and the nearly eight-year legal battle "to bring Sharon home" ensued.<sup>104</sup> Karen initially agreed to appointing of Mr. Kowalski as the guardian, because she believed she would be granted visitation rights; but instead, with the court's approval, Sharon's father terminated Karen's ability to visit and relocated Sharon to a remote nursing home 200 miles away.<sup>105</sup>

Ironically, the couple kept their relationship secret to avoid the moral judgment of their families and rural community.<sup>106</sup> But after the accident, in order to raise money for the mounting legal bills and to advance her cause, Karen was forced to publicize their story and to fight her battle in the public arena.<sup>107</sup> Three years later, the court ordered physicians to examine Sharon in order to determine whether she was capable of expressing her wishes regarding visitations.<sup>108</sup> The court reinstated Karen's

101. *Id.* (discussing the story of two partners who experienced bigotry when they decided to reveal their hidden relationship).

102. *Id.* (explaining that Karen sought the advice of medical and legal professionals when Sharon's family asked her to stop visiting Sharon); Fajer, *supra* note 19, at 581–83 ("During the court battles over guardianship and visitation, the Kowalskis consistently denied that their daughter was in a lesbian relationship . . . Sharon's father accused the court that granted Thompson's visitation rights [Feb. 1989] of 'legalizing a lesbian relationship.'"); Rivera, *supra* note 20, at 896 (stating that the Kowalskis indicated that if Thompson were allowed to see Sharon, she would sexually molest her).

103. *Kowalski*, 478 N.W.2d at 791 (explaining that "[i]n March of 1984, both Thompson and Sharon's father, Donald Kowalski cross-petitioned for guardianship"); Fajer, *supra* note 19, at 581. Although Sharon and Karen purchased a house together, exchanged rings, and named each other as insurance beneficiaries, they did not execute mutual power of attorney nor advance medical directives. Fajer, *supra* note 19. Therefore, their relationship lacked legally-recognized status. *Id.*

104. THOMPSON & ANDRZEJEWSKI, *supra* note 19 app. A (providing a timeline of significant events); CHARLES, *supra* note 19, at 14 ("Thompson's legal battle became a rallying cry for a movement reeling from the disability and death associated with AIDS pandemic, her separation and legal mistreatment dramatizing the deepest fear of same-sex partners.").

105. *Kowalski*, 478 N.W.2d at 791.

106. Rivera, *supra* note 19, at 895 (stating that Thompson was a teacher and feared losing her job if it was discovered she was a lesbian).

107. CHARLES, *supra* note 19, at 1 (stating that Karen's efforts "outside the courtroom begun to play a major role in the case, demonstrating how law functions as a historically and socially conditioned process, one that is influenced by contexts as seemingly far removed from the public sphere as the bedroom, as the private predilection of romantic lovers.").

108. *Kowalski*, 478 N.W.2d at 791. In "1988, Judge Robert Campbell ordered specialists at Miller-Dawn Medical Center to examine Sharon to determine her level of functioning and whether Sharon could express her wishes on visitation." *Id.*

visitation rights in January of 1989 after doctors concluded that Sharon wanted to see Karen.<sup>109</sup> Upon the doctor's recommendation Sharon was moved to a different facility and Karen was allowed to bring Sharon home "for semi-monthly weekend visits."<sup>110</sup> Prior to this arrangement, in 1988, Mr. Kowalski had petitioned the court to terminate his guardianship due to a medical condition.<sup>111</sup> Karen filed an uncontested request to be appointed Sharon's subsequent guardian, but in a truly incredible and cruel twist of events, the court granted the guardianship to Kowalski's family friend, Karen Tomberlin, who testified against Sharon, but never filed a petition for guardianship.<sup>112</sup> Karen appealed, and on December 17, 1991, after years of litigation, and a grassroots movement to recognize Sharon's rights to choose her caregiver, the court concluded that Karen's suitability for guardianship was "overwhelmingly clear from the testimony of Sharon's doctors and caretakers." and she was finally awarded guardianship.<sup>113</sup>

The *Kowalski* case was filed in 1984, and it was virtually the first of its kind. Although it ultimately had a happy ending, it is a sobering reminder and a testimonial of the longstanding and comprehensive history of discrimination against gender minorities, most notably, gays and lesbians.<sup>114</sup> Foremost, it is a cautionary tale for same-sex couples to be proactive and to take the necessary measures to protect their rights and assets in an event of unforeseen medical emergencies. Although, as illustrated

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109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 791–92. "On April 23, 1991, the trial court denied Thompson's petition for guardianship and simultaneously appointed Tomberlin as guardian without conducting a separate hearing into her qualifications." *Id.* at 792 "Thompson appealed to [this] court." *Id.*

113. *In re Kowalski*, 478 N.W.2d 790, 797 (Minn. Ct. App. 1991).

[I]t should be made clear that this court is also reversing specific restrictions on the guardian's decision-making power that might be read into the trial court order. She is free to make whatever decisions she and the doctors feel free are necessary to achieve Sharon's best interests, including decisions regarding Sharon's location.

*Id.*

114. See CHARLES, *supra* note 19, at 14 (citing WILLIAM N. ESKRIDGE JR., GAYLAW, CHALLENGING THE APARTHEID OF THE CLOSET 2 (1999)) ("[It is still] difficult to identify any other group of American citizens who are currently less protected under the United States Constitution than are gays and lesbians."); Fajer, *supra* note 19 at 583 (confirming society's refusal to acknowledge or accept homosexual relationships). "[T]he saga of Karen and Sharon exposes not only a vindictive family and an undependable judiciary, but also repulsive and lawless forces. The Kowalski family actually made the courts into unwitting co-conspirators in their own form of lesbian bashing." AMY D. RONNER, HOMOPHOBIA AND THE LAW, 42 (2005).

by *Langbehn*,<sup>115</sup> *Flanigan*,<sup>116</sup> and *Reed*,<sup>117</sup> drawing proper legal documents may not suffice (it does not provide the certainty one would expect), but it is a necessary first step towards preserving freedom of choice because of two dismal realities.<sup>118</sup> The first reality is that even if states grant substantially the same rights and responsibilities to same-sex couples as those enjoyed by a heterosexual married couple, the federal government does not recognize these unions under federal programs.<sup>119</sup> Second, state laws do not have to recognize legal unions from other

115. See *supra* Part II.A–B (elaborating on specific instances in which having prepared the proper legal documents in advance would have helped protect a homosexual partner's rights in unanticipated medical emergencies).

