

SEX CRIMES IN DELAWARE

DELAWARE LAWYER

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OF THE
DELAWARE BAR
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Volume 19 Number 2

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Sex And The Law

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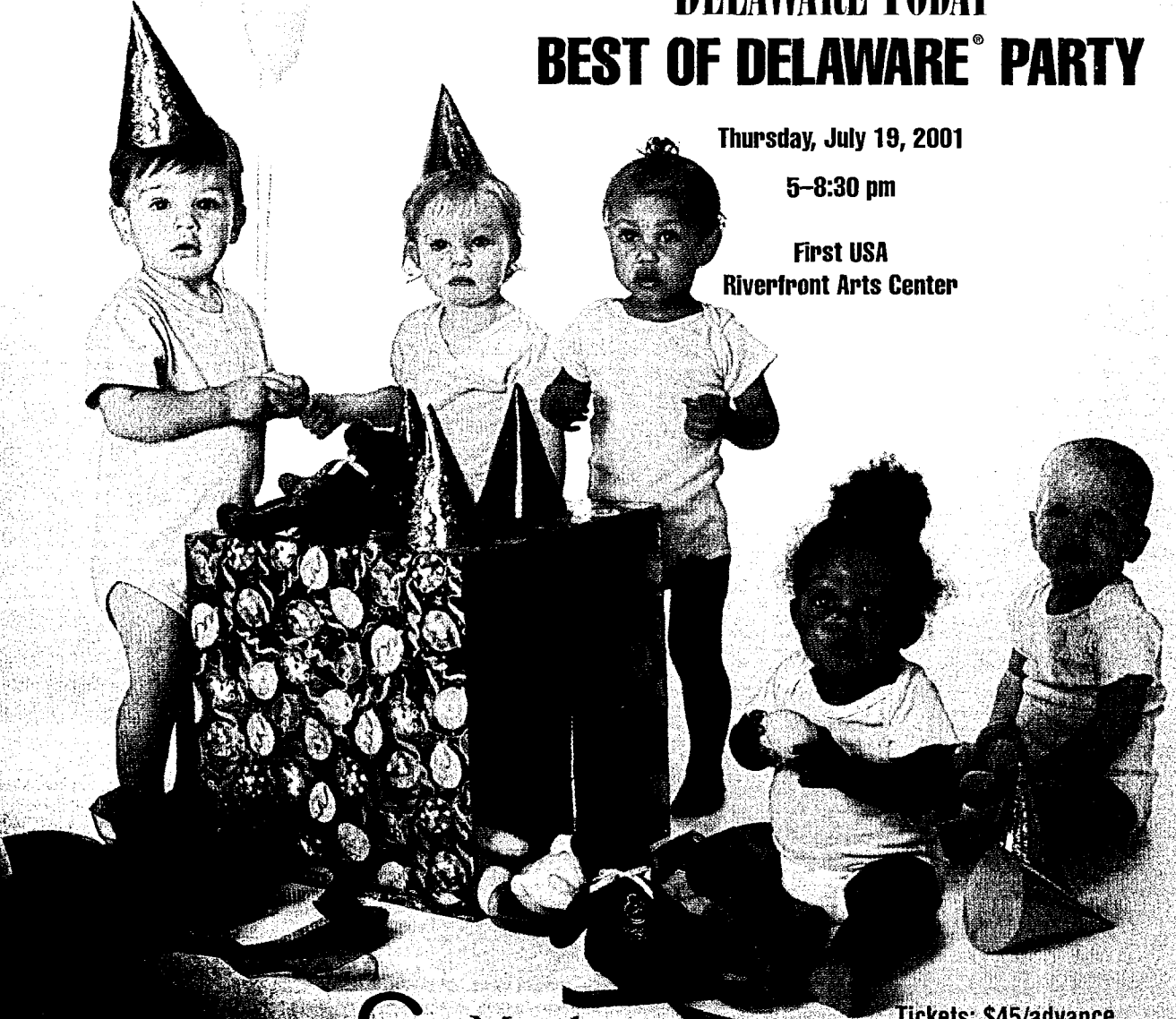
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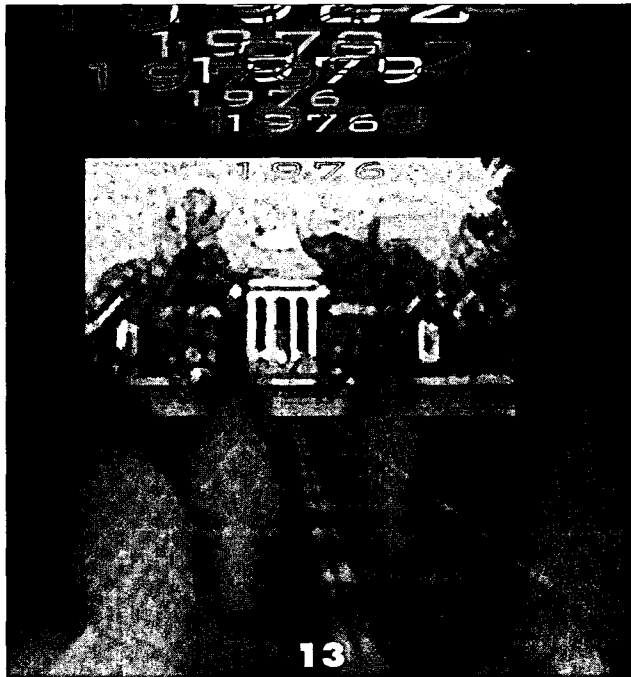
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and Susan Paikin

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DURABLE DISCRIMINATION (1988)

William E. Wiggin



Light at the end of the tunnel?

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NOTE FROM THE EDITOR

The name of this issue was chosen deliberately, and not without objection from members of our editorial board. We did not intend that "Sex and the Law" serve as a salacious magnet to bolster newsstand sales. Had that been the goal, given the scholarly approach taken by our authors, we would have stood justly accused of an egregious "bait and switch" tactic. Had that indeed been the goal, we would have used a more risqué cover!

Karen Pascale and I discussed the "naming" matter at some length and concluded that the title was appropriate because sex is the "common denominator" of every article that appears here. No other three-letter word ties together these articles about sex crimes, gay rights, sexual harassment, parentage and discrimination. With all due respect to President Bush, the word "sex" is intended to serve as "a uniter, not a divider." In thematic terms, at least.

We applaud the variety and the quality of the material in this volume. Terry Check of our editorial board has contributed a concise piece on sexual harassment that furnishes a kaleidoscopic view of relevant case law and concludes with some worthwhile, practical recommendations for prevention.

Susan Purcell lends her expertise as a prosecutor to a short history of the development of sex crimes legislation in Delaware over the past decade. The differences between the various categories of offenses can be fairly nuanced, yet there is an underlying objective of passing such legislation—an objective that is clearly stated at the end of the article.

Next, New York corporate litigator Marc Wolinsky has provided a thorough analysis of gay rights issues that covers many

of the most controversial aspects of that broad topic, including "gay marriage" and the Boy Scouts. While not everyone will agree with the author's viewpoint, the subject is articulately and thoughtfully presented, and relevant developments in Delaware are featured.

Next, Susan Paikin and former Family Court Judge Battle Robinson offer a welcome overview of the Uniform Parentage Act, a work that is particularly timely given recent technological developments involving cloning and the human genome project. Although this article focuses on paternity issues, one might well envision a sequel called "Are You My Mother?" (With apologies to Dr. Seuss, or whoever wrote that story.)

Finally, Bill Wiggin has excerpted a 13-year-old article from our 1988 "AIDS issue" and has sandwiched around it a short analysis of H.B. 99, one of the most controversial anti-discrimination bills to reach the Delaware General Assembly in recent years. As always, Bill gets straight to the point and, although he is no longer "at our helm," his mordant wit has not diminished over time.

Despite the saucy title of this issue, every contribution is stimulating and substantive, and we hope that you enjoy it.



VRP

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Battle Robinson is former judge of the Delaware Family Court in Sussex County and a Delaware Commissioner to the National Conference of Commissioners on Uniform State Laws.

Marc Wolinsky is a litigation partner at Wachtell, Lipton, Rosen & Katz, a New York firm. He has been active in the gay rights movement as part of his pro bono practice. He and his life partner, Barry Skovgaard, who is also a lawyer in New York, have been together for twenty-one years. Jonathan Pickhardt, an associate at Wachtell Lipton, and Paul Polking, a paralegal, contributed to this article, although the views expressed are solely Mr. Wolinsky's.

Teresa A. Cheek

SEX AND THE WORKPLACE: UNDERSTANDING AND PREVENTING SEXUAL HARASSMENT

Over the past ten years, the number of formal complaints of sexual harassment filed with state and federal agencies has spiraled upward. According to statistics compiled by the United States Equal Employment Opportunity Commission ("EEOC") and published on its website (<http://www.eeoc.gov/stats/harass.html>), in fiscal years 1980-1989, a total of 5,489 sexual harassment charges were filed with the EEOC. Most of the charges during this period were filed in the years after 1986, when the Supreme Court issued its first decision addressing sexual harassment.

In 1991, Congress amended Title VII of the Civil Rights Act of 1964 to permit the recovery of compensatory and punitive damages. In 1992, 10,532 sexual harassment charges were filed with either the EEOC, state fair employment practices agencies such as the Delaware Department of Labor, or both. The number of sexual harassment charges filed each year climbed steadily until peaking at 15,889 in 1997. In fiscal year 2000, 15,836 people filed sexual harassment charges. Almost 14 percent of sexual harassment charges in fiscal year 2000 were filed by men.

The money paid by employers to resolve such cases at the administrative level has also risen steadily, from \$12.7 million in fiscal year 1992 to \$54.6 million in 2000. This figure does not include the fees paid by employers to their lawyers to defend against charges of sexual harassment, nor the additional funds spent by employers on litigation costs and on the merits when unresolved cases move from the agency level into the courts.

Why has the number of sexual harassment charges exploded in recent years? Are workplaces becoming more discriminatory? Increasing public awareness and decreasing judicial tolerance of

sexual harassment, combined with the availability since 1991 of compensatory and punitive damages for unlawful discrimination and harassment, have all fueled the fire. This article will discuss the guidance provided by the EEOC and the United States Supreme Court on what constitutes sexual harassment, and it will explore how employers can prevent and avoid liability for sexual harassment.

Sexual harassment is a form of discrimination outlawed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17. Title VII was the first major modern federal civil rights law. It prohibits discrimination in employment on the basis of race, color, religion, sex and national origin. Title VII applies to "compensation, terms, conditions, or privileges of employment," thereby including hiring (or refusing to hire), firing, compensation, promotions, demotions and discipline. There is little legislative history available regarding what Congress intended when it included sex as a protected characteristic, because sex was added at the last minute in the House of Representatives. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63 (1986).

The EEOC promulgated guidelines on sexual harassment in 1980. 29 C.F.R. § 1604.11. The EEOC guidelines do not have the force and effect of law, but the courts defer to the EEOC's interpretations of Title VII when making their decisions. Section 1601.11(a) defines sexual harassment as follows:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affect-

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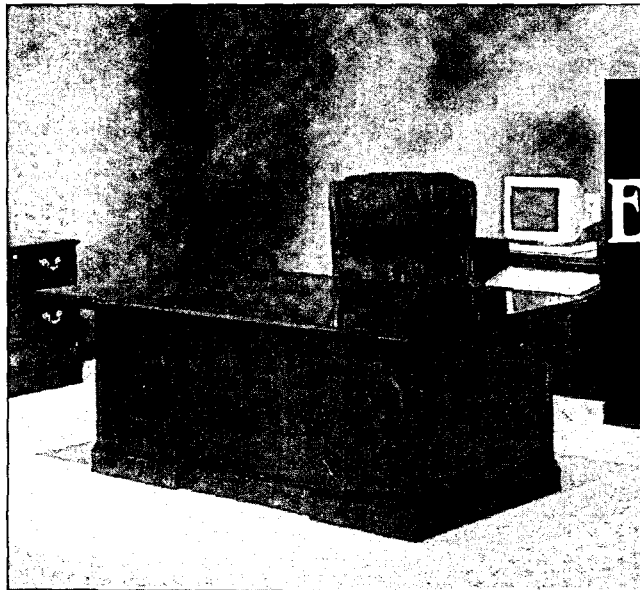
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SEXUAL HARASSMENT

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ing such individual, or (3) conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

When the EEOC is trying to determine whether sexual harassment in violation of Title VII has occurred, the agency examines "the totality of the circumstances," including the context in which the conduct occurred and the nature of the sexual advances. Although the EEOC focuses on conduct that is sexual in nature, the Third Circuit has held that any form of hostile or abusive conduct can constitute sexual harassment as long as it is motivated by the victim's gender. *Andrems v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990).

To date, the Supreme Court has issued five decisions exploring the subject of sexual harassment under Title VII. The first, *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), presented a claim of hostile environment sexual harassment. Vinson was hired as a teller-trainee in September 1974 on the same day as she applied. She had encountered the branch manager in the bank parking lot and asked if there was any work available. She alleged that he acted in a fatherly and helpful manner for the first several months, but that in May 1975 he invited her to dinner and suggested that after dinner they go to a motel together and have sex. At first she refused, but then, after he told her that she "owed him" for hiring her, she agreed to go to the motel with him and did engage in sexual relations with him. Thereafter, she testified, he repeatedly demanded sexual favors, fondled her at work, exposed himself to her, and forcibly raped her, and stated that he fondled other female employees also. She testified that she and the manager continued to have sexual relations until 1977, when she started going with a steady boyfriend. The supervisor denied the allegations, saying they were in response to a business dispute between Vinson and himself about which of the branch's tellers should be trained for a head teller position. During her employment at the bank, Vinson was promoted three times based on merit, but she called in sick on September 21, 1978, and filed suit on September 22, 1978. She never returned

to work and was eventually fired for taking excessive sick leave.

The Court held that "without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex." 477 U.S. at 63. The Court agreed with the EEOC's guidelines interpreting Title VII as covering hostile environment harassment, noting that the EEOC's position was based on ample judicial precedent "holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.* at 64. The Court rejected the argument that there is no liability unless the employee has suffered economic harm, quoting with approval the Eleventh Circuit's rationale:

"Sexual harassment which creates a hostile or offensive working environment for members of one sex is every bit the arbitrary barrier to sexual equality in the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."

Id. at 67, quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982). However, for harassment to be actionable under Title VII, cautioned the Court, it must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.*, quoting *Henson*, 682 F.2d at 904.

The Court also pointed out that there is a distinction between whether a victim of sexual harassment "voluntarily" submits to sexual advances and whether such advances are "welcome." Where advances are welcome, there is no actionable conduct, but "voluntary" submission to advances that are unwelcome does not mean that an employee forfeits his or her claim. According to the Court, "[t]he correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." 477 U.S. at 68. Consequently, evidence regarding a complainant's own conduct, including his or her sexually provocative speech or dress, is relevant to the question of whether advances were unwelcome.

Finally, as to whether the employer was liable for its supervisor's sexual harassment, the Court declined to hold

that employers are strictly liable for such sexual harassment, but it also held that employers could not escape liability simply because "management" did not know about the supervisor's harassment.

In the second case, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), the Court again addressed "hostile environment" sexual harassment, this time examining the question of whether the plaintiff must prove he or she suffered a psychological injury in order to prevail. In *Harris*, the plaintiff, a female manager working for a rental equipment company, complained that the male company president made derogatory comments based on gender to her. She alleged that he said to her, "You're a woman, what do you know," and, "We need a man as the rental manager." He also told her that she was a "dumb ass woman." He addressed sexual innuendos about their clothing to Harris and other women, asked them to retrieve coins from his pockets, and threw objects on the ground and asked them to pick them up. Harris eventually told him that she found his conduct offensive. He said he was surprised, and apologized. He stopped making offensive remarks for about two weeks, but then resumed the practice. Harris quit her job two weeks later and pursued her hostile environment claim.

