



HUMAN
RIGHTS
CAMPAIGN
FOUNDATIONTM

1640 Rhode Island Ave. NW
Washington, D.C. 20036
web: www.hrc.org
phone: 202/628-4160
fax: 202/347-5323

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RECENT DEVELOPMENTS IN SEXUAL ORIENTATION AND GENDER IDENTITY LAW

IN THE HEADLINES:

Supreme Court Overrules *Bowers v. Hardwick* and Strikes Down Sodomy Laws. On June 26, 2003, the U.S. Supreme Court handed down the much-awaited decision in *Lawrence v. Texas*, 2003 U.S. LEXIS 5013 (2003). The case was brought and won by Lambda Legal on behalf of John Lawrence and Tyron Garner, who had been convicted under Texas' "deviate sexual intercourse" law. In its decision, the court held that the Texas sodomy law, as well as the 12 other state sodomy statutes violated the Due Process Clause of the 14th Amendment by infringing individuals' liberty and privacy interests. The majority made it clear that disagreements about morality cannot limit the rights that all Americans enjoy under the U.S. Constitution. The majority decision written by Justice Kennedy, and joined by Justices Stevens, Souter, Ginsburg and Breyer, explicitly overruled *Bowers v. Hardwick*, a 1986 Supreme Court case that had upheld the Georgia sodomy law. Justices Rehnquist, Scalia and Thomas dissented.

Congresswoman Proposes Anti-Gay Constitutional Amendment. On May 21, U.S. Rep. Marilyn Musgrave, R-Colo., introduced *House Joint Resolution 56*, proposing to amend the U.S. Constitution to limit the institution of marriage to opposite-sex couples. H.J. Res. 56, known as the Federal Marriage Amendment ("FMA") proposes to amend the U.S. Constitution by adding the following language:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

As of Oct. 1, the resolution has 90 co-sponsors in the House. Senate Majority Leader Bill Frist, R-Tenn., has stated that he supports the House resolution but as yet no similar resolution has been introduced in the Senate. On Sept. 17, Sens. Sam Brownback, R-Kan., Rick Santorum, R-Pa., and

Pete Sessions, R-Ala., held a news conference to declare their support for the Federal Marriage Amendment. When questioned about his views on homosexuality, President Bush said, "We are all sinners," and went on to say that, "I believe marriage is between a man and a woman and I believe we ought to codify that one way or the other and we have lawyers looking at the best way to do that."

Sen. John Cornyn, R-Texas, chaired a hearing Sept. 4, 2003, titled "What is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?" in the Senate Judiciary Committee's subcommittee on the Constitution, Civil Rights and Property Rights.

Bob Barr, a former Republican representative from Georgia from 1995 to 2003 who authored the Defense of Marriage Act, has publicly stated that he thinks an amendment to the Constitution is unnecessary, at least at this point. Likewise Alan Simpson, a former Republican senator from Wyoming, wrote: "In the view of this old Senate hand, it's time for everyone to take a deep breath, calm down and wait for this storm to head out to sea ... The real threats to family values are divorce, out-of-wedlock births and infidelity."

Lawsuit Filed Challenging Military's "Don't Ask, Don't Tell" Policy. Steve Loomis, a former Vietnam veteran who was discharged from the military just days before retirement, brought suit challenging the military's "don't ask, don't tell" policy. The U.S. Supreme Court has never ruled on the constitutionality of the military policy, but several federal appeals courts have upheld it. The policy may be more vulnerable in the wake of the Supreme Court's decision in *Lawrence*, striking down all sodomy statutes.

Ontario Court of Appeals Grants Same-Sex Couples the Right to Civil Marriage. On June 10, 2003, the Ontario Court of Appeals upheld a lower court decision that found the exclusion of same-sex couples from civil marriage violated the Canadian Charter of Rights and Freedoms. *Halpern v. Canada (Attorney General)*, 225 D.L.R. (4th) 529. The Court of Appeals made its decision effective immediately thus requiring city clerks in Ontario to begin issuing civil marriage licenses to same-sex couples on that day. Because Ontario has no residency or citizenship requirements for its civil marriage licenses, couples from other countries, including the United States, are being issued licenses. (Note that there is a one-year residency requirement to divorce in Ontario.) However, same-sex couples returning to the United States will face some legal uncertainty as it is expected that some companies and governments will honor but some will refuse to honor these civil marriages.

