

# *Fordham Environmental Law Review*

---

*Volume 14, Number 3*

2002

*Article 2*

---

## The Trajectory of “Normal” After 9/11: Trauma, Recovery and Post-Traumatic Societal Adaptation

Joel Eisen\*

\*University of Richmond School of Law

Copyright ©2002 by the authors. *Fordham Environmental Law Review* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/elr>

# THE TRAJECTORY OF “NORMAL” AFTER 9/11: TRAUMA, RECOVERY AND POST-TRAUMATIC SOCIETAL ADAPTATION

*Joel B. Eisen*<sup>1</sup>

Cultures are not static phenomena like the laws of nature; they are human creations that undergo a continuous process of evolution. They can be modified by economic development, wars and other national traumas, immigration or by conscious choice.<sup>2</sup>

I may never again see a plane fly over a city skyscraper without registering some small tic of worry. I have trouble imagining the “normal” that we can go back to. I have equal trouble imagining life on endless high alert or imagining anxiety as my central vision.<sup>3</sup>

---

1. Professor of Law and Director, Robert R. Merhige, Jr. Center of Environmental Law, University of Richmond School of Law. I wish to extend my sincerest thanks to the editors of the Fordham Environmental Law Journal for the invitation to take part in their outstanding “Terror in the Air” symposium and for their wonderful hospitality. I would like to thank the psychologists who contributed to and inform this Article: Dr. Gordon Henry and Dr. Susan Donner for helping me understand the field, and Dr. Robert Resnick for discussing “trauma” with me and introducing me to the major comprehensive databases of psychology abstracts and articles. I am grateful to Derek Jinks for helping me untangle the complexities of law and behavioral economics. This Article was supported by a research grant from the School of Law, to which I also offer my gratitude.

2. FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 222 (1992).

3. Ellen Goodman, *An Anxious Respite in a Season of War*, BOSTON GLOBE, June 13, 2002, at A19.

What is a “national trauma” and how will we be changed by it? This question in the aftermath of September 11, 2001 suggests the enormous scope of the answer. Certain events are so massive in their impact that the legal course of society is dramatically altered.<sup>4</sup> What “modifications” should we expect after those events? Do “national traumas” produce sharp discontinuities in the nation’s legal evolution?

Without minimizing the current challenges of the war on terror, there is ample reason to think there will be a considerable transformation in public discourse and policy in the long term. A poll conducted one year following 9/11 found that a majority of Americans believe “things were not at all back to normal” and they never would be.<sup>5</sup> This is not to imply that there is anything resembling a “silver lining” about 9/11; instead, it suggests that traumatic events lead to major changes in our social fabric.<sup>6</sup> A traumatic event can be a powerful force for change. Scholars believe, for example, that 9/11 “connected Americans in ways they have not been connected since

---

4. I recognize that this presents a line drawing problem. Some cataclysmic events – 9/11 and past armed conflicts – would have to count, but what about major natural disasters or the Oklahoma City bombing? This problem is readily apparent in the claims of victims of Oklahoma City that they too should be eligible for the federal compensation offered to 9/11 victims. See Michael Kinsley, *Justice a la Carte*, WASH. POST, Mar. 29, 2002, at A23.

5. *9/11 Poll: Majority say [sic] U.S. not back to normal*, CNN.com at <http://www.cnn.com/2002/us/09/01/poll.9.11/index.html> (last viewed Sept. 1, 2002).

6. Unfortunately, in this charged climate, I am aware that simply saying we might change anything as a result of 9/11 might make me seem a soulmate of those who argue that we “caused” 9/11. See generally NOAM CHOMSKY, 9-11 (Greg Ruggiero ed., 2002); M. Mitchell Waldrop, *The Relentless Revolutionary*, TECH. REV., Mar. 2002, at 9 (recounting a speech in which Prof. Chomsky “spent 90 minutes documenting his claim that the United States was guilty of profound hypocrisy on human rights,” and noting that “he strongly implied . . . that the terrorist attacks of September 11 were the proverbial chickens come home to roost...”); A. Barton Hinkle, *GMU Should Have Invited Fisk Some Other Time*, RICH. TIMES-DISPATCH, Sept. 10, 2002, at A9 (criticizing the views of British newspaper writer Robert Fisk and others). I believe no such thing.

World War II.”<sup>7</sup> However, some believe the changes were temporary and we have reverted to the status quo ante.<sup>8</sup> In this Article, I disagree with the first proposition, and conclude that it is too soon to conduct a postmortem for 9/11.

This inquiry begs a larger question: if it is plausible or even likely that change will occur, what form will it take? I believe that focusing on the character of 9/11 as a traumatic event may yield some answers. Upon deeper analysis of the relationship between the resilience of our nation and our ability to recover from post-traumatic stress, we might be able to hypothesize about long-term changes. In this Article, I use the literature that describes how trauma affects us and how we deal with it as a paradigmatic lens through which to imagine the legal future. My hope is that we might find a nation that will adapt in an identifiable way to the new emerging reality.

Unfortunately, this inquiry does not yield easy answers. Due to the dynamic field of trauma study, involving the best efforts of psychologists, psychiatrists, biologists, and chemists, the extent of the landscape itself has been rapidly changing in recent years. Established notions of what constitutes trauma and how we recover from it are undergoing intense scrutiny. As a result, there is considerable debate about the process of how we deal with traumatic events. Aggregating these new ideas about trauma at the societal level requires extrapolation; scholars spanning a variety of academic disciplines have begun to offer ideas about the impacts of traumatic events on the nation.<sup>9</sup>

---

7. *An Uncertain Trumpet*, N.Y. TIMES, Sept. 8, 2002, § 4, at 14 (discussing the views of noted author Robert Putnam).

8. *See id.* (claiming that the opportunity to capitalize upon the “heightened political consciousness, [increase] in trust for the federal government,” and other beneficial effects of 9/11 identified by Putnam has been squandered since the aftermath of the attacks).

9. For example, scholars in the field of “political psychology” have done much to help us understand the psychological consequences of what we would ordinarily think of as political events. To date, the field has been most helpful in describing the psychological effects of events such as war and the Holocaust. However, going beyond that to predict social change as a result of traumatic events requires more work. *See, e.g.*, Cheryl Koopman, *Political Psychology as a Lens for Viewing Traumatic Events*, 18 POL. PSYCHOL. 831 (1997).

In this evolving interface between law and psychology, there may be some useful touchstones for discussing the aftermath of 9/11. These rest on two debatable propositions that are the focus of this Article: first, that the field of trauma study can predict the reaction of an entire nation to 9/11, as differentiated from reactions to more circumscribed traumatic events studied extensively over the last quarter-century (such as the individual experiences of rape victims and Vietnam veterans); and second, that we can extend ideas about trauma and recovery that largely address a process of repairing the self, to describe and possibly even predict the development of policies in the public sphere.

I believe we can begin to develop a “post-traumatic societal adaptation” model of legal evolution with which we enhance our understanding of how major dislocations in the course of the nation’s history and associated processes of recovery may affect the trajectory of public policy. This term quite deliberately mimics the term for the syndrome affecting trauma victims that is probably familiar to many Americans: post-traumatic stress disorder (“PTSD”). The reason for this is that I propose to describe indicia of the likely direction of societal change brought about by a severe “stressor” (or, more colloquially, “shock”) such as 9/11. Due to this Article’s focus on an examination of major episodic stressors, I will not posit a macroscopic all-encompassing theory such as that brought to the legal literature by students of evolutionary biology or complexity theory for the process of post-traumatic societal adaptation.<sup>10</sup> The process of post-

---

10. See William H. Rodgers, Jr., *Where Environmental Law and Biology Meet: Of Pandas’ Thumbs, Statutory Sleepers, and Effective Law*, 65 U. COLO. L. REV. 25, 28 (1993) (aiming to “introduce some of the recent findings of evolutionary biology to the legal community and to urge their consideration in developing a more effective law”); William H. Rodgers, Jr., *The Lessons of the Red Squirrel: Consensus and Betrayal in the Environmental Statutes*, 5 J. CONTEMP. HEALTH L. & POL’Y 161 (1989); William H. Rodgers, Jr., *The Lesson of the Owl and the Crows: The Role of Deception in the Evolution of the Environmental Statutes*, 4 FLA. ST. U. J. LAND USE & ENVTL. L. 377 (1989); J.B. Ruhl & Harold J. Ruhl, Jr., *The Arrow of the Law in Modern Administrative States: Using Complexity Theory to Reveal the Diminishing Returns and Increasing Risks the Burgeoning of Law Poses to Society*, 30 U.C. DAVIS L. REV. 405 (1997); J. B. Ruhl, *Thinking of Environmental Law as a Complex Adaptive System:*

traumatic societal adaptation, however, will share one common feature with these ideas. This field of trauma study tells us more about ourselves as human beings, so it can help us understand how we will bring about legal change via adapting to a new post-9/11 world. As a result of the nature of this inquiry, I begin to describe adaptation that will take place over a long period of time, the focus being on the possibility for broader societal change after 9/11, not short-term responses.

I shall evaluate some of the wide-ranging psychological effects of 9/11<sup>11</sup> to further flesh out the concept that 9/11 is a "national trauma," in pursuit of a more sophisticated understanding intended to supplant the traditional concept of "trauma" so often associated with events of this caliber. Before 9/11, most people thought post-traumatic stress was something Vietnam veterans<sup>12</sup> (or perhaps rape victims<sup>13</sup>) suffered. As I describe in Part I, this is squarely at odds

---

*How to Clean Up the Environment by Making a Mess of Environmental Law*, 34 HOUS. L. REV. 933, 969-75 (1997) (applying complex adaptive system theory to environmental law). See generally Fred P. Bosselman & A. Dan Tarlock, *The Influence of the Ecological Science on American Law: An Introduction*, 69 CHI.-KENT L. REV. 847, 849-70 (1994).

11. By total coincidence, just as I wrote this clause my computer alerted me to a breaking story from the *Wall Street Journal* indicating that New Yorkers were experiencing a "second wave" of trauma; visits to psychologists and psychiatrists had begun to spike up, and residents in major cities were still worried about terrorist attacks. Lucette Lagnado, *Bracing For 9/11 Trauma's Second Wave*, WALL ST. J., Mar. 5, 2002, at B1.

12. See, e.g., Vietnam Veterans of America, VVA's Guide on PTSD, at <http://www.vva.org/Benefits/ptsd.htm#Whatis> (citing PTSD is "often associated with Vietnam veterans"). Before 1980, PTSD was often termed "post-Vietnam syndrome" for this very reason. See Fred Lerner, *The Unending Trauma: A Librarian's Guide to PTSD*, Nat'l Ctr. for PTSD, at [http://www.ncptsd.org/treatment/resource\\_center/unending\\_trauma.html](http://www.ncptsd.org/treatment/resource_center/unending_trauma.html) (last viewed March 23, 2000).

13. See JUDITH HERMAN, *TRAUMA AND RECOVERY* 32 (Basic Books 1997) (1942) (noting that once PTSD was recognized as a disorder affecting Vietnam veterans, psychological trauma inflicted on women could be seen as strikingly similar).

with recent research that shows such trauma is common.<sup>14</sup> I will discuss current literature reflecting on post-traumatic stress and the associated disorder (post-traumatic stress disorder, or “PTSD”), and, in Part II, I will propose a mechanism to describe who might lead legal change and what change might take place. I shall also discuss a specific application of the model, namely energy policy and the concept of “energy independence” in the wake of 9/11.

This model, because it is based on suppositions about human behavior, necessitates a reference in this Article to the growing controversy over the nascent field of “law and behavioral economics.” In Part III, I evaluate the model in light of some of the major criticisms leveled at that scholarship, as well as other possible drawbacks. There I find that this effort to mesh law and behavior, like others, is commendable even though the generalizations inherent in doing so threaten to undermine such effort. This not only leaves many more questions than answers, but also indicates elements of a productive research agenda that may well occupy and utilize the talents of scientists, historians, legal scholars and others for years to come.

### I. POST-TRAUMATIC STRESS AND 9/11

When people think of post-traumatic stress disorder, they might think of Robert De Niro in *Taxi Driver*, waving a gun at the mirror, shouting, “You lookin’ at me?” . . . But then, we’ve never been through a period quite like this one.<sup>15</sup>

I begin with what must seem most obvious: 9/11 will produce societal change, and we need only discern what that change will be. I am hardly the first to say this.<sup>16</sup> For the moment, the war with Iraq and the threat of terror at home dominates current discussion. This is not surprising. Concerted responses to threats of terror are indispensable to the existence of a pluralistic republic such as our own.

---

14. *See infra* Part I.

15. Alex Markels, *Can You Deal?*, *MEN’S J.*, Dec. 2001, at 71.

16. After 9/11, the inevitable slew of “what happened, why, and where are we going” books began to appear, sometimes cobbled together within mere months. *See, e.g.*, *THE AGE OF TERROR: AMERICA AND THE WORLD AFTER SEPTEMBER 11* (Strobe Talbott & Nayan Chanda, eds., 2001) [hereinafter *AGE OF TERROR*].

We may have fractious disputes about issues such as diversity, but if we cannot unite to deal with a threat, we are doomed.<sup>17</sup> Responding to terrorism has already produced enough changes in such areas as airport security<sup>18</sup> that indicates post-9/11 America will not go back to "normal," no matter how much some politicians and pundits say we should or could.<sup>19</sup> The question on everyone's mind is what the new "normal" will be, whether the topic is the balance between civil liberties and homeland defense, the role of the military, the makeup of our intelligence-gathering structure, or any other formulation.<sup>20</sup>

---

17. This is not to say that there is always unity in our response to the threat, as, for example, those concerned that actions taken in the name of national security risk abridging fundamental civil liberties have argued. For a small sample of the many commentaries on these issues, see *National Security and Civil Liberties: How to Strike the Balance?*, at <http://www.duke.edu/web/forums> (last visited Oct. 31, 2003) (comments of Duke Univ. law professor Walter Dellinger that "he was particularly concerned with the use of racial profiling and 'how we treat immigrants.'"); Eric Pianin & Thomas B. Edsall, *Civil Liberties Debate Revived Amid Efforts to Fight Terrorism*, WASH. POST, Sept. 14, 2001, at A11. See JURIST, at <http://jurist.law.pitt.edu/terrorism3b.htm> (last visited Oct. 31, 2003) (providing an in-depth collection of materials and links on terrorism and civil liberties, which is maintained by the University of Pittsburgh Law School).

18. One of the many examples of actions taken on this front since 9/11 is the establishment of the Transportation Security Administration ("TSA") within the Department of Transportation to handle passenger screening and related issues. See Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. (Nov. 19, 2001) (establishing the TSA); U.S. DEP'T OF TRANSP., MEETING THE AIRPORT SECURITY CHALLENGE: REPORT OF THE SECRETARY'S RAPID RESPONSE TEAM ON AIRPORT SECURITY (2001), available at <http://www.dot.gov/affairs/airportsec.htm> (last viewed Oct. 31, 2003) (recommending the establishment of the federal security agency).

19. See, e.g., Peggy Noonan, *Bush's Text and Subtext*, WALL ST. J., May 29, 2002, at A20 ("They asked us to return to normal and we did.").

20. Many interesting issues have received a post-terrorism spin. My law school held a post-9/11 symposium on the propriety of as-

We seem to take the likelihood of this transformation for granted, but rarely acknowledge one reason we will change: we have suffered through a traumatic event. Since 9/11, I have had many opportunities to tell friends, colleagues, and acquaintances about my interest in the connection between post-traumatic stress and the attacks. When I use “trauma” and “9/11” in the same sentence, I am usually met with a kind of puzzled look, the first response, almost universally, has been: what possible connection can there be to the law?

The preliminary step in delving into this mystery begins with my offering of my personal experience and subsequent efforts to cope<sup>21</sup> with 9/11 by learning about trauma and recovery.

#### A. *The “Murderous Rage” and “Trauma”*

On December 13, 2001, I flew into a hot, murderous rage while watching a cable news channel. In that moment, I was Meursault with the sun glinting in my eye;<sup>22</sup> Kurt Russell saving his wife and

---

sassinating a foreign leader. *See Allen Chair Symposium: Terrorism and Assassination*, 37 U. RICH. L. REV. (forthcoming Mar. 2003).