116. See *infra* Part III.A (demonstrating patterns of systematic discrimination against homosexuals in emergent medical situations, even when the proper legal paperwork has been completed).

117. See *infra* Part III.B (providing another example of an individual in a loving, committed, same-sex relationship being denied access to her partner and adequate legal remedies).

118. See DENIS CLIFFORD, ET AL., *A LEGAL GUIDE FOR LESBIAN & GAY COUPLES* 136–37 (Emily Duskow ed., 15th ed. 2010) (pointing out that hospitals and doctors often conveniently look to the immediate family for authority to act (in absence of documents giving the power to the partner)). As a result, a partner is often forced to look in horror while the doctor is instructed regarding treatment in ways that the lover knows to be contrary to his partner's wishes. *Id.* at 136. "When a person is ill or incapacitated, someone must pay bills, deposit checks, and make other financial matters. And traditionally, the authority to make financial decisions belongs to a spouse, not a lover or friend." *Id.* at 139. Some scholars believe that:

Same-sex partners face greater challenges than many heterosexual couples in ensuring that their partners and families are protected after their deaths. Specific considerations must be addressed that will benefit couples whether married or unmarried, heterosexual or homosexual. . . . The most important planning documents that one can give oneself – and often surviving spouse – are a will, a health care proxy, or durable power of attorney, and a declaration of homestead.

Aimee Bouchard & Kim Zadworthy, *Growing Old Together: Estate Planning Concerns For the Aging Same-Sex Couple*, 30 W. NEW. ENG. L. REV. 713, 726 (2008). See also Fajer, *supra* note 19 at 581 (noting that homosexual couples are otherwise without legal standing to make decisions for each other during times of incapacitation); Elizabeth Schwartz, *Top Ten Legal Protections for Gays & Lesbians*, ELIZABETH F. SCHWARTZ: ATTORNEYS & MEDIATORS, <http://www.sobe.law.com/top10.html> (last visited on Oct. 9, 2011) (providing a guide of ten legal documents every same-sex couple [in Florida] should have, when applicable, including: will, properly titled deed and accounts, durable power of attorney, designation of healthcare surrogate, living will, designation of pre-need guardian, designation of pre-need guardian for minor child, beneficiary designations, co-habitation agreements, and co-parenting agreements).

119. CLIFFORD, *supra* note 118, at 17–18.

The federal government does not recognize a Massachusetts marriage nor a domestic partner registration or civil union in any other state. This means that none of the over 1,000 federal rights that . . . apply to marriage apply to same-sex couples, no matter how significant their legal relationship is under [the] state law. For example, same-sex

states, and they presume that legally unmarried people are heterosexual.<sup>120</sup> Thus, same-sex couples, who do not exercise advance medical directives, powers of attorney, wills, or other necessary legal documents to protect their legal rights, may be subject to a state-mandated “order of preference.”<sup>121</sup> As a result, property and medical decision-making rights will often be granted to a blood relative in lieu of the same-sex partner, if an LGBT individual dies intestate or becomes incapacitated during a medical crisis and has not legally named a healthcare proxy.<sup>122</sup> Thus, in the absence of legislative or judicial consensus regarding the medical and financial decision-making rights of LGBT couples, it behooves these couples to execute suitable legal documents to preserve the, albeit imperfect, legal protections afforded to them under current state and federal laws.<sup>123</sup>

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couples cannot take advantage of Social Security benefits, immigration privileges, or the marriage exemption to federal estate tax.

*Id.* at 29. See Bouchard & Zadworny, *supra* note 118, at 725 (explaining that [s]ame-sex couples often face intolerance by their own families, making them subject to intestacy laws, which “primarily direct inheritance to biological family members by a matter of relationship hierarchy, effectively cutting a partner out of any share of the decedent’s estate”). However, “despite inadequacies of intestacy, a ‘number of studies suggest that the majority of the population dies intestate.’” *Id.* at 726. See also *Statistics Regarding Status of Same-Sex Relationships Nationwide*, LAMBDA LEGAL, <http://www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html> (last updated Aug. 19, 2011) (stating that only seven states recognize marriage equality, while twenty-nine states have constitutional amendments restricting marriage to a union between man a woman, and forty-five states bar same-sex marriage by statute).

120. CLIFFORD, *supra* note 118, at 31 (noting that some states may treat homosexual unions as married, while others treat the parties as single, unrelated adults).

121. Bouchard & Zadworny, *supra* note 118, at 715, 725 (discussing common state intestacy law relationship hierarchies that can cut a surviving LGBT partner out of the decedent’s estate); CLIFFORD, *supra* note 118, at 4 (highlighting the lack of federal and state protections for same-sex couples in matters of property, tax, and end of life health-care decisions).

122. Bouchard & Zadworny, *supra* note 118, at 715, 725–26, 745 (discussing the common occurrence of a LGBT person’s estate passing to her parent or distant relative, and the medical proxy hierarchy for many states that includes adult children, parents, or adult siblings before or to the exclusion of a same-sex partner); *Hospital Rights*, ALTERNATIVES TO MARRIAGE PROJECT, <http://www.unmarried.org/hospital-rights.html#rights> (last visited Oct, 10, 2011) (explaining that, in many states, close friends and domestic partners are either at the bottom of the medical proxy list or completely prevented from making medical decisions for an incapacitated loved one).

