Waiting for Change: Obama’s ‘Progressivism’ and LGBT Rights

The issues raised by the Lesbian, Gay, Bisexual and Transgender (LGBT) community and human rights groups in support of LGBT rights are wide-ranging and far-reaching. The resolution of these issues, or the failure to resolve them, will have significant consequences, not only for the LGBT community, but also for other groups, especially minorities, in American and global society. An example of such an issue, the importance of a progressive resolution to it, and its wide-ranging consequences is that of gay and lesbian marriage. While ten countries have legalized gay marriage, the United States has passed legislation, the Defense of Marriage Act (DOMA), which “protects” the institution of marriage from gays and lesbians by means of an exclusionary definition of “marriage” and of the term “spouse” (Associated Press, 2011; DOMA watch, 2011). States have followed with exclusionary legislation or initiatives of their own. This is extremely troubling for the obvious reason; it is an attempt to deny gays and lesbians the right to marry, but it also troubling because it threatens the very fabric of American society; its commitment to equality, what President Obama calls “our founding promise” (Obama, 2008).

Barrack Obama directly addressed the issues raised by the LGBT community and human rights groups in an Open Letter, written in February of 2008, during the Democratic primary campaign. In the beginning of the letter, he makes a commitment, if elected, “to build an America that lives up to our founding promise of equality for all – a promise that extends to our gay brothers and sisters.” He further says that the realization of equality is not just a political goal but a “moral imperative” and that he will “never compromise on my commitment to equal rights for all LGBT Americans.” The letter identifies the struggle of the LGBT community for equality of rights as a civil rights movement. The rhetoric of the letter emphasizes the connection between the issues of the LGBT community and the Civil Rights movement of the 1960s. Examples are the reference to our “gay brothers and sisters,” “Americans living as second-class citizens,” the “founding promise of equality for all,” and the “Ebenezer Baptist Church . . . where Dr. Martin Luther King once preached.”

In the letter, he explains the means by which he will achieve the goal of “equal rights for all LGBT Americans.” “As your President,” he says, “I will use the bully pulpit to urge states to treat same-sex couples with full equality in their family and adoption laws.” However, the bully pulpit does not mean, according to Obama, that the federal government should impose its understanding of “full equality” on the states as they “decide on how best to pursue equality for gay and lesbian couples . . . .” Examples he gives in the letter of various ways the states may pursue equality are “a domestic partnership, a civil union, or a civil marriage.” Two other means for achieving the goal of equality are “the weight of my administration” and leadership, a “leadership,” he says, “that can appeal to the best parts of the human spirit.”

The policy goals that Obama identifies in the letter that are necessary to achieve the promise of equality for the LGBT community are the repeal of federal legislation that deprive the LGBT community of their rights, the Defense of Marriage Act and Don’t Ask Don’t Tell. He says, “I support the complete repeal of the Defense of Marriage Act (DOMA) . . . and I have also called for us to repeal Don’t Ask, Don’t Tell (DADT). Another of his policy goals is the enactment of legislation that extends rights to the LGBT community. “I will place the weight of my administration behind the enactment of the Matthew Shepard Act to outlaw hate crimes and a fully inclusive Employment Non-Discrimination Act to outlaw workplace discrimination on the basis of sexual orientation and gender identity.” Later in the Letter, Obama refers to his work to “improve the Uniting American Families Act (UAFA).” This legislation would amend immigration law so that gay and lesbian bi-nation couples would have the same rights under the law as heterosexual bi-national couples. At the end of the letter, Obama says that to reach the policy goals that he has set will require listening to “all Americans” even those who remain skeptical and “winning [the] broad support . . . of those who still need to be convinced.”

In light of the letter and Obama’s progressive rhetoric in the presidential campaign, it is not difficult to understand the enthusiasm and optimism with which the LGBT community and human rights advocates greeted the Obama presidency. The criteria for evaluating Obama and his administration will be based on Obama’s letter to the LGBT community. They will include evaluating the success that he has had in achieving his policy goals, whether he fulfilled his promise of leadership, and whether he fulfilled his promises to use the “weight of his administration” and the bully pulpit of the presidency. In addition to these criteria, it is also fair to evaluate Obama’s presidency on how it has dealt with a problem that Obama has brought attention to and that is LGBT bullying in school. According to the *California Educator*, the problem of bullying, which ranges from verbal harassment to physical assault, has become a wide spread and continually growing phenomenon which has created serious problems for its victims.