21. I am hardly the only one to personalize 9/11, as is evident from the many post-9/11 books. *See, e.g., AFTERWORDS: STORIES AND REPORTS FROM 9/11 AND BEYOND* (Salon.com eds., 2002). Much of what is available consists of first person accounts memorialized within days or weeks of 9/11. It is obviously important to share these experiences, as we continue to do on the anniversaries of 9/11. Simple expediency also accounts for much of the books' focus on the immediate aftermath: newspapers and magazines commissioned books that used what was available. At some point, however, we will turn to examining longer-term consequences, and to that end I have offered my own experience as a possible starting point. As we will see, in discussing my own recovery process I use the word “cope” quite deliberately, for I have come to recognize that I am going through the process that trauma experts describe as coping. *See infra* note 92 and accompanying text. It almost goes without saying that my discussions with friends, family and strangers were in themselves a form of coping.

22. ALBERT CAMUS, *THE STRANGER* (Stuart Gilbert trans., Vintage Books 1946).

confronting the bad guys in "Breakdown."<sup>23</sup> I am hardly given to such fits of anger, and my reaction surprised me at that moment and remains a source of curiosity to this day. The target of my anger was Osama bin Laden, featured in a videotape making anti-American, anti-Western statements while claiming credit for his orchestration of the attacks on the United States. Fortunately for me, when I saw the videotape there was no one else present. Had Mr. bin Laden been nearby I felt sure I would have taken the opportunity to attack him myself.<sup>24</sup>

I had a number of intense reactions to 9/11, foremost among them a concern for my relative trapped in a New York airport and grief for an acquaintance who lost her life in the Pentagon attack. This outburst was the first time I was prompted to wonder whether I should seek help. I "cooled down" over the next day or so and began to question whether this anger might be part of some larger phenomenon. I did not think of myself as "traumatized" by 9/11, but I certainly was affected. I spent virtually an entire month glued to the television, looking for any information about the attacks and for clues whether new ones were coming. I ran up a large phone bill communicating with my loved ones and friends. Like many other Americans, I found it hard to work. I put aside the research already underway,<sup>25</sup> and spent that first month nearly paralyzed by my reac-

---

23. *BREAKDOWN* (Paramount 1997). I did not pick this movie idly. It portrays a situation that brings on the ultimate in psychological terror: the random kidnapping of a loved one (in this case, a spouse). Kurt Russell, playing the husband, is "baffled and angered by the disappearance of his wife." See Roger Ebert, *Breakdown*, CHI. SUN-TIMES, available at [http://www.suntimes.com/ebert/ebert\\_reviews/1997/05/050202.html](http://www.suntimes.com/ebert/ebert_reviews/1997/05/050202.html) (last viewed Oct. 31, 2003).

24. Apparently I am not the only one feeling this way. A poll taken in July 2002 found that 45% of those responding would attempt to kill Mr. bin Laden if given the chance. See *Poll: Americans Uncertain They Would Kill Osama*, FOXNews.com, available at <http://foxnews.com/story/0,2933,58211,00.html> (last viewed July 19, 2002); see also HERMAN, *supra* note 13, at 189 (noting that revenge fantasies are a common but incomplete way of mourning traumatic loss).

25. Which, fortuitously, happened to be related to the intersection of law and behavior. This made it easier to think about some of the

tion. When I returned to a higher level of productivity, I resolved to learn as much as I could about the nature of this personal detour from normal behavior, and to address the needs of those who felt pain, suffering and loss resulting from 9/11.<sup>26</sup>

### 1. The “Third Wave” of Trauma Study

Unfortunately, I found it no easy matter to understand the literature relating to traumatic events. In part this is due to the field’s confusing evolution. The history of trauma study is cyclical, starting with the pioneering work of Sigmund Freud and Pierre Janet on hysteria in the late nineteenth century.<sup>27</sup> After the focus on hysteria waned, trauma next attracted attention during World War I when the ghastly impact on soldiers could not be easily explained by the turn-of-the-century predilections concerning war.<sup>28</sup> The study of neuroses brought on by combat had brief notoriety. A mere thirty years ago,

---

behavioral ramifications of 9/11 and their intersection with the law. *See infra* Part III.

26. One could see this drive as therapeutic. *See* HERMAN, *supra* note 13, at 58-59 (noting that having a high degree of resilience and making use of it as an opportunity for “purposeful action in concert with others” is a factor in determining why some people do not experience PTSD). But one could also call it luck; if I had not been studying behavior and law already I might have missed this opportunity. *Id.* at 60 (no one personality trait is essential to survival and luck may be an important factor).

27. *Id.* at 10-15 (discussing the rise and fall of the study of hysteria). Hysteria was thought of as a strange women’s disease (even its name relates to female anatomy), but Freud and Breuer discovered separately that it was psychological trauma that caused hysteria. *Id.* at 12. Later in the twentieth century, there was much commentary on how it is ridiculous to make up a psychological disease that only afflicts women. Still, even today, some are willing to reexplore the possibility that hysteria exists. This fascination shows just how difficult it is to get a proper handle on the nature of mental disorders, let alone treat them.

28. *Id.* at 20-26. *See generally* Maj. Susan L. Turley, *A War of Nerves: Soldiers and Psychiatrists in the Twentieth Century*, 170 *MIL. L. REV.* 197 (2001) (discussing a book detailing the uneasy relationship between mental health professionals and the military).

one could point to only a few volumes about trauma.<sup>29</sup> It was not until Vietnam veterans experienced problems that trauma began to attract attention again.<sup>30</sup>

Currently, many see the past quarter-century as a "third wave" of trauma study.<sup>31</sup> Since the 1970s the field has expanded dramatically, and with the flowering of research in many directions, virtually redefined itself every few years. Not surprisingly, the literature is wide-ranging and fragmented. Members of different psychology disciplines disagree on basic concepts. In the same collection of work one can find papers that directly contradict each other. Anything, even a few years old, might well be controverted by more recent studies.<sup>32</sup> The basic definition of the best-known illness associated with trauma – post-traumatic stress disorder ("PTSD") – has been in a state of flux since its first usage in 1980.<sup>33</sup> Certain absences in empirical data prevent the articulation of anything approaching a grand theory. Legal literature and reported cases about post-

---

29. *Id.* at 32.

30. *Id.* at 26. The relatively recent beginning of a resurgence in trauma study is yet another reason why many still think of post-traumatic stress as something only Vietnam vets get. *Id.*

31. See Bessel A. van der Kolk et al., *Approaches to the Treatment of PTSD*, at <http://www.trauma-pages.com/vanderk.htm> (last visited Oct. 31, 2003) [hereinafter van der Kolk et al., *Treatment Approaches*] (stating that "Over the past decade our profession has experienced the third intense wave of efforts to grasp the reality of trauma on body and soul . . .").

32. See BABETTE ROTHSCHILD, *THE BODY REMEMBERS: THE PSYCHOPHYSIOLOGY OF TRAUMA AND TRAUMA TREATMENT* xv-xvi (2000) ("The scientific study of the mechanisms of trauma, PTSD, and memory is accelerating at such a fast pace that it is hard to keep up. There are sometimes strong disagreements between scientific groups. What causes and what heals PTSD and how memory systems function are subject to broad debate. The research-supported theories of one group are disputed by another and vice versa.").

33. The first usage of the term "PTSD" was in "DSM-III," the now superseded third edition of the American Psychological Association's standard reference on trauma. AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (3d ed. 1980).

traumatic stress date to the 1980s and early 1990s.<sup>34</sup> In light of recent developments, this body of work would seem to warrant re-examination.<sup>35</sup>

This fluidity of scholarship is consistent with active scientific inquiry in a relatively new field. The breadth and scope of this dialogue is exciting, but may not last. The unhappy history of trauma study involves peaks of inquiry, followed (sometimes rapidly) by valleys of retrenchment. Our periodic doubt about trauma reflects the confusion trauma victims feel.<sup>36</sup> Traumatic effects are usually substantiated only by subjective statements about memories supplied by the victims themselves, thus such discovery yields quickly to attacks on the credibility of patients and investigators. Some reversals

---

34. Some attention centered on the use of evidence of PTSD in Vietnam veterans as a defense in criminal cases. *See, e.g.*, Michael J. Davidson, *Note, Post-Traumatic Stress Disorder: A Controversial Defense For Veterans of a Controversial War*, 29 WM. & MARY L. REV. 415 (1988).

35. An excellent example of how the treatment of PTSD in the legal system has not kept up with state-of-the-art science is found in Edgar Garcia-Rill & Erica Beecher-Monas, *Gatekeeping Stress: The Science and Admissibility of Post-Traumatic Stress Disorder*, 24 U. ARK. LITTLE ROCK L. REV. 9, 10 (2001) (noting that evidence of PTSD, “[c]uriously,” is often excluded from evidence “in precisely those circumstances where it would be the most helpful to the fact-finder”). *See also* Roger K. Pitman et al., *Legal Issues in Posttraumatic Stress Disorder*, in *TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY AND SOCIETY* 378, 392-94 (Bessel A. van der Kolk et al. eds., 1996) (discussing reasons for the use and misuse of PTSD evidence in criminal cases).

36. *See* van der Kolk et al., *Treatment Approaches*, *supra* note 31 (“Mirroring the confusion and disbelief of people whose basic assumptions are shattered by traumatic experiences, the psychiatric profession periodically has been fascinated by trauma, followed by sudden disbelief in the importance of trauma in the genesis of psychopathology.”); Bessel A. van der Kolk & Alexander C. McFarlane, *The Black Hole of Trauma*, in *TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY AND SOCIETY*, *supra* note 35, at 4. There are many other reasons for societal challenges to the legitimacy of trauma, some part of which shall be discussed later in this Article. *See infra* Part II.

of position have been sparked by the pioneers themselves, the most famous being Freud's recantation of his theory of hysteria that caused the study to fade into obscurity.<sup>37</sup> Even in our time, the tension between belief and disbelief manifests itself in pitched legal battles about the reliability of memory concerning traumatic events, perhaps most emphatically, in cases involving childhood sexual abuse.<sup>38</sup>

## 2. Fundamentals of Trauma and PTSD

At the onset of this inquiry, I must start at the foundation of the field with the word "trauma." The word has always conjured images of pain and loss one of the most common experiences of the human condition.<sup>39</sup> In contemporary parlance, "trauma" is discussed casually. We speak of the "trauma" of not being selected as a cheerleader,<sup>40</sup> of the "trauma" induced by losing a job or going through a divorce, of the "trauma" brought on by losing a loved one, or of the "trauma to the head" from a direct blow. The quote at the beginning of this Article refers to a "national trauma." Thus, what is trauma?

---

37. HERMAN, *supra* note 13, at 12.

38. JON G. ALLEN, *COPING WITH TRAUMA: A GUIDE TO SELF-UNDERSTANDING* 107 (1995). A noteworthy current situation involving controversy over the use of repressed memories, of course, is the scandal involving Catholic priests accused of molesting young boys. See, e.g., Sacha Pfeiffer, *Crisis in the Church: Shanley set for Mass. return; Coakley Eyes Roles Conflict*, BOSTON GLOBE, May 4, 2002, at A1 (citing attorney Roderick MacLeish Jr.'s statement that "lawsuits alleging abuse by [Rev. Paul R.] Shanley in Newton are based on recovered or repressed memories . . . [and] that such cases sometimes lend themselves to controversy.").

39. One article notes that "[p]ost traumatic stress has been recognized in the poetry of Homer, Shakespeare and Goethe." van der Kolk et al., *Treatment Approaches*, *supra* note 31.

40. Lest one think I am providing this example in jest, consider the usage of "trauma" I found in the magazine devoted to tennis, one of my avocational passions: "While choking away a club title won't cost you what it does a professional, the trauma of the experience still exacts a heavy toll in terms of lost confidence and added fear in future matches." John F. Murray, *Rebound Ace*, TENNIS, July/Aug. 2002, at 62.

Consider this definition of a traumatic event from the fourth edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-IV"), the most widely accepted standard reference on trauma:

"The person experienced, witnessed or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others; [and] the person's response involved intense fear, helplessness, or horror."<sup>41</sup>

Trauma may therefore be considered insufficient as a description for the failure to become a cheerleader, because there is no serious injury save for the impact upon teenage pride. Beyond this, it would seem the DSM-IV definition should be criticized for over-breadth, as it would make 9/11 a traumatic event to virtually everyone who watched the news coverage. However, perhaps this is not inappropriate. Recent scholarship views traumatic events as more ubiquitous than previously thought, and, for that reason, does not define those suffering from post-traumatic stress as abnormal.<sup>42</sup> Yet, as recently as 1980, the version of the DSM in effect included a statement that trauma was "outside the range of usual human experience."<sup>43</sup> We now know that certain traumatic events such as rape war, and natural disaster are disturbingly common.<sup>44</sup> This bears im-

41. See AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (4th ed. 1994).

42. ALLEN, *supra* note 38, at 5. But see Arie Y. Shalev, *Stress versus Traumatic Stress: From Acute Homeostatic Reactions to Chronic Psychopathology*, in *TRAUMATIC STRESS*, *supra* note 35, at 83, 85 (claiming that this conclusion is based on unproven assumptions).

43. HERMAN, *supra* note 13, at 33, (quoting the AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (3d ed. 1980)).

44. ALLEN, *supra* note 38, at 8 (citing a variety of studies, including a national survey finding that "1 [woman] in 8 reported having been the victim of forcible rape"). Psychologist Jon G. Allen states for this reason that rape creates "the largest group of people with posttraumatic stress disorder in this country." *Id.* at 8. See also Susan Estrich, *Teaching Rape Law*, 102 *YALE L.J.* 509, 512 (1992) (rape "happened to me and to so many others"); Susan Estrich, *Rape*,

portant implications for the social acceptance of trauma victims, who in the past were considered to be outside the societal mainstream,<sup>45</sup> and also as a result of their treatment. We need different response options if one departs from the premise that someone who suffers from trauma is abnormal.<sup>46</sup>

There is a subtle but critically important distinction between the person who experiences a simple head blow and the person who watches a loved one die. The psychological consequences after the initial event is the concern, the so-called "intrusion of the past into the present," as one expert puts it.<sup>47</sup> This is hardly a new concept. Breuer and Freud stated famously that "hysterics suffer mainly from reminiscences."<sup>48</sup> Janet invented the term "subconscious" to represent the memories that affect our daily activities,<sup>49</sup> and based on his studies of hundreds of traumatized patients, he described the central role in post-traumatic stress of a phenomenon which he called "dissociation": the domination of traumatic memories that blocked a pa-

---

95 YALE L.J. 1087 (1986) (citing firsthand account of rape and analysis of rape law).

45. Janet, for example, viewed his hysteria patients as abnormal. See Frank W. Putnam, *Pierre Janet and Modern Views of Dissociation*, in *ESSENTIAL PAPERS ON POSTTRAUMATIC STRESS DISORDER* 116, 117 (Mardi J. Horowitz ed., 1999). See also Rachel Yehuda & Alexander C. McFarlane, *Conflict between Current Knowledge about Posttraumatic Stress Disorder and Its Original Conceptual Basis*, in *ESSENTIAL PAPERS ON POSTTRAUMATIC STRESS*, *supra*, at 41, 43 (discussing whether "trauma survivors [were] to be viewed as psychologically damaged by the experiences that befell them or was it more appropriate to validate the experience of trauma from a humanistic and existential perspective by viewing their responses as an adaptation to frightening environmental events.").

46. ALLEN, *supra* note 38, at 235 ("Given the broad array of problems, symptoms and disorders associated with traumatic experience, it should come as no surprise that virtually all major forms of treatment are applicable.").

47. *Id.* at 4.

48. HERMAN, *supra* note 13, at 12.

49. Bessel A. van der Kolk et al., *History of Trauma in Psychiatry*, in *TRAUMATIC STRESS*, *supra* note 35, at 47, 52 [hereinafter van der Kolk et al., *History of Trauma*].

tient's ability to resume normal functioning.<sup>50</sup> Freud's recantation of the role of memories in traumatic events, and subsequent pursuit of psychoanalytic theory, largely ended the study of this great discovery.<sup>51</sup> During most of the twentieth century there were important studies linking trauma and its psychological consequences,<sup>52</sup> but there were also unfortunate detours, particularly in the study of combat-related situations.<sup>53</sup> It was not until the 1980s that the relationship between dissociation and traumatic disorders was rediscovered<sup>54</sup> and great breakthroughs occurred under the rubric of PTSD.

---

50. *Id.* at 53.

51. HERMAN, *supra* note 13, at 14. *See also* van der Kolk et al., *History of Trauma*, *supra* note 49, at 53 ("psychoanalysis . . . crowded out competing schools of thought," including Janet's theories). Freud turned to psychoanalysis, and the acceptance of his theory largely ended research on factors other than developmental ones in trauma in children's lives. *Id.* at 56. His turn toward a focus on development has often been misinterpreted, as he continued to believe that while developmental factors were important there was still a category of response to trauma called "traumatic neurosis." Yehuda & McFarlane, *supra* note 45, at 43.