The New York Times has reported that between the June 10 court ruling and Aug. 25, 2003, 590 gay and lesbian couples had taken out civil marriage licenses in Toronto's City Hall, out of a total of 5,500 same-sex couples receiving licenses. More than 100 U.S. same-sex couples crossed the border to marry.

British Columbia Follows in Ontario's Footsteps. The British Columbia Court of Appeals had previously held that excluding same-sex couples from the freedom to marry violated the Charter, but gave the federal government two years (until Sept. 6, 2004) to fix the violation. On July 8, 2003, the Court amended its decision to make it effective immediately in the province. *Barbeau v. British Columbia (Attorney General)* 2003 BCCA 406.

Quebec Marriage Case Continues. Despite the withdrawal of the federal government (there remains some religious organizations appealing) from the case, the Quebec Court of Appeals will hear arguments in late September on an appeal from a lower court that held the exclusion of same-sex couples from civil marriage violated the Charter. *Hendricks v. Quebec (Procureur General)*, [2002] R.J.Q. 2506 (Que. Superior Ct.).

Canadian Government Proposes Legislation To Allow Same-Sex Couples the Freedom To Marry. The Canadian federal government revealed legislation June 17, 2003, entitled “An Act Respecting Certain Aspects of Legal Capacity for Marriage.” This measure defines marriage as “the lawful union of two persons to the exclusion of all others” and states that “nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.” The legislation was sent to the Supreme Court of Canada for review. The Court has said it will not fast-track this review, which means the earliest the Court will look at the draft is late winter or early 2004. Once the Court responds, the bill will be introduced into Parliament. By the time this happens, Prime Minister Chrétien will have stepped down as the Liberal leader and there will be a new prime minister who may allow members of the ruling Liberal party a “free vote.” This is an infrequently invoked rule that releases party members from having to vote along party lines, thus allowing some Liberal members of Parliament to vote against the bill.

EMPLOYMENT:

East Baton Rouge Parish Amends Policy. Mayor-President Bobby Simpson added sexual orientation to the parish government’s equal employment opportunity policy in April 2003, making East Baton Rouge Parish the second jurisdiction in Louisiana, after New Orleans, that prohibits discrimination based on sexual orientation against city employees.

Shawnee County Approves Measure for County Employees. In July 2003, county commissioners unanimously approved a measure that prohibits discrimination against county employees based on sexual orientation. Shawnee County joins the city of Lawrence as the second jurisdiction in Kansas prohibiting this type of discrimination.

Five Other Jurisdictions Pass Inclusive Anti-Discrimination Ordinances. El Paso, Texas, Covington, Ky., and Peoria, Ill., all passed city-wide ordinances in the past quarter that prohibit discrimination based on sexual orientation and gender identity in employment as well as other areas. The San Diego City Council voted unanimously to add gender identity to the list of prohibited categories in the city’s Human Dignity Ordinance. The ordinance prohibits discrimination in housing, education, employment and public accommodations. The Ithaca, N.Y., City Council in Ithaca also recently voted unanimously to add protections for transgender individuals in the city’s Human Rights Ordinance.

STATE EMPLOYEES:

Arizona Governor Signs Non-Discrimination Executive Order. Gov. Janet Napolitano, a Democrat, signed an executive order June 21, 2003, prohibiting employment discrimination based on sexual orientation in Arizona state agencies, boards and commissions. *Ariz. Exec. Order 2003-22.*

Pennsylvania Governor Signs Executive Order Banning Discrimination Based on Gender Identity.

Gov. Edward Rendell, a Democrat, signed an executive order July 28, 2003, adding language to an existing executive order which will bar state agencies from discriminating against state employees based on “gender identity or expression.” *Penn. Executive Order 2003-10*. In a statement Rendell said, “The addition of only four words to this short executive order is an important step for the recognition of personal dignity and freedom.” The new policy expands a 2002 executive order signed by then-Gov. Mark. Schweiker, a Republican, that added sexual orientation to the list of protected categories. The order covers the approximately 87,000 state employees who work for Pennsylvania’s state agencies, boards and commissions.