123. See Bouchard & Zadworny, *supra* note 118, at 743 (explaining that it is important for LGBT couples to execute legal documents concerning medical and financial decision-making powers in order to avoid the possibility of these powers being stripped away from them in the event of an unforeseeable death or incapacitation). “Everyone should be cautious about planning for their future, and ultimately, their death, but it is especially important for same-sex couples who do not have the benefit of default rules for legally

B. *Flanigan v. University of Maryland Medical System Corp.*

Another case that showcases a systemic pattern of discrimination involves Bill Flanigan and Robert Daniel, life partners who were together for nearly five years before Robert's death in October of 2000.<sup>124</sup> Over the years, Robert's health progressively deteriorated due to HIV, and Bill took an active role in Robert's treatment as his caregiver.<sup>125</sup> Unlike the *Kowalski* case, to protect their rights, the couple had signed a durable power of attorney, appointing each other as health care proxies.<sup>126</sup> In his power of attorney, Robert specified medical circumstances under which "he did not wish to receive life-sustaining treatment."<sup>127</sup> Living with uncertainty of Robert's chronic medical condition prompted the couple to engage in honest conversations about each other's wishes in the event of medical crisis. Robert feared hospitals and doctors and repeatedly stated his aversion to having his life prolonged by artificial means.<sup>128</sup>

The events giving rise to the lawsuit began on October 15, 2000 when Robert became severely ill while visiting family in Washington, DC.<sup>129</sup> Bill took Robert to the nearest hospital, where the attending physician advised the couple that Robert's lungs were failing and he required a respirator.<sup>130</sup> Robert unequivocally refused intubation, and his condition quickly deteriorated.<sup>131</sup> The next day the treating physician advised Bill that Robert's condition was critical and he required surgery at a better-equipped facility.<sup>132</sup> Robert was transferred by ambulance to a trauma center, along with his file that contained the durable power of attorney, appointing Bill as his healthcare proxy.<sup>133</sup> Upon arrival at approximately 6:30 p.m., Bill immediately spoke to the trauma center staff in order to

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recognized relationships to plan for the future to ensure that their loved ones are protected." *Id.* at 749.

124. Flanigan Complaint, *supra* 21, at 4. "Bill and Daniel had a warm and supportive relationship, and were committed to each other as a couple, emotionally and financially." *Id.*

125. *Id.* at 5. "Flanigan attended Daniel's doctor and hospital visits, fed and cleansed Daniel when he was especially weak, and gave him prescribed injections." *Id.*

126. *Id.* "Daniel and Flanigan took steps to ensure that Flanigan's authority as Daniel's closest family member would not be questioned in health care settings." *Id.*

127. *Id.*

128. *Id.*

129. Flanigan Complaint, *supra* note 21, at 6.

130. *Id.* "Immediately after the discussion with the attending physician, Flanigan and Daniel phoned Daniel's primary care physician in California, who stressed that Flanigan would need to play a central role in ensuring that Daniel's wishes regarding life-sustaining measures such as a breathing tube were honored." *Id.*

131. *Id.*

132. *Id.* at 6-7.

133. *Id.* at 7. The file also contained a note that Bill was Robert's most significant personal contact). *Id.*

inform the physicians that Robert was very “vulnerable medically,” because of his extremely low T-cell count and Bill stressed that Robert did not wish for any life-prolonging measures (such as a breathing tube).<sup>134</sup> The clerk assured Bill that she would relay the information to the surgeon, but Bill became concerned when, by 7 p.m., the staff had not provided Bill with an update on Robert’s condition.<sup>135</sup> In fact, the staff did not even confirm that Robert arrived at the trauma center, so Bill called the transferring hospital, and was told that Robert left that facility at 6:10 p.m.<sup>136</sup> Desperate for an update, Bill spoke to the trauma center clerk, who verified that Robert was admitted and assured Bill the nurse would come out to get him shortly.<sup>137</sup>

At 7:15 p.m. Bill picked up the phone in the waiting area, designated for patient inquiries, and after identifying himself, he was told that “only ‘family’ members were allowed to see patients in the Shock Trauma Center, and that ‘partners’ did not qualify.”<sup>138</sup> Bill, once again, explained he had power of attorney, and after being placed on hold, was told “somebody would come and get him.”<sup>139</sup> After another agonizing few minutes, Bill requested to speak to a manager, and over the next three hours, he continued to beg and plead with hospital staff for access to Robert.<sup>140</sup> Meanwhile, as in the *Langbehn* case, Bill observed other families upon arrival, being briefed by the physicians and gaining access to their loved ones.<sup>141</sup> Four hours after arriving at the trauma center, Robert’s sister arrived and she immediately received an update on Robert’s condition.<sup>142</sup> Soon after Robert’s mother arrived, the staff finally granted Bill (and the family) access.<sup>143</sup> Unfortunately, Robert was no longer con-

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134. Flanigan Complaint, *supra* note 21, at 8 (“Flanigan also needed to support Daniel, to have Daniel know that he was present, and to say goodbye if that became necessary, as they had promised each other.”).

135. *Id.* at 9.

136. *Id.*

137. *Id.*

138. *Id.*

139. Flanigan Complaint, *supra* note 21, at 9–10. “Flanigan begun to cry, saying that he wanted to be able to say goodbye to Daniel. He was put on hold, and then was told that a nurse would come to get him in approximately ten minutes. He was in an obviously fragile emotional state.” *Id.*

140. *Id.* at 10. “Increasingly demoralized and distraught, Flanigan asked the receptionist repeatedly over [a period] of three more hours for access to Daniel. The receptionist put Flanigan off each time.” *Id.*

141. *Id.*

142. *Id.* at 11.

143. *Id.*

scious, his eyes were taped, and he was attached to a ventilator.<sup>144</sup> Robert died three days later.<sup>145</sup>

Bill filed a suit, with the assistance of Lambda Legal, against the trauma center, alleging negligence and intentional infliction of emotional distress.<sup>146</sup> The case was tried and the jury found for the defendant.<sup>147</sup> Once again, we see raw discrimination, and in this case it was actually exacerbated by a battery, when the trauma center performed intubation directly in contradiction to Robert's wishes, as expressly stated in his legal documents. And, similar to the plaintiffs in *Langbehn* and *Reed*, Bill Flanigan did not have any remedy.

### C. *Reed v. AMN Healthcare*<sup>148</sup>

The third case, filed in Washington State Court, concerns Sharon Reed, who was barred access to her life partner, Jo Ann Ritchie, in intensive care, the night before her partner's death.<sup>149</sup> Sharon and Jo Ann were a couple for seventeen years, and for years, Jo Ann suffered from a number of medical conditions which required frequent hospitalizations.<sup>150</sup> Consequently, Jo Ann had executed the necessary documents, including a du-

144. Flanigan Complaint, *supra* note 21, at 11. "Flanigan remained at Daniel's side during all *available* visiting hours, but never saw Daniel conscious again." *Id.* "According to a nurse at Defendant Hospital, Daniel apparently regained consciousness for a brief time during one of the final two nights of his life [after visiting hours]" and he attempted to pull out his breathing tube. *Id.* The hospital staff "responded by tying down Daniel's arms." *Id.* at 12.