Repeal of Anti-Gay Legislation: Defense of Marriage Act (DOMA)

When Obama wrote the letter to the gay and lesbian community, the most important anti-gay and lesbian marriage legislation was federal legislation referred to as the Defense of Marriage Act. The Defense of Marriage Act (DOMA) HR3396.ENR was passed by overwhelming majority in both houses of Congress and signed into law by President Bill Clinton in 1996. Within the Bill Text, the legislation is introduced as “an Act to define and protect the institution of marriage” (Library of Congress, 1995-1996). In so doing, it defines “marriage,” codifies the rights of states which prohibit same-sex marriage, and defines the term “spouse.” Section 2 of the Act entitled “Powers Reserved to the States” says:

`No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or right or claim arising from such relationship (Library of Congress, 1995-1996).

Section 3 of the Act entitled “Definition of Marriage” defines both “marriage” and “spouse”:

`In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word `marriage' means only a legal union between one man and one woman as husband and wife, and the word `spouse' refers only to a person of the opposite sex who is a husband or a wife' (Library of Congress, 1995-1996).

While DOMA does not overturn state laws that allow same sex marriages, it codifies the right of states to make and enforce legislation that deprives a minority population of that right. It also gives those states the legal authority to refuse to recognize the marriage of gay and lesbian couples who move to the state. By defining ‘marriage’ as a “legal union between one man and one woman,” and a ‘spouse’ as

“ refer(ring) only to a person of the opposite sex who is a husband or a wife, the rights of partners in same-sex marriages to federal spousal benefits such as social security are effectively denied. The consequences of the act go well beyond spousal benefits; the act enjoins “the various administrative bureaus and agencies” to use the definition of marriage and of the term “spouse” when making any determination within their purview. An example of the far-reaching consequences is that enforcement of the act’s definition of “marriage” and the term “spouse” in immigration cases denies the right of gays and lesbians who are citizens or legal permanent residents of the United States to sponsor their foreign legal partners to the United States, a right enjoyed by heterosexual couples (Human Rights Campaign, 2011).

In his letter, Obama makes a commitment to the “repeal” of DOMA. However, for the first two years, the Obama administration had not demonstrated the leadership necessary to achieve the repeal of DOMA, nor had Obama used the bully pulpit of his office to move public opinion in the direction of support for the repeal of DOMA. In fact, for the first two years of the administration, the Obama Department of Justice had been defending DOMA in court cases brought against it. In a letter to Congress in February 2011, Attorney General Holder acknowledged the Department’s defense of DOMA in courts. Specifically, he wrote, the Department has defended Section 3 (see above) in lawsuits. However, the purpose of the letter was to inform Congress that the President and the Attorney General had determined that Section 3 of DOMA was unconstitutional and that the Department was no longer going to defend it in law suits. Holder says in the letter, “After careful consideration, including review of a recommendation from me, the President of the United States has made the determination that Section 3 of the Defense of Marriage Act (“DOMA”), 1 U.S.C. § 7,as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment” (Holder, 2011).

The obvious question that arises concerns the timing of this change of policy; it is difficult not to view this new position as a cynical political decision designed to regain support from a largely disappointed and disillusioned LGBT community at the start of the 2012 presidential campaign. This view is reinforced by the argument itself, “after careful review” Section 3 of DOMA violates the Equal Protection Clause of the Fifth Amendment. It should not have taken two years for the Obama administration to determine that legislation that obviously violates the rights of a minority group is unconstitutional. President Obama could have used the weight of his administration to get the Democratic leadership to introduce legislation to repeal DOMA and he could have ordered the Department of Justice to challenge DOMA in court. At the very least, he could have ordered the Justice Department to refrain from defending the legislation in court while it was reviewing its position on the law, especially if the Justice Department had serious concerns about its constitutionality. It also turns out, at present, that the Administration’s position on DOMA is more “nuanced” than it seemed at first. While the Administration will no longer defend DOMA in court, it has ordered all of the agencies of the executive branch to continue enforcing Section 3 of DOMA (see below Uniting American Families Act) even though it has determined that it is unconstitutional.