52. Yehuda & McFarlane, *supra* note 45, at 43 (citing a number of the major studies). Perhaps the most influential scientist working in these middle years was Abram Kardiner, who discussed war neuroses in veterans of World War I. *See* van der Kolk et al., *History of Trauma*, *supra* note 49, at 56-58 for a concise description of Kardiner's work.

53. In 1915, the British military psychiatrist Charles Samuel Myers coined the term "shell shock" to describe the adverse psychological consequences of war. van der Kolk et al., *History of Trauma*, *supra* note 49, at 48. While Myers worked to explore the emotional aspects of combat neuroses, others were often not convinced. The Germans believed for decades that combat stress was a function of the failure of a soldier's will to fight. This led doctors to remove soldiers from the battlefield and give them electric shock therapy that made it more unpleasant to remain away from the battlefield than to return to it. *Id.* at 50; *see also* Mardi J. Horowitz, *Introduction*, in *ESSENTIAL PAPERS ON POSTTRAUMATIC STRESS DISORDER*, *supra* note 45, at 19.

54. van der Kolk et al., *History of Trauma*, *supra* note 49, at 53.

The most important revolution in the field involves a focus upon the "intrusive reliving" of the traumatic event, rather than the event itself.<sup>55</sup> As one leading authority puts it, "it is the subjective experience of the objective events that constitutes the trauma."<sup>56</sup> My encounter with Mr. bin Laden on TV was brief, but produced lasting effects: for a while, every time I saw a picture of him I became angry again. Recent work has shown that I was not alone. It is not enough to simply eliminate the traumatic stressor.<sup>57</sup> The mind is altered by the traumatic experience even after the event has ended, and those changes must be dealt with successfully if there is to be any resolution of the individual's relationship to the trauma. It is insufficient to focus only on the victim's state of mind, for traumatic events also result in a disconnection between the victim and external society; they "breach the attachments of family, friendship, love and community."<sup>58</sup>

So the changes brought on by a traumatic event are wide-ranging, and it is difficult to sum them up neatly. The common denominators in all traumatic events are a high degree of stress and the individual's feelings of fear and helplessness,<sup>59</sup> whether the event in question is

---

55. van der Kolk et al., *Treatment Approaches*, *supra* note 31 ("Evidence during the past decade supports the notion that it is the intrusive reliving, rather than the traumatic event itself that is responsible for the complex biobehavioral change that we call PTSD."). Both pre- and post-event experiences shape our response to trauma. See, e.g., Allan N. Schore, *Dysregulation of the Right Brain: A Fundamental Mechanism of Traumatic Attachment and the Psychopathogenesis of Posttraumatic Stress Disorder*, at <http://www.trauma-pages.com/schore-2002.htm> ("[t]he etiology of PTSD is best understood in terms of what an individual brings to a traumatic event as well as what he or she experiences afterward, and not just the nature of the traumatic event itself.").

56. ALLEN, *supra* note 38, at 14.

57. See, e.g., ROTHSCCHILD, *supra* note 32, at 4-14 (describing how the "body remembers traumatic experiences" in the context of a case called "Charlie and the Dog").

58. HERMAN, *supra* note 13, at 51.

59. *Id.* at 33 (quoting N.C. Andreason, *Post Traumatic Stress Disorder*, in *COMPREHENSIVE TEXTBOOK OF PSYCHIATRY*, 918-24 (H.I. Kaplan and B.J. Sadock eds., 4th ed. 1985)).

rape, combat or terrorist attack.<sup>60</sup> No two people react the same;<sup>61</sup> there are as many symptoms as human reactions in the face of terror. Symptoms can, and do, fluctuate over time. Still, the symptoms are recognized as falling into several principal categories.<sup>62</sup> One of these is "hyperarousal," a physiological response in which the central nervous system puts the body constantly on alert for more danger.<sup>63</sup> Another is "intrusion," in which the victim constantly relives the traumatic event.<sup>64</sup> Still another is "constriction" or the almost trance-like state of dissociation.<sup>65</sup> In this state, according to psychiatrist Abram Kardiner, whose early work on combat-induced trauma is still relevant today, a trauma victim is almost literally unable to pursue any purposeful activity.<sup>66</sup> Dr. Judith Herman, the author of a leading book on trauma, describes a "dialectic of trauma," noting that victims oscillate back and forth between these opposing psychological states during their efforts to come to grips with their traumatic events.<sup>67</sup>

Most people who are affected by traumatic events will recover without suffering illness. Some will develop PTSD, a recognized psychiatric disorder that, like obsessive-compulsive disorder or panic disorder, is phenomenological in nature.<sup>68</sup> The DSM-IV states that a person who experiences PTSD must have one or more symptoms from each of the following three different categories: (1) reliving the traumatic event through upsetting thoughts, nightmares or flashbacks; (2) purposely avoiding activities that remind one of the trauma; and (3) experiencing chronic hyperarousal.<sup>69</sup> This classification as phenomenological in nature indicates such behavior bears a resemblance to normal human behavior,<sup>70</sup> and thus can be difficult to attribute to the traumatic event instead of to pre-existing

---

60. HERMAN, *supra* note 13, at 31.

61. *Id.* at 58.

62. *Id.* at 35.

63. *Id.* at 35-37.

64. *Id.* at 37-42.

65. *Id.* at 42-47.

66. *Id.* at 35.

67. *Id.* at 47.

68. van der Kolk & McFarlane, *supra* note 36, at 4-5.

69. AM. PSYCHIATRIC ASS'N, *supra* note 41.

70. ALLEN, *supra* note 38, at 15; HERMAN, *supra* note 13, at 49.

conditions.<sup>71</sup> Such misdiagnosis produces "costly errors" due to the failure to recognize treatable post-traumatic stress disorders.<sup>72</sup> Another source of confusion is that people may possess some of the described symptoms, but lack the aggregate accumulation that causes the contemporary recognition of PTSD.<sup>73</sup> Still another problem is that some will have symptoms that immediately yield PTSD, while in others onset may be delayed for weeks or months.<sup>74</sup>

Who shall suffer from PTSD depends on a wide range of risk factors. The DSM-IV applies a classic dose-response relationship to this problem.<sup>75</sup> The closer one is to the traumatic stressor, the greater the likelihood of severe effects.<sup>76</sup> The severity and duration of the traumatic event are also important in predicting whether one will experience PTSD.<sup>77</sup> There have been considerable disagreements over the extent to which certain people are predisposed to experience PTSD by virtue of their "family history, childhood experiences, personality variables, and preexisting mental disorders."<sup>78</sup> This suggests imposing blame on the victim, which has been an unfortunate aspect of this research going back to the age of hysteria.<sup>79</sup>

---

71. ALLEN, *supra* note 38, at 15.

72. HERMAN, *supra* note 13, at 49.

73. ROTHSCHILD, *supra* note 32, at 7-8.

74. ALLEN, *supra* note 38, at 180-81.

75. AM. PSYCHIATRIC ASS'N, *supra* note 41. *See also* ALLEN, *supra* note 38, at 13; HERMAN, *supra* note 13, at 57 (noting that the greater the exposure the more likely that people experience PTSD, citing studies of rape survivors and kidnaps).

76. For example, witnessing the death of a friend in combat or a loved one in natural disaster creates a high risk for PTSD. HERMAN, *supra* note 13, at 54.

77. AM. PSYCHIATRIC ASS'N, *supra* note 41.

78. *See* Anne M. Dietrich, *Risk Factors in PTSD and Related Disorders: Theoretical, Treatment, and Research Implications*, 7 TRAUMATOLOGY No. 1 at 27 (2001), available at <http://www.fsu.edu/~trauma/v7/RiskFactorsfinal.pdf> (last visited Oct. 31, 2003).

79. HERMAN, *supra* note 13, at 116-17. Herman notes that the tendency to blame the victim still predominates in "conceptual errors" in research, citing examples of research regarding supposed personality defects that predispose a woman to abuse by her spouse, and a recent study of emergency room personnel describing battered women as "crocks." *Id.*

A promising focus of research seeking knowledge of the biochemical workings of the brain and the connection to the individual human experience of trauma continues forward with already dispositive results.<sup>80</sup> This work, like that attempting to discern biochemical causes for attention deficit/hyperactivity disorder (ADHD), is not, however, without controversy.<sup>81</sup>

### 3. The Recovery Process and Treatment Options

Those affected by traumatic events must understand that the recovery process is a necessary component of resolving the issue that impacted their lives.<sup>82</sup> The principal stages of recovery are fairly widely recognized.<sup>83</sup> The central idea of recovery is “to restore power and control to the survivor.”<sup>84</sup> First and foremost, one focuses on restoring the trauma victim’s connections with society

---

80. Schore, *supra* note 55 (proposing that early child abuse imprints the right brain and makes structural changes that predispose that person to PTSD); *see also* ROTHSCCHILD, *supra* note 32, at 9 (describing Rachel Yehuda’s work relating a deficiency in cortisol production by the adrenal glands to PTSD).

81. *See, e.g.*, RICHARD DEGRANDPRE, *RITALIN NATION: RAPID-FIRE CULTURE AND THE TRANSFORMATION OF HUMAN CONSCIOUSNESS* 38-41 (1999) (sharply criticizing any attempt to find a biological mechanism to explain ADHD). Like PTSD, ADHD is a defined mental disorder in the *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS*. *Id.* at 38; *see* AM. PSYCHIATRIC ASS’N, *supra* note 41. Interestingly, some studies find a high degree of comorbidity (confluence) of ADHD and PTSD. Alexander C. McFarlane & Bessel A. van der Kolk, *Trauma and Its Challenge to Society*, in van der Kolk et al., *TRAUMATIC STRESS*, *supra* note 35, at 24, 31 [hereinafter McFarlane & van der Kolk, *Trauma and Society*]. If the biochemical “causes” of ADHD were undermined, these links would probably also have to be called into question.

82. HERMAN, *supra* note 13.

83. HERMAN, *supra* note 13, at 155 (“[t]he same basic concept of recovery stages has emerged repeatedly, from Janet’s classic work on hysteria to recent descriptions of work with combat trauma, dissociative disorders, and multiple personality disorder.”).

84. HERMAN, *supra* note 13, at 159.

through a process that has three basic steps.<sup>85</sup> In the first stage, we allow the victim to establish a sense of safety. This can be difficult if the traumatic event threatens to recur (as in the case of spousal rape), and that difficulty can be compounded by the isolation from society that victims often feel.<sup>86</sup> The popular notion is that prompt action in the pursuit of restoring safety, such as crisis intervention, can restore people to normal,<sup>87</sup> however Dr. Herman cautions that even when this appears to be true it may take more for healing to occur.<sup>88</sup> After basic safety is established, the trauma victim still needs to recognize and process the traumatic experience, often by way of sharing it with others.<sup>89</sup> Finally, the survivor reconnects with external society.<sup>90</sup> The recovery process is not as cleanly delineated

---

85. Alexander C. McFarlane & Rachel Yehuda, *Resilience, Vulnerability, and the Course of Posttraumatic Reactions*, in *TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY AND SOCIETY*, *supra* note 35, at 155, 157.

86. HERMAN, *supra* note 13, at 62.

87. However, it is hardly clear that all such immediate actions are productive. Two recent studies challenge the use of "debriefing" (counseling sessions given to survivors immediately after disasters) for those affected by 9/11. See Shankar Vedantam, *Two Studies Raise Doubts on Trauma Counseling's Value*, WASH. POST, Sept. 6, 2002, at A12. The technique "consists of individual or group sessions lasting one to three hours where survivors describe what they have been through and talk about their feelings." *Id.* A government-funded study of 9/11 survivors found that debriefing is often counterproductive because it runs the risk of creating additional distress. *Id.* As the article makes clear, "[n]o one knows how long clinicians should wait after a traumatic event to evaluate individuals to see whether they are getting better on their own." *Id.* This is just one more example of the difficulties we face in grappling with these events. *Id.*

88. HERMAN, *supra* note 13, at 165 ("Though the survivor may make a rapid and direct return to the appearance of normal functioning, this symptomatic stabilization should not be mistaken for full recovery, for the integration of the trauma has not been accomplished.").

89. ALLEN, *supra* note 38, at 237 ("The universal prescription for trauma: *Talk about it.*").

90. HERMAN, *supra* note 13, at 3.

as it appears from this brief description. Most importantly, the stages are not discrete; nothing is linear when responding to trauma. Recovery can occur sporadically and over a lengthy period of time. Numerous studies recognize that “backsliding” can occur along the way.<sup>91</sup>

Consistent with this perspective towards the nature of trauma, there is a wide range of treatment options ranging from none at all (completely self-directed recovery, or, in trauma lingo, “coping”<sup>92</sup>) to active professional intervention.<sup>93</sup> Even in a nation with many opportunities for therapy, where there is seemingly a fix for everything, not everyone who watched television on 9/11 is a candidate for professional help or a pill. Not everyone will suffer from PTSD. Some will recover quickly whereas others will not. The “[a]ctive, task-oriented person” might find success with his trauma by the coping modality.<sup>94</sup> Others will require therapy, medication,<sup>95</sup> behavioral or cognitive techniques,<sup>96</sup> and well-known social strategies, such as

---

91. See Lagnado, *supra* note 11.

92. See Arie Shalev, *supra* note 42, at 89; ALLEN, *supra* note 38, at 262 (“Many people can cope with trauma without any treatment.”).

93. ALLEN, *supra* note 38, at 239-46 (describing the benefits of individual psychotherapy in treatment); HERMAN, *supra* note 13, at 156.

94. HERMAN, *supra* note 13, at 58. A study of men who suffered heart attacks suggests that even “social support in the absence of an internal locus of control may in fact impair healing processes.” *Id.*; McFarlane & van der Kolk, *Trauma and Its Challenge to Society*, *supra* note 81, at 24, 29.

95. The class of antidepressants known as “SSRIs” (selective serotonin reuptake inhibitors), including such widely known drugs as Prozac, Paxil, and Zoloft, is widely used in the treatment of PTSD. See ALLEN, *supra* note 38, at 258.

96. One interesting approach among the many available is “eye movement desensitization reprocessing” (EMDR), in which patients are asked to follow the therapist’s finger with their eyes while concentrating on the traumatic event. The investigator responsible for the development of EMDR reports that it is highly effective in desensitizing patients’ traumatic memories. See Francine Shapiro, *Efficacy of the Eye Movement Desensitization Procedure in the Treat-*

reliance on self-help organizations and the justice system.<sup>97</sup> Treatment needs to be carefully monitored to make sure it is appropriate to the survivor's progress in the recovery process. One should note that an action or treatment modality adopted at one point in time may not be the best form of treatment at another.<sup>98</sup>

### B. *We Are Not Yet "Over" 9/11*

Some would argue that the above discussion is moot regarding 9/11 because most of us can cope easily and have already done so. The nation does appear to be returning to some sense of normal. The Fourth of July, the World Series and the Super Bowl came and went without incident. Over the course of the past year, Iraq, Enron, WorldCom, and the successful return of Elizabeth Smart dominated the news. There seems to be a prevalent belief – or perhaps hope – that time and the absence of additional successful terrorist attacks have gone a long way toward healing the national wound.

#### 1. Talking Heads Can't Get Trauma "Right"

There is a widespread belief that post-traumatic stress affected only those present on 9/11 in New York or Washington (victims and rescue workers, for example),<sup>99</sup> or those with family members or business acquaintances in those areas, and not the populace of a country. We want to believe that the symptoms and disorders associated with trauma happen to other people, and that we are a nation that recovers quickly from adversity. Any focus on trauma would also seem to run contrary to our stance against terrorists, shining the

---

*ment of Traumatic Memories*, in ESSENTIAL PAPERS ON POSTTRAUMATIC STRESS DISORDER, *supra* note 45, at 432, 432.

97. HERMAN, *supra* note 13, at 160.

98. van der Kolk et al., *Treatment Approaches*, *supra* note 31 ("Trauma needs to be treated differently at different phases of people's lives following the trauma, and at the different stages of the disorder PTSD. Treatments that may be effective at some stages might not be effective at others.").