145. *Id.*

146. *Id.* at 3 (alleging negligence and intentional infliction of emotional distress in keeping Bill from visiting Daniel in the hospital and assisting in decisions regarding his medical care according to Daniel's advance directives).

147. *Flanigan v. University of Maryland Hospital System*, LAMBDA LEGAL (Feb. 27, 2002), <http://www.lambdalegal.org/in-court/cases/flanigan-v-university-of-maryland.html>.

Bill Flanigan and Robert Daniel's story has been a key feature in presentation to state and local legislators around the country, and part of nationwide educational work that led vice presidential candidate John Edwards to raise the importance of hospital visitation rights for same-sex couples in the 2003 debates. In conjunction with this lawsuit, Lambda Legal distributed an action kit to the same-sex partners across the country to help make sure their local hospitals honor national accreditation standards and allow partners to visit loved ones.

*Id.*

148. While the official case reporter lists the defendant as ANM Healthcare, various documents filed by both sides list the defendant as AMN Healthcare. After a thorough search, there is no such company as ANM Healthcare, so all documents have been renamed to reflect the proper corporation.

149. *Reed v. AMN Healthcare*, 225 P.3d 1012, 1012 (Wash. Ct. App. Dec. 8, 2008).

150. *Id.*

rable power of attorney and making Sharon her health care proxy and the personal representative of her estate.<sup>151</sup>

The events giving rise to the allegations in the complaint began to unfold on August 30, 2005 when Sharon brought Jo Ann to the Washington Medical Center.<sup>152</sup> Jo Ann complained of shortness of breath and was admitted.<sup>153</sup> During her hospitalization, Jo Ann often said that she was afraid of being left alone.<sup>154</sup> However, she was allowed unrestricted visitations from her partner and other family members, and one of them would stay by Jo Ann's bedside at all times.<sup>155</sup>

Things changed on September 3, 2005 when, at approximately 4 p.m., Jo Ann's condition worsened and she was admitted to the Intensive Care Unit (ICU).<sup>156</sup> At that time, Jo Ann repeated her plea to Sharon to not leave her alone, because she was scared,<sup>157</sup> and Sharon promised to stay by her side. From the time of admission to the ICU until 11 p.m., Sharon and other family members were allowed access to Jo Ann.<sup>158</sup> Around 11 p.m., when the doctor advised Sharon that Jo Ann's condition was grave, Sharon asked the doctor whether she would be able to stay with Jo Ann throughout the night; the doctor assured Sharon that she could, but when the night shift nurse, Defendant Karen E. Hulley arrived, she ordered Sharon out of the room.<sup>159</sup> Several times, throughout the night, Sharon tried to enter Jo Ann's room, but she was repeatedly denied access.<sup>160</sup> On one occasion, she also noticed the nurse "roughly shoving a bed pan" under Jo Ann, and when Sharon offered to help, the nurse yelled at her to "get out."<sup>161</sup> The nurse later explained that she denied Sharon access in the best interest of the patient, alleging that Sharon was agitating Jo

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151. *Id.* In the durable power of attorney, Jo Ann authorized Sharon the following: "to provide for companionship for me and to be accorded the status of a family member for purposes of visitation and to provide for such companionship for me as will meet my needs and preferences at a time when I am disabled or otherwise unable to arrange for such companionship." *Id.* See also Plaintiff's Trial Brief at 1–2, *Reed*, 225 P.3d 1012 (No. 06-2-16160-2SEA), 2010 WL 1689082, at \*1–2.

152. *Reed*, 225 P.3d at 1012–13.

153. *Id.*

154. *Id.* Quoting Jo Ann as stating "I'm scared. Don't leave me." *Id.*

155. *Id.*

156. *Id.*

157. *Reed v. AMN Healthcare*, 225 P.3d 1012, 1013 (Wash. Ct. App. Dec. 8, 2008). "One of the things her [Sharon's] partner said to her was, 'I'm afraid of dying. Don't leave me alone,' said Judith A. Longquist, a lawyer for Ms. Reed. "That's why the suffering was so enormous – she felt as if her partner was thinking she had betrayed her trust." Parker-Pope, *supra* note 49.

158. *Reed*, 225 P.3d at 1013.

159. *Id.*

160. *Id.*

161. *Id.*



Ann, worsening her respiratory status.<sup>162</sup> At 7 a.m. the next morning when the nurse's shift ended, Sharon was allowed to visit Jo Ann, but at that time Jo Ann was in a "drugged state . . . and [she] died a few hours later."<sup>163</sup>

Sharon filed suit against the hospital and the nurse claiming the tort of outrage and negligent infliction of emotional distress, based on the nurse's refusal of visitation rights to Sharon.<sup>164</sup> The case showed early signs of victory and the promise to advance visitations rights for same-sex partners, because the nurse's Motion for Summary Judgment was denied and affirmed on appeal.<sup>165</sup> However, the celebration was premature because in April 2010, the case went to trial and Sharon lost.<sup>166</sup> Therefore, like in the *Langbehn* and *Flanigan* cases, same-sex couples who were in committed long-term, loving relationships, endured the loss of a loved one without having the ability to say their last goodbyes, and could not get an adequate legal remedy.

#### IV. SOLUTION

##### A. *Inadequacy of Legal Options Available to Langbehn-Pond Family and Other Same-Sex Couples*

One might argue that Janice's claims in *Langbehn* would have been sufficient if they were based on a theory which made the discrimination claim more prominent. However, based on the state of current jurisprudence and legislation regarding rights of gender minorities, she pursued the best claims available to her. Like many other same-sex couples, Lisa Marie and Janice could be discriminated against without adequate legal recourse because LGBT are not considered a protected class under the Constitution.<sup>167</sup> Furthermore, there is no uniform federal legislation re-

162. *Id.*

163. *Reed*, 225 P.3d at 1013. The Final Brief states that:

The traumatic interactions that Reed had with [nurse] Hulley who took it upon herself to impose egregious, arbitrary, dictatorial and punitive restrictions upon Reed by inhumanely prohibiting her from being with her loved one in the most tenuous last hours of Ritchie's life inflicted severe emotional distress upon Reed, for which she had since been under a doctor's care. Hulley's actions also significantly exacerbated Reed's difficult task of coming to terms with her partner's death. . . . She remains haunted by the events of that terrible night.

Plaintiff's Trial Brief, *supra* note 151, at 5.