The Court addressed the definition of hostile work environment, holding that Title VII is violated when the workplace is "permeated with 'discriminatory intimidation, ridicule, and insult ... sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" 510 U.S. at 21. The Court explained that it was taking a "middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Id.* As in *Harris*, hostile environment claims typically include allegations of coarse, sexually explicit or vulgar language; propositions; actual or attempted physical contact; off-color jokes and banter; sexually derogatory graffiti or display of sexually explicit material; and non-sexual hostile conduct based on gender. A plaintiff may not win his or her case unless the conduct is "severe or pervasive," but, as the Court explained in *Harris*:

... Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological

well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.

510 U.S. at 22. The Court again noted that all of the circumstances must be examined to determine if a workplace is hostile or abusive: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23. The conduct must be objectively hostile or abusive—that is, such that a reasonable person would find it to be hostile or abusive—and the alleged victim must also subjectively have felt that the conduct was unwelcome and abusive. While psychological harm is relevant, neither it nor any other single factor is a requirement.

In 1998, the Supreme Court decided three landmark sexual harassment cases: *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), and companion cases *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

Oncale is of interest because it explores the definition of sexual harassment in the context of same-sex harassment. Oncale, a male, worked on an offshore oil rig in an eight-man crew. He was subjected by three male co-workers to repeated episodes of humiliating physical sexual abuse and was threatened with rape. He complained to supervisors but they did nothing to intervene. He quit his job as a result of the harassment.

The Court held that Title VII protects both men and women from discrimination and harassment based on sex, and that harassing workplace conduct need not be based on sexual desire to violate Title VII. The Court wrote: "The critical issue ... is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." 523 U.S. at 80, *quoting Harris*, 510 U.S. at 25 (Ginsburg, J., concurring). Concerned with the

continuing contention that the courts were turning Title VII into a "general civility code," the Court cautioned that in same-sex cases, as in all sexual harassment cases, the plaintiff must show an objectively hostile environment. The inquiry "requires careful consideration of the social context in which the particular behavior occurs and is experienced by its target." 523 U.S. at 81.

Ellerth and *Faragher* provide clearer rules as to when employers will be held liable when a supervisor harasses a subordinate, and give guidelines on how to avoid or defend against sexual harassment claims. *Faragher* was brought by a female lifeguard who worked for the City of Boca Raton part time during the school year and full time during the summers from 1985 until June 1990. She and the other female lifeguards were subjected to unwanted touching and numerous other lewd, vulgar and offensive acts and remarks by one of her first-line male supervisors and by his supervisor, the Chief of the Marine Safety Division, who was responsible for hiring, supervision and discipline of all the City's lifeguards. The other first-line supervisor, also a male, did not harass the female lifeguards, but he also failed to report the harassing conduct about which they complained to his supervisor or any other City official because he did not feel it was his "place" to do so. The lifeguard group was paramilitary in structure with a clear chain of command. The city had adopted a sexual harassment policy in 1986, but it had not sent a copy to the Marine Safety Section, so the lifeguards and their supervisors were not aware of it.

In *Ellerth*, a female salesperson alleged that her supervisor's supervisor had subjected her to hostile environment harassment. She alleged that he had made offensive remarks and gestures and had implied threats that were never carried out. Ellerth eventually quit her job. Although the company had a sexual harassment policy and complaint procedure, Ellerth did not utilize the complaint procedure before quitting.

Turning to the question of the employer's liability for harassment by supervisors, the Court in both opinions (one was written by Justice Souter and the other by Justice Kennedy) described the various rationales followed by the lower courts to impose or refuse to impose liability. Such theories included scope of employment, apparent authority, a "proxy" theory, and the "aided in

the agency relation standard." In general, said the Court, agency law principles of vicarious liability applied, but "[t]he proper analysis ... calls not for a mechanical application of indefinite and malleable factors set forth in the Restatement [(Second) of Agency], see, e.g., §§219, 228, 229, but rather an enquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor's employment, and the reasons for the opposite view." *Faragher*, 524 U.S. at 797. The Court explained that, while agency concepts provided a starting point, the Court's task was to adapt them to the "practical objectives of Title VII." *Id.* at 802 n. 3.

The primary objective of Title VII, said the Court, was to avoid harm. *Id.* at 805-06. The Court pointed out that, in 1990, the EEOC had published guidelines for employers, instructing them to establish complaint procedures to encourage sexual harassment victims to come forward by not requiring them to address their complaints first to a supervisor who was himself or herself engaging in harassment. *Id.* at 806. See EEOC Policy Guidance on Sexual Harassment, 8 FEP Manual 405:6699 (BNA) (Mar. 19, 1990). The Court concluded that a standard for liability should provide an incentive for employers to make reasonable efforts to prevent and remedy sexual harassment. 524 U.S. at 806. Furthermore, noted the Court, as a general rule victims of discrimination have a duty to mitigate potential damages and avoid harm where it is possible, and the standard for liability should recognize this duty as well. *Id.*

Accordingly, in both cases, the Court provided the following statement of the basis for liability for supervisory sexual harassment:

In order to accommodate the principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees, we adopt the following holding. ... An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability

ty or damages, subject to proof by a preponderance of the evidence. ... The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or an undesirable reassignment.

524 U.S. at 764-65, 807-08.

The Court explained that "tangible adverse employment action" was "a significant change in employment status" such as discharge, demotion, failure to promote, or reassignment with significantly different responsibilities or a significant change in benefits. *Ellerth*, 524 U.S. at 761. The Court noted that "[w]hen a supervisor makes a tangible employment decision, there is assurance that the injury could not have been inflicted absent the agency relation," that "[t]angible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates," and that a tangible employment action "requires an official act of the enterprise." *Id.* at 762. The act of the supervisor in taking such tangible employment action "becomes for Title VII purposes the act of the employer," and therefore the employer will not be able to escape liability for such an act, said the Court. *Id.* at 762-63.¹

Employers can do many things to maximize the opportunity for establishing

an affirmative defense under *Ellerth* and *Faragher*. First, all employers should of course have a written anti-sexual harassment policy that specifically describes the types of conduct that are prohibited and that encourages reporting of harassment. Employers should then ensure that employees know about the policy by giving all new employees a copy of the policy when they are hired, and by posting copies of the policy conspicuously in locations in the workplace where other legally required posters are placed (*i.e.*, the lunchroom, near the time clock, etc.). Employers also should periodically update and distribute new copies of the policy. If feasible, employers should obtain signed receipts from employees whenever copies of the policy are distributed, and employers should always maintain a file of documentation demonstrating each instance of distribution of the policy.

To encourage reporting of sexual harassment, the complaint procedure should provide multiple avenues for complaints, assure employees that they will be protected from retaliation for complaining or for cooperating in a sexual harassment investigation, give appropriate assurances about confidentiality, and keep complainants informed about the status of their complaints. Traditional internal complaint procedures often require employees to "go up the chain of command" when complaining about their working conditions. Insistence on such a process is likely to discourage complaints about harassment by supervisors or managers, however. Consequently, the policy should designate a few people (of both genders) by name and telephone number as persons to whom complaints should be directed. These designated representatives should be trained to respond immediately to complaints by initiating an investigation. They should be trained in proper investigative techniques themselves, or should be authorized to bring in experienced third party investigators to assist in the investigation.

Employers also should train supervisors so that they understand what kind of conduct is forbidden. For example, policies may contain a general definition of sexual harassment, such as the EEOC definition, but they also should enumerate examples of conduct that violates the policy, such as gender-based epithets and name-calling, repeated sexual or romantic overtures after rejection, off-color jokes or sexually suggestive comments, comments about personal appearance, staring, stalking, offensive touching, sexual assault, display of sex-

ually explicit materials, and any other hostile or abusive conduct based on gender.

Supervisors also must understand that they will be held accountable for handling complaints properly should a complaint be made to them, because the courts require employers to take prompt and appropriate action when someone complains, and knowledge of harassment on the part of a supervisor is likely to be attributed to the employer.

Once a complaint has been received and the investigation has been launched, the employer should provide feedback to the complainant about the progress of the investigation. The employer should also check with the complainant periodically (*i.e.*, every few days during the investigation) to be sure that no one has been retaliating against the employee for complaining. The employer also must ensure that the harassment has stopped after the investigatory and disciplinary process has been completed, because the courts require employers to do whatever is needed in terms of discipline of a confirmed harasser to make the harassment end. If a harasser becomes a repeat offender, the level of discipline must be increased until it becomes effective in stopping any further incidents of harassing conduct.

An employer's failure to take the steps outlined above may be cited by employees who have filed suit without going through the internal complaint process as justification for not complaining. Courts may agree that if employees who complained in the past were ignored, the plaintiff reasonably chose not to make a futile complaint. Employers who do not take even the basic step of promulgating a sexual harassment policy with an accessible complaint procedure and communicating that policy to all employees do so at their own peril. In the *Faragher* case, for example, the employer lost its affirmative defense because the undisputed facts showed the employer had never advised the Marine Division employees of its sexual harassment policy. Now more than ever, all law firms that advise employers should urge their clients to review their sexual harassment policies and to take the additional steps discussed in this article to prevent sexual harassment.

FOOTNOTES

1. Given the Court's description of "tangible employment action," emphasizing that tangible employment action exists when the supervisor acts on behalf of the employer to make economic decisions affecting the employees under his or her supervision, a constructive discharge (as opposed to actual discharge authorized and executed by the company) logically should not be construed as a tangible adverse employment action. ♦

Susan Purcell

THE EVOLUTION OF DELAWARE SEX CRIMES LEGISLATION IN THE 1990S

During the 1990s, there was a dramatic increase in the number of sex offenses reported to law enforcement. Many of the crimes involved children, as both victims and perpetrators. It was a time of heightened awareness of the scope of sexual abuse and the lasting impact victimization has upon individuals, especially children. Perhaps most alarming was the recognition that victims sometimes reappeared in the criminal justice system, as either the victim or the defendant. Developments in technology provided sex offenders with the ability to communicate with each other and with potential victims from their home computers, creating issues never even contemplated ten years ago. This explosion led to a focus upon the way in which these cases were processed by the criminal justice system and, ultimately, to significant changes in the laws, along with a refinement of the resources available to address the issues raised by these crimes.

During the eleven years I prosecuted sex offenses in New Castle County, I worked with victims from five months to 88 years old. While the victims were primarily female, men and boys were not exempt from this type of victimization. Most of the reported cases of sexual assault allege that the perpetrator is a male, but females also commit these offenses. The majority of the reported offenses were committed against children by someone they knew. Frequently the perpetrator was a member of the child's household or extended family. The perpetrator may have been the victim's friend, acquaintance or associate. Less frequently, the defendant was a

stranger, completely unknown to the victim.

Adults commit some sex offenses. Juveniles commit others. Some sex offenses may be the result of a plan. Others occur as part of a pattern of abuse, and still others are crimes of opportunity. As the victims and defendants span all humanity, so do the acts of sexual violence committed. Indeed, no two cases present identical situations.

As the 1990s began, sex offenses were addressed in a handful of statutes. These statutes broke sex offenses into three major groups known as Unlawful Sexual Intercourse (USI), Unlawful Sexual Penetration (USP) and Unlawful Sexual Contact (USC). By the end of the 1990s, this system had been completely replaced by an entirely new group of statutes, with Rape replacing the terms USI and USP. In addition, many new laws were enacted to supplement the previously existing statutory scheme.

Sex Offender Registration Laws became effective in Delaware in July of 1994. This body of law, commonly referred to as Megan's Law, was amended in 1996 and again in 1998. Currently, anyone convicted of a sex offense in Delaware is designated a sex offender by the sentencing court, and assigned a tier for purposes of community notification. There are over 1700 sex offenders registered under the three versions of the statute in Delaware.

Two significant programs were launched to improve and standardize forensic interview techniques and evidence collection during the 1990s. These programs, known as the Children's Advocacy Center (CAC) and the Sexual Assault Nurse Examiner Program (SANE), are currently an integral part of the forensic picture in many criminal prosecutions. In addition, the beginning of the 1990s marked the regular

appearance of DNA analysis as a forensic tool utilized in criminal investigations and accepted at trial as admissible evidence. This technology had been utilized in the scientific community for quite some time, but was new to criminal forensics.

These developments led to changes in the way in which sex offenses, and those who committed them, were considered by the criminal justice system. Similarly, the rights of the victims of these offenses were identified and protected.

Sexual Offenses are set forth in Subpart D of Chapter 5 of Title 11 of the Delaware Code. This subpart underwent dramatic development during the 1990s. Some basics, like the definition of major terms, have not been changed. Sexual intercourse is defined as any act of physical union of the genitalia or anus of one person with the mouth, anus or genitalia of another in which penetration, however slight, occurs. The definition also includes cunnilingus or fellatio, regardless of whether penetration occurs. (11 *Del. C.* §761(e)). USP involves penetration of the vagina or anus by a finger or an object, which is defined to include any item, device, instrument, substance or part of the body other than a tongue or a penis. (11 *Del. C.* §761(c)). USC is defined as any intentional touching of the anus, breast, buttocks or genitalia of a person, over or under the clothing, which is sexual in nature. (11 *Del. C.* §761(f)).

Of course, in order for such conduct to be criminal in nature, several other elements are required. The conduct must occur without the consent of the victim, or the victim must be a child, statutorily precluded from giving consent. The definition of "without consent" includes the common meaning of the term, in which an individual is compelled by threat or force to submit.

Resistance is required only to the degree necessary to communicate the victim's refusal to the defendant. In addition, a sexual act is deemed to have occurred without the consent of the victim if the defendant knew that the victim was unconscious, asleep or otherwise unaware that the sexual act was being performed. A sexual act may also be deemed to have occurred without consent when a defendant knew that a victim suffered from a

degree. The issue of consent is irrelevant in a statutory rape case, unless the defendant is no more than four years older than the victim and the two were voluntary social companions at the time the sexual intercourse occurred. This "teenage defendant" defense is not available if the child is less than 12 years old. A belief that the victim was of age is not a defense to a charge of statutory rape. (11 *Del. C.* §762).



While USI 3rd is a class C felony punishable by zero to ten years in jail, the rape of a child is a class A felony, punishable by a minimum of fifteen years to life in jail if the defendant was not the victim's voluntary social companion on the occasion of the crime. By definition, a victim is not the voluntary social companion of a defendant if the victim was not in the defendant's company on the occasion of the offense as a result of the victim's exercise of rational intellect and free will, without trick, coercion or duress. (11 *Del. C.* §761(h)). In 1993, the legislature codified the case law that established that a child under 16 could never be the voluntary social companion of an adult in whose care or custody he or she had been placed, and that a child under 12 could never be the voluntary social companion of a defendant over 18. Thus, the "voluntary social companion" concept was an additional element which, if proven in child sexual abuse cases, substantially increased the

penalty that might be imposed upon an adult who raped a child.

Nonetheless, the term "voluntary social companion" has created controversy since its initial appearance in the law. Under Delaware law, intercourse without consent also constituted Unlawful Sexual Intercourse 3rd degree. Intercourse without consent became a class B felony

mental illness or defect that rendered the victim incapable of appraising the nature of the sexual conduct. In 1994, the definition of "without consent" was expanded to include a provision relating to health care professionals. (11 *Del. C.* §761(g)).