Kentucky Governor Signs Executive Order Banning Discrimination Based on Sexual Orientation and Gender Identity.

Kentucky Gov. Paul Patton, a Democrat, signed an executive order May 28, 2003, banning discrimination based on sexual orientation and gender identity in state government offices.

MARRIAGE/ DOMESTIC PARTNERSHIP/ CIVIL UNIONS:

Permanent Partners Immigration Act introduced in House and Senate.

The Permanent Partners Immigration Act would modify the federal Immigration and Nationality Act to provide same-sex partners of U.S. citizens and same-sex partners of lawful permanent residents the same immigration rights that legal spouses of U.S. residents enjoy. Specifically, it would add the term “permanent partner” to the federal law’s list of definitions of family, and cover same-sex partners of U.S. citizens and lawful permanent residents. The House bill (H.R. 638) currently has 116 sponsors. For the first time, there is a Senate companion bill (S. 1510), which was introduced July 31, 2003, by Sen. Patrick Leahy, D-Vt. “Our immigration laws treat gays and lesbians in committed relationships as second-class citizens, and that needs to change,” said Leahy. “This bill would add America to the growing list of nations that extend immigration benefits to same-sex couples.” If the act passes the United States would become the 16th nation to recognize same-sex couples for immigration purposes.

California Becomes the Second State to Extend State-Conferred Rights, Responsibilities and Benefits to Registered Domestic Partners.

On Sept. 22, 2003, Democratic Gov. Gray Davis signed Assembly Bill 205 – a measure that extends almost all of the state-conferred rights and responsibilities currently enjoyed by married couples to registered domestic partners. The bill passed the California Assembly in June and the state Senate in August. The landmark bill was sponsored by Equality California, the National Center for Lesbian Rights and other groups, and authored by Assembly Member Jackie Goldberg, D-Los Angeles.

Arizona Couple Brings Suit Seeking Right to Marry.

Harold Standhardt and Tod Keltner brought suit July 7, 2003, in the Arizona Court of Appeals seeking the right to obtain a civil marriage license. The couple was denied a civil marriage license from the Maricopa County Superior Court clerk’s office. They are seeking to have the Arizona law banning civil marriage between same-sex couples declared unconstitutional based on the Supreme Court’s recent ruling in *Lawrence v. Texas*. The couple argues that a civil marriage license offers “simple civil rights” such as joint filing of tax returns, and that they are being unconstitutionally denied these rights. A three-judge panel heard the case Aug.

19 and said they would rule soon.

FAMILY LAW:

California Supreme Court Upholds Second-Parent Adoption. On Aug. 4, 2003, the California Supreme Court affirmed the right of same-sex couples to use the state's adoption laws to establish a legal relationship with each other's children. The court overruled a California Court of Appeals decision that held the state's adoption statutes did not allow both parents in a same-sex relationship to establish a legal relationship with their children. In *Sharon S. v. Annette F.*, 2003 Cal. LEXIS 5378, the couple broke up just before the adoption of their youngest child was to be completed. The biological mother then tried to stop an adoption from going forward by arguing that second-parent adoptions were not permitted under California's adoption statutes. The California Supreme Court opinion emphasized the importance of providing the same legal protections to children born to unmarried couples as are available to children born to married couples, stating, "Unmarried couples who have brought a child into the world with the expectation that they will raise it together, and who have jointly petitioned for adoption, should be on notice that if they separate the same rules concerning custody and visitation as apply to all other parents will apply to them."

BASIC PARTNERSHIP PROTECTIONS:

Nevada and Utah Pass Bills That Can Help Same-Sex Couples. Senate Bill 386 in Nevada allows an individual to designate an individual who is permitted to visit them at medical facilities and who will be responsible for their burial. The passage of the bill comes just seven months after Nevada voters amended the state constitution to limit marriage to opposite-sex couples. Like the Nevada law, Utah Senate Bill 91 allows a person to designate a person in writing who will have the legal right to make funeral arrangements. Although neither of these laws is specific to the needs of same-sex couples, they can serve as a tool for couples to ensure the basics rights of hospital visitation and funeral arrangements.