164. *Reed*, 225 P.3d at 1013.

165. *Id.* ("[A] reasonable jury could infer that Hulley's decision to exclude Reed was motivated by reasons other than her medical judgment.")

166. Special Verdict Form, *Reed*, 225 P.3d 1012 (No.06-2-16160-2 SEA), 2010 WL 1689087. The jury did not find intentional infliction of emotional distress. *Id.*

167. *Cf. Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that the Texas statute criminalizing homosexual sodomy was invalid but declining to identify neither the funda-

garding medical rights for same-sex couples, which would provide guidelines for the medical providers<sup>168</sup> or instill fear of penalty for would-be offenders. Basically, the states decide how to address the medical rights of LGBT,<sup>169</sup> making same-sex couples vulnerable to unequal treatment based on their geographical location. Because the regulation extending hospital visitation rights to same-sex partners applies only to federally funded healthcare facilities,<sup>170</sup> the state legislatures and private hospitals

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mental right it was protecting nor the applicable level of scrutiny it applied to reach its decision); *Romer v. Evans*, 517 U.S. 620, 631–32 (1996) (deciding that under the Equal Protection Clause of the Fourteenth Amendment, homosexuals are not a suspect class and thus holding that laws potentially discriminatory against homosexuals must be analyzed under the more deferential rational basis review), *but cf.* Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 137 (2007) (illustrating the differences between the *Romer* and *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that the Texas statute criminalizing homosexual sodomy was invalid but declining to identify neither the fundamental right it was protecting nor the applicable level of scrutiny it applied to reach its decision) opinion).

The equality discussed in the *Lawrence* opinion is the same as the equality discussed in *Romer*: equality of status for a social group defined by sexual orientation. Yet, the Court rested the *Lawrence* decision not on an equal protection ground, but rather on Fourteenth Amendment liberty – that is substantive due process. Although the opinion in *Lawrence*, neither identified a fundamental interest nor suggested a standard of review that would require the state to offer important or compelling justification for its restriction on liberty, it did insist on some significant justification beyond the moral disapproval of homosexuality that had sufficed in *Hardwick*.

Karst, *supra*.

168. Anisa Mohanty, Comment, *Medical Rights for Same-Sex Couples and Rainbow Families*, 13 RICH. J.L. & PUB. INT. 367, 367–71 (2009). The author discusses the inconsistencies in the law with regard to medical rights of same-sex couples. *Id.* at 367. Although beyond the scope of this article, but pertinent to the Langbehn-Pond case—the author addresses the issue of medical visitation rights involving non-biological children, who are not treated the same as non-biological children of heterosexuals. *Id.* at 372. As such, heterosexual stepparents are often considered in loco parentis, even in the absence of adoption, such provisions often are not extended to homosexuals. *Id.* at 370. Only in states that recognize same-sex marriages, unions, or domestic partnerships and include in loco parentis clauses for stepparents, the visitation privileges will be extended to children of same-sex couples. *Id.*

169. *Id.* at 367–69. “There are various states’ hospital visitation policies, ranging from VA and NC, which allow a patient to designate visitors, regardless of whether such visitor is related to the patient, to Florida, where there is no legal obligation to allow, visitors, including same-sex partners in an emergency situation.” *Id.* at 369.

170. See 42 C.F.R. §§ 482, 485 (2010) (regulating hospitals to comply with the advance directives of the patient); see Presidential Memorandum, *supra* note 83 (stating hospitals that participate in Medicare and Medicaid programs must abide by the advance directives of the patients). “It should be made clear that designated visitors, including individuals designated by legally valid advance directives . . . should enjoy visitation privileges that are no more restrictive than those that immediately family members enjoy.” Presidential Memorandum, *supra* note 83.

define their own scope of hospital visitation rights. Typically, these visitation rights extend first to spouses and then to immediate family members.<sup>171</sup> Thus, the definition of a “spouse” in the particular state will dictate whether same-sex partners will be granted visitation rights.<sup>172</sup> Moreover, some states, including Florida, where the *Langbehn* case arose, set up a hierarchy of visitation rights based on the relationship between the prospective visitor and the patient.<sup>173</sup> And here again, we arrive at the big issue of gay marriage.<sup>174</sup> Since Florida does not recognize same-sex unions,<sup>175</sup> same-sex partners fall only under a distant seventh hierarchical category, defined by the statute as “a close friend of the patient,” and superior only to “a clinical social worker.”<sup>176</sup> Thus, in case of *Langbehn-Pond* family, where the hospital was displaying raw prejudice

171. Mohanty, *supra* note 168, at 376–77. The author offers “the most convincing argument” why same-sex partners are not extended medical decision making rights is “the threat of medical malpractice by blood relatives.” *Id.* at 376.

Health care providers can ill afford to disclose health information to the ‘wrong’ person or allow the ‘wrong’ individual to make decisions on behalf of a patient. Providers may be subject to great financial liability and medical ethics violations for refusing a blood relative to make decisions regarding an incapacitated patient.

*Id.*

172. *Id.* at 367. “[A] number of cases have demonstrated that same-sex partners are routinely denied visitation rights, and even with the requisite legal documentation, are denied the right to have whom they choose to make decisions for them. Greater burdens must be placed on physicians to honor patients’ wishes.” *Id.*

173. *Supra* note 56 and accompanying text.

174. See John G. Culhane, *Public Health & Marriage (Equality)*, in RECONSIDERING LAW AND POLICY DEBATES: A PUBLIC HEALTH PERSPECTIVE 89 (John G. Culhane ed., 2011) (discussing the public debate about same-sex marriage, pointing out that “[e]ven the terms of engagement have been a bone of contention”).

Those favoring marriage rights for same-sex couples have coined the term “marriage equality” to make the point that basic principles of fairness and treating like cases alike compels recognition of same-sex couples’ unions, whereas the most virulent opponents place the word marriage into alarmed and ironic quotation marks – homosexual “marriage” – to signal that, in their worldview, such unions can never be true marriages, even if the law deems it otherwise.

*Id.*; Mohanty, *supra* note 168, at 376–77 (“While it is tenuous whether a cause of action, upon which to sue, exists for same-sex partners who are not in legally cognizable relationship with the patient, failing to provide access and rights to same-sex partners is likely to result in continue litigation.”); see also Evan Wolfson, *Why Marriage Matters*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/why-marriage-matters1> (last visited on Oct. 9, 2011) (discussing ways, in which government by denying same-sex right to marry, punishes couples and families by depriving them tangible and intangible protections in every area of life, including: death benefits, debts, divorce, family leave, health, housing, immigration, inheritance, insurance, portability, parenting, privilege in judicial proceedings, property rights, retirement benefits, and taxes).