On June 14, 2011, a federal bankruptcy judge ruled in a case involving the bankruptcy petition of a same-sex couple that DOMA was unconstitutional. The Obama Justice Department had sought the dismissal of the petition based on DOMA Section 3 (Elias, 2011). This ruling, the more recent passage of legislation in New York that allows same-sex marriage, and California’s Proposition 8 being ruled unconstitutional might encourage Obama to take a less nuanced position on DOMA.

Repeal of Anti-Gay Legislation: Don’t Ask, Don’t Tell

In January of 2009, Sandy Tsao violated the Don’t Ask, Don’t Tell policy by informing her superiors that she was gay. Tsao was an officer in the U.S. Army and was discharged from the service for admitting she was gay. Following this, Tsao wrote a letter to President Obama in which she said, “I do hope, Mr. President, that you will help us to win the war against prejudice.” The President replied to Tsao’s letter with a handwritten response that reaffirmed his commitment to repealing DADT, but said that it would take time because it required “Congressional action” (Khanna, 2009).

Don’t Ask Don’t Tell was the military’s policy accompanying federal legislation passed in 1994 that defined the conditions under which gays and lesbians could serve in the U.S. military. The policy was the result of a compromise between President Bill Clinton, the military and political opposition to gays, lesbians and bisexuals serving openly in the military. With Don’t Ask, Don’t Tell, the military agreed not to ask its service members about their sexual orientation and gay, lesbian and bisexual service members agreed not to make public their sexual orientation. If they did so, they would be discharged.

By the time Barrack Obama became president, public opinion concerning gays in the military had changed significantly from 1994. A 2010 Pew survey revealed that 58% of the public approved of allowing homosexuals to serve openly in the military while only 27% were opposed. The 31 point margin was much larger than a similar Pew poll taken in 1994 which had only a 7 point margin (Steinhauser, 2010). A CNN/Opinion Research Corporation poll found an even higher number of Americans supporting homosexuals being allowed to openly serve in the military, and an even lower number of Americans opposed (Steinhauser, 2010). In addition, the resistance within the military had lessened. Robert Gates, Secretary of Defense, and Chairman of the Joint Chiefs of Staff Admiral Mike Mullen supported the repeal of DADT (Stolberg, 2010). The military’s own survey of its personnel demonstrated that dissent within the services to gays serving openly had decreased. One of the significant findings of the survey that confirmed this was that over two-thirds of those surveyed said they thought they had worked with someone who was gay, and over 90% of those said, “it had no negative impact on their ability to work together” (Tighman, 2010).

In a White House ceremony on December 22, 2010, President Obama signed the Don’t Ask Don’t Tell Repeal Act of 2010 (H.R. 2965). An article in the *New York Times* of that day described an audience of gay and lesbian rights advocates cheering Obama, “You rock, Mr. President!” (Stolberg, 2010). And Obama, according to the article, “pronounced himself overwhelmed” (Stolberg, 2010). In his recent proclamation naming June as LGBT Pride month, Obama took credit for the repeal of the legislation and commended himself for keeping his promise to the LGBT community (Conner, 2011). This is interesting and not a little ironic because despite the changing social and political climate, the public’s increasing support of the repeal, and the military’s changing attitude toward DADT as a workable and effective policy, Obama’s administration dealt with DADT much the same way that it had dealt with DOMA. The Administration defended DADT in court cases brought against it. And even after DADT was ruled unconstitutional by a federal judge in *Log Cabin Republicans v United States*, the Obama Department of Justice “asked the court to stay the injunction against enforcement of DADT while they appealed” (Adler, 2010).

President Obama’s efforts on behalf of the repeal of DADT were far short of the “leadership” he promised in his letter; it was much more, as one commentator put it, “’I’m not going to step in the middle of this’” (Adler, 2010). Or, as Jonathan Turley, Professor of Constitutional Law at Johns Hopkins University said, “Obama made choices identical to those that would have been made by the Bush Administration” (Adler, 2010). The reason the Obama administration gave for its defense of DADT in court cases was the same as the reason it gave for its defense of DOMA; it was that the President was obligated to “faithfully execute” the laws of the land.

Obama had other options that would have been consistent with his interpretation of presidential authority. He could have chosen not to defend DADT in court, and if he determined that too was beyond the purview of the office, he could have chosen, according to Turley, not to appeal the ruling of its constitutionality. “The appeal is completely discretionary. Whatever duty the president has to defend the existing statute was satisfied before the trial court” (Adler, 2010).