BENEFITS:

Federal Domestic Partner Bill Introduced in Both Houses. Rep. Barney Frank, D-Mass., and Sen. Mark Dayton, D-Minn., introduced companion bills June 11, 2003, entitled the Domestic Partnership Benefits and Obligations Act of 2003. These bills would require the federal government to offer the same benefits to their employee's with domestic partners that it currently offers to employees with spouses. H.R. 2426 currently has 78 co-sponsors and S. 1252 has seven co-sponsors. A similar bill was introduced in the House last year and was never brought up for consideration. The Human Rights Campaign is actively involved in recruiting co-sponsors and corporate endorsements to encourage support for the bill.

California To Offer Same-Sex Couples Property Tax Benefit. Property transfers between registered domestic partners upon the death of one of the partners will no longer be reassessed under new rules promulgated by the board of equalization. Previously, the death of one partner triggered a reassessment of jointly owned property or of property transferred to the surviving partner, which leads to significantly higher taxes. Property owned by married couples is not reassessed when one spouse

dies. This change was spearheaded by former Assembly Member Carole Migden, who is now the chair of the board of equalization. *Property Tax Rules 462-040 and 462-240.*

Fulton County Becomes Fourth Georgia Jurisdiction to Offer Domestic Partner Benefits. In a 4-2 vote, the Commissioners of Fulton County, Ga., extended domestic partner benefits to county employees. Benefits granted include insurance benefits, employee bereavement leave upon the death of a partner and pension benefits. A similar measure failed to pass two years ago, but two commissioners who had voted against the measure last time reversed their votes this time. Commissioner Tom Lowe explained his decision by saying, "I've seen in my heart that it's the right thing to do." Fulton County joins Atlanta, Dekalb County and Decatur to offer these benefits to public employees.

Woman Sues New York Labor Department for Unemployment Benefits. Jeanne Newland is suing the New York Labor Department for denying her unemployment benefits after she quit her job there to follow her partner to Virginia. In similar situations, married individuals are usually granted benefits when they relocate to another state because their spouse has a new job. Newland's former New York employer has filed an amicus brief in the case, arguing the department's decision undermines their effort to treat all of their employees fairly, regardless of sexual orientation. The Labor Department is reconsidering its denial after New York's Gov. George Pataki, a Republican, asked it to do so. Newland is represented by the American Civil Liberties Union.

GENDER IDENTITY AND EXPRESSION:

California Becomes Fourth State to Prohibit Discrimination Based on Gender Identity. Gov. Gray Davis, a Democrat, signed a bill that prohibits discrimination in housing and employment based on gender identity. Sponsored by Assembly Member Mark Leno, A.B. 196 adds discrimination based on gender characteristics to the list of categories protected by the Fair Employment and Housing Act. This makes California the fourth state (after Minnesota, Rhode Island and New Mexico) to explicitly prohibit discrimination toward transgender individuals.

HIV/ AIDS:

President Bush Signs Important HIV/AIDS Bill. The U.S. Leadership Against HIV/AIDS, Malaria and Tuberculosis Act (H.R. 1298) designates \$15 billion for global AIDS prevention over the next five years. With nearly half of new infections occurring in gay and bisexual men, HIV is disproportionately impacting the gay community. Unfortunately, the bill contains language requiring that one-third of that money be spent on pre-marital abstinence education programs, limiting the potential effectiveness of the funding.

HATE CRIMES:

Former Morehouse Student Convicted in Beating. Aaron Price was convicted of assault and battery June 11, 2003, for the November 2002 beating of fellow Morehouse student Gregory Love in the

dormitory showers. According to Love's testimony, Price beat him with a bat shouting, "Faggot, you're gay, gay...I hate these Morehouse faggots." Although Price was sentenced to 10 years for assault and battery, the jury did not find him guilty of a hate crime, which would have added up to five years to his sentence under *Ga. Code Ann. § 16-15-2 (2001)*, the Georgia hate crime statute.

Ohio State Representative Sues to Have Cincinnati Hate Crimes Ordinance Nullified.

Republican state Rep. Tom Brinkman has brought suit to have the Cincinnati hate crimes ordinance declared invalid. He argues that the law, which protects victims who are attacked due to their sexual orientation, violates the city charter's 1993 prohibition on legislation protecting people based on their sexual orientation.