175. *Supra* note 58 and accompanying text.

176. Fla. Stat. § 765.401 (2007).

and moral judgment against Janice, Lisa Marie, and their children, the law was its co-conspirator. Even though the couple took legal steps to protect their rights and prepared for the eventuality of a medical emergency, the state-run hospital did not have to recognize Janice's rights as Lisa Marie's healthcare proxy, because Florida does not embrace same-sex marriage. Therefore, for the purposes of statutory interpretation, Janice was not considered "a spouse," but rather a "close friend."<sup>177</sup>

Cases from various jurisdictions involving rights of same-sex couples in medical emergencies, like *Kowalski*, *Flanigan*, and *Reed*, reveal inconsistency and deficient outcomes. However, the common aspect of the cases reviewed for the purposes of this Note is that all three involve state-based claims of negligence,<sup>178</sup> which do not adequately frame the issues of the discrimination based on sexual orientation.

#### B. *Comprehensive Federal Legislature to Provide Umbrella Protection for Sexual Minorities*

The framers of the Constitution articulated the principles of democratic citizenship as imperative in the struggle of the disadvantaged and yet excluded minorities to achieve the equality promised by the United States Constitution.<sup>179</sup> Particularly in the twentieth century, many of the minorities considered second-class citizens achieved the democratic citizenship status.<sup>180</sup> However, the equality for LGBT is part of the "unfinished business" of modern democracy.<sup>181</sup> Although at the heart of our democratic

177. *Id.* (designating priority according to the relationship with the patient); *Langbehn v. Pub. Health Trust of Miami-Dade Cnty.*, 661 F. Supp. 2d 1326, 1331–32 (S.D. Fla. 2009) (withholding information from the patient's life partner because she was not considered a family member).

178. *Flanigan Complaint*, *supra* note 21, at 3 (suing hospital for negligence and intentional infliction of emotional distress on behalf of himself and his deceased partner); *In re Guardianship of Sharon Kowalski*, 478 N.W.2d 790, 791 (Minn. Ct. App. 1991) (filing petition for guardianship of paralyzed partner); *Reed v. AMN Healthcare*, 225 P.3d 1012, 1012 (Wash. App. Div. 1 2008) (bringing negligence suit against the critical care nurse who barred her from her partner's hospital room on the night of her partner's death).

179. *See* KAPLAN, *supra* note 15, at 3.

180. *Id.*

181. *See id.* (describing his book *Sexual Justice: Democratic Citizenship and the Politics of Desire*, the author indicates that the only way to achieve equality for the LGBT community is to develop a "robust conception of lesbian and gay rights").

Equality for lesbian and gay citizens entails the end of laws by which private sexual activities between adults of the same-sex are defined as crimes; it requires the extension of civil rights laws to protect queer citizens against retaliation for exercising their freedom to associate openly with others both social and political contexts. Such a conception of lesbian and gay rights depends on a strong reading of the demands of democratic citizenship and the exigencies of desire in individual self-making.

*Id.*

system are rights of individuals, the way to achieve them is through collective, well-organized efforts (social movements), which address the discrimination based on a trait common to all members of the group.<sup>182</sup> Although each minority strives for independence in its own particular way, discriminated classes share certain universal characteristics, such as history of discrimination, social stigma, and inadequacy of political representation.<sup>183</sup>

As recent history has shown, there are many ways in which an oppressed minority can advance their agenda for equality, and the obvious one is through the legal system.<sup>184</sup> However, LGBT have enjoyed only limited success, and their status as a “constitutional underclass” remains.<sup>185</sup> Generally, the legal system “has a limited potential as an arena

182. See *Id.* at 3–4, 6 (discussing how identity of LGBT defines politics of sexuality and “[q]ueer” must necessarily be defined in opposition to dominant norms.”). Thus, in a society of “compulsory heterosexuality,” such nonconformity is actually manifested by sexual minorities. *Id.* at 6. At the same time, these minorities become “vulnerable to risks of imposing exclusions of their own to defend their limited gains.” *Id.* However, such tendencies, “conflict with the egalitarian and contestatory character of modern democratic aspiration.” *Id.* See RIMMERMAN, *supra* note 8, at 17

[O]ur goal must be to build a political and social movement that attempts to weaken hierarchies, challenge prejudices, and end inequalities in political, social, and cultural life. The challenge is to do so in a way that rises above people’s sexual identities at the same time that it respects those identities.

*Id.*

183. See *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (expressing the “long and unfortunate history of sex discrimination” in the United States); JOHN HART ELY, *DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW* 162 (1980) (discussing various minorities, including homosexuals, in context of their qualifications for constitutional suspicious classification).

Homosexuals for years have been the victims of both “first-degree prejudice” and subtler forms of exaggerated we-they stereotyping. It appears, however, that quite a substantial percentage of the population is “gay,” and most of us must therefore interact with homosexuals quite frequently. [Thus] . . . shouldn’t that serve substantially to neutralize the prejudices? In this case it doesn’t, since a person’s homosexuality is not normally a characteristic of which others who are not gay themselves become aware simply, say, by working with him or her. Our stereotypes – whether to the effect that male homosexuals are effeminate, females “butch”; that they are untrustworthy and menacing to children, or whatever – are likely to remain fixed, given our obliviousness to the fact that the people around us may well be counterexamples.

*Id.*

184. See RIMMERMAN, *supra* note 8.

185. RIMMERMAN, *supra* note 8, at 63. See *Bowers v. Hardwick*, 478 U.S. 186, 190, 193–94 (1986) (explaining how, under current jurisprudence, the U.S. Supreme Court does not recognize LGBT as a protected class nor does it define a specific fundamental right interest specifically related to sexual minorities). Therefore claims of sexual orientation discrimination are subject to rational review. Under rational review, the discriminatory state law is likely to be upheld. *Id.* at 193. *But see* *Lawrence v. Texas*, 539 U.S. 558, 578

for major social reform” because it cannot construct a coherent public policy; instead, it allows for merely narrow victories.<sup>186</sup> In addition, judicial power is limited, because as part of the system of separation of powers, it has to defer to the other two branches of government to implement the laws.<sup>187</sup> Finally, the Supreme Court hears a minimal number of cases, and does so on a discretionary basis.<sup>188</sup> Thus, it would be futile to rely on certiorari as a door to meaningful change.