Intentional sexual intercourse with a child under 16 constitutes USI 3rd

known as Unlawful Sexual Intercourse 2nd degree, however, if the defendant was not the adult victim's voluntary social companion on the occasion of the crime. Unlawful Sexual Intercourse 2nd was punishable by up to 20 years incarceration, with a minimum sentence of ten years in jail. It became clear that Delaware's continuing use of the term "voluntary social companion" created a situation in which date and acquaintance rape were considered a lesser crime than stranger rape. Virtually every jurisdiction in the United States has now rejected this distinction in the prosecution of sex offenses.

On September 9, 1998, a new statutory scheme designed to eliminate this disparity in the classification of offenses became law. Sex offenses committed after that point would be charged as Rape 1st degree, Rape 2nd degree, Rape 3rd degree, Rape 4th degree or Unlawful Sexual Contact 1st, 2nd or 3rd degree. The challenge to redrafting the statutes revolved around the need to ensure that criminal conduct was not inadvertently categorized as a lesser offense under the new law than it had been under the old law. The major substantive change involved the elimination of the "voluntary social companion" concept. In addition, USP was eliminated as a separate category of offenses and the elements once constituting those crimes were incorporated into the new Rape 2nd, Rape 3rd and Rape 4th degree. USC remained unchanged, as "voluntary social companion" was not an element of those offenses.

A class C felony, Rape 4th basically encompasses the former statutory rape provisions of USI 3rd and USP 3rd. Rape 4th actually broadens the scope of statutory rape under Delaware law by criminalizing sexual intercourse with 16 and 17-year-old individuals, if the defendant is 30 years of age or older or stands in a position of trust, authority or supervision over a child. Prior to the enactment of this statute, it would not have been illegal for such a teenager to engage in consensual intercourse with a 40-year-old, a teacher or coach, or a parent's paramour. Prior to this modification, even intercourse with an adult family member would have constituted the misdemeanor incest, without evidence of a lack of consent. (11 *Del. C.* §§761(i), 770).

Rape 3rd degree is a class B felony, punishable by two to 20 years in jail. Rape 3rd contains the elements once constituting USP 2nd degree, in which the defendant caused the victim physical injury. In

addition, the penalty for committing statutory rape is enhanced under the Rape 3rd degree statute if the defendant is at least ten years older than the victim, or if the defendant is at least 19 and the victim is under 14. The statute further directs that the court shall order the defendant, as a condition of probation, to make support payments as ordered by Family Court, should the statutory rape result in the birth of a child. (11 *Del. C.* §771). The requirement of support was a response to the number of teen pregnancies determined to be the result of intercourse with adults, who accepted no responsibility for the resulting children.

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Rape 2nd degree is also a class B felony, but conviction under this section carries up to 20 years, with a minimum sentence of ten years in jail. A person is guilty of Rape 2nd degree when the evidence establishes the defendant had intentional intercourse with another person, without the victim's consent. An act of penetration may also constitute Rape 2nd degree if the defendant inflicts serious physical injury upon the victim or displays a deadly weapon. Rape 2nd degree also encompasses those cases involving penetration in which the defendant is an adult in a position of trust, authority or supervision over a

child under 12 years old.

An individual engaging in sexual intercourse with a child under 16 is guilty of Rape 1st degree if the defendant stands in a position of trust, authority or supervision over the child. Regardless of the relationship between the two, an adult who engages in sexual intercourse with a child under 12 is guilty of Rape 1st degree. Nonconsensual intercourse constitutes Rape 1st degree if a weapon is displayed or if the victim sustains serious physical injury. Any nonconsensual intercourse which is facilitated by or occurs during the course of the commission of a felony or violent misdemeanor constitutes Rape 1st degree. Like USI 1st degree, Rape 1st degree is a class A felony, punishable by a minimum of 15 years, up to life in prison. In fact, if a defendant causes serious physical injury to a victim, has a previous conviction for a class A sex offense, or is convicted of the rape of three or more victims, the sentence imposed is life in jail without benefit of probation or early release.

Throughout the decade, the number of sex offenses on Delaware's books grew in response to public outrage at the significant impact these crimes have upon society as a whole. "Sexual extortion," "Continuous sexual abuse of a child" and "Dangerous crime against a child" are examples of statutes designed to enhance the penalty imposed upon those who repeatedly sexually abuse children. (11 *Del. C.* §§776, 778, 779). Bestiality and female genital mutilation also appeared in response to public outcry over the conduct constituting these offenses. (11 *Del. C.* §§777, 780).

Possession of child pornography is not recently criminalized conduct. (11 *Del. C.* §1111). Widespread computer access and literacy has given rise to a new generation of issues relating to child pornography, with which law enforcement is now well qualified to deal. While "Unlawfully dealing in child pornography" is a class D felony, a subsequent conviction for this crime is categorized as a class B felony. A closely related crime is "Sexual exploitation of a child," itself a class B felony, with subsequent convictions resulting in the imposition of a life sentence. (11 *Del. C.* §§1108, 1109, 1110). Even mere solicitation to engage a child in a sexual act carries a significant penalty for an adult, as it is categorized a class C felony. The "Sexual solicitation statute" also addresses the issues raised by the defendants' possible use of a com-

puter in another jurisdiction by specifically referencing (11 *Del. C.* §204), which sets forth the territorial applicability of Delaware law.

Included in the increasing number of reported sex offenses are those in which adults reported sexual abuse that occurred during childhood. There are many reasons for waiting years to report abuse, but it is clear that the secretive nature of the criminal conduct inflicted upon a child by a sex offender works to guarantee the child's cooperation and silence. This was particularly true years ago, in an era where the authority of a parent, a teacher or clergy was supreme and disclosure may have been perceived to be more traumatic than the abuse itself. The act of reporting is sometimes helpful to the victim and provides law enforcement with information that might identify an individual as a repeat offender, should fresh complaints be made. Almost without exception, however, the statute of limitations had run long before the report was made. In response to this situation, the statute of limitations was essentially removed. The new provision permits prosecution to commence within two years of initial disclosure to Family Services or law enforcement, provided the victim was under 18 at the time of the offense. This section is applicable to those offenses not barred by the statute of limitations in July 1992, when the new statute became effective. (11 *Del. C.* §205(e)).

During the past ten years, victims' rights have been clarified and services have been expanded. Chapter 94 of Title 11 contains the Victims' Bill of Rights. The statute recognizes the importance of providing victims with separate waiting areas at the courthouse, or otherwise guaranteeing that the victim and the defendant are not in the same area of the courthouse. By directing that scheduling of child sexual abuse cases should be expedited, the victims' interest in speedy prosecution is recognized. This chapter sets forth the guidelines for keeping victims informed about the status of the case as it moves through the criminal justice system from pretrial through post-conviction matters. The victim is entitled to be present at any proceedings, absent good cause for exclusion. The Victims' Bill of Rights also acknowledges a victim's right to make an impact statement to the court at the sentencing stage. *See also* 11 *Del. C.* §4331. Since 1994, victims have had the right to request that sex offenders be tested for sexually trans-

mitted diseases in certain circumstances. (11 *Del. C.* §§3910 - 3914).

The successful prosecution of sex offenses depends upon communication between the various interests brought together once such a crime is reported. These groups may have varying and often conflicting goals and purposes, which must somehow be unified to protect the interests of both the victim and society.

Ten years ago, law enforcement was concerned with identifying the perpetrator and determining whether to make an arrest. A child victim would be taken to the police station for an interview. In a facility designed to deal with adults, attempts at videotaping frequently produced less than optimal results, as cameras could not pick up where the child was pointing, what was being drawn as the child described the abuse, or the child's soft and timid voice. Case workers would be focused upon the safety of the child and possible placement issues. Emergency room physicians, with minimal training in the area of the forensic physical examination of child sex abuse victims, would examine the child, sometimes hours past bedtime. Within the first six to 12 hours after a report of sexual abuse, over ten individuals may have interviewed the child to some degree, each with a different focus, few recording in a uniform manner the details of the disclosure. An interview with a prosecutor and a social worker in the attorney general's office several weeks later rounded out a rather exhaustive interview process. This summary does not even begin to consider those involved as the case proceeds through the child welfare and criminal justice systems and treatment needs are identified.

Next, consider that most cases of child sexual abuse are not reported contemporaneously with the event, but are rather late reported crimes. The child has kept the secret, usually as a result of the perpetrator's statements or actions. This affects the potential to collect meaningful physical evidence and the way in which the disclosure is made. After keeping such a secret, it is not likely that the initial disclosure is either complete or detailed. A defense attorney's delight at trial, the practice of multiple interviews by individuals with different levels of training, experience and focus creates a prosecutor's nightmare when attempting to determine whether a crime has been committed and, if so, whether prosecution is possible.

By 1994, the number of reported

child abuse cases in Delaware was well into the thousands, and a task force was formed to bring together public and private groups involved with abused children and their families to find a better way to handle the issues presented by these difficult cases. The Children's Advocacy Center (CAC) opened in 1996, stating as its mission the desire to reduce the devastating long-term effects that child abuse has on children, their families and society. The CAC virtually eliminated the problems created by the above-outlined process by providing a child-friendly setting for expert response teams of forensic interviewers, detectives, social workers, medical staff and prosecutors to work together. All involved professionals observe one interview, which is videotaped using equipment capable of moving with the child and picking up the tiniest whisper. Following the interview, a doctor specially trained in the area of child sex abuse examines the child.

The CAC does not only work to aid in criminal prosecutions, however. Sometimes a concern that a child is sexually abused is raised by behaviors or other indicators. Frequently, the team meets to observe an interview and is able to close the case on the spot, alleviating weeks of stress on the family as the case proceeds through the system from report to case worker, to police officer, to prosecutor, before closure. Demand for the services provided by the CAC led to the opening of a second facility in Milford in 1999.

The video made at the CAC is available for use at trial, and allows the judge or jury an opportunity to assess circumstances surrounding the disclosure and the credibility of the child at the time the event is reported. This video assumes even more importance, as the reality of the situation is that these cases may take over a year to get to trial. The child in the courtroom, after a growth spurt, may barely resemble the child on the video. *Counseling and a supportive environment* may have helped the child to put the abuse in perspective by the time of trial, making it difficult for a jury to understand the circumstances as they existed at the time of the abuse.

The videotape made at the CAC may be admissible under several different theories at trial. Section 3507 of Title 11 provides that a voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value. In order to admit the tape of the

child's disclosure, the child must take the witness stand, certain foundational requirements must be met, and the defense must have an opportunity for cross-examination. In addition to tapes, the child's unrecorded statements to others may also be admissible under Section 3507. Case law has developed detailing procedures that must be employed before evidence is admissible under Section 3507.

In some circumstances, the foundational requirements cannot be met and the tapes are not admissible under Section 3507. In the early 1990s, a child victim's inability to testify in open court brought a prosecution to a grinding halt. Several alternatives were developed to allow these cases to proceed.

Although criminal depositions are permitted under limited circumstances, a law was enacted specifically providing for the videotaped deposition of a child witness under 12 years old. If the deposition is taken in accordance with the statutory provisions, the videotape may be admissible as substantive evidence and the child may not be compelled to testify at trial. Under circumstances set forth in section 3511 of Title 11, the defendant may be excluded from the deposition, provided he or she is able to observe and hear the witness and to communicate with defense counsel. Section 3514 provides for testimony by means of closed-circuit television in cases in which the victim of sexual or physical abuse is less than 11 years old. Use of closed-circuit television requires the judge to find that testimony in the courtroom will result in serious emotional distress that prevents the child from communicating.

Section 3511 requires a pretrial ruling that the child will not be able to testify, a determination that is not always possible. In addition, the deposition does not provide a remedy in circumstances in which the child was simply unavailable to testify even in the protective environment created under sections 3511 and 3514. Section 3513 is Delaware's "tender years" statute, providing a hearsay exception applicable to out-of-court statements of children under the age of 11 at the time of trial. Under this exception, a statement is deemed admissible if the court specifically determines the child to be unavailable and the statement the child made out of court is shown to possess particularized guarantees of trustworthiness. The child might be declared unavailable due to death, physical or mental impairment or a substantial likelihood of severe emotional

trauma from testifying. Other grounds include the child's absence from the jurisdiction, incompetence, and a total failure of memory or persistent refusal to testify despite judicial instruction to do so. (11 Del. C. §3513). The Superior Court first upheld the constitutionality of section 3513 in *State v. Crick*, Del. Super., 643 A.2d 331, 337(1993). This section has been relied upon in a handful of trials since its adoption.

Another program sprang from the heightened awareness of the additional trauma that is frequently but inadvertently inflicted upon victims by the investigative process. A Sexual Assault Nurse Examiner (SANE) is a specially trained nurse, qualified to conduct a forensic examination of the sexual assault victim. The SANE program has allowed for consistency in evidence collection and preservation in a supportive environment, as well as the opportunity for appropriate referrals to meet the needs of the victim. SANE nurses also testify at trial on the results of these forensic examinations.

From a forensic standpoint, DNA analysis has had a significant impact upon the prosecution of sex offenses by allowing the successful prosecution of sex crimes that might have gone unsolved, due to an inability to identify the rapist. Prior to the availability of DNA, a series of rapes might be linked due to similarities between the offenses. Today, crimes can be conclusively linked, first to each other and ultimately to a particular defendant, by DNA evidence. Obviously compelling evidence of identity at trial, many cases have also been resolved by way of a plea once a defendant's DNA has been extracted from evidence collected at a crime scene.

Originally, evidence was sent to the FBI crime laboratory for DNA analysis, as Delaware did not have a lab qualified to conduct this type of scientific analysis. Without control over the length of time it took to have the work completed and results made available to the State and the defense, cases languished in the system, sometimes for over a year. As a result, a Delaware DNA laboratory was established in the Office of the Chief Medical Examiner.

As the rights of victims received recognition throughout the 1990s, limitations placed upon convicted sex offenders grew. Convicted sex offenders are prohibited from residing or loitering within 500 feet of school property, broadly defined to include virtually any institution that is primarily dedicated to

the education or instruction of children. (11 Del. C. §1112). The probation office, like every other agency involved in any capacity with sex offenses, has a specialized unit to supervise these offenders in the community and to monitor compliance with conditions of release. Sex offenders may be required to submit to polygraph examinations to monitor compliance and relapse potential.

Individuals in the community demanded information about convicted sex offenders. In response to the tragic death of a seven-year-old child in New Jersey, communities nationwide began to enact legislation requiring the registration of sex offenders. Delaware's version of Megan's Law, originally enacted in 1994, requires that convicted sex offenders register with the Delaware State Police. One purpose of registration was to allow for community notification. An amendment in 1996 provided that sex offenders be assigned to one of three tiers, based upon a risk assessment. The tier designation affects the nature and extent of community notification of the registered address of the offender. In 1998, a third amendment modified the manner in which tier designation was made. Today, tier designation is based strictly upon the crime a defendant is convicted of committing, with room for modification both up and down a level under certain circumstances. Tier designation continues to affect the manner in which community notification is effectuated by local law enforcement throughout Delaware. (11 Del. C. §§4120, 4121).