99. For a description of the significant impacts on people present at "Ground Zero," see Julie Knop, *Ground Zero: Almost*, 7 TRAUMATOLOGY No. 4 (2001), available at <http://www.fsu.edu/~trauma/v7/GroundZeroAlmost.pdf> (last visited Oct. 31, 2003).

light on ourselves and perpetuating a notion of victimhood;<sup>100</sup> it is apparently much more satisfying to go get revenge on Osama bin Laden than to engage in introspection. There is more at work here than a lack of information; avoidance, repression, and denial are common responses to trauma.<sup>101</sup> The reductive presentation of trauma and 9/11 in the popular press exacerbates these reactions, preventing effective understanding of the issue. According to published reports, about 10% of those in the cities that were attacked will develop PTSD after 9/11.<sup>102</sup> The few empirical studies completed in the past year tend to show that adults and children in New York and Washington are still affected;<sup>103</sup> the rest of us can supposedly go about our business.

This business of adopting shortcuts to explain the trauma of 9/11 is clearly intended to offer a measure of comfort to a beleaguered public. However, it is meaningless to reduce trauma to numbers in this

---

100. ALLEN, *supra* note 38, at 17 (because most people do get over their traumatic experiences, “[w]e like to think of ‘survivors,’ not ‘victims.’”).

101. HERMAN, *supra* note 13, at 32; ALLEN, *supra* note 38, at 3 (“Avoidance is such a common reaction that it’s a defining feature of posttraumatic stress disorder.”).

102. *See, e.g.*, Garret Condon, *Vague Terror Alerts Called Hurtful*, HARTFORD COURANT, May 22, 2002, at B1 (citing comments by Dr. Charles A. Morgan III, associate professor of psychiatry at the Yale University School of Medicine and associate director of the post-traumatic stress disorder program at the VA Connecticut Healthcare System, that “he expects that the rate of PTSD from [9/11] will be comparable to the rates among war veterans: 8 percent to 12 percent among Vietnam War vets, and about 8 percent among those who fought in the Gulf War.”). Dr. Morgan admits, however, that “it’s impossible to say what the lasting psychological impact of Sept. 11 will be, although a number of studies are underway.” *Id.* *See also* Markels, *supra* note 15, at 71 (citing the 8 percent figure).

103. A study released in May 2002, conducted by a research team from the Columbia University School of Public Health and Applied Research & Consulting LLC, concludes that “[m]ore than a fourth of New York City schoolchildren are suffering from at least one trauma-related disorder such as anxiety and agoraphobia.” Christine Haughney, *N.Y. Students Still Distressed From Sept. 11*, WASH. POST, May 2, 2002, at A6.

fashion.<sup>104</sup> Even if it were defensible, the unique nature of 9/11 guarantees that these numbers are unreliable. One research team posits that the number of people who are clinically ill as a result of traumatic events could be much larger than any previous studies could predict, given the prevalence of "subthreshold PTSD."<sup>105</sup> This diagnosis would apply to people who have suffered as a result of 9/11 but fall short of having enough symptoms to warrant a clinical diagnosis of PTSD under the DSM-IV definition.<sup>106</sup>

As a result, it follows that the definition of PTSD itself may be insufficient for issues related to 9/11, implying we do not have a sufficient comprehension of the situation. Experts caution that using such a label to explain the various reactions to traumatic events may be outdated, as there may be a continuum of disorders instead of one.<sup>107</sup> The field trials leading to the groundbreaking recognition of PTSD focused on patients with a limited number of post-traumatic conditions, namely combat, disaster, and rape.<sup>108</sup> Terror is different because of its randomness predicated on the terrorists' promises to strike anywhere, at any time, with little or no warning.<sup>109</sup> This is an

---

104. HERMAN, *supra* note 13, at 34 ("[s]implistic efforts to quantify trauma ultimately lead to meaningless comparisons of horror.").

105. See Randall D. Marshall et al., *Comorbidity, Impairment, and Suicidality in Subthreshold PTSD*, 158 AM. J. OF PSYCHIATRY No. 9, at 1467 (2001).

106. *Id.*

107. See HERMAN, *supra* note 13, at 119-20.

108. "They [diagnostic criteria for PTSD] are based on the prototypes of combat, disaster, and rape." HERMAN, *supra* note 13, at 119. See also Alexander C. McFarlane & Giovanni de Girolamo, *The Nature of Traumatic Stressors and the Epidemiology of Posttraumatic Reactions*, in *TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY AND SOCIETY*, *supra* note 49, at 129, 137 (field trials for DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS were based on individuals "who had experienced a limited range of traumatic experiences").

109. See, e.g., Jessica Hamblen, *What are the Traumatic Stress Effects of Terrorism?*, Natl. Ctr. for PTSD, at [http://ncptsd.org/facts/disasters/fs\\_terrorism.html](http://ncptsd.org/facts/disasters/fs_terrorism.html) (last visited Oct. 31, 2003) ("Terrorism erodes—at both the individual level and the community level—the sense of security and safety people usually feel. Terrorism chal-

important element of the terrorist's strategy, and thus introduces a new dimension to our thinking about trauma; a dimension that those who have studied Vietnam veterans, for instance, never faced.

Dr. Judith Herman points out another problem with the DSM-IV definition of PTSD. She notes that development was based on "circumscribed traumatic events," not those occurring over a length of time, it cannot accurately account for prolonged traumatic events, such as repeated spousal abuse – or terror.<sup>110</sup> She proposes the recognition of a syndrome to be called "complex post-traumatic stress disorder." Using this logic for 9/11, the current definition of PTSD is inadequate for conditions involving terror events plus warnings of terror over a protracted amount of time.<sup>111</sup>

More problems exist. Due to the unique nature of 9/11 in our history; we have no experience with the psychological effects of this type of traumatic event.<sup>112</sup> Other major conflicts took place elsewhere. It is of note that the last time a foreign power invaded the sanctity of our Capitol was during the War of 1812; the pioneers of trauma research were not born until more than fifty years later. 9/11's ubiquity exacerbates the problem. Virtually every American experienced 9/11 through the media. The sight of the White House burning in 1814 may have been terrifying for those on the scene, but it was not broadcast live on national television. What impacts were felt by those transfixed to CNN's coverage of the planes slamming into the World Trade Center? We cannot know for sure.<sup>113</sup> While

---

lenges the natural need of humans to see the world as predictable, orderly, and controllable.").

110. HERMAN, *supra* note 13, at 119; van der Kolk et al., *History of Trauma in Psychiatry*, *supra* note 49, at 61-62 (noting that the basis for inclusion of PTSD in the third edition of DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS was studies on war and rape that were done in the 1970s).

111. See Jamie Talan, *The Danger In Frequent Danger Warnings*, NEWSDAY, June 4, 2002, at D01 (noting that the impact of repeated warnings is not well understood); Condon, *supra* note 103.

112. See Hamblen, *supra* note 110 ("Fortunately, there have been very few terrorist attacks in the United States. One consequence of this, however, is that there has been little research about how people are affected by terrorism.").

113. See Shankar Vedantam, *After Sept. 11, Psychic Wounds Slow to Heal*, WASH. POST, Mar. 17, 2002, at A3 ("What psychological

some have studied adults and children in New York and Washington, few seem curious about what those in Kansas City or Peoria are feeling. We posit that someone who personally watched a body falling from a burning tower must be more at risk for symptoms of post-traumatic stress than someone who watched that same event on television, but beyond such comparison it gets difficult to say who is affected and by how much.<sup>114</sup> The element of surprise inherent in terrorist attacks could increase the likelihood that even those watching on television were seriously affected.<sup>115</sup>

## 2. We May Not Be Back to Normal (Even If it Looks Like It)

Conventional wisdom may say that 9/11 changed everything for a short time and then life went on, more or less, as before.<sup>116</sup> Yet ex-

---

scars, for example, were suffered by Americans who watched horrific images over and over on TV, and felt personally attacked?"). See generally Jessica Hamblen, *How the Community May Be Affected by Media Coverage of the Terrorist Attack*, at [http://www.ncptsd.org/facts/disasters/fs\\_media\\_disaster.html](http://www.ncptsd.org/facts/disasters/fs_media_disaster.html) (last viewed Oct. 31, 2003) (citing conflicting studies regarding the impact of watching television on increases in PTSD symptoms and concluding that "[a]lthough there is little research" on the subject, "too much trauma-related television viewing may have a negative impact, especially on children").

114. See, e.g., Markels, *supra* note 15, at 71 ("As yet, though, it's unclear whether [the people who get PTSD as a result of the attacks] will turn out to be 8 percent of the tens of thousands of rescue workers and victims' relatives, or of the tens of millions who experienced the trauma via TV and the event's social and economic aftermath.").

115. See Hanna Rosin, *9-11 Changed Everything. For a Little While*, WASH. POST, Mar. 19, 2002, at C1 ("Most research in post-traumatic stress so far has examined direct victims of catastrophe, their families or rescue workers. But in an age of terrorism and 24-hour news, researchers have begun to study the more oblique symptoms that show up months later in people who do nothing more than watch.").

116. One observer notes wryly, "McDonald's is still frying up Big Macs and Calvin Klein is still dreaming up evening dresses." Walter Kirn, *Notes on the Darkest Day*, N.Y. TIMES, Sept. 8, 2002, at 7 (reviewing a number of post-9/11 books).

perts tell us that well after a traumatic event, the trauma may remain unresolved.<sup>117</sup> At the Fordham Environmental Law Journal's symposium entitled "Terror in the Air", there were sharp, pointed exchanges about the cleanup of lower Manhattan and the alleged malfeasance of governmental officials. Anyone who heard the outbursts of raw emotion from angry residents did not have to be a clinical psychologist to note that those closest to Ground Zero are still suffering.<sup>118</sup> Those at a distance may have since resumed fully functional lives, yet harbor a fear of further terror attacks. In this environment, who is to say what is to follow in the coming months?

There is also a simple temporal problem. New warnings come all the time, no one can theorize when the war on terror will end.<sup>119</sup> Thus it is counterintuitive to assume most people are "over" 9/11. Even the secondary evidence that convinces some that America is returning to "normal" (for example, such a belief based on rebounding travel rates)<sup>120</sup> does not uniformly indicate a return to pre-9/11 levels and in fact shows that some behavior has been changed in significant ways.<sup>121</sup> In sum, the relationship between trauma and 9/11

117. HERMAN, *supra* note 13, at 165 ("Though the survivor may make a rapid and direct return to the appearance of normal functioning, this symptomatic stabilization should not be mistaken for full recovery, for the integration of the trauma has not been accomplished."). An observer who reviewed a number of post-9/11 books for the "anniversary" of 9/11 asks, "Can the books help us move on? It feels too soon for that." Kirn, *supra* note 117, at 7.

118. Still, it helps to have some confirmation. One observer noted that well after 9/11 there was another wave of people requesting psychological help for lingering effects. See Lagnado, *supra* note 11.

119. Michael Kilian, *Global Anti-terrorism Efforts Can't Slack Off, Senators Told*, CHI. TRIB., June 27, 2002, at 3 (discussing ongoing threat posed by al-Qaeda and the arrest of the "dirty bomb" suspect); James P. Pinkerton, *Militarism's Lethal Logic*, L.A. TIMES, May 10, 2002, at B15 (citing the prediction by investment expert Warren Buffett that it is "virtually a certainty" that "terrorists will inflict 'a major nuclear event' on the United States sometime soon").

120. See, e.g., Michael Cabanatuan, *Travelers Defy Threats, Take to Skies For Holiday*, S.F. CHRON., May 23, 2002, at A1.

121. *Id.* (stating "...all is not back to normal. Airlines are still flying fewer flights, and hotel occupancy rates in most tourist destinations – including San Francisco – remain down."). Some interesting

is complex and not reducible to decisions to book hotel rooms. The unspoken assumption that if as many people take a hotel room as before we are "cured" does not account for those whose lives have changed after 9/11 and those who still fear a terrorist attack.

One might expect that it would be relatively straightforward to predict who may still be affected. Such ease of analysis, if expected, is unfounded. Beyond the simple uniqueness of 9/11, there are plenty of reasons for the dearth of good information. As a result of the recent development conceptualizing trauma as within the realm of normal human experience, we have little practice with viewing it as something that can affect large groups of people in diverse ways. There are also complex logistical difficulties inherent in mounting a longitudinal study that would evaluate rescue workers from Pittsburgh, television viewers in Kansas City and children in New York schools.<sup>122</sup> One does not poll people for quick answers about trauma; such research will take concerted effort by researchers over a lengthy period of time.

Not surprisingly, then, if one goes looking for a comprehensive study of how large groups of people respond to terror, few good models are at hand. American researchers have studied disasters in some detail,<sup>123</sup> but a natural disaster does not compare to a manmade

---

evidence that Americans have changed their travel habits, albeit mostly anecdotal in nature, can be found in the increasing allure of domestic vacations. In mid-2002, for example, one writer posited a link between terrorism and a surge in RV usage. Nicholas D. Kristof, *When Home Got 10 Miles A Gallon*, N.Y. TIMES, July 14, 2002, § 5, at 10 (noting that the reasons for increased RV usage "presumably include a reluctance to fly and a preference for old-fashioned family vacations in remote places with mosquitoes and bears, but no terrorists").

122. See, e.g., John B. Reid, *A Role for Prospective Longitudinal Investigations in the Study of Traumatic Stress and Disasters*, at <http://www.trauma-pages.com/reid90.htm> (last viewed Oct. 31, 2003) (describing some of the difficulties in longitudinal studies of trauma victims, including biases).

123. See Fran H. Norris et al., *50,000 Disaster Victims Speak: An Empirical Review of the Empirical Literature 1981-2001*, Natl. Ctr. for PTSD and Center for Mental Health Services, at <http://obssr.od.nih.gov/Activities/911/disaster-impact.pdf> (last visited Oct. 31, 2003).

terrorist attack. There is some reliable information available about the Oklahoma City bombing that suggests a high rate of PTSD in rescuers and survivors.<sup>124</sup> The other model of a situation comparable to 9/11 – an attack plus the threat of future harm – is found in the detailed studies of the Israeli reaction to terror.<sup>125</sup> Yet even these studies can be readily distinguished from the 9/11 experience. Israelis live in a country much smaller than our own, surrounded by hostile states harboring terrorists. The threat of terrorism has been pervasive and omnipresent dating to the country's founding in 1948.

The current state of research on trauma and recovery is marked with opacity when applied to 9/11. Given that the collection of raw data, showing how most of us recovered within a period of months after 9/11, come from this research, they give us little confidence. We are not “over” 9/11 yet; the psychological effects of that wound require a lot more attention than simple statistics can offer. Even if we assume only 10% of those in our two largest metropolitan areas were stricken with PTSD, such would be a major mental health concern.

## II. A MODEL OF POST-TRAUMATIC SOCIETAL ADAPTATION

We must acknowledge that the psychological effects of 9/11 could well be more wide-ranging than previously perceived, and may lead to changes previously unforeseen. Not all of these changes will be constructive, and not all will have a relationship to the legal system. Many trauma survivors are not interested in reconnecting with external society, and we can expect that some will withdraw from the world around them and engage in wholly private pursuits.<sup>126</sup> Yet others will attempt to bring about change by turning to social action.<sup>127</sup>

---

124. See Vedantam, *supra* note 114, at A3 (citing a study finding a 34% rate of PTSD among rescuers and survivors).

125. See Koopman, *supra* note 9, at 841 (citing studies); Shalev, *supra* note 42, at 84 (citing his own study of 15 terror victims).

126. HERMAN, *supra* note 13, at 207 (“Most survivors seek the resolution of their traumatic experience within the confines of their personal lives.”).

127. Obviously, not all victims set aside destructive forces, and it might be interesting to speculate on how that problem might resolve

Traumatic events can be "catalyst[s] for social change,"<sup>128</sup> but the mechanism by which this occurs has not been made clear. There are many reasons for such a state of affairs. Trauma study is a recent phenomenon, but impacts causing change have happened for centuries without any recognition of traumatic effects.<sup>129</sup> Change can happen under circumstances that make it difficult to recognize the effects of trauma (for example, official denials of traumatic events).<sup>130</sup> It is also apparent that not all social change after an event such as 9/11 is the result of the introspection demanded by the recovery process. Still, one should note the widely held notion that many trauma survivors have been active and successful advocates for change.<sup>131</sup> They have, in the words of one expert, "been able to

---

itself in the context of 9/11. Certainly one could imagine without too much difficulty a criminal trial with a defense related to post-traumatic stress.

128. McFarlane & van der Kolk, *Trauma and Society*, *supra* note 81, at 33. See also HERMAN, *supra* note 13, at 208; Paul Kennedy, *Maintaining American Power: From Injury to Recovery*, in *THE AGE OF TERROR*, *supra* note 16, at 53, 57 ("History is replete with examples of well-established nations that received a staggering blow but then scrambled to recover from the wound.").