As demonstrated in the *Langbehn*, *Reed*, and *Flanigan* cases, relying on a state-based cause of action to advance LGBT goals is not the most effective way to utilize resources, and such approach is also susceptible to the particular political and moral climate of the various jurisdictions, as well as to the state of national politics (administration) on the subject.<sup>189</sup> As the *Kowalski* case shows us, where the litigation took almost a decade to vindicate the rights of the victims, sometimes there is not enough time or resources to pursue such a protracted litigation. Lastly, inconsistency of state-based actions only adds to the general muddle regarding LGBT discrimination rights and fails to usher in comprehensive change.<sup>190</sup>

Since the ability of the judiciary is limited we must turn to the legislative branch, which would provide comprehensive, uniform protection to limit, and eventually end discrimination based on sexual orientation. The most obvious analogy is to the Civil Rights Act of 1964, in which Congress “virtually in one fell swoop erased the legal barriers to racial equal-

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(2003) (striking down a statute criminalizing homosexual sodomy, but the Court did not specify level of scrutiny); *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (applying rational review, the court found an amendment to the Colorado Constitution classifying homosexuals as unequal violated the Equal Protection Clause).

186. RIMMERMAN, *supra* note 8 at 62 (discussing limitations of a legal rights strategy, but pointing out that even limited victories for LGBT, “victories that, while fragmented and often uncoordinated, did provide some momentum for the post-Stonewall lesbian and gay liberation movement”).

187. *Id.* (illustrating the challenges facing the judicial system in trying to implement social reform).

188. *Id.* (providing reasons why the legal system has limited potential to be an arena for major social reform).

189. *Id.* at 64 (listing variables affecting the extent to which an interest group will pursue litigation and whether that strategy will target either the state government or national government).

190. *But see* RIMMERMAN, *supra* note 8 at 80 (illustrating the constraint put on state-level politics by the Defense of Marriage Act).

Successful legal strategy would be part of a broader movement for progressive political and social change, one that would challenge the classical liberal paradigm that focuses on the individual and identity-based group rights and assumes an interest-group, pluralistic approach to political and social change.

*Id.*

ity that stood for generations.”<sup>191</sup> Observing the patterns of discrimination centered around harmful, dehumanizing stereotypes, such as those observed in racism, sexism, and anti-Semitism, can be instructive in fighting homophobia.<sup>192</sup> As observed by David A. J. Richards: “[S]uch claims include both demands for basic human rights of conscience, speech, intimate life, and work and skeptical scrutiny of laws and policies expressing homophobia rooted in structural injustice.”<sup>193</sup> Richards asserts that homosexuality is “no more exclusively about sex than heterosexuality, as deeply rooted in our humanity and as expressive, on just terms, of our moral powers.”<sup>194</sup> Sexuality is simply used to demoralize and degrade a person to sex acts (like gays in military viewed as predators), and this aspect, which the author calls “moral slavery,” is a common denominator to sexism, racism, and homophobia.<sup>195</sup> Thus, an entire group of people, cast as moral deviants and degenerates becomes vulnerable to attacks and alienation by society, which affects every aspect of life: work, religion, politics, and health. Richards considers the discrimination and torment experienced by sexual minorities as even more pervasive than for other minorities.<sup>196</sup>

Comprehensive LGBT legislation, like the Civil Rights Act of 1964, would guarantee equal political, social, and economic rights to minorities.

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191. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (now codified in scattered sections of 42 U.S.C.); see CHARLES & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (Steven Locks Press 1985); RIMMERMAN, *supra* note 8 at 155 (“A minority group framework has provided lesbians and gays with legitimacy by aligning them with other identity-based movements, including the civil rights and women’s movement.”).

192. See DAVID A. J. RICHARDS, *IDENTITY AND THE CASE FOR GAY RIGHTS, RACE, GENDER, RELIGION AS ANALOGIES* 188 (1999) (stating that the image of gender and sexuality, “once so aggressively enforced against African[-]Americans, women, and Jews,” is often enforced against homosexuals).

193. *Id.*

194. *Id.*

195. *Id.* at 97.

196. *Id.* at 189–90. The author continues the discussion of harmful effect of social injustice:

The structural injustice of homophobia raises the same general issue, but at another, perhaps deeper level that advances understanding of the political dynamics that support structural injustice in general. Homophobia does not limit homosexuality to a private sphere (as with gender) or a servile sphere (race), but to no legitimate sphere of activity at all—a sphere defined by its unspeakability. Such structural injustice inflicts a deeper injury to moral personality even than race and gender in the sense that no legitimate cultural space at all is allowed to the thoughts, feelings, and actions, that express spontaneous erotic feelings and attachments deeply rooted in one’s sense of self as a person, let alone to integration of that sense of self into a fabric of convictions about enduring personal and ethical value in living.

*Id.*

From a pragmatic prospective, however, such comprehensive legislation would not immediately end discrimination.<sup>197</sup> Rather, its greatest value would be the acknowledgment that LGBT are equal citizens, and that their historical discrimination has been noted and deemed worthy of remedy.<sup>198</sup> Enacting a comprehensive legislation prohibiting discrimination based on sexual orientation, would allow LGBT individuals to simply live their lives privately rather than assume the role and responsibility of social activists.<sup>199</sup> On the other hand, such legislation would also emphasize the very traits by which LGBT do not wish to be defined; those that lead to social stigma.<sup>200</sup> Similar to the case of the Civil Rights Act for racial and gender discrimination, however, legislation would be the first step in a long process of giving back to a severely subjugated minority.<sup>201</sup>

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197. See WHALEN, *supra* note 191, at 7 (stating the Civil Rights Act could not overcome or erase “by a stroke of the president’s pen on a parchment handed to him by Congress” three and one-half centuries of dehumanization, because the effects of “constant humiliation, substandard education, [and] inadequate . . . training” would take a long time to translate into a better life). It would require “time, national patience, and willingness by minorities to pursue the educational and training opportunities now open to them,” as well as vigilance to ensure the new law is followed. *Id.*

198. See KAPLAN, *supra* note 15, at 5 (arguing that the rights of lesbians and gay can be vindicated “through collective political struggle and must be established in social and ethical institutions”). Thus, “[t]he integrity of private sphere of individual decision-making will be protected only to the extent that it is recognized as such by political and legal authorities and respected by popular opinion.” *Id.* “[T]his is especially true where the liberties in question are those of an unpopular minority.” *Id.*; Eskridge, *A Social Constructionist Critique*, *supra* note 25 at 426–27 (explaining that the laws help to “define the class of individuals stigmatized by their defining traits, but also contributed to the class willingness to challenge, not only legal, but also social stigmas”).