Many issues remain for discussion over the next decade. The past decade has highlighted the long-term, devastating impact sex offenses have upon the victim, the perpetrator and society. Appropriately, great effort has been directed toward protecting the members of society from sex offenders. However, only very small advances have resulted from efforts to break the cycle of sexual abuse and violence. It may seem impossible to identify those at risk of becoming a victim or a perpetrator of sexual abuse and to develop a successful intervention program. Who is responsible for such programs? How will they be implemented? Who will pay for them? Fifteen years ago, young children were interviewed in police stations, the use of computers by sex offenders was virtually unheard of, and DNA analysis was an untapped forensic tool. Perhaps this is the challenge for upcoming decade: prevention. ♦

Marc Wolinsky

STEREOTYPES, TOLERANCE AND ACCEPTANCE: GAY RIGHTS IN COURTS OF LAW AND PUBLIC OPINION

By legend, the modern gay rights movement began in front of the Stonewall Bar in Greenwich Village, New York in 1969. In 1976, it moved to the United States District Court for the District of Delaware. Richard Aumiller, a lecturer at the University of Delaware, had been fired from his position because he gave interviews to three newspapers about the difficulties that the university's gay and lesbian student group had experienced in finding a place to meet. During the weeks leading up to the firing, the then-president of the university, Edward A. Trabant, told Aumiller that the majority of Delawareans did not share his views on homosexuality and would not do so in Aumiller's lifetime.

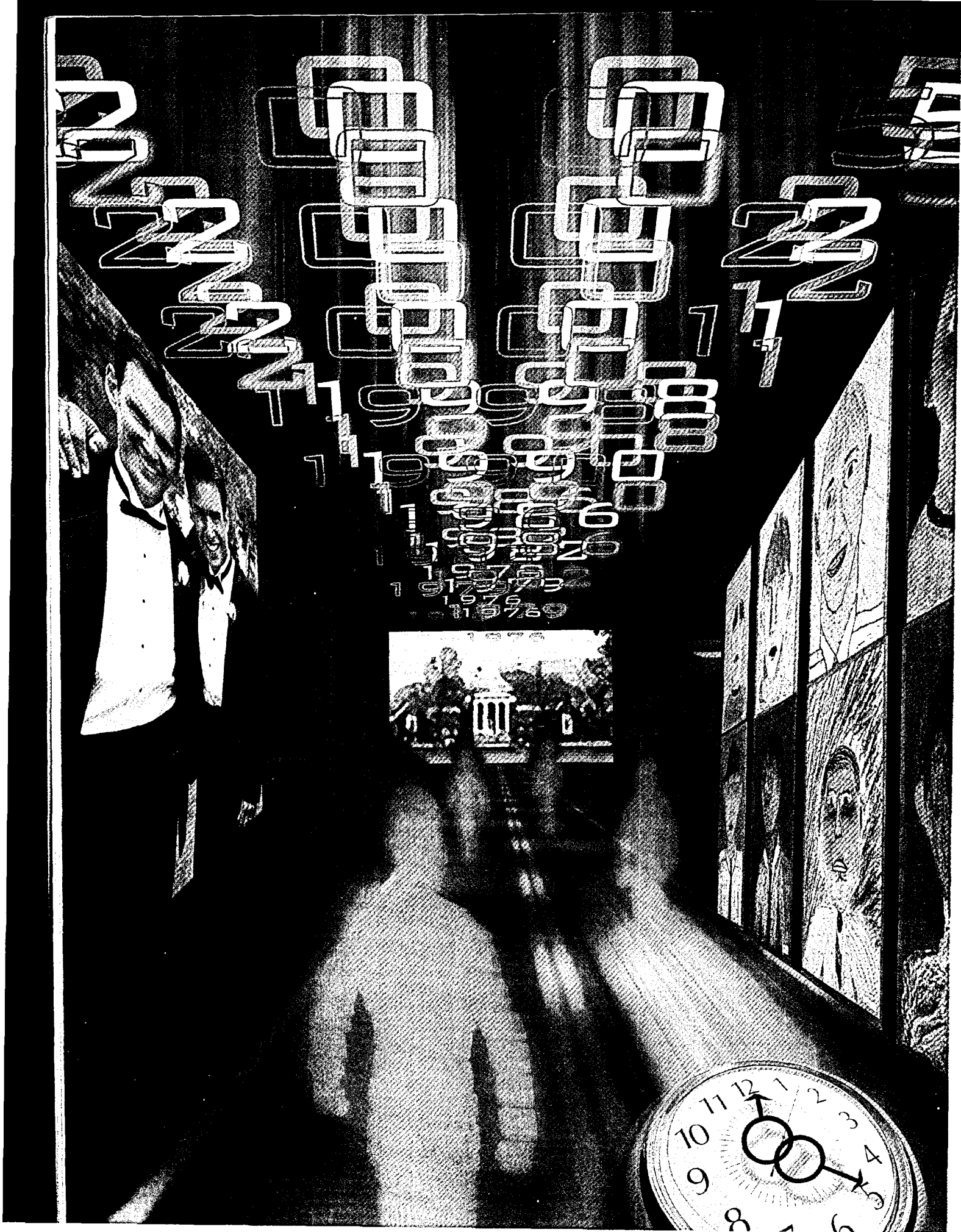
The university defended Trabant's decision, claiming that Aumiller's comments reflected an "evangelistic endeavor" to attract gays to the campus, that they could cause "harm" and "embarrassment" to the university, and that Aumiller had "placed himself in a position of encouraging, condoning and sanctioning homosexuality for the undergraduate." Trabant said that Aumiller's statements were "shocking" and an "effront (sic)" to him personally. The university also claimed that Aumiller's termination was justified because he falsely suggested in one interview that university officials knew that he was gay when he was hired, something that the officials claimed they would not have done.

Aumiller won his suit.¹ In an opinion by District Judge Murray M. Schwartz, the court found that the university and its president had violated Aumiller's First Amendment rights, and awarded him reinstatement, compensatory and punitive

damages, and attorneys' fees. The 40-page opinion shows that the case was hotly litigated: the university, its trustees and its president apparently believed that an action that today looks indefensible should be vigorously defended. They had reason to think that they would prevail.

In 1972 and 1976, the Eighth and Ninth Circuits had upheld decisions by government agencies that refused to employ openly gay people—in one case, an applicant for a position as a cataloguer in a university library, in the other, a probationary clerk-typist at the EEOC—on the ground that their employment would "foist tacit approval of this socially repugnant concept upon his employer" and "reflect discredit upon ... [his] employer, impeding the efficiency of the service by lessening general public confidence in the fitness of the government to conduct the public business with which it is entrusted."² And the next year, in *University of Missouri v. Gay Lib*, three Justices of the Supreme Court voted to grant certiorari to review an Eighth Circuit decision upholding the right of a gay student group even to exist. The university claimed that the group could be banned because its existence would encourage students to have gay sex, which was criminal under Missouri law.³

In his dissent from the decision not to grant *certiorari*, Justice Rehnquist wrote: "Writ large, the issue posed in this case is the extent to which a self-governing democracy, having made certain acts criminal, may prevent or discourage individuals from engaging in speech or conduct which encourages others to violate [sodomy] laws." He continued: "[T]he question is more akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have



measles, in order to urge repeal of a state law providing that measles sufferers be quarantined.⁷⁴

Judge Schwartz distinguished the Eighth and Ninth Circuit decisions on the ground that the employees in those cases were more out of the closet than Aumiller: unlike those unsuccessful plaintiffs, Aumiller had never "appl[ie]d for a marriage license, kiss[ed] a man in public, or participat[ed] in homosexual demonstrations." He went on to rule that there was not "a scintilla of evidence ... that Aumiller was on a campaign to convert heterosexuals to homosexuality," that his presence on campus would not cause students to change their sexual orientation, and that Aumiller had not sought to create the impression that he was speaking for the university or that it endorsed his views. Judge Schwartz concluded: "The Court fully recognizes that homosexuality is an extremely emotional and controversial topic and that Aumiller's opinions on the subject quite likely represent a minority view. But this unpopularity can not justify the limitation on Aumiller's First Amendment rights by the University of Delaware."⁷⁵

The Erosion of Stereotypes

Aumiller stands as a paradigm of the challenges facing the gay rights movement when it began. In 1976, in Delaware and throughout the country, employers felt perfectly justified in discriminating against a gay man or woman solely on the basis of his or her self-identification as a gay person. In education, one of the most pernicious stereotypes used against gay people was offered as a basis: that an openly gay teacher would "recruit" questioning teens to homosexuality. It was thought that the mere presence of individuals who spoke the words "I am gay" would bring discredit to any institution that employed them. As Justice Rehnquist's 1978 dissent shows, the idea that gay people were sick, immoral and criminal remained in currency. And the personal morality of a majority was deemed a sufficient basis for terminating a government employee. Indeed, in 1986, a bare majority of the Supreme Court held in *Bowers v. Hardwick* that the personal morality of the majority can provide a constitutional basis for imprisoning a person who shares intimacy in the privacy of his or her home with someone of the same sex.⁶

Judge Schwartz's decision rejected these stereotypes. Gay people are not

criminals, at least not in Delaware.⁷ Psychological studies show that homosexuality is not an illness. Studies also show that homosexuality is not transmitted through casual contact like the measles, and that gay teachers do not recruit their students to homosexuality. And no right-minded person would think that the employment of a gay person meant that an institution endorsed his or her sexuality.

But the impact of the *Aumiller* decision and other cases like it far transcended the debunking of stereotypes. By protecting the right to identify oneself pub-

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licly as a gay person, decisions like *Aumiller* gave gay people the ability to change people's minds through example. It is easy to demonize gay people when you don't know any. It is harder to demonize them when you have gay friends, co-workers, aunts and siblings or when your favorite television shows feature sympathetic gay characters. Discrimination has long forced gay people into the closet. Freeing gay people from discrimination has helped them to come out of the closet. And the more gay people come out of the closet, the

easier it is for others to do so. The result has been that while in 1983, only 24% of Americans surveyed said that they had gay friends or acquaintances, by 1998, the percentage had increased to 55%.⁸

This openness has led to growing tolerance and acceptance, and the prediction that a majority of Delawareans would not change their minds about gay people in Aumiller's lifetime has proven to be wrong. The University of Delaware now has a policy prohibiting discrimination on the basis of sexual orientation that is widely supported on campus: a 1994 survey of University of Delaware employees and graduate students found that 86% agreed that gay men and women should have the same employment opportunities as non-gays.⁹ The survey is in line with broader polls, which show that between 1977 and 1999, public support for equal employment opportunities for gays increased from 56% to 83%.¹⁰ Attitudes on the "hot button" issue of gay school teachers has shifted even more dramatically: between 1977 and 1999, the percentage of people who agreed that gays should be allowed to teach elementary school increased from 27% to 54%.¹¹ While a majority (56% in 1996) disapprove of homosexuality, that percentage has gone down by 20% in just one decade.¹²

These gains have translated into political results. In 1997, the Delaware General Assembly amended the definition of a hate crime to include a crime committed against a victim selected because of his or her sexual orientation.¹³ On December 15, 2000, as one of his last acts in office, Governor Carper signed an executive order prohibiting employment discrimination based on sexual orientation in the Cabinet and the state's executive branch.¹⁴ And on March 27, 2001, the Delaware House of Representatives narrowly passed a bill that would prohibit discrimination on the basis of sexual orientation in employment, housing, public works contracting, public accommodations and insurance. Governor Minner has said that she will sign the bill if it is passed by the Senate.¹⁵ Similar steps have been taken by authorities at the federal, state and local levels throughout the country, and are too numerous to catalogue.

The Cultural War in the Courts

Broad shifts in majority views across the country have not insulated gay people from political defeats, however. In

1992, Coloradans voted 53% to 47% to amend the state's constitution to prohibit the state and its subdivisions from adopting any laws protecting gay people from discrimination. The amendment repealed anti-discrimination laws adopted in Denver, Boulder and Aspen. Once again, the courts stood in the way of a majority's imposition of its moral sense uniquely to disadvantage gay people. In *Romer v. Evans*, the Colorado Supreme Court, and then the United States Supreme Court, ruled that the amendment "defies" the Constitution's guarantee of equal protection to all Americans.¹⁶ Justice Scalia, in his spitting dissent joined in by Justices Rehnquist and Thomas, accused the majority of taking sides in a "culture war" and defended the amendment as "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws." Justice Scalia continued that, since *Bowers* upheld the right of states to criminalize gay sex, Colorado should be able to deny "special protection" to a class of persons defined by their propensity to engage in "criminal" and "morally wrong" sex acts.¹⁷

The majority did not even bother to respond to the dissent, resting upon its conclusion that the majority's action in amending the Colorado constitution was "born of animosity" towards gays. Implicit in the Court's decision was the view that government cannot legitimize this animosity towards gays by citing to either sodomy laws or majoritarian views of morality. It is hard to imagine that the Supreme Court that threw out the amendment to Colorado's constitution would decide *Bowers* the same way it was decided just 15 years ago.

The one thing in Justice Scalia's dissent that is undeniably true is that the Supreme Court had become enmeshed in a cultural war. But Justice Scalia is wrong when he faults the Court for having done so. Because the rule of law is so pervasive in our society, our courts inevitably get drawn into cultural wars. The Delaware courts were at the forefront of the battle over segregation. In 1952, they ordered the State Board of Education to desegregate two schools in New Castle County.¹⁸ The Delaware Supreme Court decision in the case, *Gebhart v. Belton*, was consolidated with three other cases and upheld by the United States Supreme Court in *Brown v. Board of Education*. In those decisions,

the Delaware courts and, on appeal, the United States Supreme Court became enmeshed in a cultural war over whether America would be a segregated society. And when it decided *Roe v. Wade*, the Supreme Court became enmeshed in a cultural war over whether a woman's right to control her own body should prevail over the interest of the state in preserving potential life.

Justice Scalia's real complaint was not that the Supreme Court took sides in a cultural war, but that his side lost this battle in that war. And history shows

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that judicial opinions are one of the battlegrounds upon which the war is fought. White people rioted in the streets in the years after *Brown* was decided, and armed soldiers were called in to enforce the desegregation orders. Forty-six years later, only a fringe element of our society endorses the idea of racial segregation. The very act of deciding *Brown* helped effect a sea change in public opinion. Even the controversy over *Roe v. Wade* has subsided, as a majority has become convinced that

decisions regarding abortion should be the province of the individual, not the state, and as a minority opposed to abortion has come to accept that the prospect of a wholesale repudiation of *Roe v. Wade* is nil.

Gay rights advocates appreciate that, through the courts, public opinion can be shifted. Stereotypes and assumptions are challenged and held up to scrutiny. By putting the views of the then-president and trustees of the University of Delaware on trial, Richard Aumiller revealed members of its administration to be dissembling bigots.¹⁹ In defending the amendment to Colorado's constitution, the state presented an expert witness who testified that the world would be a better place if there were no gay people. That is not the kind of company elected officials want to keep.

Winning Through Losing

Even unsuccessful litigation can move public opinion. My most significant involvement in the gay rights movement was litigating the case of Joseph Steffan, an Annapolis midshipman. Steffan was thrown out of the academy in April 1987, six weeks before graduation, because he answered "Yes, sir" to the question: "Are you willing to admit that you are a homosexual?" The suit gave Steffan the opportunity to appear on major talk shows, and brought tremendous public attention to the issue. It forced then-presidential candidate Clinton to take a stand on the issue, which he did when he promised to adopt an executive order repealing the ban on openly gay service members. It also gave Lambda Legal Defense and Education Fund, the organization that sponsored the case, the opportunity to reach out and engage other organizations. One result was an *amicus* brief prepared by Young, Conaway, Stargatt & Taylor that contains one of the most eloquent statements of why Steffan's fight was of broad concern to all people dedicated to civil rights.²⁰

The *Steffan* case was ultimately lost in the D.C. Circuit Court of Appeals.²¹ And Congress blocked any immediate hope of a repeal of the ban by President Clinton when it enacted "Don't ask, don't tell" into law.²² But public opinion was moved as the justifications for the policy were critically examined. In 1993, only 40% to 45% agreed that gays should be allowed to serve openly in the armed services.²³ In January 2000, 57% of the

adults polled believed that gays should be allowed to serve openly.²⁴ Every candidate for federal office now is expected to take a position on "Don't ask, don't tell." Democrats routinely call for its repeal. While it is difficult to gauge, one would expect that opinions within the military will change as servicemembers realize the silliness of a policy that purportedly lets gay people serve so long as they remain in the closet. With a majority of Americans in favor of permitting gays to serve openly, and the United States and Turkey as the only NATO countries that exclude them, it is only a matter of time before the policy falls.