129. McFarlane and van der Kolk offer the examples of the Marshall Plan, GI Bill, and Veterans Administration construction, all of which were done without attention to psychology and its meaning for a recovering nation; in the case of VA construction, for example, "with all this thoughtful attention to the returning veteran, no attention was paid to the psychological scars of war." McFarlane & van der Kolk, *Trauma and Society*, *supra* note 81, at 34.

130. An example of this is political recognition of the Holocaust. Even research on its psychological consequences "was initiated slowly because of a social climate of denial." Koopman, *supra* note 9, at 838. Yet another example is that of repressive societies where torture and other brutal behavior sponsored by governments are of course frequently accompanied by denial. See, e.g., McFarlane and van der Kolk, *Trauma and Society*, *supra* note 81, at 40-41. Even in these repressive societies it is possible for change to take place. *Id.*, at 41 ("Somehow, it is possible for societies to make a transition from cycles of victimization and revenge.").

131. McFarlane & van der Kolk, *Trauma and Society*, *supra* note 81, at 33.

transform their trauma into a way of helping other people.”<sup>132</sup> Those most successful at this strike a delicate balance between excessive reliving of the traumatic events and capitulation to a societal failure to recognize the trauma and ameliorate its effects.<sup>133</sup>

Leading authorities on trauma recognize the potential for advocacy, but offer few definitive statements about how advocates transform suffering into social change. In response, I offer an approach I will term “post-traumatic societal adaptation” (PTSA). This approach, with appropriate caveats and qualifications, is intended to offer guidance about what may become “normal” after 9/11. I have mimicked the term “post-traumatic stress disorder” quite deliberately, to signal to those largely unfamiliar with this field (but who may know of the disorder) that the process of social change relates, in a fundamental way, to trauma and recovery. I use the term “adaptation” to recognize the pervasiveness of post-traumatic stress and the full range of adaptive behavior likely to be required of trauma survivors.<sup>134</sup> In some respects, I also echo the work of those scholars who have looked to science and mathematics for ideas about legal change that represent a more holistic (or “adaptive”) approach to how we respond to our environment.<sup>135</sup>

There is no one way that people respond to trauma, there are relatively few hard specifics, and many areas exist where rigorous empirical testing yet have not been studied. Taking these factors into account yields this to be potentially a more satisfying model than any other at hand to explain how human beings will continue to respond to 9/11, but it should not be mistaken for a justification for law that substitutes scientific principles for Western political philosophy; that would be entirely unsatisfactory. Trauma and recovery may be an important factor in steering the course of the republic over the next decades, but any specific laws that emerge should still be

---

132. *Id.*; see also HERMAN, *supra* note 13, at 208.

133. McFarlane & van der Kolk, *Trauma and Society*, *supra* note 81, at 34.

134. McFarlane and van der Kolk state, “[i]n order to move beyond trauma, people, institutions and societies need to take adaptive action.” *Id.*

135. For a fascinating commentary on this link between science and public policy, see STEVEN VOGEL, *PRIME MOVER: A NATURAL HISTORY OF MUSCLE* ix (2001) (“[a] biologically based view can shed light on our human world.”).

judged against traditional political and economic criteria.<sup>136</sup> Survivors can and will encounter opposition to their claims. Proposals for compensation for 9/11 victims were debated and approved rather swiftly.<sup>137</sup> Going beyond that may prove problematic, as it has often been difficult in the political sphere to validate the empowerment of recovered victims.<sup>138</sup> When rape victims spoke out about not only rape laws but also more generally the unequal treatment of women, we saw resistance in the legislative and judicial systems to that pressure.

A. *The Model: "Adaptive Resources," "Early Adapters," "Pattern Markers," and the "Survivor Mission"*

1. Early Adapters and the Survivor Mission

I will begin by identifying the advocates introduced above. If the aftermath of 9/11 resembles past situations involving traumatic events, those with the strongest predisposition to social action, as a logical extension of their recovery process, should find themselves in a vanguard.<sup>139</sup> Those pioneers will assess the existing system and apply themselves to changing the legal structure. For example, they

---

136. See, e.g., CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 47-60 (1990) (describing statutes as products of forces such as market failure and attempts to trade off private preferences).

137. See Lena H. Sun & Jacqueline L. Salmon, *U.S. Sets Formula to Pay Victims; Sept. 11 Families Average \$1.6 Million*, WASH. POST, Dec. 21, 2001, at A1 (describing the rules of the Sept. 11 Victims Compensation Fund approved in the airline bailout legislation). Unfortunately, the fund is not without its challenges. See Lena H. Sun & Jacqueline L. Salmon, *Sept. 11 Families Fight Fund Rules; Relatives Call Federal Compensation Stingy*, WASH. POST, Jan. 17, 2002, at B1.

138. HERMAN, *supra* note 13, at 211 ("The survivor who undertakes public action needs to come to terms with the fact that not every battle will be won.").

139. *Id.*, at 207-08 (describing the forcefulness of survivors who "transcend" traumatic events by establishing a "connection with the best in other people"); McFarlane & van der Kolk, *Trauma and Society*, *supra* note 81, at 33.

may work to reverse laws that embody societal assumptions that put them at risk of becoming victims again. There are already formal 9/11 survivor groups that have dedicated themselves in part to legal change. Whether they will be the most successful advocates for change remains to be seen; however their mere existence suggests the importance for some survivors to become involved in the political process.<sup>140</sup> Dr. Herman uses the term “survivor mission” to describe the agenda developed by these early advocates, and I will do so as well.<sup>141</sup>

These pioneers enjoy a sort of prominence in history. They are credited with the strength of personal commitment and perseverance that makes change possible.<sup>142</sup> The literature does not always use the language of psychology, as it could, but often makes clear that there is a direct link between their traumatic experiences and their commitments to improving the lot of others.<sup>143</sup> It is probable, though it requires evaluation, that these people would have a very substantial impact on the course of any law that bears a relationship

---

140. The New York Environmental Law and Justice Project has been an active advocate for “awareness of the eruption of dangers to our environment that we now face since 9-11, plans for a major cleanup, and . . . actions to rectify these situations.” See New York Environmental Law and Justice Project, WTC Page, at <http://www.nyenvirolaw.org/wtc-index.htm> (last visited Oct. 31, 2003). See also Susan Levine, *A Mission of Remembrance; Relatives of Sept. 11 Victims Turn Grief Into Political Action on Array of Issues*, WASH. POST, Dec. 12, 2001, at B1 (“It [9/11] also is giving rise to grief as a political force. At least five groups have formed, including the Families of September 11 and Pentagon Angels here and three others in New York.”). A vivid description of the impact of the attacks on the New York legal community, and the response from lawyers interested in pro bono efforts, is found in Matthew Wilkes, *Teaching Through Tragedy: The Aftermath of September 11 – A Community Service Response*, 34 CASE W. RES. J. INT’L L. 205 (2002).

141. HERMAN, *supra* note 13, at 207; see also ALLEN, *supra* note 38, at 309 (quoting Dr. Herman and placing her comments about the “survivor mission” in the context of a desire to help others).

142. McFarlane & van der Kolk, *Trauma and Society*, *supra* note 81, at 33.

143. See, e.g., *id.*

to trauma and 9/11. It may be hypothesized that they will develop alliances that will prove useful in advancing their agenda, so it is incorrect to assume they would act alone.<sup>144</sup> Still, we are so accustomed to recognizing the importance of those who speak out forcefully about legal and political issues that I will term them "early adapters" to reflect their prominence in post-recovery dynamics. The fact that 9/11 happened to everyone does not necessarily make everyone an early adapter; that term fits only those who have become motivated to press for change as a result of their own dealings with 9/11.

## 2. Adaptive Resources

As we think about the legal change likely to be spurred by early adapters, we should be sure to examine the role of certain values, developed during the recovery process, as motivational forces. The recovery process is all about the development of a new self, different in fundamental ways from the old.<sup>145</sup> For many survivors of trauma, a variety of elements of the self can arise or, if already in existence, be honed during the recovery process. Survivors have come to appreciate capabilities they developed during the process (for example, mental skills that allowed for better processing of unpleasant memories) and features of their renewed connections with society (such as new support networks).<sup>146</sup> It is an understanding of these new elements of their lives that drives some survivors to change the world

---

144. HERMAN, *supra* note 13, at 210 (noting that the choice to speak out about social ills increases the potential for finding allies).

145. HERMAN, *supra* note 13, at 202 ("Her [the trauma survivor's] task now is to become the person she wants to be. In the process she draws upon those aspects of herself that she most values from the time before the trauma, from the experience of the trauma itself, and from the period of recovery. Integrating all of these elements, she creates a new self, both ideally and in actuality.").

146. An empirical study of rape victims, 15-30 months after their rapes, found that notwithstanding the fact that rape is a "highly stressful experience," the evidence "reinforces the view that for many people stressful life events can be growth promoting and foster maturation." Carol C. Nadelson et al., *A Follow-Up Study of Rape Victims*, in *ESSENTIAL PAPERS ON POSTTRAUMATIC STRESS*, *supra* note 45 at 161, 167-68.

around them, helping others achieve the same or similar goals.<sup>147</sup> As we shall soon see, not all of these elements of the new self lead to a preference for social action, but we can attempt to link those that do to the type of change that survivors might demand. We see this in describing why recovered trauma victims do not simply focus on their own predicament. If the recovered rape victim pushes for stronger rape laws because that would prevent others from being raped, we can conclude that the survivor's understanding of her new-found sense of safety may have played a part in the formation of her advocacy.

Borrowing from Dr. Herman, I use the term "adaptive resources" as a shorthand description of both the means deployed to enable the victim to survive and recover from trauma and the characteristics of the new self developed during that process.<sup>148</sup> These adaptive resources are aspects of the recovery process that frequently lead a recovered victim to a new lifelong personal agenda. The interaction with others during the latter stages of recovery, for example, can stimulate a new way of entering into and fostering of interpersonal relationships.<sup>149</sup> Many adaptive resources are significant markers of personal growth and development, but present no real necessity for any legal change. If one has become more confident speaking in front of groups as a result of recovery, such may be a laudable development, but presents no basis for legal change. The opposite is also true: it is often possible that some existing laws might come into conflict with adaptive resources developed by early adapters after a dislocation. The trauma survivor's evaluation of whether legal change is necessary builds upon the adaptive resources she developed in the crucible of the recovery process.

What are the expected adaptive resources and survivor's mission after a traumatic event has occurred? For survivors, the process of overcoming fear and replacing it with empowerment requires a variety of skills.<sup>150</sup> One of the most basic is doing whatever necessary to survive the immediate impact of the stressor. Psychologists often

---

147. HERMAN, *supra* note 13, at 207-11.

148. *Id.* at 204.

149. *See, e.g.*, ALLEN, *supra* note 38, at 163-65.

150. HERMAN, *supra* note 13, at 204.

refer to this by the shorthand of "fight or flight,"<sup>151</sup> to represent the fact that not all victims choose to resist. One who has come to grips with trauma, in part by identifying and bolstering this skill, may later advocate concrete measures to protect the self and others against future danger; for example, a rape victim who seeks to prevent future similar attacks could focus on the promulgation of new rape laws.<sup>152</sup> This push for safety would hardly be limited to action aimed at punishing acts of aggression because survivors may also focus on helping others avoid similar traumatic experiences.<sup>153</sup> In the case of rape, it would include action taken to eliminate societal preconditions that make rape possible; for example, if there were no pornography the objectification of women, thus delimited, would preclude the potential for characterization as "sex objects."<sup>154</sup> Other advocates work to eliminate barriers to overcoming fear that prolong the reliving of the traumatic event: if, for example, the law did not allow the defense to probe a woman's conduct before her alleged attack, then rape victims could have less fear of taking the witness stand.<sup>155</sup>

The survivor mission is typically even more adventurous because the common characteristic of all social action efforts by survivors is that they seek to raise awareness of the traumatic event and its wide-ranging effects.<sup>156</sup> Once again, a comparison to rape victims is in order. No one would seriously argue that rape survivors should be limited to pressing for changes in rape laws, because that would be inconsistent with the survivors' desire to challenge entrenched beliefs about the full panoply of societal assumptions that cast women

---

151. ALLEN, *supra* note 38, at 29-30; *see also* Garcia-Rill & Beecher-Monas, *supra* note 35, at 12-14 (describing the physiology of the "fight or flight" response).

152. *See generally* Estrich, *supra* note 44.

153. HERMAN, *supra* note 13, at 208.

154. *See generally* CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSE ON LIFE AND LAW* 127-205 (1987).

155. *See* Estrich, *supra* note 44, at 1093. These so-called "rape shield laws" are not without their controversy. *See* Shawn J. Wallach, *Rape Shield Laws: Protecting the Victim at the Expense of the Defendant's Constitutional Rights*, 13 N.Y. L. SCH. J. HUMAN RTS. 485 (1997); David Haxton, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 WIS. L. REV. 1219 (1997).

156. HERMAN, *supra* note 13, at 208.

in a subordinate role. Indeed, one thread running through the advocacy efforts of rape survivors over the years is the desire to make conditions better for all women.<sup>157</sup> It may well be that a survivor will encounter more resistance when pursuing a broader reform effort, however this, one may argue, does not indicate an attempt shall not be made.

### 3. The Problem of Attribution and the Role of “Pattern Markers”

Giving proper credit to the trauma and recovery process, as a driver for change, can be difficult. This leads to a problem I will term “attribution,” which has two fundamental aspects. The first is the challenge of identifying early adapters accurately, particularly in the context of 9/11 where everyone has been affected to some extent.

Sometimes identification need not be difficult. For many survivors, there is a need for societal support for the expression of their voices; without that the status quo cannot be readily overcome.<sup>158</sup> It is therefore possible that some survivors of 9/11 will identify themselves by speaking out about their mission, much as rape survivors have. Even if they do identify themselves, it may prove difficult to discern the motivation for their actions. Adaptive resources can take the form of enhancements of existing personality traits, and this can tempt us to believe resilience is an innate quality, rather than something developed as an outcome of a careful recovery process. Still another problem is that many who would push for change may have records of advocacy. In the years to come, it may be argued by some that decide that pre-existing agendas, not the impacts of 9/11, drive some survivors to pursue social change.

---

157. For example, Professor Estrich may be best known for her pioneering articles on rape, but her recent scholarship and works for laypersons include analyses of the “gender gap” in elections (Susan Estrich, *Bridging the Gender Gap*, 3 *SCHOLAR* 153 (2001)), women in the workplace (SUSAN ESTRICH, *SEX AND POWER* (2000)), and even women’s diet and nutrition needs (SUSAN ESTRICH, *MAKING THE CASE FOR YOURSELF: A DIET BOOK FOR SMART WOMEN* (1998)).

158. HERMAN, *supra* note 13, at 9.

A second attribution-related problem is deciding which survivors have a "first mover" advantage in forcing social change.<sup>159</sup> The universal nature of 9/11 means that virtually anyone can claim that their advocacy agenda is a legitimate outgrowth of 9/11. The challenge is to decide which of these people will become successful to the extent that we would think of them as early adapters. As a result, we need to qualify the role of adaptive resources by positing that they may well be most relevant to the extent there are perceived widespread similarities in the recovery process from 9/11. The individualized nature of the recovery process means adaptive resources will not be the same for everyone (just as not every woman responds to rape in the same way) and these resources will change and develop over time (the way one expresses and conducts oneself in the final stage of the recovery process is not the same way one does later). Commonalities among early adapters and others who either join with them or offer political support will be reflected in the legal system; other resources will not.

If I have become empowered in a certain way and build upon that to reconnect with the public sphere, but my message does not resonate with anyone else, then little change is likely. The essential characteristic is this resonance that depends on the presence of others who support my viewpoint, whether or not they are early adapters themselves. There are numerous reasons why the messages of one or more survivors may fail to gain widespread acceptance. Other survivors can perceive them as not important. Entrenched political obstacles can stymie them.<sup>160</sup> Notably, opposition to one group of survivors can arise from other survivors convinced of the merit of their own missions. This has already been problematic in the case of

3

---

159. An excellent discussion of this dynamic and the literature on which it is based is found in William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 WM. & MARY ENVTL. L. AND POL'Y REV. 1 (1997).

160. This is particularly true if survivors are part of a group disadvantaged by existing laws. See, e.g., SUNSTEIN, *supra* note 137, at 63 (noting that "Psychological mechanisms of this sort [embodying a 'taste' for discrimination] furnish a formidable barrier to social change.").