EDUCATION

Maryland Board of Education Adds Sexual Orientation to Regulations. On June 24, 2003, the Maryland Board of Education voted 8-3 to enact regulations that seek to protect students from harassment based on, among other things, sexual orientation. This makes Maryland the 11th state, along with the District of Columbia, to pass legislation or regulations protecting students from discrimination based on their sexual orientation.

Mississippi State University Adds Sexual Orientation: Mississippi State joins the University of Mississippi as the only educational institutions in the state that include sexual orientation in their equal opportunity statements.

RELIGION

Vatican Issues Edict against Marriage between Same-Sex Couples. In a 12-page set of guidelines issued July 31, 2003, by the Congregation for the Doctrine of the Faith, a Vatican watchdog agency for policing orthodoxy, the Vatican took a strong stand against unions between same-sex couples. The document states, "[t]here are absolutely no grounds for considering homosexual unions to be in any way similar or even remotely analogous to God's plan for marriage and family," and calls on Catholic and non-Catholics alike to oppose marriage between same-sex couples. The guidelines say that Catholic politicians have a "moral duty" to oppose all laws granting recognition of unions between same-sex couples, and to work toward repealing any such existing laws. The Human Rights Campaign issued a statement where they "made clear today that religious institutions will not be forced to recognize the civil marriages of gay and lesbian couples" and "urged American lawmakers to be mindful of the nation's founding principle of the separation of church and state."

First Openly Gay Bishop Elected by Episcopal Church. On Aug. 5, 2003, the House of Bishops installed the first openly gay bishop in the Episcopal Church when they confirmed the election of V. Gene Robinson to become bishop of New Hampshire. The vote followed the House of Deputies vote Aug. 3 to confirm Robertson. His confirmation process included false allegations of sexual impropriety by those opposed to his election to the post of bishop. "It's been a long time in coming," Robinson said after the vote. "It's not so much a dream as a calling from God, and I'm really thrilled

to be on my way to being the bishop of New Hampshire.” The Episcopal Church has approximately 2.3 million congregants in the United States.

INTERNATIONAL

Brazilian Resolution in United Nations Delayed until 2004. Brazil’s “Human Rights and Sexual Orientation” resolution, which was introduced in the United Nations Commission on Human Rights, did not come up for a vote before the end of the 2003 session. The resolution was supported by most of the European countries, but was unpopular with the Vatican and most Muslim nations. The United States neither supported nor opposed the resolution. Although the resolution failed to come up for a vote, most activists view the fact that it was introduced in the United Nations as a victory in itself.

South African Government Offers Domestic Partner Benefits to Employees. The government has changed its regulations to include same-sex and permanent opposite-sex partners of government employees among those eligible to receive pension benefits. The regulations were changed after the Constitutional Court found previous regulations limiting benefits to spouses unconstitutional and discriminatory. South Africa is one of the few nations in the world that explicitly includes sexual orientation non-discrimination language in its constitution, which has also been interpreted to protect transgender people.

Great Britain To Legalize Civil Unions in 2004. The House of Parliament plans to create civil unions for same-sex couples by 2004, granting them the spousal rights and obligations granted to married couples in the country. This act will bring the island nation in line with the rest of Western Europe, where same-sex couples have been extended a plethora of rights and responsibilities. The majority of European Union nations already have civil unions for same-sex couples, and Belgium and the Netherlands allow same-sex couples to enter into civil marriage.

German Court Finds Rights Granted to Same-Sex Couples Constitutional. The German Constitutional Court held 5-3 that legislation granting same-sex couples insurance benefits and inheritance rights did not violate German constitutional provisions “protecting” marriage. Currently, same-sex couples in Germany have the right to register and exchange vows in a clerk’s office, but are still denied many of the rights and benefits of civil marriage. For example, they cannot take advantage of the same tax benefits as opposite couples. Germany joins several other European nations in granting same-sex couples some form of relationship recognition, including Denmark, the Netherlands, Iceland, Norway, Sweden and France.

Human Rights Watch Urges Equal Marriage. On Sept. 4, 2003, Human Rights Watch issued a report urging equal marriage in lieu of civil unions and alternate systems. Human Rights Watch called on governments, including the United States, to follow a growing international trend of giving legal recognition to gay and lesbian relationships.

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