Other moderate options open to Obama would have been to order the military to temporarily suspend the enforcement of DADT while the court was hearing the Log Cabin Republicans case, or while legislation was being debated. This would have been a compromise between the Obama administration’s goal of having legislation passed repealing DADT and those advocating for Obama to issue an executive order ending it. But the Obama Administration chose not even to follow this moderate path. Another option had been open for Obama from the beginning of his presidency. He never considered it seriously and never explained why. Legislation had already been passed that gave him the power to stop DADT from being enforced. He could have exercised the power granted to him through the legislation called stop-loss. “Stop-loss authority is a statutory authority enacted by Congress. . . .It gives the president authority to suspend any law that involves the discharge of service members” (Adler, 2010).

Enacting Progressive Legislation: Hate Crimes Prevention Act, Safe Schools Improvement Act, and School Non-Discrimination Act

In Obama’s letter to the LGBT community, he identifies hate crimes as an important issue for the community and affirms his commitment to the enactment of the anti-hate crime legislation, the Mathew Shepard and James Byrd Jr. Hate Crimes Prevention Act. Hate crimes are an important issue and problem for American society and an important issue and problem for the various groups in our society that have been victimized by such crimes. One attempt to resolve the problem of crimes motivated by bias towards specific groups has been the enactment of legislation that codifies these offenses as hate crimes. According to the U.S legal code, a hate crime is a “criminal offense against a person or property motivated in whole or in part by an offender's bias against a race, religion, disability, ethnic origin or sexual orientation”(Federal Bureau of Investigation, 2011). The argument justifying the need to create a special class of crimes, hate crimes, and the need to codify more severe punishments for the perpetrators of these offenses, is that they are not just attacks on persons, their property, or their immediate families, but that they are crimes against an entire group. And, in fact, a hate crime is a offense against society as a whole if that society is committed to the belief in the dignity of all of its citizens and to the belief that none of its citizens should live in fear.

While hate crimes are a significant problem for American society and for the targeted groups, hate crimes are an even more serious problem for members of the LGBT community. In the latest statistics on hate crimes, overall hate crimes have decreased as have hate crimes directed at gays and lesbians. According to the latest statistics from the FBI, there were 7,789 hate crime offenses in 2009 down from 9,168 in 2008, and of those hate crime offenses in 2009, 1,436 were hate crime offenses based on sexual-orientation bias ranging from anti-male homosexual bias to anti-heterosexual bias (slightly over 1%). This was down from 1,617 in 2008 (Federal Bureau of Investigation). Gay and lesbian groups and human rights groups monitoring hate crimes believe that there is evidence that these statistics do not accurately reflect the true extent of the problem of hate crimes for the LGBT community. A study by the Southern Poverty Law Center supports this view. The study looked at hate crimes during the fourteen year period from 1995 to 2008 and found that members of the LGBT community were more likely to be victims of hate crimes than members of any of the other groups protected by anti-hate crime statutes. The report concludes that LGBT are two times more likely to be victims of hate crimes than Jews or blacks, four times more likely to be victims than Muslims, and fourteen times more likely to be victims of hate crimes than Latinos (Potok, 2010).

The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act broadens anti-hate crimes legislation to include sexual orientation, gender identity and disability (OpenCongress, 2009; Wiener, 2010). Early in his administration, Obama fulfilled his commitment to the LGBT community by signing the Act into law. Not only does the legislation expand the groups covered by anti-hate crimes law, but it also expands the authority of the Attorney General in relation to certifying a crime as a hate crime. Furthermore it provides “technical, forensic, prosecutorial and any other forms of investigative assistance” (OpenCongress, 2009), as well as providing grants to the states to help with the investigation and the prosecution of hate crimes. It gives the federal government the authority to prosecute hate crimes when it believes that states have failed to do so (OpenCongress, 2009; Wiener, 2010).

The passage of anti-hate crime legislation is one part of solving the problem of hate crimes, but enforcement is another issue. One must assume that Obama’s commitment to the passage of the Hate Crimes Prevention Act included the commitment to its enforcement. An article in the Daily Kos (craigkg, 2010) raises questions about the Obama administration’s commitment to the latter, especially when it might involve the military. The Kos article describes an assault by two Marines on a gay man. The reason that the Marines gave were that the man had been harassing them. The man, Kieran Daly, said that he was assaulted because the Marines told him that he had “winked” at them. According to the Daily Kos, neither the local district attorney nor the Justice Department chose to prosecute the assault as a hate crime. Legal reasons were given by both that contradicted the spirit and the letter of the law.