9/11, as was evident from the protracted battles over what to build on the remains of the fallen World Trade Center.<sup>161</sup>

In deciding whether a survivor's action is likely to generate sufficient energy that will bring forth a critical mass of support, we must look at whether the action is a reliable reflection of the shifts in the preferences of others.<sup>162</sup> The self-identification of a survivor and the intensity of her argument are helpful but not necessarily conclusive because they do not indicate that others will alter their preferences for legal action. The principal reason why preferences change is that the survivor's message relates to our own development of adaptive resources. Unfortunately, we do not know what path that will take because the reactions of large populations to traumatic events of this sort have not been studied. So we will need what we might consider secondary indicia: data tending to correlate with well-known responses such as "fight or flight" as an expression of avoidance behavior of danger. Thus, data showing that videoconferencing has increasingly replaced travel as a means of doing business<sup>163</sup> may be useful to suggest how we have adjusted our behavior as a result of 9/11, and how we might as a result be amenable to legal change that builds upon and reflects these adjustments. I will term this type of data "pattern markers" to indicate its importance in signaling potential shifts in preferences.

---

161. See *WTC Site Plans Receive Mixed Reaction*, CBS News.com, July 16, 2002, at <http://www.cbsnews.com/stories/2002/07/17/national/main515386.shtml> (last visited Oct. 31, 2003); Anna Quindlen, *Look at What They've Done*, NEWSWEEK, June 3, 2002, at 68 (discussing and critiquing various proposals for the site).

162. That a survivor has the ability to shift the preferences of others is unquestioned. See, e.g., SUNSTEIN, *supra* note 137, at 40-42 (noting that preferences are not fixed like economics scholars argue but can shift).

163. See, e.g., National Business Travel Association, *Business Travel Professionals Seek to Cut Costs, Strengthen Relationships*, July 1, 2002, at [http://www.nbta.org/info/pressreleases\\_7\\_1.htm](http://www.nbta.org/info/pressreleases_7_1.htm) (last visited Oct. 31, 2003) (providing a survey of business travel managers, which found that 61% of travel buyers "say they will recommend increasing the use of conference calls or webcasts").

### B. *The Model in the Context of 9/11*

What would this model imply for social change after 9/11? We would expect advocates to begin with actions designed to protect the victims of 9/11 and others (such as future generations) against danger. Much has already been said about modifying our strategies to combat new terrorist attacks both at home and abroad, but there is still room for innovation. Just as rape victims seek development with rape laws, so too could those affected by 9/11 push for even stronger anti-terror laws than those already emerging.<sup>164</sup> The ongoing examination of strategies designed to help prevent attacks in the first place is also likely to continue. This helps explain why there has been extensive fingerpointing about who knew what and when before 9/11.<sup>165</sup> If our feckless and Byzantine governmental bureaucracy made it easier for terrorists to come here, stay here,<sup>166</sup> and then attack us, this must change to make subsequent attacks more difficult. Consequently, BICES (formerly the INS), the CIA and the FBI will probably face comprehensive overhauls in the years to come.<sup>167</sup>

---

164. To a certain extent, this is already taking place. See Levine, *supra* note 141 at B1 (“... several of the groups [formed after 9/11] claim a greater purpose, realizing the power of their collective voice to affect everything from the recovery of bodies amid the rubble of the World Trade Center to government debate on improving airline security and combating terrorism.”).

165. The reorganization of the FBI to emphasize terrorism prevention has a deep resonance with the types of actions taken by individuals to ensure safety in the wake of traumatic events. See Susan Schmidt, *Terrorism Focus Set For FBI; Mueller's Reorganization Would Shift 480 Agents*, WASH. POST, May 29, 2002, at A1. The fear of helplessness many felt after 9/11 relates not only to their post-event condition, but also to the recognition that nothing their government had done served to prevent 9/11 from happening. *Id.*

166. See Dan Eggen & Cheryl W. Thompson, *Hijackers' Visa Fiasco Points Up INS Woes; System Fails So Often It's Not Even Expected to Work, Immigration Experts Say*, WASH. POST, Mar. 17, 2002, at A20 (discussing the “embarrassing news that a Florida flight school had belatedly received visa approval notices for two dead Sept. 11 hijackers”).

167. See *id.*

Beyond this, some laws that will emerge farther in the future – but will be indelibly etched in the public mind as connected to 9/11 – will be no more obvious to hindsight than the GI Bill would have appeared in 1942. At present, we cannot clearly tell what form those laws will take. In the middle of an armed conflict there is understandable preoccupation and little opportunity to develop a survivor mission for 9/11. Still, there are those who have looked beyond the narrow focus of conducting the war. A broad spectrum of theologians, pundits, academics, so-called “terrorism experts” and the like offer a wide range of views on what happened and why, and what form the national response shall take. Definitive pronouncements have been made by pundits willing to offer unqualified opinions about our new reality. Some demand changes in foreign policy because they believe resentment of America fueled the attacks.<sup>168</sup> So called “hawks” press for more military spending. Advocates of globalization say it is now more essential than ever, while opponents speak of a new American unilateralism, which finds its most potent expression in the war in Iraq. Yet amid the present cacophony of voices, it is hard to tell who speaks with clarity. There must be pearls of wisdom scattered about; after all, it is believed that some people were right about 9/11 had anyone listened to their warning.<sup>169</sup>

Nevertheless, we can begin to make a tentative short list of adaptive resources that seem to be prominent in discussions about the aftermath of 9/11, which may well help steer public policy. Some of these resources relate to specific actions that a number of people

---

168. See, e.g., John Lewis Gaddis, *And Now This: Lessons From the Old Era For the New One*, in *THE AGE OF TERROR*, *supra* note 16, at 3, 11-18 (noting that “our foreign policy since the cold war ended has insufficiently served our interests” and discussing the reasons for resentment of America in the world); Bill McKibben, *An End to Sweet Illusions*, *MOTHER JONES*, Jan./Feb. 2002, at 38. Of course, there is nothing new about the charge that democratic republics make missteps and lack coherence in the sphere of foreign policy. See, e.g., FUKUYAMA, *supra* note 2, at 9 (citing a criticism dating to de Tocqueville that “democracies have great difficulties sustaining serious and long-term foreign policies”). But the chorus for change in the wake of 9/11 seems especially loud.

169. See, e.g., STEVEN EMERSON, *AMERICAN JIHAD: THE TERRORISTS LIVING AMONG US* (2002) (detailing more than ten years’ experience studying terror movements and predicting attacks).

have taken to deal with the trauma induced by 9/11, creating the foundation for a lasting shift in preferences. There is, for instance, an increased interest in developing networks for personal support, which one historian calls "tribal closeness."<sup>170</sup> In the months after 9/11, many of us reached out to loved ones and even neighbors with whom we had previously not had much contact; pattern markers that would tend to support this include trends in cell phone usage and the like. Survivors of 9/11 who find this most relevant to their recovery might push for more extensive networking of individuals and entities (public and private) in society as a whole. Without rehashing the difficulties of defining a "community," which are thoroughly explored elsewhere,<sup>171</sup> one may infer that land-use laws allowing tighter neighborhood clusters, or transportation laws that make new reliable high-speed connections possible, will find stronger support after 9/11.

### 1. Preference For Low-Profile, Low-Risk Networks

Another adaptive resource may well be a preference for production and distribution networks of staples of life that have two salient characteristics: low profiles to make it far less likely that these systems would face terrorist attacks, and a related feature, overall low risks of disruption of resource availability. Terror's biggest threat is the random attack that disrupts society. In the aftermath of 9/11, there has been considerable concern about means of production and distribution of basic staples such as food, water, and energy. Terrorists slammed into urban buildings because they were prominent symbols of American power, but also because they were relatively easier to target due to their size and location.<sup>172</sup> Overcoming the fear

---

170. See Christopher Dickey & Daniel Klaidman, *How Will Israel Survive?*, NEWSWEEK, Apr. 10, 2002, at 22 (quoting a statement by author and historian Tom Segev that terrorism – in this case the Palestinian intifada – "pushes us back into tribal closeness").

171. See, e.g., Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047 (1996) (calling for a new urban policy based on community building); see generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

172. See, e.g., Mark Felsenthal, *Another Casualty of Attack: Skyscrapers*, ORLANDO SENTINEL, Sept. 16, 2001, at G5 (quoting Uni-

of a terrorist attack and replacing it with empowerment virtually requires us to look around for other comparable targets and to protect them.

However, there is more to the idea of creating a low profile than simple protection, which we may well be virtually impossible. For example, it is exceedingly difficult to protect every urban transit system from attack by a suitcase bomb. Once one views that goal as impossible, then the appropriate response would be to replace prominent targets with less prominent ones to the maximum extent possible. As a result, there would be a need for legal structures that favor decentralized, reliable means of production over those that are massive and vulnerable to attack. Arguments will be made that seismic shifts in the production of staples would require compensation for mothballing of expensive infrastructure, and might fail to ensure that basic needs will be met. The likely responses are that there may be means to provide the same or greater level of resources (unless we cut back our level of consumption, which of course is a possibility), and there may be ways to replace outmoded infrastructure and compensate owners in some fashion.<sup>173</sup>

The idea of overall low risk with respect to staples of life is a slightly different one. It is a focus not so much on the vulnerability

---

versity of Wisconsin engineering professor Awad Hanna's statement that "To build a structure with a capacity for 40,000 people – it's a clear target."); Jesus Sanchez, *Fewer Skyscrapers Likely to Be Built in Shadow of Attack*, L.A. TIMES, Sept. 13, 2001, at A32 (noting that "[t]he high-profile, prestige and size that attract image-conscious businesses to such buildings are the same features that make them attractive targets").

173. An example in the energy arena, the subject of the next section, is the effort by various states to compensate utilities for so-called "stranded costs" (costs of infrastructure utilities assert they cannot recover due to deregulation of the electricity industry). See U.S. CONG. BUDGET OFFICE, *ELECTRIC UTILITIES: DEREGULATION AND STRANDED COSTS* (1998), available at <http://www.cbo.gov/showdoc.cfm?index=976&sequence=0#pt2> (last viewed Oct. 31, 2003); ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, *STATUS OF STATE ELECTRIC INDUSTRY RESTRUCTURING ACTIVITY*, available at [http://www.eia.doe.gov/cneaf/electricity/chg\\_str/scosts.html](http://www.eia.doe.gov/cneaf/electricity/chg_str/scosts.html) (last viewed Oct. 31, 2003) (charting the progress of recovery of stranded costs in each state's deregulation proceedings).

of production and distribution systems to attack as on minimizing the reasons to fear that terrorist actions will disrupt availability of basic resources. These two attributes overlap; if there are fewer high-profile terrorist targets there is a decreased risk of resource shortages. Yet, decreasing the risk of shortages means much more. Such action could lead to a preference for more compact, more streamlined distribution networks.

As an example of the current perilous status of our infrastructure, if all supermarkets were to close tomorrow it would be difficult for most of us to obtain food. Farms have consolidated into large operations far removed from most urban centers. The reliability of this production and distribution system could be improved by narrowing the gap between agricultural conglomerates and the dinner table. We could grow some of our own food, and certainly some modern update of the "Victory Garden" would be beneficial. More importantly would be laws encouraging a network of small-scale agriculture that will not fail when large systems go down and which are within the reach of the average city dweller.<sup>174</sup> The benefits of redundant small-scale production have been made obvious for decades, but we have not acted in any systematic way to capitalize upon them. It is hardly a novel idea; one of the first books I read was *Small Is Beautiful*.<sup>175</sup> The promising field of "biomimetics" involves ways to foster production using devices that more closely mimic nature in their smaller size and overlapping redundancy.<sup>176</sup> The idea that as a result of our recovery we will see things differently adds a unique perspective on the merit of this approach.

---

174. One battleground in this area in recent years is the development of state land use laws that attempt to protect and set aside land on the urban periphery for farming. See, e.g., John C. Becker, *Promoting Agricultural Development Through Land Use Planning Limits*, 36 REAL PROP. PROB. AND TR. J. 619 (2002); Mark W. Cordes, *Agricultural Zoning: Impacts and Future Directions*, 22 N. ILL. U. L. REV. 419 (2002). These laws are controversial but might be viewed in a more positive light if considered to be essential for national recovery.

175. E.F. SCHUMACHER, *SMALL IS BEAUTIFUL* (1973).

176. VOGEL, *supra* note 136, at 319 (noting how a number of small motors can be conjoined into something approximating muscle).

## 2. A Potential Focus: Energy Independence

The scale of the September 11 events and the vastness of the economic impact makes it imperative that the United States take urgent and tough action to reduce energy system vulnerabilities, notably those related to oil imports, nuclear power plants and associated infrastructure, and the electricity grid.<sup>177</sup>

Many see a connection between 9/11 and our dependence on foreign oil. Our need to import oil bolsters skeptics' arguments that we are combating terror for the wrong reasons,<sup>178</sup> and blinds us to the considerable imperfections of oil producing nations (including their record of harboring and supporting terrorists).<sup>179</sup> Our failure to ratify the Kyoto treaty on global warming<sup>180</sup> and take measurable steps

---

177. ARJUN MAKHIJANI, INST. FOR ENERGY & ENVTL. RESEARCH, SECURING THE ENERGY FUTURE OF THE UNITED STATES: OIL, NUCLEAR, AND ELECTRICITY VULNERABILITIES AND A POST-SEPTEMBER 11, 2001 ROADMAP FOR ACTION (2001), *available at* <http://www.ieer.org/reports/energy/bushsumm.html> (last viewed Oct. 31, 2003).

178. *See, e.g.*, Thomas L. Friedman, *A Failure to Imagine*, N.Y. TIMES, May 19, 2002, § 4, at 15 (criticizing these arguments).

179. A number of possible connections between Middle Eastern governments and terrorism have been probed since 9/11, including charities funneling funds to terrorist groups. *See, e.g.*, Michael M. Phillips, *U.S., Saudi Arabia to Freeze Assets Of 2 Branches of an Islamic Charity*, WALL ST. J., Mar. 12, 2002, at A2 (examining the link between charities, terrorists, and the Saudi government); William O'Rourke, *Terror War Should Not Skip Saudis; Nation Has Obvious Ties to Those Who Want to Destroy Us*, CHI. SUN-TIMES, Nov. 6, 2001, at 3.

180. The Kyoto Treaty is a protocol (amendment) to the United Nations Framework Convention on Climate Change. United Nations Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (opened for signature Mar. 16, 1998). Intense negotiations among delegates to negotiate a protocol embodying specific limits on greenhouse gas emissions culminated in a document that incorporated long-term emissions targets. Kyoto Protocol, *supra*, at Art. 3 (imposing obligation

to curb fossil fuel use does disservice to our international public image, even as we call for international coalitions to stop terror.<sup>181</sup> For

---

on countries listed in Annex D) and Annex I (listing the U.S. with a 7% reduction target). The protocol was rejected by the Bush Administration. See William Drozdiak, *U.S. Left Out of Warming Treaty; EU-Japan Bargain Saves Kyoto Pact*, WASH. POST, July 24, 2001, at A1; Eric Pianin, *U.S. Aims to Pull Out of Warming Treaty*, WASH. POST, Mar. 28, 2001, at A1 (noting that EPA Administrator Whitman called the Kyoto Protocol "dead").

Since this development the protocol has been ratified by major industrial nations but to date the Senate has not ratified it and the Administration continues to oppose it. See Colum Lynch, *EU Ratifies Global Warming Treaty; Kyoto Accord En Route to Becoming Law Despite U.S. Rejection*, WASH. POST, June 1, 2002, at A15 (noting also that "[t]he environmental accord has been the source of enormous political tension between the United States, the world's largest polluter, and many of its closest allies, particularly in Europe."). The Bush Administration's recent actions on global climate change have hardly signaled a willingness to accept limitations on carbon dioxide emissions. The Clear Skies Act, the Administration's proposed "multi-pollutant legislation" for controlling emissions from power plants, makes no reference to carbon dioxide emissions. See S. 485, 108th Cong., (2003). In contrast, the "Clean Power Act," which was reported out of the Senate Environment and Public Works Committee in 2002, and, upon its failure to reach the Senate floor, reintroduced in 2003, contains specific carbon dioxide limits. See S. 366, 108th Cong., (2003); H.R. 5206, 107th Cong., (2002); S. 556, 107th Cong., (2002). See also Jim Jeffords, *Unhealthy Air*, N.Y. TIMES, June 30, 2002, § 4, at 15 (Senator Jeffords, chairman of the Senate Environment and Public Works Committee, notes that President Bush criticized the National Academy of Sciences report calling global warming a "real and significant threat," and proposed rollbacks of the Clean Air Act "new source review" provisions that would allow old power plants to escape modernization requirements and continue to emit "large amounts of carbon dioxide, a greenhouse gas").