The Marginalization of the Boy Scouts

The most recent courtroom setback for gay rights litigants was the Supreme Court's decision in *Boy Scouts of America v. Dale*.²⁵ The decision represents another courtroom loss that will ultimately move public opinion in favor of broader acceptance of gays. Indeed, the decision in many ways confirms that gay people have won the cultural war. Jim Dale was an Eagle Scout. At 19, he became an Assistant Scoutmaster. A year later, now in college, he became the president of a gay student group, and was interviewed in a newspaper covering a seminar on the psychological and health needs of gay teenagers. Two weeks later, Dale was informed by his local Boy Scout Council that his adult membership in scouting had been revoked on the ground that the Boy Scouts "specifically forbid membership to homosexuals."

Dale filed suit in New Jersey state court, alleging that the Scouts had violated a New Jersey statute prohibiting discrimination on the basis of sexual orientation. The Boy Scouts claimed that New Jersey's law unlawfully infringed upon its right under the freedom of association clause of the First Amendment to exclude gays. While the Boy Scout oath and handbook are silent on the subject, the Scouts claimed that homosexual conduct was inconsistent with the provision of the Scout oath in which Scouts promise to be "morally straight" and "clean." And in an argument reminiscent of the arguments advanced by the University of Delaware 25 years ago, the Boy Scouts argued that because Dale was not in the closet, his presence as an Assistant Scoutmaster would send a message that the Boy Scouts accept homosexual conduct as a legitimate form of behavior.

The New Jersey Supreme Court held that the Scouts' exclusion of Dale violated New Jersey law. By a 5-4 vote, the United States Supreme Court reversed. The pivotal issue in the case was whether the application of the statute significantly burdened the Boy Scouts' freedom of expressive association. The New Jersey Supreme Court had found that the Scouts' "overarching objective" was "to reach 'all eligible youth'" and that the Scouts were committed to a "diverse and 'representative' membership."²⁶ Justice Stevens' dissent reviewed Scouting literature and concluded that the Scouts had not adopted any clear position on homosexuality and had "actively eschewed teaching any lesson on sexuality." "A state's antidiscrimination law does not impose a 'serious burden' or a 'substantial restraint' upon the group's 'shared goals' if the group itself is unable to identify its own stance with any clarity."²⁷

Justice Rehnquist, writing for the majority, took a simple position: if the Boy Scouts insist that they are a discriminatory organization, that the mere inclusion of a gay Scout in a troop will dilute the Boy Scouts' message that gay people are immoral, and that a gay man, whatever his qualities, can never be a desirable role model, then the courts should inquire no further. The Scouts are entitled to their opinions. Justice Rehnquist—who once analogized homosexuality to criminality and questioned whether the First Amendment protected the rights of a gay student group to exist—now acknowledged that "it appears that homosexuality has gained greater societal acceptance." But he continued that social acceptance of gays "is scarcely an argument for denying First Amendment protection to those who refuse to accept these views." For legal support of this proposition, Justice Rehnquist cited decisions protecting the First Amendment rights of a Ku Klux Klan leader and a flag burner.²⁸

What a remarkable reversal of fortunes. In *Aumiller*, Judge Schwartz protected the First Amendment rights of a teacher from a disapproving majority that believed that gay people are immoral. Twenty-five years later, the Supreme Court protected the First Amendment rights of the Boy Scouts from a disapproving majority that believed that gay people should be protected from discrimination. The First Amendment protects unpopular ideas so that, through their expression, the public can decide for itself whether the idea should be accepted or

rejected. As a consequence, over a 25-year span, the prevailing majority views of gay people and their place in society have been transformed to the point that the Boy Scouts have to rely on decisions protecting the free speech rights of the Ku Klux Klan to invalidate a state anti-discrimination statute.

While the current leadership of the Scouts has won the right to perpetuate an organization that discriminates against gay people, that victory has come at a cost. Throughout the country, government and school officials, donors and parents are looking at whether they can continue to support the Scouts and remain true to their own values. Why should a company that forbids discrimination in its own workplace support an organization that discriminates in its membership? That is especially true when there are many organizations that do not discriminate against gays, including the Girl Scouts, 4-H Clubs, Camp Fire Girls and Boys, Big Brothers/Big Sisters, the YMCA and YWCA, and the Boys and Girls Clubs of America. Donors allocating scarce dollars can remain true to their own values by supporting other organizations.

The controversy has come to Delaware. Effective January 1, 2001, the United Way of Delaware adopted a policy prohibiting funding of organizations that discriminate on the basis of sexual orientation, putting its support for the Boy Scouts in jeopardy.²⁹ In New York City, the local Boy Scout Council won a 120-day reprieve from a threatened funding cut-off by promising to use the time to convince the national leadership to drop its ban on gays.³⁰ If the leadership does not change its stance, the Boy Scouts will become more and more marginalized as an organization.

Gay Families

The final frontier of the gay rights movement is in the area of family relations. Gay people have children—from previous marriages, through adoption, or through natural or artificial insemination. As gay people have become increasingly open in society, they have sought to protect their parental relationships in the courts. Just as with other areas of the law, stereotypes have stood in their way.

In a number of states, the common law provided that a gay parent was presumptively unfit to have custody of a child following a divorce.³¹ Even as that presumption has generally been abandoned in favor of a best-interest-of-

the-child standard, recent state court decisions in Mississippi, Alabama, North Carolina and Virginia have denied a parent custody on the basis of the parent being gay.³² The degree to which courts have allowed their prejudices to blind themselves to the best interests of children is illustrated by the decisions of the Mississippi courts in *Weigand v. Houghton*.³³

In that case, the lower court denied a gay father's petition for custody of Paul, his 13-year old-son. The father held a good job and maintained a stable home with his partner of eight years, and planned to put Paul in a private school that would be more academically challenging to Paul than his public school. In denying the father's petition, the court left the boy in the home of his mother, whose then-husband was a jobless and violent convicted felon, drinker, drug user, adulterer, and wife beater who had threatened to kill Paul during one of his repeated violent episodes. The lower court made clear that its decision to leave the child in the home of a husband and wife who had been evicted from their prior residence because of domestic violence was based on its belief that a gay person in a committed relationship is a criminal: "The conscious [sic] of this Court is shocked by the audacity and brashness of an individual to come into court, openly and freely admit to engaging in felonious conduct on a regular basis"—referring to the fact that the father acknowledged having sex in the privacy of his bedroom with his partner of eight years—"and expect the Court to find such conduct acceptable."³⁴ The Mississippi Supreme Court affirmed, holding that the lower court could reasonably conclude that the father was not morally fit to raise his own son and that the child was better left in the home of a wife beater.³⁵

Social science has decisively shown that the stereotypes and empty moral judgments that lead to this type of irrational decision have no basis, and that gay people can and do make fine parents.³⁶ Children raised by gay parents are as likely to be well-adjusted, content, and socially equipped as children raised by heterosexual parents.³⁷ Children raised by gay parents are also no more likely to grow up to be gay themselves and are at less risk of being sexually abused than children raised by heterosexual parents.³⁸ An increasing number of courts, including courts in Maryland and Pennsylvania, have recognized this fact—that loving

gay parents raise children as well as loving heterosexual parents—and have insisted that decisions regarding custody be made on the basis of individualized determinations regarding the child's interests rather than blanket stereotypes.³⁹

Adapting to the realities of modern family life and remaining true to their mission of protecting the best interests of children, courts and state legislatures have also become more receptive to approving adoptions by gay parents.

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While a number of states, including Utah and Arkansas, have recently adopted statutes or regulations prohibiting gay people from adopting, there has been an equal trend, in states like Vermont and New Hampshire, of removing legislative impediments to gay adoptions.⁴⁰

Second Parent Adoptions

An issue that has come before many

state courts is whether adoption statutes permit second parent adoptions of children being raised by same-sex couples. This issue typically arises where one member of a same-sex couple has a child (either naturally or through adoption) and his or her same-sex partner seeks to obtain parental rights as well. This can be critically important to protect the best interest of a child. For example, if the legal parent dies or is incapacitated, it protects the child from being removed from the only other person that was responsible for the child's upbringing. It also ensures that the two people who are most invested in the child's development are able to make, and are legally responsible for, important decisions regarding that child's welfare. One of the first cases construing a state's domestic relations law to permit second parent adoptions was in New York in 1992.⁴¹ Since then, most of the state appeals courts that have considered this issue—including in New York, New Jersey, Vermont, Massachusetts, Illinois, and the District of Columbia—have directed trial judges to grant second parent adoptions under the same best-interest-of-the-child standard used in single parent adoptions.⁴²

Delaware apparently has never presumed that gay people cannot make good parents. No Delaware statute prohibits adoptions by gay people, and the Delaware Family Court has granted them. And while no there is no reported case approving one, Delaware's Domestic Relations Law Code and the cases construing it would appear to authorize second parent adoptions. The Code authorizes "stepparent adoptions," thereby contemplating that a child with a legal parent can be adopted by a second person without terminating the parental rights of the first parent.⁴³ The term "stepparent" is not defined in the Code. However, the Code does provide that the provisions governing adoption are "designed to achieve without undue delay the paramount objectives of the best interests of the child, and all questions of interpretation shall be resolved with that objective in mind."⁴⁴

Relying on this legislative command, the Delaware Family Court has held that a divorced husband who continued to act as a parent of his former wife's child from a prior marriage was entitled to seek a second parent adoption.⁴⁵ The Family Court reasoned that a "stepparent" could include an adult that was the "de facto" parent of a child, and held that the best interests of the child could be served by permitting a loving adult

who functioned as a parent to establish a legal paternal relationship. Similarly, the Delaware Supreme Court has construed the Code broadly in a decision upholding a Family Court order granting visitation rights to a non-parent couple that had raised a child as their own, concluding that "the welfare of the child is the single most important factor in determining visitation rights and must not be subordinated to any other interests."⁴⁶

When the issue is decided, the Delaware courts will have a choice. They can join the courts of Maryland, Pennsylvania, New York, New Jersey, Vermont, Massachusetts, Illinois, and the District of Columbia and reject the stereotypes and preconceptions that have stood in the way of protecting the best interests of children when gay parents are involved. Or they can follow in the steps of the courts of Mississippi, Alabama, North Carolina and Virginia, which have ignored social science studies and injected moral views that have been rejected by broad segments of our society in deciding individual cases. The traditions of the Delaware courts, the statutory language of the Domestic Relations Law and prior precedents suggest that the Delaware Family and Supreme Courts will follow the weight of modern authorities and recognize that the best interests of a child can be served by granting second parent adoptions.

Gay Marriage

The most controversial idea that the gay rights movement has raised is gay marriage. The traditional view of marriage is reflected in a 1912 decision of the Delaware Superior Court: "It is, however, now firmly established, that 'marriage ... is the civil status of one man and one woman legally united for life, with the rights and duties, which, for the establishment of families and the multiplication and education of the species, are, and from time to time may thereafter be, assigned by the law to matrimony.'"⁴⁷ Over 50 years later in *Aumiller*, the idea that gay people could marry was so radical that Judge Schwartz distinguished a Ninth Circuit case upholding the dismissal of a gay employee on the ground that the individual in that case had applied for a marriage license.⁴⁸

It is hard to imagine that a government employee today could be discharged for advocating gay marriage—indeed, hard to imagine that Judge

Schwartz really meant what he said when he suggested that could be the case in *Aumiller*. But here too, litigation has provided the vehicle for stimulating public debate over an issue. In 1993, the Hawaii Supreme Court held that the state's restriction of marriage to opposite-sex couples presumptively violated the Hawaiian constitution's equal protection clause.⁴⁹ And in 1999, the Vermont Supreme Court held in *Baker v. Vermont* that while the state did not have to permit same-sex couples to marry, it could not deprive them of the benefits that the state provided to married couples.⁵⁰ In response, the Vermont Legislature, like the Hawaii legislature, adopted a statute granting same-sex couples all of the same benefits and obligations of marriage.⁵¹

As the *Baker* Court noted, the benefits and protections that the state grants to married couples are significant. They include intestacy rights, the right to bring a wrongful death action, rights to health benefits, the presumption of joint ownership, the spousal communication privilege, hospital visitation rights, and so on.⁵² Delaware law provides similar, extensive benefits to married couples.⁵³ The Court concluded that the "legal benefits and protections flowing from a marriage license are of such significance that any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority that the justice of deprivation cannot seriously be questioned."⁵⁴

And in weighing the justifications offered by the State of Vermont—which, essentially, are the same considerations cited by the Delaware Superior Court in 1912—the Vermont Supreme Court found them wanting. The state has an interest in promoting procreation and in protecting children. But, as noted, the reality is that same-sex couples do have and raise children. Are their children entitled to less protection than the children of opposite-sex couples? The Vermont Supreme Court said "no." And it is hard to come up with an argument as to why the answer should be "yes." The only claim can be that gay people are not fit to be parents, and that depriving gay people of the benefits of marriage is justified by some generalized desire to discourage gay people from raising children. But as discussed above, that claim is inconsistent with both the social science literature that shows that gay people do make good parents, and the fact that most states, including New York, Vermont and

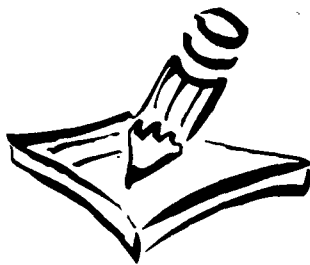
Delaware, permit gay people to adopt and to be foster parents.

The decisions of the Hawaii and Vermont Supreme Courts generated a legislative response in Congress, which passed the Defense of Marriage Act. Similar statutes were adopted in 32 states, including Delaware, where the legislature amended the provision of the Domestic Relations Law prohibiting relatives, the insane and drug addicts from marrying to prohibit marriages between persons of the same gender.⁵⁵ While a majority of the public supports the idea that gay spouses should be entitled to Social Security benefits and equal inheritance rights, two-thirds oppose "gay marriage."⁵⁶

Is this likely to change? In the long run, the answer has to be "yes." While public acceptance of gay people using the word "marriage" seems far off, public resistance to providing legal protections to their committed relationships through domestic partnership laws is sure to fall. Major religious groups like the Central Conference of American Rabbis, the Reconstructionist Rabbinical Association, the Unitarian Church and the Society of Friends have decided to sanction committed gay relationships.⁵⁷ The decisions by these religious organizations refute the legitimacy of the notion that gay people can be labeled morally inferior. At least 100 of the Fortune 500 provide domestic partnership benefits, including AT&T, Bank of America, IBM, Microsoft, the "Big Three" auto makers and all five major airlines. A committed group is working to add DuPont to the list—one wonders why it has not already happened. Any number of cities provide domestic partnership benefits, including New York, Chicago, Philadelphia, Seattle, Los Angeles, Denver and San Francisco, as do scores of leading law firms, including Wachtell, Lipton, Rosen & Katz. As religious organizations, local governments and private companies increasingly recognize committed gay relationships, broader recognition of domestic partnerships by government organizations is sure to follow.