Under the Hate Crimes Prevention Act Section 249, the offense was clearly a hate crime offense and under Section 248 (b), the Department of Justice ought to have “certified” it as a hate crime and “assume (d) jurisdiction (OpenCongress). The Daily Kos concluded:

While far too many people die from hate crime violence, murders constitute a very small number of the total number of hate crimes committed each year. There are far more simple and aggravated assaults, incidents of intimidation and acts of theft, burglary, arson and vandalism against property. In those cases, it was the intent of the hate crimes act to elevate such bias motivated offenses to the level of felonies and mete out more serious sentences to such offenders. Instead, the two Marines in this case will, if convicted, only have misdemeanor convictions (craigkg, 2010).

Related to the issue of hate crimes is the issue of school bullying of LGBT students. This issue became a part of public consciousness and public debate when four LGBT students took their lives in September of 2010. “Among them was Sean Walsh, a 13-year-old-middle school student in Tehachapi, Calif., who was on life support for nine days after hanging himself after being the victim of relentless bullying” (*California Educator*, 2011). These suicides are tragic, but, even more tragically, they are not rare occurrences; they are common enough to be indicators of the serious consequences of school bullying of LGBT students. The rate of suicide for LGBT students is three to four times higher than the rate of straight students (*California Educator*, 2011). The 2009 National School Climate Survey, a survey done by the Gay, Lesbian and Straight Education Network (GLSEN) of 7,621 middle and high-school students, shows that school bullying is a wide ranging social phenomenon and that there are serious consequences for the victims. According to the survey, 85% of LGBT students reported being verbally harassed, 40% reported being physically harassed, and 19% reported being physically assaulted. The consequences of victimization, not unexpectedly, are extremely serious: increased suicide rate, increases in anxiety and depression, declines in self esteem and the lowering of grade averages (California Educator, 2011).

President Obama held the first annual White House Convention on Bullying Prevention on March 10, 2011. The conference, according to an article in *MetroWeekly*, was “dedicated to discussing bullying prevention and sharing ideas and strategies for combating the crisis” (Geidner, 2011). The emphasis of the conference was on what individuals could do, as Obama said at the conference, “As parents and students, as teachers and members of the community, we can take steps-all of us-to help prevent bullying and create a climate in our schools in which all of our children can feel safe; a climate in which they all can feel like they belong” (Geidner, 2011). Obama’s video for the “It Gets Better Project” stands as an example of what an individual can do. In the video, which was made shortly after the suicides of the four LGBT students, he expresses both his sympathy for the LGBT victims of school bullying and the promise of the project, it will get better. He says in the video, "You are not alone. You didn't do anything wrong. You didn't do anything to deserve being bullied. And there is a whole world waiting for you, filled with possibilities” (*Huffington Post*, 2010).

That which was absent from the conference, however, according to *MetroWeekly*, was what the government, in this case, obviously, the Obama administration, could and should do. In fact the article pointed out that there are already two legislative acts introduced in Congress that addressed this serious problem. They are the Safe Schools Improvement Act (SSIA) and the School Non-Discrimination Act (SNDA). “The SSIA would amend the Safe and Drug-Free Schools and Communities Act to include bullying and harassment-prevention programs, including ones based on sexual orientation or gender identity. The SNDA, modeled after Title IX, would add sexual orientation and gender identity to federal education nondiscrimination law” (Geidner, 2011). The Obama administration has claimed to support the legislation but so far has “failed to endorse either bill and . . . rarely even mentioned the bills except in response to specific questions about them” (Geidner, 2011). The typical response from the administration, according to *MetroWeekly*, has been that it intends to address the issue when the Elementary and Secondary Education Act is being considered next year.