181. See INST. FOR ENERGY AND ENVTL. RESEARCH, MULTILATERAL TREATIES ARE FUNDAMENTAL TOOLS FOR PROTECTING GLOBAL SECURITY; UNITED STATES FACES CHOICE OF BOLSTERING THESE REGIMES OR ALLOWING THEIR EROSION (2002),

the moment, I will put aside these geopolitical considerations and concentrate on how our overuse of petroleum and other energy sources makes us vulnerable to terrorists. Much imported oil is used in the transportation sector.<sup>182</sup> SUVs themselves aren't real terror targets, but the oil production and distribution system that provides fuel for them is a large target. An ambitious terrorist could wreak havoc by attacking a pipeline, supertanker, or refinery.<sup>183</sup> If we are to reduce the risk of terrorist attacks, we need alternative technologies or cutbacks in consumption that will decrease our need for fuels coming from these central facilities.

Concerning electricity generation, our use of oil is considerably less than at the time of the first OPEC oil embargo, thus it is relatively inconsequential to focus on the politics of imported oil when discussing this area.<sup>184</sup> Instead, we should look at how our generat-

---

*available at* <http://www.ieer.org/reports/treaties/factsht.html> (last viewed Oct. 31, 2003) (criticizing the failure to ratify the Kyoto protocol and other international treaties); *see also* Thomas L. Friedman, *Better Late Than...*, N.Y. TIMES, Mar. 17, 2002, § 4 at 15:

We need to find a way to ratify the Kyoto climate change treaty. It's not only the right thing to do, but it would also send a hugely positive signal to the world – that America understands that if it's going to have lasting allies in a global war on terrorism, it has to be the best global citizen it can be.

182. *See* J.W. Anderson, *The Surge in Oil Prices: Anatomy of a Non-Crisis*, RES. FOR THE FUTURE 6 (2000), *available at* [http://rff.org/CFDOCS/disc\\_papers/PDF\\_files/0017.pdf](http://rff.org/CFDOCS/disc_papers/PDF_files/0017.pdf) (last viewed Oct. 31, 2003) (stating that “[t]wo-thirds of the oil this country now uses is highway fuel.”). Oil use has actually fallen in other areas. Charles C. Mann, *Getting Over Oil*, TECH. REV., Jan./Feb. 2002, at 33, 34.

183. *See* Makhijani, *supra* note 178 (noting that “those [events] of September 11 have pointed up the need to urgently reconsider the domestic energy infrastructure, even as it has dramatically reinforced consideration of security of oil supplies”); Mann, *supra* note 184, at 38 (asking readers to imagine the impacts on current low oil prices of “the effects of terrorist attacks against pipelines or oilfields”).

184. Mann, *supra* note 184, at 34 (noting that “almost one-fifth of U.S. electricity was generated by petroleum in 1973; today the figure is less than one one-hundredth.”).

ing capacity makes for high-profile targets for terrorists. Nuclear power plants have already been identified as vulnerable,<sup>185</sup> and it does not require speculation to envision that transmission lines and centralized fossil fuel-fired plants, that generate much of our electricity,<sup>186</sup> are vulnerable as well. In order to move toward a low-profile, low-risk environment for generating electricity, we have two fundamental alternatives: use less electricity, thereby reducing the need for central stations or build alternatives that do not rely as much on central generation. This is the same choice, more or less, that we face in the transportation sector.

*a. Use Less Energy*

The fundamental problem with using less energy is that we have heretofore resisted it mightily. Americans consume more energy per capita than any other nation (in most cases, far more).<sup>187</sup> We are working to make manufacturing processes more energy efficient and environmentally friendly, but have not yet completely succeeded.<sup>188</sup>

---

185. See, e.g., Makhijani, *supra* note 178 (listing the various ways in which nuclear power plants are vulnerable); Richard L. Ottinger & Rebecca Williams, *Renewable Energy Sources For Development*, 32 ENVTL. L. 331, 334 (2002) (arguing that "an overriding concern with nuclear plants is their great vulnerability to terrorist attack [particularly on the control rooms and spent fuel ponds that are located outside the containment vessels].").

186. Nearly eighty percent of the energy produced in the United States in 1999 came from fossil fuels. See U.S. ENERGY INFORMATION ADMINISTRATION, ENERGY OVERVIEW (Mar. 2002), at Table 1.3, available at <http://www.eia.doe.gov/emeu/mer/pdf/pages/sec1.pdf> (last viewed Oct. 31, 2003).

187. Ed Ring, *World Energy Consumption: The Good, The Bad, and The BTUs*, available at <http://www.ecoworld.org/Energy/Articles/articles2.cfm?TID=294> (last viewed Oct. 31, 2003) (relying on 1995 data supplied by the World Bank).

188. According to data provided by the Department of Energy, the amount of energy we consume per dollar of gross domestic product is decreasing. See ENERGY OVERVIEW, *supra* note 188, at Table 1.8. For an overview of current and potential improvements in energy-using processes, see generally WILLIAM McDONOUGH & MICHAEL

Worse yet, we continue to be a nation in the tenacious grasp of a laissez-faire, energy-hogging consumer culture. Evidence of this is plainly available; one need only consult the bestseller list. David Brooks' *Bobos in Paradise* deftly skewers the worship of consumption by the baby boom generation.<sup>189</sup> The type of vehicle you drive, particularly if it happens to be the right kind of SUV, says more about you than your opinions on issues of the day.<sup>190</sup> Eric Schlosser's *Fast Food Nation*<sup>191</sup> details painstakingly how our love of hamburgers and fried chicken has catalyzed the growth of energy-wasting food production and distribution systems. The food industry is responsible for such comprehensive changes to our way of life that McDonalds' restaurants are viewed as archetypal symbols of America throughout the world.<sup>192</sup> Supplying these restaurants has become the exclusive province of corporations, which, some argue, care little about environmental regulations or improving wasteful energy practices.<sup>193</sup>

---

BRAUNGART, *CRADLE TO CRADLE: REMAKING THE WAY WE MAKE THINGS* (2002).

189. DAVID BROOKS, *BOBOS IN PARADISE: THE NEW UPPER CLASS AND HOW THEY GOT THERE* (2000).

190. *Id.* at 86 (describing the appeal of the term "sport utility vehicle"). Decrying the diminishing engagement of those with means in political life, of course, is nothing new among social critics. *See, e.g.*, BARBARA EHRENREICH, *FEAR OF FALLING: THE INNER LIFE OF THE MIDDLE CLASS* 249 (1989) (noting that "[t]he suburban middle class has of course long since withdrawn, geographically and often mentally, from the challenges of a diverse and unequal society."); PUTNAM, *supra* note 172, at 31-48 (providing data that tends to show a "disengagement from public affairs"). *See generally* RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY AND EVERYDAY LIFE* (2002) (showing similar observations).

191. ERIC SCHLOSSER, *FAST FOOD NATION: THE DARK SIDE OF THE AMERICAN MEAL* (2001).

192. *See id.* at 243-44.

193. Michael Pollan, *This Steer's Life*, N.Y. TIMES, Mar. 31, 2002, § 6, at 44, 69 (noting that beef cattle produced for slaughter are "the product of an industrial system dominated by fossil fuel"); SCHLOSSER, *supra* note 193, at 134 (noting the adverse environmental impacts of ranching). *See also* J.B. Ruhl, *The Environmental*

Consumption has always been intertwined with status. One may argue that such a condition has now reached a higher order of magnitude, yet in a specific way that imperils any attempt at restriction or reformation. Brooks notes that among the new upper class it is not consumption for its own sake but a self-centered "code of financial correctness" designed "to help them convert their wealth into spiritually and intellectually uplifting experiences"<sup>194</sup> that drives consumptive behavior. That so much that is "upscale" (to employ possibly the most overused word of the late 20<sup>th</sup> and early 21<sup>st</sup> century) is wasteful is lost on the person who must have the latest high-tech kitchen or Cadillac Escalade SUV.<sup>195</sup> This behavior is so ingrained that the law probably cannot change its worst features, even that law generated in the aftermath of 9/11. The poor performance record of previous attempts at curtailing consumption in this country is testament to this observation.<sup>196</sup>

The Washington establishment is responsible for a stalemate that prevents the enactment of even the mildest of measures to encourage energy efficiency and conservation. While the Bush Administration

---

*Law of Farms: 30 Years of Making a Mole Hill Out of a Mountain*, 31 ENVTL. L. REP. 10, 203 (Feb. 2001) (arguing that failure to regulate environmental consequences of farming has created an "anti-law," and noting the "propensity toward vertical integration" of related industries); J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOL. L. Q. 263 (2000).

194. BROOKS, *supra* note 191, at 84.

195. *Id.* at 85.

196. See James Salzman, *Sustainable Consumption and the Law*, 24 ENVTL. L. 1243, 1245 (1997) (noting that "more goods and services have been consumed since 1950 than by all previous generations combined," and claiming that "stringent regulation of polluting industries will not ensure environmental protection if current trends of consumption continue over the longer term"). With respect to one commodity that we consume in large quantities – gasoline – demand is only likely to subside if there is a "substantial hike in gas prices." David J. DePippo, *I'll Take My Sin Taxes Unwrapped and Maximized, With a Side of Inelasticity, Please*, 36 U. RICH. L. REV. 543, 559 (2002). In the current regulatory climate a tax that would increase prices is not likely to be enacted.

has been rightly criticized for its retrograde energy policy,<sup>197</sup> Congress continues to block new automotive mileage standards, even though they are well below the current state-of-the art and would not force new, more efficient vehicles to the market in large numbers.<sup>198</sup> It is a measure of the current lack of a national political will that technology-forcing standards that would change driving behavior are only possible in California, by virtue of its Clean Air Act exemption

---

197. See NAT'L ENERGY POLICY DEV. GROUP, RELIABLE, AFFORDABLE, AND ENVIRONMENTALLY SOUND ENERGY FOR AMERICA'S FUTURE (2001), available at <http://www.whitehouse.gov/energy> (last viewed Oct. 31, 2003). The Bush Administration policy was criticized from its inception by environmentalists, other public interest groups, and commentators, in part because it seemed inapt after 9/11 to rely on expanding conventional forms of production. See, e.g., Gary C. Bryner, *The National Energy Policy: Assessing Energy Policy Choices*, 73 U. COLO. L. REV. 341 (2002); David J. Hayes, *Energy—Again, But With a Kicker*, NAT. RES. & ENV'T, at 215, 216 (Spring 2002) (noting that “it is misleading, at best, to suggest that energy “independence” can be achieved with additional domestic oil production); Makhijani, *supra* note 178 (noting that “[i]t is stunning that the Bush administration has not revisited its energy plan proposed four months prior to September 11 in light of the events of that day”); see Friedman, *supra* note 183 at 15 (noting that President Bush has “exploited the shock of Sept. 11 to argue why his same old, pre-Sept. 11 policies were still the only way to proceed – only more so” and pointing to the call for “even more drilling for oil in wilderness areas” as an example). Congressional action has been criticized as well. See, e.g., *Alliance to Save Energy Rebukes U.S. Senate For “Pitiful Showing” on Energy Efficiency in Major Energy Bill*, Alliance to Save Energy, available at <http://www.ase.org/media/newsrel/senategetsd.htm> (last viewed Apr. 25, 2002) (giving the Senate a “D+” grade for the energy efficiency provisions of the Energy Policy Act of 2002).

198. As introduced, the Energy Policy Act included a provision that would have raised auto fuel economy (CAFE) standards to 35 miles per gallon by 2015. S. 1766, 107th Cong. (2001). On March 13, 2002, the Senate voted 62-38 to strip this provision from the bill. See *Senate Running on Empty on Fuel Economy*, Alliance to Save Energy, at <http://www.ase.org/media/newsrel/senatefail.htm> (last viewed Mar. 13, 2002) (criticizing the vote).

that allows it to set standards that differ from the national counterpart.<sup>199</sup>

Fostering the political will needed to overcome this resistance has been difficult as we have relied on setting up Middle Eastern nations as bogeymen, with a predictable lack of success as long as OPEC continues to keep open the oil tap. If that situation should change, and there are occasional threats that it might,<sup>200</sup> we could incur a shock to the economy that could prompt the same drive for energy independence as initiated in the 1970s. Lacking such imperative, there is a low likelihood for change.

*b. Produce Energy Differently*

When we pull up to the gas station or flip a light switch, most of us do not think of the vulnerability of the complex network of facilities required to sustain our present level of energy consumption. There is plenty of opportunity for early adapters to learn more about the energy production and distribution system, and attempt to reshape it with laws that encourage changes in the way energy is produced.<sup>201</sup> One goal might be the implementation of laws encouraging smaller-scale power generation technologies that are less vulnerable to attack. By focusing on lowering risk, we could see a drastic shift from

---

199. See Paul Rogers, *State Could Set Auto Trend; Global-Warming Bill Linked to Gas Mileage*, S.J. MERCURY NEWS, July 15, 2002, at 1 (describing California's legislation [A.B. 1493] that would toughen gas mileage standards indirectly by requiring lower greenhouse gas emissions from automobiles).

200. Iraq attempted to begin a new oil embargo in May 2002, but failed to win support from other oil-producing nations. See *Iraq Embargo Off After Fellow Oil Exporters Ignore Calls to Follow Suit*, OIL DAILY (May 7, 2002) available at 2002 WL 5641829 (noting that "When Baghdad halted oil exports last month to protest Israeli incursions into Palestinian territory, its calls for other producers to join an embargo fell on deaf ears.").

201. I am hardly the first to see this as a possible outgrowth of 9/11. See Friedman, *supra* note 179 (criticizing President Bush for "squandering all the positive feeling in America after 9/11, particularly among young Americans who wanted to be drafted for a great project that would strengthen America in some lasting way – a Manhattan project for energy independence").

central generation to decentralized forms of generation such as inexpensive solar cells or fuel cells;<sup>202</sup> small oil- or gas-fired generators in every backyard would not be vulnerable to attack themselves but could be shut down if a pipeline is attacked. In support of this shift in energy production, one could imagine, for example, a streamlined approval process and grant program that would allow individuals to make their own electricity from fuel cells, build a simple distribution network (with federal support), and sell it to their neighbors.<sup>203</sup> At present, the institution of such a network would likely face licensing and other requirements. Furthermore, its dependence on the existing transmission grid would in itself pose a tempting terror target.<sup>204</sup>

The fundamental problem with the Bush Administration's National Energy Policy is that it would continue our reliance on conventional production and distribution; it would in fact increase through such measures as the "safe expansion" of our nuclear energy program and

---

202. The technology necessary to switch from nuclear and fossil fuels is hardly science fiction. *See* Makhijani, *supra* note 178 (noting that "[t]he technologies to achieve the goal of simultaneously reducing carbon dioxide emissions and vulnerabilities to attack already exist. Some, such as wind energy and cogeneration, are already economical. Others will need suitable government procurement policies to make them economical. All of the needed technologies are advanced enough that they can be commercialized within the next five to ten years."); *see also* David H. Freedman, *Fuel Cells vs. The Grid*, 105 *TECH. REV.* 40 (Jan./Feb. 2002) (discussing the potential for fuel cells to "offer clean electricity to offices and homes).

203. Freedman, *supra* note 204, at 45 (offering a technical discussion of how that might take place).

204. *See* Makhijani, *supra* note 178 (noting the vulnerability of the electricity transmission grid, recommending that:

A national policy decision should be made to create regional distributed electricity grids in the next three to four decades. In these regional grids, a large proportion of the electricity would come from relatively dispersed generators, where installation of generation systems would be accompanied by efficiency improvements. *Regulatory changes should be geared to encouraging the achievement of a distributed grid, rather than a centralized national grid of interconnected local and centralized electricity generation.*) *Id.* (emphasis added).

by opening the Arctic National Wildlife Refuge to exploration and development.<sup>205</sup> While there are some initiatives for alternative and renewable energy resources in the policy,<sup>206</sup> they do not do enough to diminish our reliance on central generating plants – ready and visible terror targets.<sup>207</sup> The policy predated 9/11 and for that reason its goals are different than one would expect in such a report. However, in the acrimonious debate in Congress which did take place after 9/11, Administration representatives defended the policy, and the omnibus energy bill moving through Congress in 2003 largely reflects current thinking.<sup>208</sup> However, this sort of status quo reasoning may well yield to the demands of a populace motivated to think differently in the aftermath of 9/11.