Over time, non-gay America will see more and more same-sex couples in their neighborhoods and will become more and more comfortable with the fact that their gay co-workers have relationships that are as worthy of respect as their own. The children of non-gay couples will go to school with the children of same-sex couples, and will see more and more positive portrayals of gay couples

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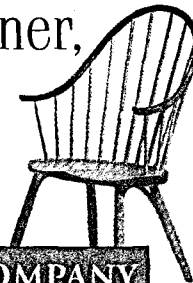
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in movies and on television. Inevitably, the result will be that these experiences will break down stereotypes, which will lead to tolerance and, ultimately, acceptance of gay people and their families.

FOOTNOTES

1. See *Aumiller v. University of Delaware*, 434 F. Supp. 1273 (D. Del. 1977).
2. *McConnell v. Anderson*, 451 F.2d 193, 196 (8th Cir. 1971), cert. denied, 405 U.S. 1046 (1972); *Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247, 250, 255 (9th Cir. 1976), vacated and remanded, 429 U.S. 1034 (1977).
3. See *University of Missouri v. Gay Lib*, 434 U.S. 1080 (1978).
4. 434 U.S. at 1082, 1084.
5. 434 F. Supp. at 1285, 1293, 1301.
6. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).
7. As Judge Schwartz notes, Delaware does not criminalize consensual gay sex between individuals over the age of 16. See 434 F. Supp. at 1304 n.89; 11 Del. Code Ann. §768 (2000).
8. See Alan Yang, FROM WRONGS TO RIGHTS: PUBLIC OPINION ON GAY AND LESBIAN AMERICANS MOVES TOWARD EQUALITY at 18 (Policy Institute of the National Gay and Lesbian Task Force, 1999).
9. See *Survey Indicates Acceptance of Campus Diversity*, UPDATE, Vol. 13, No. 29, p. 2 (April 28, 1994).
10. See Alan Yang, FROM WRONGS TO RIGHTS at 7.
11. See Alan Yang, FROM WRONGS TO RIGHTS at 10.
12. See Alan Yang, FROM WRONGS TO RIGHTS at 2.
13. See 71 Del. Laws 175, amending 11 Del. Code Ann. §1304(a)(2).
14. State of Delaware, Executive Department Executive Order No. 83 (2000).
15. *House OKs Sexual Bias Bill*, THE NEWS JOURNAL (Mar. 28, 2001).
16. 517 U.S. 620, 621 (1996).
17. 517 U.S. at 640, 641, 645, 652.
18. See *Belton v. Gebhart*, Del. Ch., 87 A.2d 862, aff'd, Del. Supr., 91 A.2d 137 (1952), aff'd, *Brown v. Board of Education*, 347 U.S. 483 (1954).
19. Among other things, Judge Schwartz found that President Trabant was "less than forthright" in his testimony, that he had deliberately misquoted a university report to support his position, and that he was guilty of a "pernicious insensitivity" to Aumiller's constitutional rights. 434 F. Supp. at 1298 n.78, 1312 n.109, 1312.
20. Explaining the interest of the amici in the case, Young Conaway wrote:
The American Jewish Committee, the American Jewish Congress, the Puerto Rican Legal Defense Fund, and the Asian-American Legal Defense Fund are organizations founded to protect the civil rights of minority groups. Each opposes discrimination based upon race, religion, national origin, disability, sex and, pertinent to this appeal, sexual orientation. Discrimination against a group based upon a characteristic over which the members of the group have no practical control and which condemns the group as morally inferior is especially virulent. The danger of such discrimination is

compounded when adopted by the government because it appears to sanction intolerance and prejudice against that group in all spheres of life: public and private. The most horrific discrimination of history, the Nazi genocide of Jews, homosexuals and other minorities, purported to be based in significant part on the "moral inferiority" of those condemned.

... Divine revelation and scripture may be a proper basis for a moral standard, but they cannot serve as the unexamined basis for discrimination by our government. In this circumstance, the Equal Protection Clause and, more specifically, the doctrine of heightened scrutiny serve a most important function: assuring that irrational or unreasoned discrimination against minorities based upon the unexamined moral code of the majority is not allowed. ...

... If the guarantee of equal protection under the law can be misshapen and misapplied in this case, it can be in any case; and these amici are dedicated to preserving the legal barriers to the persecution of minorities.

21. See *Steffan v. Perry, Secretary of Defense*, 41 F.3d 677 (D.C. Cir. 1994) (en banc).

22. See Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1670-73 (1993) (codified at 10 U.S.C. § 654).

23. See RAND INSTITUTE REPORT ON GAYS IN THE MILITARY, Ch. 6 at 202. The same poll found that if the draft were reinstated, 78% believed that gay people should not be exempt. Id. at 204.

24. See Fox News/Opinion Dynamics Poll (Jan. 12-13, 2000).

25. 530 U.S. 640, 120 S. Ct. 2446, 2449 (2000).

26. 120 S. Ct. at 2452.

27. 120 S. Ct. at 2470.

28. See 120 S. Ct. at 2457.

29. See *United Way Helps Scouts*, THE REVIEW, Vol. 127, No. 9 (Sept. 29, 2000).

30. See Curtis L. Taylor, *Scouts Asked to Drop Gay Ban*, NEWSDAY, Feb. 27, 2001, at A18; Letter from Harold O. Levy, Chancellor, The New York City Board of Education, to Daniel R. Gasparo, Scout Executive and Chief Executive Officer, Boy Scouts of America (Dec. 1, 2000).

31. See, e.g., *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985).

32. See, e.g., *Weigand v. Houghton*, 730 So. 2d 581 (Miss. 1999); *J.B.F. v. J.M.F.*, 730 So. 2d 1190 (Ala. 1998); *Pulliam v. Smith*, 501 S.E. 2d 898 (N.C. 1998); *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995).

33. See *Weigand*, 730 So. 2d at 588-89 (McCrae, J., dissenting).

34. 730 So. 2d at 590.

35. 730 So. 2d at 586-87.

36. See American Psychological Association, LESBIAN AND GAY PARENTING: A RESOURCE FOR PSYCHOLOGISTS at 8 (1995) ("Not a single study has found children of gay and lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents.")

37. See, e.g., Raymond W. Chan et al., *Psychological Adjustment Among Children Conceived Via Donor Insemination by Lesbian and Heterosexual Mothers*, 69 CHILD DEV. 443 (April 1998); Charlotte J. Patterson, Children of the Lesbian Bay Boom: Behavioral Adjustment, Self-Concepts, and Sex-Role Identity, in *Lesbian and Gay Psychology: Theory, Research and Clinical Applications* 156 (Beverly Greene & Gregory M. Herck eds., 1994).

38. See, e.g., Michael J. Bailey et al., *Sexual Orientation of Adult Sons of Gay Fathers*, 31 DEV. PSYCHOL. 124 (Jan. 1995); Carole Jenny



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et al., Are Children at Risk for Sexual Abuse by Homosexuals?, 94 PEDIATRICS 41 (July 1994).

39. *See, e.g., Boswell v. Boswell*, 721 A.2d 662 (Md. 1998); *In re Marriage of Wicklund*, 932 P.2d 652 (Wash. App. Div. 1996); *Pleasant v. Pleasant*, 628 N.E. 2d 633 (Ill. 1993); *Blew v. Verza*, 617 A.2d 31 (Pa. 1992).

40. *See Board Adopts Ban on Gay Foster Parents*, ARK. DEMOCRAT-GAZETTE, Mar. 24, 1999, at B-3; "Utah Bans Some Adoptions by Gay Couples," SALT LAKE TRIB., Jan. 23, 1999, at A1; 1999 N.H. Laws 18; 1996 Vt. Pub. Act 161.

41. *See In re Evan*, 153 Misc. 2d 844 (N.Y. Surr. 1992).

42. *See In re Jacob*, 660 N.E.2d 397 (N.Y. 1995); *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. App. Div. 1995); *In re M.M.D. & B.H.M.*, 662 A.2d 837 (D.C. 1995); *In re Petition of K.M. and D.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995); *In re Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *Adoptions of B.L.V.B. and E.L.V.B.*, 628 A.2d 1271 (Vt. 1993).

43. 13 Del. Code Ann. §§ 904(a)(1), 908(a), 913(b).

44. 13 Del. Code Ann. § 932.

45. *In the Matter of Kenneth*, Del. Fam. Ct., 1992 WL 208410 (1992).

46. *Rogers v. Trent*, Del. Supr., 594 A.2d 32, 33 (1991).

47. *Cohen v. Cohen*, Del. Super., 84 A. 122, 123 (1912).

48. *Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247 (9th Cir. 1976), *vacated and remanded*, 429 U.S. 1034 (1977).

49. *Bachr v. Lewin*, 852 P.2d 44 (Haw. 1993).

50. *Baker v. State of Vermont*, 744 A.2d 864 (Vt. 1999).

51. *See* 2000 Vt. Pub. Act 91 §§1-3 (codified at 15 Vt. Stat. Ann. §§ 1201-07 (2000)).

52. *See* 744 A.2d at 883-84.

53. *See, e.g.*, 10 Del. Code Ann. § 3724 (2000) (limiting actions for wrongful death to persons related to the deceased by "blood or marriage"); 16 Del. Code Ann. § 2507(b)(2) (2000) (permitting a "spouse" to make surrogate health care decisions for an incapacitated patient); 13 Del. Code Ann. § 903 (limiting joint petitions for adoption to a "husband and wife"); 12 Del. Code Ann. § 502 (describing the share of an intestate estate to which a surviving "spouse" is entitled).

54. 744 A.2d at 884.

55. *See* 70 Del. Laws 375 (1996), codified at 13 Del. Code Ann. § 101(a).

56. *See* Alan Yang, FROM WRONGS TO RIGHTS at 14-15.

57. In 1993, the Federation of Reconstructionist Congregations and Havvrot and the Reconstructionist Rabbinical Association published a report entitled HOMOSEXUALITY AND JUDAISM: THE RECONSTRUCTIONIST POSITION which states: "We affirm the qualities of mutual respect, trust, care, and love in committed relationships regardless of sexual orientation. . . . As we support the long-term commitment of heterosexual couples and the acknowledge the kedushah [holiness] of their marriages, so do we support long-term partnerships between gays or lesbians and affirm that kedushah resides in committed relationships between same-gender Jewish couples." And in March 2000 the Central Conference of American Rabbis passed a resolution which states that "the relationship of a Jewish same-gender couple is worthy of affirmation through Jewish ritual." More than 500 of the 1,800 Reform rabbis have said that they are performing or are willing to perform same-sex ceremonies. ♦

Battle Robinson and Susan Paikin¹

WHO IS DADDY? A CASE FOR THE UNIFORM PARENTAGE ACT (2000)

"F

irst comes love, then comes marriage, and then comes Billy in a baby carriage."

This jump-rope chant, all too familiar to men and women of at least a certain age, innocently reflects a world long since past. Children were born during marriage, the husband was the father, and any other means of procreation was not "known" in polite society. Of course, as with most nostalgic pictures, the reality was blurred. Many children have always been born out of wedlock and the mother's husband was

sometimes not the father of her child.

Yet, despite these harsher truths, until fairly recently paternity law regarding both marital and nonmarital children was straightforward. A child born during a marriage was conclusively presumed to be the child of the marriage. The child's paternity could not be attacked. Eventually, paternity could be questioned where it could be shown that the husband and wife could not possibly have had intercourse at the probable time of conception.² Later, challenges were allowed when the husband was imprisoned at the time of conception and in situations where the husband was impotent or sterile. The exceptions all hinged on the fact that a husband could prove that he was not the biological father of his wife's child.

As to nonmarital children, paternity proceedings were quasi-criminal in nature. The alleged father was arrested, a jury trial was held, and the mother had to prove paternity beyond a reasonable doubt. Such a proceeding was not brought for the emotional, psychological or familial good of the child: it was brought to relieve the public from the burden of the child's support. The

possibility that a father might want to establish his paternity and have a relationship with his child was not considered.

Recent changes in the structure of society and scientific developments have radically altered how we look at paternity. The first factor is that the nonmarital birth rate has soared in the last 40 years. In 1960, 225,000 children (five out of 100 children) were born to unmarried mothers. By 1994, the number had risen to 1.2 million (33 children out of 100), a 433 percent increase since 1960.³ In America today, the 1.2 million children who start off life in a single-parent household each year because they are born to unmarried parents represent a larger group than the 1 million children who move into a single-parent household as a result of their married parents' separation or divorce.

A second factor is the advent of accurate, available genetic testing that can report with near certainty whether or not an individual is the biological parent of a particular child. This presents a classic example of opening Pandora's box. Laws and public policy must now be examined and retooled to consider, for instance, whether parenting and biology are exclusively intertwined and the extent to which traditional legal concepts, such as the "best interest of the child," should remain applicable. As science has inexorably honed in on biological "truth," courts and legislators have grappled with the impact on longstanding principles, often reacting, and rarely cohesively considering the public policy impact on mothers, fathers and children.

For example, the advent of genetic testing made it possible to expand greatly the number of situations in which a husband could prove his nonpaternity. Such testing has also made it possible for outsiders to the marriage to assert their paternity—even when the husband has fully accepted parental responsibility. Courts and legislatures have had to consider whether such a further expansion of attacks on the paternity of marital children is desirable.⁴ Recent national headlines,

television news stories and talk shows seemingly daily ask, "Are science and the law on a collision course over fatherhood?" Whether or not a man (husband or otherwise) who has been declared or has declared himself to be the father of a child should be permitted to disestablish his paternity of a child is a complex policy question and one that is rarely informed by rational discussion and nuanced debate. Recent news stories about a father "wrongly prosecuted" for child support when genetic tests show him not to be the father of the minor children born during his marriage have dramatically brought the issue to the public's attention. The essence of such stories is that a criminal would be freed upon such truth, so why won't the state child support enforcement agency or the courts act on the "truth" and "do justice"? Increasingly, these cases have resulted in reactive, quick fix "disestablishment" legislation.⁵ And, as if questions surrounding paternity were not sufficiently complex, due to artificial insemination and assisted reproduction, it is now possible that the woman who gives birth to a child is not the child's biological mother.

Recognizing the need to help states develop a statutory framework to address these difficult public policy issues and meet the federal standards, in 1997 the National Conference of Commissioners on Uniform State Laws (NCCUSL) formed a drafting committee to revise the existing model Uniform Parentage Act (UPA).⁶ In addition to addressing the establishment of paternity for marital and nonmarital children, the drafting committee decided to look at the provisions of two other model acts relating to aspects of paternity determination and incorporate them into the new UPA. They are the Uniform Putative and Unknown Fathers Act (UPUFA 1988),⁷ which provides a model for the creation of state paternity registries, and the Uniform Status of Children of Assisted Conception Act (USACA 1988), which deals with parentage of children who are born pursuant to surrogacy agreements.⁸

The new UPA also contains all of the provisions regarding paternity of nonmarital children that states need to have in order to be eligible for federal funding for their child support and Temporary Assistance to Needy Families (TANF) programs. In addition, it provides guidance in areas like rescission of acknowledgments of parentage and the establishment of paternity registries, where the

federal law is silent. It also goes beyond the federal requirements and deals with parentage of marital children and children conceived through means other than sexual intercourse.

UPA (2000) was approved by NCCUSL on August 1, 2000, and has been endorsed by the American Academy of Matrimonial Lawyers, the National Child Support Enforcement Association, the Eastern Regional Interstate Child Support Association, the Academy of American Adoption Attorneys, and the Organization of Parents Through Surrogacy. As of this writing, it has been introduced in five states,⁹ and it is anticipated that UPA (2000) will be introduced in the Delaware General Assembly during this legislative session. Delaware enacted its own version of the Uniform Parentage Act in 1983 and has modified it through the years. While in general Delaware has done well in updating its parentage law and court procedures to reflect changing circumstances, adoption of UPA (2000) would be beneficial in several respects. The new Act would modernize and consolidate Delaware's existing provisions and procedures pertaining to the establishment of parentage. An additional benefit of adopting a truly uniform act (one which is identical to acts in other states) is that Delaware judicial officers and agency officials could be informed by decisional law and by interpretations and implementation of the Act in other jurisdictions.