199. See RIMMERMAN, *supra* note 8 at 62–64 (“[H]aving presidential and/or congressional support for a public policy is perhaps even more crucial than judicial enforcement.”). “Having the support of the President and/or Congress carries more practical weight because the executive and legislative branches can provide tangible resources to implement the policies they favor.” *Id.* at 63–64.

200. See GOFFMAN, *supra* note 26 at 5 (describing sociological process of stigmatization and the “the attitudes we normals have towards a person with a stigma”). Thus, we discriminate and construct elaborate stigma-theory, “an ideology to explain his [or her] inferiority and account for the danger he [or she] represents, sometimes rationalizing animosity based on other differences, such as those of social class.” *Id.*

201. See RIMMERMAN, *supra* note 8 at 185 (calling for the need to challenge “heterosexuality’s claim to normalcy,” which requires comprehensive initiatives, consisting of political and cultural changes, supported by LGBT’s “individual and collective acts of courage and resistance”). See also, Jennifer Ann Abodeely, Comment, *Thou Shall Not Discriminate: A Proposal for Limiting First Amendment Defenses to Discrimination in Public Accommodations*, 12 SCHOLAR 585, 595 (2010) (stating that no amendment has been offered to “add sexual orientation or gender” as protected classes under the Civil Rights Act).



Some scholars criticize the narrowness of a rights-based strategy based on its inability to catalyze change and promote liberation.<sup>202</sup> But, we need to take steps to protect sexual minorities from the discrimination experienced by Janice Langbehn, Bill Flanigan, Sharon Reed, Sharon Kowalski, their partners, and their families. Although recent legislation is promising, it is a piecemeal, reactionary, and incomplete measure, which does not provide the necessary solution to the inequality and mistreatment experienced by LGBT in medical emergencies.

## V. CONCLUSION

As lawyers, we tend to posture, and in this regard, we don the robes of chilly professionalism. Sometimes, we feign embracing principles of objectivity and emotional restraint; in doing this, we “cover.”<sup>203</sup> Yet, I cannot “cover” as I find myself thinking about Lisa Marie, lying alone and scared in a cold hospital room, without her loving family to comfort her.<sup>204</sup> From my extensive research of the file and the media coverage, I know that inability to be with Lisa Marie was a truly traumatic experience for Janice. I also wonder what Lisa Marie was thinking about during these long eight hours, drifting in and out of consciousness, especially after receiving her last rites. Although it is not medically plausible that Lisa Marie would have survived had Janice and the children been allowed to see her earlier, I am certain that having her loved ones at her side during the last hours of her life would have been beneficial.<sup>205</sup>

The Langbehn-Pond family did not ask for special treatment, but they deserved equal treatment. Because LGBT continue to be a target of dis-

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202. See *Id.* at 167 (citing Dennis Altman) (“The gay movement must be concerned not just with specific legal and electoral battles, but also with the far broader and more amorphous ways in which homophobia is maintained through a complex structure of institutions, values, and often unconscious prejudices.”). See generally, Eskridge, *A Social Constructionist Critique*, *supra* note 25 (discussing importance of social movements and defining three types, which are particularly relevant to law, including: “cultural change,” “resource mobilization,” and “political process”).

203. WILLIAM I. MILLER, *FAKING IT* 77 (2003) (admitting that some emotions are easier to fake than others). He points to La Rochefoucauld, who said that generally “it is harder to disguise emotions we have than to pretend [fake] those we do not.” *Id.*

204. *Id.* “I can cover up benevolence more easily than my sense of disgust, my sense of satisfaction in a beautiful object more easily than my grief.” *Id.*

205. Amended Complaint, *supra* note 30, at 13–14, 16. “[B]ased on . . . [the hospital’s] own medical forms and indications in Lisa Marie’s medical records, Lisa Marie was placed in restraints throughout the evening in order to protect herself and because no family members were allowed to provide [her] care and supervision.” *Id.* at 16. “Someone precious was taken from my family that day, someone we can never get back. Lisa was denied the right to be with her family and to hold my hand during the last moments of her life.” Langbehn, *supra* note 30.

crimination in medical emergencies and in other crucial aspects of their lives, they need government protection in the form of a comprehensive legislative measure. Such legislation may not end all discrimination, but it would transmit a potent message that discrimination based on sexual orientation is not acceptable. Like the Civil Rights Act, such legislation would provide a framework for legislation on state and local levels. And the legislation would eventually prompt change in social attitudes, because then society would have to rethink its general attitudes towards sexual minorities.

In the face of a medical emergency, or in any other facet of life, LGBT and their families deserve fair and equal treatment. Consequently, the definitions of “marriage” and “family,” imposed by society and enforced by the legislature, should be expanded to include sexual minorities. *Covers* distort LGBT identity. *Covers* either force LGBT people into hiding through assimilation, or impose implicit and explicit penalties for choosing to live *cover-free* lives that discriminators, through a distorted lens of a society, perceive as “flaunting.”<sup>206</sup> A legislative measure is needed to prompt change. It pains me that during the final hours of their lives, Lisa Marie, Mary Joe, and Robert were deprived the love and comfort of their chosen families.

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206. YOSHINO, *supra* note 1, at 90. Author offers Michel Foucault’s explanation as to why same-sex expressions of affection, which are virtually unnoticed in equivalent heterosexual encounters, are perceived by public as “flaunting.” *Id.* “People can tolerate two homosexuals they see leaving together, but if the next day they’re smiling, holding hands and tenderly embracing one another, they can’t be forgiven. It is not the departure for pleasure that is intolerable, it is waking up happy.” *Id.* Yoshino concludes, that people, even moralists, can find ways to consider the homosexual “departure for pleasure” as abject and fleeting, but the public finds the idea of gay couple demonstrating their relationship works galling. *Id.*