### III. CRITIQUES OF THE MODEL

As I have noted above, this model of post-traumatic societal adaptation is not without its potential shortcomings. The most obvious is that it is predicated upon a number of assumptions about behavior that reinforce each other and may time proven to be wrong. Perhaps I have been immersed in these books for so long that I am simply

---

205. NAT'L ENERGY POLICY DEV. GROUP, *supra* note 199, at ch. 5-9. Despite setbacks in Congress, the Administration continues to push for development of ANWR. See H. Josef Hebert, *Senator: ANWR Plan Won't Make Bill; Domenici Says One More Run at Alaska Drilling Will Fail*, WASH. POST, Apr. 5, 2003, at A7.

206. NAT'L ENERGY POLICY DEV. GROUP, RELIABLE, AFFORDABLE, AND ENVIRONMENTALLY SOUND ENERGY FOR AMERICA'S FUTURE (2001), *supra* note 199, at ch. 6.

207. Makhijani, *supra* note 178 (noting that "the Bush administration is on an unsound course of recommending an energy policy to the people of this country in the post September 11-period without revisiting its key vulnerabilities" and claiming that "[t]he Bush administration's energy plan will result in greatly increased vulnerabilities by . . . increasing the attractiveness of and number of targets for terrorism particularly in the nuclear, oil, and electricity systems.").

208. See Energy Policy Act, H.R. 6, 108th Cong. (2003) (marked up by the House Energy and Commerce Committee on April 4, 2003).

overexaggerating the role of trauma and recovery in influencing national policy.<sup>209</sup> Yet, even if the trauma and recovery process turns out to be a less significant force, it still can be a useful paradigmatic lens through which to assess our various responses to 9/11. The state-of-the-art in trauma study is certainly inadequate, but dealing with the issues presented for 9/11 and its aftermath is still far better than the alternative of ignoring it; that is just another form of denial.

1. Proceeding from Individual Behavior is Problematic:  
The Analogy to “Law and Behavioral Economics”

Nonetheless, basing a model on behavior requires some careful consideration of the rather bold leap from the largely individual-centered process of trauma and recovery to the collective response of public policy. I am well aware that it is problematic to relate a behavioral phenomenon – the personal journey to recover from trauma – to broader societal policies of any sort. One set of problems is comparable to those besetting scholars trying to make headway in “law and behavioral economics.”<sup>210</sup> Consider the disputes over that field’s foundational assumptions about human foibles and their relationship to economics (“anomalies”<sup>211</sup>). Some may perceive that these anomalies are only the equivalent of sophisticated party games, not the basis for law.<sup>212</sup> Whether I am willing to drink wine from

---

209. This is reminiscent of what a leading scholar on trauma calls “Medical Student’s Disease”: hearing about a disease or affliction makes one overestimate its rate of occurrence. ALLEN, *supra* note 38, at 16.

210. See generally BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000).

211. Economist Richard Thaler is the originator of this term. See RICHARD H. THALER, *THE WINNER’S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE 2* (1992) (stating that “[a]n anomaly is a fact or observation which is inconsistent with the theory”).

212. See, e.g., Samuel Issacharoff, *The Difficult Path From Observation to Prescription*, 77 N.Y.U. L. REV. 36, 39 (2002) (observing that “the empirical observations [in behavioral economics] are either insufficiently robust or amenable to conflicting interpretation, thereby limiting their ability to offer reliable generalizations,” and that “empiricism does not readily generate normative conclusions”);

my collection but not readily willing to spend the amount it would take to replace it,<sup>213</sup> may be quite entertaining to regale friends over chardonnay and brie, but is hardly the rigorous stuff upon which law should be built.

One might imagine two distinct but related problems. The first I will call gravity: there does not appear to be any serious jurisprudential basis for using an anomaly, as real as it may be in the world of wallets and wine, as the normative foundation of law.<sup>214</sup> In this view, more emphasis should be given to established principles of political economy than these party quirks.<sup>215</sup> The cruel irony in a recovery process based, in part, on self-awareness is its relationship to much of what has generated difficulty in the first place: the national craze for self-awareness and the entire industry that has sprung up to feed the craze. This observation underscores the great difficulties inherent in distinguishing between what is legitimately done in the name of self-awareness and recovery, and what is just self-centered. Endless tapes, TV shows,<sup>216</sup> workshops and the like promote a myriad of approaches to recovery, presenting the link to the trauma of 9/11 as a prescription for public policy leading down the slippery slope which ends just with another meeting of a support group and take a Zolof<sup>®</sup>.

---

Samuel Issacharoff, *Behavioral Decision Theory in the Court of Public Law*, 87 CORNELL L. REV. 671 (2002).

213. See THALER, *supra* note 213, at 63. Thaler terms this the "endowment effect": "people often demand much more to give up an object than they would pay to acquire it." *Id.* See also Cass R. Sunstein, *Switching The Default Rule*, 77 N.Y.U. L. REV. 106 (2002) (discussing the endowment effect in a number of legal contexts and proposing that default rules be reversed to accommodate it).

214. See Jeffrey Rachlinski, *The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739, 764 (2000) (detailing Judge Richard Posner's critique of behavioral economics on this ground).

215. *Id.* (noting that Judge Posner believes behavioral economics may turn out to be a "sideshow").

216. It may be argued that currently, psychology for the masses comes in the form of a syndicated television show. See Douglas Durden, *Psychology Today*, RICH. TIMES-DISPATCH, July 20, 2002, at G4 (discussing the advent of the "Dr. Phil" show featuring clinical psychologist Phillip McGraw).

Gravity does not appear to pose an insurmountable problem to behavioral economists, who observe that behavioral observations are adding to, not replacing the foundation of law. We base substantial chunks of public policy on imperfect economic models, and taking behavior into account allows us to amplify upon those models or replace them with better ones.<sup>217</sup> Central to this issue, the appeal of behavioral economic theory about more than “changing the numbers in the law-and-economics equations;”<sup>218</sup> it prompts us to ask “unique questions about law that legal scholars would not otherwise have asked.”<sup>219</sup> Moreover, I am not challenging specific normative assumptions upon which a body of law is predicated, with the purpose of replacing them with my own. This model is not “trauma *and* economics.”<sup>220</sup> While I do suggest some possible types of law that could change, the appropriateness of that change would still need to be tested by conventional political and economic means. The model, therefore, helps to predict the direction of change, not its legitimacy.

The essential response of behavioral economics is inclusiveness: all law needs to become behavioral. Professor Cass Sunstein and his collaborators have claimed that twenty years from now the relationship among psychology, research and law will be better defined.<sup>221</sup> In developing theories to support normative law we will take into account this relationship just as we take into account other aspects of the human character that are regulated by law. In practice, of course, we are still a long way from figuring out what that means.<sup>222</sup> Many critics of behavioral economics have noted that if today’s empirical

---

217. Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471, 1546-47 (1998) (noting that classical economics theories can be “simply wrong,” and pointing to new directions in which behavioral influences should be studied).

218. Rachlinski, *supra* note 216, at 764.

219. *Id.* at 766.

220. *See id.* at 763 (noting that the “primary use” of scholarship in behavioral economics “will be to undermine law and economics”).

221. *See generally* Jolls, Sunstein & Thaler, *supra* note 219.

222. *See, e.g.*, Issacharoff, *supra* note 214, at 40-42 (discussing a behavioral economics approach to the “at will” rule of employment and finding that the observed discrepancy from classical economic assumptions “does not in itself drive any particular policy prescription”).

studies give us good information about behavior, variations make it difficult to generalize to the extent necessary for use in the legal system. For now, I have to admit that my response is no better than informed supposition in need of empirical verification: I believe, based on our understanding of trauma and recovery, that the path of change will be altered when a critical mass of people have essentially similar notions based on adaptive resources.

## 2. Avoidance and Denial: Problems Relating to the Passage of Time

Another set of problems relates to the avoidance and denial that characterize our reaction to trauma, and the passage of time that exacerbates these problems. We tend to think of adaptive resources as evanescent: you "do what you have to" to recover from trauma, thus you return to the status quo once you have recovered. The central idea of the recovery process, however, is that many have experienced a re-creation of the self. There is a critical distinction to be made here between actions taken in dire circumstances (which might not be repeated) and the skills developed during the recovery process (which can endure). Even those who have only coped with trauma, and are therefore not changed in some fundamental way, may well have memories that would allow the survivor mission to appeal to them. I may not make dozens of cell phone calls in one day again, but I certainly recall how important it was for me to be close to my friends and family.

There are other reasons why we might think of trauma and recovery as presently unimportant. Recognition of trauma and its effects challenges "[o]rdinary social processes of silencing and denial."<sup>223</sup> This silencing process makes us constantly tempted to downplay or even suppress any role that trauma and recovery may have in societal change.<sup>224</sup> One such process of denial is evidenced by the comments of those who believe we should not change at all because to do so would be to capitulate to the terrorists. This misses the point. Change may be necessary because we believe that it is essential to our healing process, not because we capitulate to the warped ideology of the terrorists.

---

223. HERMAN, *supra* note 13, at 9.

224. *Id.* at 7-8 (noting, for example, that "[w]ithout a supportive social environment, the bystander usually succumbs to the temptation to look the other way.").

This tendency to suppress the role of trauma is exacerbated by the fact that recovery from trauma is hardly the only force impacting change in a society. Laws created in the decades after a dislocation will be in large part the product of other, unrelated forces: societal change brought on by the dislocation, normal evolution of the legal system (to the extent there is such a thing), and impacts brought to bear by persons who have no connection to the dislocation. This is evident when observing the women's movement. It is obvious now that not all feminists have had an experience with rape and that feminism is about much more than rape.

None of this is to suggest that the model is fundamentally flawed. I do not mean to imply that the trauma and recovery process is the sole mechanism that may explain the possible evolution of our laws in the decades ahead. Others would tie societal change more closely to advances in science, but I am not one of them.<sup>225</sup> However, this does not suggest that there is more complexity to the attribution process than I have previously described. There are two primary forces weighing against proper attribution which might best be termed active resistance (opposition to the survivor mission, described earlier) and passive resistance (avoidance and denial leading to downplaying the role of trauma and recovery). Both are likely to be stubborn barriers to legal progress.

### 3. Is a Social Movement Necessary?

This leads one to consider that a stronger counterbalancing force on the advocacy side may be necessary to effect change — that is, that trauma and recovery may be a significant force for change only in the context of a societal movement. It is not coincidental that many of my analogies have involved references to the women's movement. There is a common but mistaken perception that survivors, with their notions of empowerment, are overly strident in imposing their views on the rest of society.<sup>226</sup> A social movement can

---

225. Francis Fukuyama, in *THE END OF HISTORY*, claims that the direction of “modern natural science” is a “possible underlying ‘mechanism’ of directional historical change.” FUKUYAMA, *supra* note 2, at 80. *But see, e.g.*, VOGEL, *supra* note 136, at 150 (finding it difficult to “tie history to physiology”).

226. *See* McFarlane & van der Kolk, *Trauma and Its Challenge to Society*, *supra* note 81, at 38 (noting that “Contrary to general per-

help survivors prevail over criticism (particularly doubts about the legitimacy of their claims), and it is therefore no accident that the ascent of political movements correlates chronologically with the cycles of the rise of interest in trauma.<sup>227</sup> However, this does not mean that the existence of a movement is indispensable for trauma and recovery to play an important role in national policy. The universality of 9/11 makes it quite different from contexts in which the link between trauma and movements has been evaluated thus far (particularly the women's movement and advocacy of Holocaust survivors). These involved situations where trauma victims challenged established mainstream beliefs. 9/11 does not pose such a problem because it affected everyone in the nation. The large number of trauma victims can themselves provide the societal support necessary for survivors.

However, as I have noted earlier, the political dynamics that would operate to bring early adapters' ideas to fruition are not understood in this context. It is therefore completely untested whether there can be widespread interest in trauma, and resulting influence in the political system, without the existence of a movement. Part of the problem is the nascent nature of any effort to link behavior and law.<sup>228</sup> Psychologists have not traditionally been as concerned with this link between individual behavior and the dynamics of the public

---

ceptions, few victims make shrill demands for compensation and special privileges. Many victims quietly acquiesce in their suffering.”).

227. HERMAN, *supra* note 13, at 9; Yehuda & McFarlane, *supra* note 45, at 43 (noting that “[t]he human rights issues that emerged in the investigation of the effects of torture and political repression, civil rights issues, and the rise of feminism all resulted in an increasing urgency to address the plight of the traumatized individual.”). Members of the new generation of historians who aim to revise conventional wisdom to include the contributions of excluded groups such as women would do well to explore this link further. The social movements that many of them claim to represent were started by those who experienced traumatic events, and an understanding of trauma and recovery would be useful to amplify upon their conclusions.

228. See Issacharoff, *The Difficult Path*, *supra* note 214, at 39 (noting that behavioral economics is a “relatively young field emerging from the social science tradition”).

sphere as one might think proper.<sup>229</sup> One senses, as I have noted in the development of the model, that for change to happen, the adaptive resources must be tightly related in large concentrations of people. This, like many other building blocks of the model, requires testing over time.

### CONCLUSION

Jeffrey Rachlinski, an advocate of behavioral economics, notes that “[t]he extension of psychology to a broader array of legal issues is inevitable.”<sup>230</sup> Psychology, in his view, “offers an empirical, scientific source for theories of human behavior”<sup>231</sup> that is superior to the “ad hoc accounts” on which law has traditionally relied. In this Article I have attempted to a certain extent to replace the ad hoc with the scientific, but I have also undertaken to do something *sui generis*: to use psychological research to predict the direction of societal change and hence new law. The primary impetus for this, however, is similar to that of behavioral economics, in that without a study of behavioral trends, particularly of trauma and recovery as currently understood, our comprehension of the societal response to 9/11 will be incomplete. The primary drawbacks of linking trauma study and the law are also similar to those faced by behavioral economists, who repeatedly face criticism that they have created a piece of the overall puzzle, not the grand solution.

Even with its generalizations, caveats and lacunae, the model I have offered should provide some additional guidance in the current chaos. Our political leaders and bumperstickers proclaim that “America is united,” but that only refers to support for immediate military campaigns, not to a consensus about what needs to be done in the aftermath of terror. In the discussion about 9/11, one cannot satisfactorily find final resolution to the problem of terror and its

---

229. *Id.* (citing Rachlinski, *supra* note 216, at 750-52 (finding “As Jeffrey Rachlinski has observed, the academic conventions in psychology strongly rewarded the observation of empirically verifiable decisional behaviors; there was relatively little effort directed towards or reward given to attempts to generalize or systematize the ensuing mass of observed behaviors.”)).

230. Rachlinski, *supra* note 216, at 766.

231. *Id.*

impact on society; we cannot say we should return to "normal" and refuse to change because that would mean capitulation to terror, and simultaneously say all the rules are now different. However, such is consistent with a difficulty to discern that we will change as individuals and as a nation because 9/11 was a traumatic event. If studying how we, as human beings, respond to the darkest events in our human experience grants us greater clarity, this discourse will have been worth the effort.

Some historians and other commentators may claim to already know what changes the terrible and momentous event of 9/11 will produce. They contend that 9/11 is one event in a march of history that is bound to reach some universal end, such as widespread global cooperation.<sup>232</sup> Some claim there is an equilibrium state of sorts in our history, where bedrock principles endure despite shocks to the system such as world wars.<sup>233</sup> A different sort of mechanism may help explain the new "normal" after 9/11. Such is a model that attempts to describe our resilience as a function of our capacity to adapt and of the resources developed during this process of recovery and adaptation. The critical assumption of this model is that the adaptive resources which are most pronounced will drive social change. While considerable testing is required of this assumption, it is in furtherance of an explanation of why traumatic events produce sharp transformations in public policy. Such an inquiry is a considerably more satisfying venture of study than a model which fails to account for human behavior.<sup>234</sup>

---

232. See generally ROBERT WRIGHT, *NONZERO: THE LOGIC OF HUMAN DESTINY* (2000).

233. The central problem with this argument is that it inevitably seems to be advanced by those who wish to advance their view of these core principles, Constitutional or otherwise.

234. See, e.g., Rachlinski, *supra* note 216, at 753 (noting with respect to the anomalies discussed in behavioral economics that "[i]f these [behavioral] phenomena are mental shortcuts that serve people well, or even enhance their well-being, then crafting legal rules to avoid them could do more harm than good.").