This article outlines key legal choices that the NCCUSL UPA Drafting Committee made during the revision process regarding establishing paternity of children born both during and outside of marriage. It is not intended to encompass the entire Act, which contains many additional important provisions. Extensive analysis and the full text may be found in "Uniform Parentage Act (2000) (with Prefatory Note and with Unofficial Annotations by John J. Sampson, Reporter)," 24 FAMILY LAW QUARTERLY 1 (Spring 2001).

Paternity of Marital Children Under UPA (2000)

As discussed above, historically, a child born to a married woman was conclusively presumed to be the biological child of her husband.¹⁰ Three policy rationales are generally cited to support this rule:

- "[T]he best interests of the child. If a child is born into a marriage and establishes a father-child relationship

with the husband, it is generally in the child's interest to maintain that relationship as it provides him/her both financial and psychological benefits.

- [T]he peace and stability of the marital relationship. If a husband and wife hold a child out as a child of the marriage, a stranger who comes forth and alleges to be the father of the child may disrupt the marriage. This is not in the interests of the husband and wife, the child or the society as a whole.

- [T]he public fisc. If a husband successfully challenges the paternity of a child thought to be his, the child might well need public assistance to replace the lost financial support the husband had provided."¹¹

However, with the ready availability of genetic "proof" that the child is not the biological child of a mother's husband—either because his paternity was excluded or another man's established—the law began to consider whether it is unfair to require a man to support a child with whom he has no biological connection. As noted earlier, the issue has been raised in many contexts, with shifting players, policy implications and, naturally, conflicting results. The first circumstance is where a mother tries to oust her husband by raising his nonpaternity at the time of divorce, seeking or offering genetic testing as proof of his lack of biological connection to the marital child. Frequently, the husband has established a relationship with the child and wishes to maintain his status as father, with all incumbent rights and responsibilities. In this situation, courts have noted that fatherhood is more than biology and generally have tried to maintain the relationship, citing an "equitable parent" doctrine.¹²

The second and opposite challenge comes from husbands seeking a declaration of nonparentage of a marital child at the time of divorce. Again, genetic testing is either sought or used to prove the lack of a biological connection. Citing both the best interest of the child and public policy, courts have often estopped husbands from raising paternity at divorce, particularly where he knew paternity was in question but failed to act, formed a relationship with the child or interfered with mother's ability to establish the parentage of another man.¹³ However, many courts allow the challenge, concerned that the husband should not be burdened with supporting someone else's child.¹⁴

Where the challenge to paternity is raised post-divorce by either mother or father, the courts generally apply principles of *res judicata* or collateral estoppel.¹⁵ However, just as in policy debates about adoption, questions have been raised as to whether the child's best interest is really to know his or her biological heritage. And there are inherent concerns that a mother should not be allowed to benefit from and rely on her "fraud."

The final two scenarios occur when it is the "stranger to the marriage" who alleges his paternity of a marital child. Such challenges to the marital presumption occur both during the marriage and after divorce. Where the marriage remains intact, cases are mixed as to whether it is in the best interest of the child to preserve family stability and the child's legitimacy or to allow biology to be destiny.¹⁶ However, where the marriage is dissolved, courts likely will allow the husband to assert *res judicata* against a man seeking to assert a biological claim to the marital child. Where father wants out (often because he does not wish to pay current or past due child support), genetic testing may proceed with a further analysis considering the best interest of the child in establishing a relationship with one or both of the men.¹⁷

The new Act, in §204, continues the presumption of paternity but solely in the context of marriage.¹⁸ If a marital presumption exists, under the Act, there are only two ways to challenge the husband's paternity: through the voluntary acknowledgment process or through a court proceeding. Moreover, the new UPA establishes rules governing the effect of paternity declarations in divorce decrees, which should help settle the law in that area.

With respect to the acknowledgment process, under Article 3 of the Act, the mother and the biological father of a marital child may execute a voluntary acknowledgment of paternity, but only if her husband also acknowledges his nonpaternity and is willing to relinquish his rights and responsibilities. The husband's denial is signed under penalty of perjury and must be incorporated in or attached to the acknowledgment executed by mother and biological father. (§§302(a)(3)(A), 303 and 304(a)). Thus, the acknowledgment process cannot be used to disestablish paternity unless there is a biological father ready, willing and able to step in, thus leaving the child protected.

The second way to challenge the marital presumption is to bring an action under Article 6. The policy choices reflected in the Article balance the rights of all

involved, but the best interest of the child predominates. As discussed above, the cases occur in factually diverse situations. Add to these broad fact categories the oft-conflicting "who knew what" inherent in domestic relations litigation, and it is clear both why the drafters spent three years debating the philosophical underpinnings of UPA (2000) and why the Act carefully incorporates provisions balancing timing and process of any challenge.

In essence, the new UPA allows both of the partners to the marriage and the biological father to challenge the marital presumption of paternity, but only if they do so within two years of the child's birth. (§607(a)). If they wait longer, they will be precluded from raising the issue. The two-year rule recognizes the interest of the child in maintaining an ongoing father-child relationship with the husband where that relationship has lasted sufficiently long that disruption would potentially harm the child. Correspondingly, within two years of birth, the paternity of the biological father should be established and the father-child bond established.

At the same time, the new UPA retains the ancient rule that, if a husband neither cohabited nor engaged in sexual relations with the mother and therefore cannot possibly be the child's biological father, a challenge may be brought at any time. The drafters concluded that under such circumstances, there is neither a marriage nor a father-child relationship to protect. The one exception to this exception is where the husband has held the child out as his own. In such a case, he has created a father-child relationship and he, the mother and the possible biological father should be estopped from claiming nonpaternity once two years have passed. (§607(b)).

Even as to cases brought within the two-year period, the Act imposes constraints that rein in reliance on biology alone. The ability to "know" a man's biological relationship to a child through genetic testing is so powerful that it is increasingly difficult to weigh fairly other factors once DNA has been uncovered. Many of the most difficult cases arise because a parent takes a child for "self-help" testing and then uses the existence or non-existence of a biological connection as a battering ram on public opinion, the courts and, far too often, even the child to obtain "justice." Because of the serious consequences of genetic test results, under the Act only a court may order genetic testing in a case where the child has a presumed, acknowledged or

adjudicated father. (§§502(b) and 621(c)(2)). The state child support enforcement agency's authority otherwise to order genetic testing (required as part of the effort to expedite paternity establishment under welfare reform) is constrained in this circumstance. There is universal agreement that these cases should not be expedited; rather, they require thoughtful action by an independent judiciary. Further, the results of "self-help" genetic tests are admissible only if the mother and the presumed father consent to the genetic testing. (§621(c)(1)).

The other restraint on the "biology is destiny" rule is that the court has the authority to decline a request for genetic testing if the conduct of the mother or the presumed father "estops that party from denying parentage" or "it would be inequitable to disprove the father-child relationship." (§608(a)). When considering a request for genetic testing, the court must consider the best interests of the child as well as several factors enumerated in the section:

- (1) the length of time between the proceeding to adjudicate parentage and the time that the presumed father was placed on notice that he might not be the genetic father;
- (2) the length of time during which the presumed father has assumed the role of father of the child;
- (3) the facts surrounding the presumed father's discovery of his possible nonpaternity;
- (4) the nature of the relationship between the child and the presumed father;
- (5) the age of the child;
- (6) the harm that may result to the child if presumed paternity is successfully disproved;
- (7) the nature of the relationship between the child and any alleged father;
- (8) the extent to which the passage of time reduces the chances of establishing the paternity of another man and a child-support obligation in favor of the child; and
- (9) other factors that may affect the equities arising from the disruption of the father-child relationship between the child and the presumed father or the chance of other harm to the child."

To ensure that the child's interests are represented, the UPA (2000) requires the appointment of a guardian *ad litem* for the child. However, denial of genetic

testing may be based only on clear and convincing evidence and, to ensure an end to litigation, the husband must be declared the presumed father. Correspondingly, if testing is permitted and the results show that the husband is not the biological father of a marital child, a finding of nonpaternity must be entered. (§631(4)).

Finally, the drafters determined to address the conflicting case law on whether and when a divorce decree is an adjudication of parentage. Currently, language in a decree stating the child was "born during the marriage" may or may not rise to *res judicata*. UPA (2000) deems the decree an adjudication of parentage if it expressly uses "issue" or "child" of the marriage or similar words, or if the husband is required to support the marital child and does not state he is not the father. (§637(d)).

Paternity of Nonmarital Children Under UPA (2000)

Even more than for children born during a marriage, the law has changed dramatically for nonmarital children. Expedited civil remedies have replaced the quasi-criminal nature of "bastardy" proceedings, and the burden of proof has shifted to a civil one. Short time limits in which to bring paternity actions have been struck down. Fathers as well as mothers or the state may now initiate paternity actions. The rudimentary blood testing used up through the mid-70s, which could only exclude a man's paternity, have been superseded by techniques that can now provide a probability in excess of 99% that the tested man is the biological father of a child. As a result of the ability to know the genetic link between an alleged father and a child, most nonmarital paternity is now resolved administratively at child support enforcement agencies or through use of a voluntary acknowledgment of paternity signed at the hospital, the vital records registrar or elsewhere.

While many of these changes are the result of litigation, there are now significant federal requirements concerning paternity establishment for nonmarital children. These come from the federal-state partnership created under Title IV-D of the Social Security Act, the national child support enforcement program. To be eligible for federal funds under this program, as well as for welfare funding under Title IV-A of the same Act, states must enact laws and adopt procedures for

the voluntary acknowledgment of paternity. State law must provide that such acknowledgments, if properly executed and filed, will ripen into the equivalent of a determination of parentage without court ratification. Only a limited time for rescinding the acknowledgment is permitted.¹⁹ Each state must also give full faith and credit to acknowledgments signed in other states, provided they have been entered in compliance with procedures required by the state where signed. (42 U.S.C. §666(a)(5)(C)(iv)).

Article 3 of UPA (2000) includes all the provisions necessary to comply with federal law. It creates a voluntary acknowledgment process through which a mother and a man who have conceived a child through sexual intercourse with the mother may voluntarily establish the paternity of that child.²⁰ (§305). The acknowledgment must be in a record and signed by both parties. Although when debating voluntary acknowledgments Congress was thinking of nonmarital children, the UPA also allows the mother, her husband and the biological father to execute a voluntary paternity acknowledgment. As discussed above, if the rules are properly followed, the biological father's paternity can be established and the husband's paternity disestablished through the acknowledgment process. (§§303 to 305). However, where there is a presumed father, and no joint agreement among the mother, her husband and the biological father, the voluntary acknowledgment route cannot be used, and a court must make the paternity determination. In other words, these acknowledgments cannot be used to "substitute" a new father for another previously adjudicated or determined by an earlier acknowledgment.

The new law allows a minor to sign the acknowledgment without appointment of a guardian—the rationale being that someone old enough to procreate is old enough to accept responsibility for the child. (§304(d)).

A rescission process is required, but not spelled out, by federal law. As a result, current state procedures run the gamut: some are simply not defined, others are administrative or quasi-administrative, and some require judicial action. The UPA drafters opted to make the process formal, determining that informal procedures carried significant risk that the opposing party would not receive notice of the rescission and wrongly conclude that paternity had been determined.

There was also a belief that the child's interest was best served by ensuring that the case moved to a formal determination of the identity of the biological father, rather than languishing.

Under the Act, filing a petition to establish nonpaternity commences the rescission process. The petitioner must be a signatory to the acknowledgment, either acknowledging or, in the case of a presumed father, denying paternity. All other signers must be made a party to the proceeding and thus receive notice that paternity is at issue. (§309(a)). The matter then proceeds normally, as contested matter, generally with genetic testing and an order determining parentage. If the order requires a change in the information recorded on the child's birth certificate, the court will issue an order to the birth records agency to make the necessary changes. (§309(e)).

After the rescission period has ended, a signatory may challenge it only for fraud, duress or material mistake of fact and must institute the challenge within two years. (§308(a)). It is also possible for another person to challenge the acknowledgment within the same two-year time period. As the contested case proceeds under Article 6, all children receive equal treatment, whether born during or outside of marriage.

Finally, where there is no presumed, acknowledged or adjudicated father, litigating a contested paternity case under the UPA (2000) is straightforward. There is no statute of limitations: the action may be brought before the child's birth and anytime thereafter. (§§606 and 611). The support enforcement agency—in Delaware, the Division of Child Support Enforcement (DCSE)—may order genetic testing in such cases, in addition to the Delaware Family Court.²¹ UPA (2000) contains qualifications and standards for testing and establishes a presumption of paternity where the genetic testing results establish a probability of paternity of at least 99% and a combined paternity index of at least 100 to one.

One issue facing the drafters was whether or not the child is a necessary party to the action. They chose a middle ground. Under §612, the child is a permissible but not mandatory party. However, if the court determines the child has a position at odds with the parties, an attorney or guardian *ad litem* must be appointed. The child is not bound by the decision unless he or she either was a party or was independently represented, or the parentage

determination was made consistent with the genetic test results and so stated in the record. (§637(b)). Article 6 details litigation rules, some of which provide that trial by jury is precluded, that paternity may be determined by default if a man declines to be tested, that motherless testing may proceed if the mother is unavailable or uncooperative, and that a presumption created by genetic testing may be rebutted only by further genetic testing that either excludes paternity or establishes the paternity of another.

Finally, the UPA drafters wanted to ensure that any dismissal resulting from the parties' failure to pursue an action was *without prejudice*. To ensure this policy election, §635 makes void any dismissal with prejudice and allows such dismissal to be challenged in a judicial or administrative proceeding.

The Uniform Parentage Act (2000) covers such additional matters as protecting fathers, children and adoptive parents through the use of paternity registries (Article 4) and determining the parentage of children born through assisted reproduction ("a method of causing pregnancy other than sexual intercourse") or pursuant to a gestational agreement (Article 8). None of these sections are noncontroversial. Yet, as with the provisions discussed in this article, the UPA offers and implements coherent and consistent policy and legal choices on complex scientific, societal and moral issues. Mindful of the rights, needs, interests and responsibilities of men and women, throughout more than three years of debate, the drafters retained a focus on what legal construct and policy compromises best serve the interest of children who, after all, had no choice in the circumstances of their birth.

FOOTNOTES

1. The authors wish to acknowledge and thank Paula Roberts, Esq., Center for Law and Social Policy, Marilyn Ray Smith, Esq., Chief Legal Counsel for the Massachusetts Department of Revenue, Child Support Enforcement Division, and Professor John J. Sampson, University of Texas Law School and the NCCUSL Reporter for UPA (2000). These colleagues generously shared both their thoughts and writings on UPA (2000) and the disestablishment of paternity to better inform this article. This article also follows up the discussion of the revised UPA presented in these pages by Professor Sampson and Harry L. Tindall, Esq., in *The Uniform Parentage Act: A Complete Revision Proposed*, 17 DELAWARE

LAWYER 2 (1999) ("The Embattled Family").

2. This doctrine came to be known as "beyond the four seas," meaning the husband was out of the country. See, 1 BLACKSTONE COMMENTARIES 456 (J.Chitty ed. 1826).

3. *Births to Unmarried Mothers: United States, 1980-92*, DHHS Publication No. (PHS) 95-1931; *Advance Report of Final Natality Statistics, 1994*, DHHS Publication No. (PHS) 96-1120 (6/96).