Enacting Progressive Legislation: Employment Non-Discrimination Act (ENDA) and

Uniting American Families Act (UAFA)

Discrimination in the workplace and discrimination in immigration law and practice are two important issues for the LGBT community and two issues Obama identified in his Open Letter. In the letter, he said he was committed to the passage of legislation that would help resolve these issues, the Employment Non-Discrimination Act and Uniting American Families Act. A study done by the American Civil Liberties Union called “Working in the Shadows” concludes that there is widespread discrimination in the workplace directed at members of the LGBT community. The discrimination ranges from workplace harassment, to being denied job opportunities, to being denied promotion, to being fired. Compelling anecdotal evidence in the report reinforces the conclusions. The stories of Jacinda Meyer, Diane Shrorer and Thomas Bryant are examples. Jacinda Meyer worked for an insurance company, received positive evaluations and a raise, but was fired when her boss learned that she was a lesbian. Evidence suggests that she was then “blackballed” locally in the industry. Diane Schrorer, who had twenty-five years of expertise in national security, was hired for a job in her field, and the day after she explained to the director of the organization that she was transgender, the director rescinded the job offer, saying “she wasn’t a ‘good fit.’” Thomas Bryant was a gay male who was responsible for training as many as fifty employees. After complaining about repeated harassment in the workplace to his supervisors and then to human resources, he was fired (ACLU, 2007).

The LGBT community is not protected from workplace discrimination by federal statue. LGBT workers can be legally fired or denied employment in 30 states, and transgender workers can be legally fired or denied employment in 39 states (Human Rights Campaign, 2011). Legislation has again been introduced in Congress that would guarantee the same rights to LGBT workers that are guaranteed for all other workers (Employment Law Update, 2011). This legislation is called the Employment Non-discrimination Act (H.R. 1397)(ENDA). According to the Human Rights Campaign, ENDA

would provide basic protections against workplace discrimination on the basis of sexual orientation or gender identity.  ENDA simply affords to all Americans basic employment protection from discrimination based on irrational prejudice.  The bill is closely modeled on existing civil rights laws, including Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act.”

The legislation would make it unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's actual or perceived sexual orientation or gender identity; or

(2) to limit, segregate, or classify the employees or applicants for employment of the employer in any way that would deprive or tend to deprive any individual of employment or otherwise adversely affect the status of the individual as an employee, because of such individual's actual or perceived sexual orientation or gender identity (DCEmployment Law Update, 2011).

The Congressman who introduced it most recently in the current session of Congress (2011), Barney Frank (D-MA), conceded that it has little or no chance of passing now that the Republican party has the majority in the House of Representatives. He says

It's an organizing tool. Obviously, with the Republicans in power, you're not going to get the bill even considered. But, we have work still to do and we have overwhelming – over 90 percent – support on the Democratic side for ENDA based on sexual orientation and we had, in the last Congress, about 30 Republicans that way. Unfortunately, there's a drop-off from that number to transgender, and this is a chance to work hard to sway those who are committed to ENDA to support the full transgender inclusion as well (Equality Matters, 2011).

The legislation has been introduced in almost every session of Congress since 1994 and was introduced in the last session of Congress when the Democratic Party had control of both houses of Congress. However, as Equality Matters reports, it “was never brought to the floor.” Obama had his best opportunity to fulfill his commitment to the LGBT community in this earlier session of Congress. He used neither his “bully pulpit,” the full weight of his administration, nor the leadership he promised to get the legislation brought to the floor. In fact, federal anti-discrimination law lags behind even corporations and quite a few of the states in demanding anti-discrimination rights for LGBT workers. The Human Rights Campaign notes that companies and states have already begun to protect LGBT workers by establishing their own anti-discrimination policies. “As of March 2011, 433 (87 percent) of the Fortune 500 companies had implemented non-discrimination policies that include sexual orientation, and 229 (46 percent) had policies that include gender identity” (Human Rights Campaign, 2011). In addition, as many as twenty-one states have passed legislation which protects workers from discrimination based on sexual orientation, and thirteen states have passed legislation which protects workers from discrimination based on gender identity (Human Rights Campaign, 2011).

Under current immigration law, the Immigration and Nationality Act, U.S. citizens and permanent legal residents can sponsor their foreign partners for residency. However, the law excludes same-sex couples from this same opportunity. According to the 2000 U.S. Census, this law negatively affects approximately 40,000 gay and lesbian bi-national couples (Williams Institute, UCLA School of Law). The Uniting American Families Act (UAFA) would amend the INA and allow U.S. citizens and legal permanent residents to sponsor their same-sex foreign partners. The Obama administration has done nothing to support the passage of UAFA and the Obama administration’s ambivalence with regard to DOMA, Section 3, has left the INA the law of the land. That is, despite the Administration’s reversal on defending DOMA in court cases, it continues to enforce DOMA’s definition of marriage and the term “spouse” in immigration cases. Many believed that with the Administration’s determination that Section 3 of DOMA was unconstitutional, the Administration’s immigration policy would change. Citizenship and Immigration Services (CIS) spokesman Christopher Bentley ended this speculation when he said May, 30 2011 that the CIS “has not implemented any change in policy and intends to follow the President’s directive to continue enforcing the law” (Daily Beast, 2011). And he continued, “the agency would continue to deny immigration status to foreigners based on those [same-sex] marriages” (Daily Beast, 2011).