4. For a discussion of the policy considerations in this regard, see *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) and, for the opposite conclusion, *Callender v. Skiles*, 591 N.W.2d 182 (Iowa 1999).

5. Recently, Ohio and Virginia have passed some form of disestablishment legislation, joining Maryland, Illinois, Arkansas, Alaska, Alabama, Louisiana and Iowa. However, these statutes vary greatly in standards, scope and application. See, e.g., *Langston v. Riffe*, 359 Md. 396, 754 A.2d 389 (Md. 2000) (holding Maryland's new paternity disestablishment statute applies retroactively but does not apply to voluntary acknowledgments of paternity made under the current statute).

6. The Conference has a long history of concern with the law relating to children born out of wedlock. Significant efforts of the Conference suggest the history of the development of parentage law and include the *Uniform Illegitimacy Act* (1922), the *Blood Tests to Determine Paternity Act* (1952), the *Uniform Paternity Act* (1960), and provisions of the Uniform Probate Code of 1960. The existing version of the UPA was written in 1973. Nineteen states had adopted this version and several others had adopted large sections of it. However, much has changed in the intervening 25 years, and there was a need to revise the document in light of these changes.

7. This model act was never adopted by a single state. However, at least 28 states have created some form of a paternity registry.

8. This act offers two different approaches to the subject. One regulates such agreements through a judicial review process, and the other makes all such agreements void. Only two states have adopted this Act, with Virginia taking the regulatory option and North Dakota choosing to make all such agreements void.

9. Maryland, Minnesota, Rhode Island, Texas and West Virginia.

10. In the famous English case of *Goodwright v. Moss*, 2 Cowp. 591, 592 (1777), Lord Mansfield declared that "where legitimacy of a child born in lawful wedlock is in issue, the declarations of a father or mother cannot be admitted to bastardize the issue born after marriage. ... It is a rule, founded in decency, morality, and policy, that they shall not be permitted to say after marriage, that they have had no connection, and therefore that the offspring is spurious; more especially the mother, who is the offending party." Lord Mansfield's rule barred testimony of a husband and wife on paternity issues. The presumption of legitimacy could be only rebutted by facts that prove beyond a reasonable doubt that the husband *could not* be the father of the child.

11. Roberts, Paula, *Biology and Beyond: The Case for Passage of the New Uniform Parentage Act*, Center for Law and Social Policy (2000) at p. 16.

12. See, e.g., *L.D.H. v. K.A.H.*, 665 N.E.2d 43 (Ind. App. 1996); *In re Worcester*, 960 P.2d 624 (Ariz. 1998). *But compare, e.g., Monroe v. Monroe*, 621 A.2d 898 (Md. 1993); *In re Marriage of Slayton*, 685 N.E.2d 1038 (Ill. App. 1997).

13. See, e.g., *White v. White*, 710 So. 2d 208 (Fla. App. 1998), *W. v. W.*, 728 A.2d 1076 (Conn. 1999). For an excellent analysis of paternity by estoppel, see Marilyn Ray Smith, *Paternity Litigation Involving Presumed Versus Putative Fathers: Conflicting Rights and Results*, first presented to the ABA 3rd National Child Support Conference in Washington, D.C. in May 1989, as updated in 1999.

14. See, e.g., *Ganitt v. Ganitt*, 716 So. 2d 846 (Fla. App. 1998).

15. See, e.g., *Patterson v. Whitehead*, 481 S.E. 2d 621 (Ga. App. 1997); *Moore v. Commonwealth*, 954 S.W.2d 317 (Ky. 1997) (raised by mother) and *In re Paternity of Rogers*, 697 N.E. 2d 1193 (Ill. App. 1998); *Godin v. Godin*, 725 A.2d 904 (Vt. 1998) (raised by father).

16. *Compare, e.g., Grice v. Detwiler*, 488 S.E. 2d 755 (Ga. App. 1997); *I.A. v. H.H.*, 710 So.2d 162 (Fla. App. 1998); *Callender v. Skiles* 591 N.W. 2d 182 (Iowa 1999); *Strauser v. Stahr*, 726 A. 2d 1052 (Pa. 1999), *with In re S.R.H.*, 981 P.2d 199 (Colo. App. 1998); *T.D. v M.M.M.*, 730 So. 2d 873 (La. 1999).

17. Louisiana even allowed the establishment of dual paternity: legal and biological. *T.D. v. M.M.M.*, 730 So.2d 873 (La. 1999).

18. (a) A man is presumed to be the father of a child if:

(1) he and the mother of the child are married to each other and the child is born during the marriage;

(2) he and the mother of the child were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce [, or after a decree of separation];

(3) before the birth of the child, he and the mother of the child married each other in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce [, or after a decree of separation]; or

(4) after the birth of the child, he and the mother of the child married each other in apparent compliance with law, whether or not the marriage is or could be declared invalid, and he voluntarily asserted his paternity of the child, and:

(A) the assertion is in a record filed with [state agency maintaining birth records];

(B) he agreed to be and is named as the child's father on the child's birth certificate; or

(C) he promised in a record to support the child as his own.

(b) A presumption of paternity established under this section may be rebutted only by an adjudication under [Article] 6.

19. 42 U.S.C. §666(a)(5)(E). Either party is able to rescind the acknowledgment within the earlier of 1) 60 days of signing; or 2) the date of any judicial or administrative proceeding relating to the child to which the signatory is a party. 42 U.S.C. §666(a)(5)(D)(ii).

20. Note that this means the voluntary process is not to be used by those conceiving a child through assisted reproduction or surrogacy. In those cases, the provisions of Articles 7 and 8 are to be used. Also, the acknowledgment process cannot be used as a "quicky" adoption, as the parties must acknowledge that the child was conceived through the requisite sexual contact. If genetic testing has been done, the acknowledgment must verify that it is consistent with the results.

21. As noted earlier, the Delaware Family Court would retain the exclusive authority to order genetic testing in any case where there is a presumed, acknowledged or adjudicated father. ♦

William E. Wiggin

DURABLE DISCRIMINATION

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he article below first appeared in the Summer 1988 issue of this magazine. It has been very slightly modified (principally to delete cross references to other articles in that issue, which was devoted to the AIDS epidemic).

Plague Politics

Mrs. Patrick Campbell, an English actress who flourished in the first quarter of this century, was at the height of her blunt powers of self-expression when an Edwardian sex scandal reduced London society to a state of lubricious hysteria. Mrs. Campbell dismissed the brouhaha with a civilized yawn: "Does it really matter what people do, so long as they don't do it in the streets and frighten the horses?"

The sentiment is decent. It endorses the right of privacy while upholding the claims of decorum. But it may become a dangerous sentiment to the extent that the notion of a right to privacy is pervertedly transformed into the power to kill by stealth. It is the purpose of this discussion not to urge the undermining of civil liberties, but to suggest a climate in which personal freedom and essential knowledge may coexist.

Behaving Badly Under Fire

For some years we have known that AIDS is a terrible threat to mankind. We have also learned that we should become fully informed about AIDS in its every aspect and that we should act decisively in accordance with that knowledge. Many, however, have been less interested in the pursuit of truth than in maintaining ideological purity. At the opposite ends of a political spectrum religionists of the far right and sexual minorities (and the officials who look to those very different constituencies for retention of office) have engaged in turfmanship and displays

of indignation to the detriment of public health.

A few years ago I disposed of my father's medical library on the theory that several hundred out-of-date textbooks on urology had limited appeal for the general reader. I could not, however, resist saving a splendid oddity titled "A Repertory of Gonorrhoea" by Samuel A. Kimball, M.D. (The principal charm of this otherwise useless volume—it was printed in 1888—is the author's inspired choice of a publisher: the fine old Boston firm of Otis Clapp & Son.) Dipping into this peculiar treasure recently, I was startled by the durability of its Victorian point of view. The preface speaks of "the noble work of curing the sick, *even if they are sick through sin.*" (Italics supplied.) The same zest for moralistic responses to medical issues is in full flower today. All too frequently, members of the religious far right equate AIDS with divine retribution. Although they speak perfunctorily about love and forgiveness, their core attitude towards the victims of AIDS appears to be patronization, laced with Old Testament wrath.

At the other end of that spectrum is politicized gayhood, which has suffered much to attain security in a lifestyle it now sees threatened by a linkage in public perception between AIDS and minority sexual preference. And, like the religious right, that minority is no stranger to folly in the defense of principle. In San Francisco, that mecca of variegated love life, sensible public health measures intended largely for the protection of homosexuals have been angrily spurned by gay leaders as acts of covert homophobia. Apparently gays can be just as self-destructively silly as their opponents.

Naturally, this kind of doctrinaire wrong-headedness also prevails among the politically sensitive members of the United States Congress. It has been reported that the respected Henry Waxman, Chair of the House Subcommittee on Health and the Environment, has gotten into hell's own tangle in trying to craft useful AIDS legislation, beset by a fellow Committee member insistent upon making it plain that the United States government endorses neither homosexuality nor drug addiction.

The misuse of the AIDS issue reached a new low in Chicago recently, according to the *New York Times* of Tuesday, July 26. A

virulently antisemitic black activist, not surprisingly fired from the office of the mayor, has declared "the AIDS epidemic is a result of doctors, especially Jewish ones, who inject AIDS into blacks." The *Times* account continues: this charmer now works for the Reverend Louis Farrakhan, who heartily endorses his allegations.

The Prudence of Concealment

The initial equation of AIDS and homosexuality has stirred up a frightening degree of hostility to gays, including violence to the point of murder. A decision of the United States Supreme Court has exacerbated this state of affairs by upholding statutory condemnation of minority sexual preference. *Bowers v. Hardwick, et al.*, 106 S. Ct. 2841 (1986). Instead of extending the *Griswold vs. Connecticut* right of privacy to all discreet consensual behavior (not in the streets and not frightening the horses), a majority of the Court embraced a traditionalist approach, stressing "crimes against nature" and the long history of the sodomy laws. *Bowers*, which does not even refer to AIDS, validates the criminalization of activity widely associated with AIDS. Concealment of

infection thus becomes a sensible, if ignoble, course of conduct.

The Delaware Response

Seemingly resistant to the prejudices and pet lunacies described above, Delaware leadership in the AIDS crisis has been strong. At the April Professional Conference, Governor Castle stated a continued resolve to deal with AIDS as a *medical* problem. The Attorney General has earned high marks for his handling of the Alfred I. duPont Institute dustup, and his office has kept itself remarkably well informed about the many legal developments in AIDS confronting us for the first time. But none of these encouraging signs should lull us into the belief that we in Delaware are immune to special interest digressions from effective response to the epidemic.

In September 1987 the AIDS Advisory Task Force of the Delaware Division of Public Health issued a lengthy report. It was later supplemented by a majority report on the issue of HIV testing, and a vigorous dissent from members of the medical community.

The report, the work of a broad-based

group of professional and community representatives, is an honorable achievement, distinguished by courteous deference to the prickly sensibilities of every imaginable concerned minority, racial or sexual. (Sometimes to bizarre effect: the report refers to "persons within the prostitution industry," a category that may raise a few eyebrows at the Chamber of Commerce.)

Perhaps the most significant features of the report are a kind of muted hostility to HIV antibody testing and a gratuitous intrusion of sexual minority preachments:

"Because AIDS first affected the gay population in the United States, we have already seen lag time between the first manifestations of this disease and the recognition that we face a very serious public health problem. In other words, had the disease first struck the heterosexual community, the alarms might have been raised earlier, and more attention might have been given to education, research, and treatment."

This is irrelevant to the problem at hand, which is to contain a plague. We should not be expending our energies on recriminations over the perceived inadequacies of our earlier response. But

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gay leaders, not unrepresented in the formulation of the report, appear to demand simultaneously the glamour of martyrdom and the security of uncritical endorsement. Given the emotional climate surrounding AIDS, this deserves a good deal of sympathetic understanding. But the contamination by special interest agenda of task force deliberations has led to a less than satisfactory piece of compromise legislation on HIV testing.

Yes, even in enlightened Delaware there is a pervasive tendency to put social priorities above sound medicine. At the Professional Conference in April, Doctors Cioffi, Day and Redfield argued eloquently for widespread and early HIV testing,

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not merely for the protection of the uninfected but for the provision of informed medical care to the infected at a time when they could still benefit from therapy. Their presentations of painful truths outraged several of those in attendance. One addressed a savage attack on Dr. Day to the authorities of the San Francisco Hospital where she practices and teaches orthopaedic surgery. (Shoot the messenger!) Another, learning of plans to show a videotape of the conference to a group of policemen, persuaded the program moderator to dispense with the medical portion of the tape because it was "off the wall," which of course it most emphatical-

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ly was not. It now appears that unpalatable truths are up against something uncomfortably close to prior restraint.

Giving Life a Chance

At the July symposium sponsored by the American College of Legal Medicine, one speaker said it all in a few well-chosen words. Here is an extremely accomplished doctor, Dr. Lonnie Bristow of the American Medical Association, telling lawyers and legislators what he as a medical specialist needs in stopping a plague:

"Discrimination triggered by the fear of AIDS may increase the risk of the spread of AIDS because those at risk may not come forward for testing and counseling. Therefore, discrimination threatens not only those who are infected, but the rest of society as well."

Consider the source of these wise words. This is not gay propaganda. This is not the extravagance of a hypersensitive civil libertarian. It is the informed assessment of one qualified to deal with a problem that is above all else a medical one. It appears that doctors and lawyers have united in fostering this emergence of dazzling common sense. Former President Robert MacCrate of the American Bar Association has spoken out strongly against discrimination as it bears on the AIDS crisis.

What are the prospects for common sense triumphant? Well, in the long run, when things get bad enough, common sense has a wonderful way of reasserting itself in the face of ideology and prejudice. The Task Force Minority Report on the issue of HIV testing correctly asserts that the time has come to stigmatize the discriminators instead of the sufferers. Despite (or perhaps because of) the shadows cast by *Bowers v. Hardwick*, we need to adopt the most stringent antidiscriminatory measures. Those at risk must feel safe in informing themselves and, if infected, in pursuing competent medical help.

I am confident in the triumph of sanity. It will not be the first occasion that our free society has shown the strength to abandon preconceptions in order to grapple with unpleasant truths and to succeed in so doing.

I found it interesting to reread the foregoing and to examine my own views after the passage of 13 years. House Bill 99, which as of this writing has passed the Delaware House and is pending in the state Senate, would bar all kinds of discrimination against gays. At first I wondered if it was really necessary. Delaware had long

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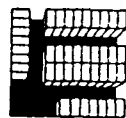
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ago decriminalized the expression of minority affectional preference (How's that for Victorian delicacy?) and folks seemed free to live their lives as they pleased. Well-meaning legislation like this had long appeared to me as fertile of unmeritorious lawsuits, flag-draped kvetching arisen from imagined slights and thin-skinned resentments of the abrasive realities of everyday living. Well, in this instance I was wrong.

Publicity about HB 99 brought a raft of letters to *The News Journal*, which, despite its own enlightened views, determined in fairness to print a wide range of opinion, some of it just plain odious. These letters,

Well-meaning legislation like this had long appeared to me as fertile of unmeritorious lawsuits, flag-draped kvetching arisen from imagined slights and thin-skinned resentments of the abrasive realities of everyday living. Well, in this instance I was wrong.

filled with pseudo-Biblical balderdash, misinformation, and old-fashioned bigotry, were frightening in the savagery they revealed. The hostility to gays and any guarantee to them of the rights ordinarily available to citizens of a democracy sounded like something out of the Third Reich.

What's happened in 13 years? Minority sexual preferences and those who espouse them are still the target of persecution. Yes, we need to be armed against bigotry. I sure hope HB 99 gets by our Senate.

W.E.W.

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