Evaluating President Obama

The criteria chosen to evaluate Barrack Obama’s presidency in relation to issues raised by the LGBT community and human rights groups and identified in his Open letter were his success in achieving his stated policy goals, his promise to provide leadership that would “appeal to the best parts of the human spirit,” and his promises to use the bully pulpit and the power of the weight of his administration to achieve his goals. In regard to the first criteria, the authors believe that Obama should be given a C. Progressive legislation *was* passed, the Hate Crimes Prevention Act, and anti-gay legislation *was* repealed, Don’t Ask Don’t Tell, during the Obama presidency; and the rights of gays *were* expanded, for example, the extension of the Family Leave Act to cover same-sex couples (Conner, 2011). However, the authors believe that the passive voice is appropriate when evaluating the successes of the Obama presidency. They believe this to be fair because Obama demonstrated no active leadership, the second criteria of evaluation, in achieving these goals. Leadership that appeals “to the best parts of the human spirit” has consistently proven to be, as one commentator phrased it, “’I’m not going to step in the middle of this’” (Adler, 2010).

Obama operates under two different theories of the presidential authority, neither of which is progressive. The first is the “strong” theory and it assumes what is called an imperial presidency. Obama asserts this theory when making domestic and foreign policy regarding the so-called “war on terror.” The policies that have resulted from this “strong” theory range from increased latitude for domestic surveillance of American citizens to the waging of war without the consent of Congress. The second theory is the “weak” theory and Obama asserts this when faced with progressive social issues. He argues that the statutory constraints on the office make it necessary for the President to wait for progressive legislation and to defend legislation, even if the President’s own administration has determined, or the courts have determined, that the legislation is unconstitutional.

The idea that this second position is progressive at all seems to rest on a questionable assumption about progressive social change. It is that society will inevitably change for the better and it does so through gradual changes in public opinion that is then reflected in new, progressive legislation. This, of course, ignores both the historical significance of social movements, like the civil rights movement, and the role of the judiciary in progressive social change. It also ignores the obvious associated fact that much of the success of social movements and the progressive actions of the judiciary have been in spite of public opinion. This gradualist idea of social change was part of a common refrain in 1950s and 1960 when Black Americas were told to just wait; things will change; things will get better.

Most importantly, though, this “weak” position ignores the moral basis of progressivism. “Equality is a moral imperative,” says Obama. But as the President, he ignores the categorical nature of an imperative: a “moral imperative” means an obligation to act. The rights that the LGBT community is seeking are human rights: the right to participate fully in all social institutions, the right to be safe and secure in their person, and the right to equal opportunity in the workplace. These are “ unalienable” rights and as such they cannot be abridged by the federal or state governments, and they do not wait upon public opinion for recognition, nor do they wait upon those who still “need to be convinced”(Obama, 2008) It was not considered necessary to either “wait upon” or “convince” racists that racism violated our founding principle, nor was it considered necessary to “wait upon” or “convince” misogynists that sexism violated our founding principle; it should not be necessary to “wait upon” or “convince” those who refuse to allow the LGBT community their human rights.

Finally, given the lack of leadership and the “weak” interpretation of the presidential authority, there is, or was, no reason to expect Obama to fulfill his promise to use the bully pulpit of his office. There is a difference between a photo op, the signing of Don’t Ask Don’t Tell Repeal, a “media event,” the “White House Conference on Bullying Prevention,” an internet video, “It Gets Better,” and a commitment to use the bully pulpit of the office to achieve policy goals. A series of Town Hall meetings, the theme of which would be the inclusion of all Americans in what Obama called our founding promise, equality, would be an example of using the bully pulpit. Or a prime time television address to the nation, like the one just given on the “withdrawal” of troops from Afghanistan, discussing human rights, equality, and the rights of the LGBT community would be another example. The authors believe Obama deserves an F in leadership, an F in the promise to use the weight of his administration, and an F in his promise to use the bully pulpit.

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